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AN ASSESSMENT OF SOME ASPECTS OF JUDICIAL INTEGRITY IN MOZAMBIQUE



Title: Analysis of some Questions on Judicial Integration in Mozambique

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1. INTRODUCTION

This article presents the current state of knowledge on judicial integrity in Mozambique. The issue is under-researched as it is challenging to conduct empirical research on this topic in Mozambique. This is mainly due to institutional resistance to publicly address judicial integrity. The aim of this report is to reignite discussions on judicial integrity, synthesising available knowledge on the subject, identifying knowledge gaps, and calling for more in-depth research to strengthen judicial integrity in the country.

To that end, we analysed the existing legal framework, as well as other available information on judicial integrity. To draw on existing and recent examples of judicial corruption and other types of judicial misconduct, the research team conducted an analysis of newspaper reports from seven Mozambican newspapers from January 2017 to October 2018. All newspaper editions were screened and articles reporting alleged and confirmed judicial misbehaviour were selected. A total of 15 relevant articles were found and some of the reports are presented in section 5 below. The report concludes with recommendations. However, as a first step, it is important to engage with key concepts on the issue. They are sometimes overlapping or are used interchangeably, without being defined.

2. CONCEPTS AND DEFINITIONS

The concepts “integrity” and “public integrity” are often used in discourses about governance, public institutions and especially the behaviour of public officials. Integrity, or more precisely the lack of public integrity, is often equated with the notion of “corruption”. But let us reflect on how these concepts relate, how we define them and what will be their scope in this article when talking about “judicial integrity”.

It is important to note that there is no single, internationally accepted definition of corruption, but the most widely used definition is “the abuse of public office or public position for private gain”.¹ Corruption usually includes, but is not limited to, acts such as bribery, pay-offs, embezzlement, extortion, blackmail and different forms of abuse of power.

Integrity is considered the opposite of corruption, and the lack of integrity as a cause of corruption. But, similarly to corruption, there is no consensus or a single definition of the concept of integrity. Huberts identifies least eight attributes associated with integrity: wholeness and coherence, professional responsibility, moral reflection, value(s) such as incorruptibility, adherence to laws and rules, moral values and norms, and exemplary behaviour.² Common to all these is that when we talk about integrity, the focus is on the behaviour of decision-makers and decision implementation.³ According to United Nations Office on Drugs and Crime (UNODC), the term integrity, in its application to members of the judiciary, refers to the ability of the judicial system or an individual member of the judiciary to resist corruption, while fully respecting the core values of independence, impartiality, personal integrity, propriety, equality, competence and diligence.⁴

Integrity provides a broader and more inclusive framework than the sole concept of corruption, as it also includes such violations as waste and abuse of (public) resources, discrimination, improper use of authority and private time misconduct.⁵ In this article we will follow this approach to an integrity framework and speak about judicial integrity rather than focusing only on corruption. However, the term “corruption” will frequently appear (especially in section 3) as most of the available literature on judicial misconduct points to it.

The next step is to clarify what we mean by “judicial” when referring to integrity. Who are all included

1 See definition available at: <https://integrityaction.org/index.php/corruption> (accessed 12 November 2018).

2 L. W. J. C. Huberts (2018) Integrity: What it is and Why it is Important, *Public Integrity*, 20:sup1, Available at: <https://www.tandfonline.com/doi/full/10.1080/10999922.2018.1477404> (accessed 12 November 2018).

3 Ibidem.

4 See definition available at: <http://www.unodc.org/unodc/en/corruption/new/judicial-integrity.html> (accessed 12 November 2018).

5 See Supra Note n. 2.

when referring to the judiciary? It is a frequently made mistake to equate the whole judicial system with the work of its judges, and speak only about the conduct and behaviour of judges when referring to judicial integrity. The judicial system or the court system of any country includes all staff governed by the same judicial administration, and who keep the system running. Apart from the judges, the judicial system also includes other professionals, such as prosecutors, Criminal Investigation Police (Serviço Nacional de Investigação Criminal) as an auxiliary of the Prosecution, as well as judicial officers, courts registrars (escrivães) and administrators. Therefore, it is important to highlight that judicial integrity in the broadest sense would involve the behaviour and conduct of all these officials. In this report we may emphasise one group of officials above another simply because of the availability of the information. For example, there is much more information and especially media reporting on the conduct of judges, prosecutors and senior officials, than there is on low ranking administrative officials.

In addition to integrity, when discussing judicial conduct, it is inevitable to hear concepts such as “independence” and “impartiality”, two necessary prerequisites guaranteed by the Constitution for an effective and efficient judicial system in a democratic country.⁶

Judicial independence is the notion that the judiciary needs to be independent from the other branches of government, and not allow other public or private institutions, officials or even individuals who enjoy high social, political or economic status, to interfere in its actions. That means, courts should not be subject to influence from the legislative and executive or from private or partisan interests. Impartiality implies that a judge’s decisions may not be based on bias, prejudice, or preference. Erosion of any of these elements means the erosion of fairness and objectivity of the courts, undermining the rule of law, and ultimately public confidence in the justice system.

In conclusion, assessing judicial integrity (or the lack thereof) means taking into consideration independence and impartiality of the judicial branch and a broad set of behaviours including, but not limited to, corruption (within the integrity framework discussed above) of all members of the judicial system.

3. CONTEXTUALISATION

There is a large body of research into corruption, its causes and its corrosive effects on the economy and society as whole.⁷ For example, it was estimated that the cost of corruption to Mozambique between 2002 and 2014 was around US\$ 4.8 to US\$ 4.9 billion, equivalent to approximately 30% of the country’s GDP in 2014.⁸

Corruption has been described as the major obstacle to development in any country.⁹ Although some countries find themselves having lower levels of corruption, this does not mean that they are free from this evil and its negative effects. In many countries corruption in the public sector is so prevalent that the problem is framed as “pandemic”.¹⁰

Mozambique is unfortunately among these countries. Various reports state that Mozambique is among the most corrupt countries in Africa and in the world.¹¹ In 2017 Mozambique was given, on Transparency International’s (TI) Corruption Perception Index (CPI), a score of 25 out of 100 (where the 0 means most corrupt and 100 least corrupt), placing the country in the 153rd position out of 180 countries.¹² Even more concerning is that the country’s score dropped in recent years from 31 in 2015 to 27 in 2016 and to 25 in the 2017. In the World Bank 2016 Doing Business Report, Mozambique also fell from 127th to

⁶ Article 217 refers only to the conduct of the judges, while article 234 of the Constitution refers to the judicial officers and agents of the Public Prosecution Service. In the later provision the word “autonomy” rather “independence” is used to describe the functioning of the Public Prosecution. Established to assist the executive in the application and the execution of criminal law, the prosecuting authority is sometimes associated more with the executive branch rather than the judicial branch. However, in other jurisdictions (South Africa for example) there are special legislative and institutional measures that promote independence of the prosecuting authority.

⁷ See for example: The Impact of Corruption on Growth and Inequality. Available at: https://www.transparency.org/files/content/corruptionqas/Impact_of_corruption_on_growth_and_inequality_2014.pdf (accessed 12 de November 2018). Or: Why corruption matters: understanding causes, effects and how to address them. Evidence paper on corruption. January 2015. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/406346/corruption-evidence-paper-why-corruption-matters.pdf (accessed 12 November 2018).

⁸ Centro de Integridade Publica. 2006. Corrupção no sector da Justiça em Moçambique. Documento de Discussão no.3.

⁹ Corrupção e desenvolvimento. Available at: http://www.unodc.org/documents/lpo-brazil/Topics_corruption/Campanha-2013/CORRUPCAO_E_DESENVOLVIMENTO.pdf

¹⁰ See for example: The Corruption Pandemic. Available at <https://foreignpolicy.com/2012/11/08/the-corruption-pandemic/> (accessed 9 November 2018).

¹¹ See for example: These are the 21 most corrupt countries in Africa. Available at: <https://www.pulse.ng/bi/politics/politics-these-are-the-21-most-corrupt-countries-in-africa/vxtb61s>; Mozambique: Mozambique most corrupt in region. Available at: <https://www.pambazuka.org/governance/mozambique-mozambique-most-corrupt-region>; The 32 most corrupt countries in the world . Available at: <https://www.businessinsider.com/most-corrupt-countries-in-the-world-world-economic-forum-2018-10?IR=T> (accessed 9 November 2018).

¹² Corruption Perceptions Index. Mozambique. Available at: <https://www.transparency.org/country/MOZ> (accessed 17 November 2018).

133rd out of 189 countries, with one of the reasons being the high level of corruption.¹³ On the Global Integrity Scale of the Africa Integrity Indicators, the overall score for Mozambique decreased by five points from 41 in 2015 to 36 in 2016, moving the country from “somewhat weak” category to the “weak” category.¹⁴

No part of the public sector is immune to corruption, including the judiciary. The 2012 “Overview of corruption and anti-corruption in Mozambique” lists the judiciary as one of the sectors where corruption is prevalent.¹⁵ According to GAN Integrity, a business anti-corruption portal, “the judiciary [in Mozambique] is generally considered corrupt and is subject to political influence, impeding the effective enforcement of the law.”¹⁶ Findings by the African Integrity Indicators also highlight compromised independence, stating “that in practice, Mozambique’s judiciary is subject to influence from the executive branch.”¹⁷

It is noted that judiciary’s budgetary reliance on the executive branch, as well as the appointment of judges do not support their independence, since appointments are reportedly based more on political connections than merit.¹⁸ Nominations for appointments to the Supreme Court, Administrative Court and the Constitutional Council, are the exclusive prerogative of the President, which are then confirmed in a routine manner by the National Assembly. This means that the Assembly has only a residual function and does not participate, even when it is proven necessary, to question and impede the appointment of candidates nominated by the President.

The President is directly responsible for the appointment of the president and deputy president of the Supreme Court, who are also the presiding members of the Higher Council of the Judiciary (Conselho Superior da Magistratura Judicial), the structure tasked with managing the selection, discipline and removal of judges. Therefore, it is understandable that there is the perception that the Council is closely aligned to the executive, thus undermining its independence. Similarly, the President also appoints the Attorney General who presides over the Higher Council of the Public Prosecution Service (Conselho Superior da Magistratura do Ministério Público). He also appoints the Deputy Attorney General, and other deputies (Procuradores-Gerais Adjuntos, who are responsible for specific areas of law) in the Attorney General’s Office.

A 2006 study pointed out that in district courts, that are often faced with a shortage of funds and a lack of physical infrastructure, judges were more vulnerable to external influence. One of the reasons is the history of the FRELIMO party’s authority over all branches of government, especially in rural areas. Also, as the study noted, particularly at district level there is a critical shortage of appropriately qualified judges.¹⁹

In the last public selection process in 2018, 648 candidates applied for nearly 100 vacancies available for admission of judges and public prosecutors, but only 34 were admitted. The selection process included a written test and it was found that there was an overall lack of knowledge of legislation and legal standards among the applicants. The Director of the Legal Training Centre (Centro de Formação Jurídica e Judiciária), Elisa Samuel, expressed serious concerns over the low pass rate. Beside the lack of legal knowledge, she also noted the lack of aptitude to take part in the initial training course, to enter a judicial career (either as a judge or a prosecutor).²⁰

Available data from 2013 reflect that 69% of Mozambicans perceived the judiciary to be corrupt or extremely corrupt, while 41% admitted to having paid a bribe to a member of the judiciary.²¹ Similarly, TI reports that, according to 2016 data, 40% of all citizen interactions with the judicial system ended with a bribe being paid.²² Reports also highlight the high prevalence of administrative corruption in the justice sector due to low salaries, limited human resources, and no or inadequate training.²³

13 BTI 2018 Country Report. Mozambique. Available at: https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2018/pdf/BTI_2018_Mozambique.pdf (accessed 17 November 2018).

14 Africa Integrity Indicators. 2016. Country Findings – Mozambique. Available at: <https://www.globalintegrity.org/wp-content/uploads/2016/06/AI14-Findings-Mozambique.pdf> (accessed 9 November 2018).

15 U4 Expert Answer. 2012. Overview of corruption and anticorruption in Mozambique. Available at: <https://www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-mozambique.pdf> (accessed 9 November 2018).

16 <https://www.business-anti-corruption.com/country-profiles/mozambique/> (accessed 9 November 2018).

17 Africa Integrity Indicators. 2016. Country Findings – Mozambique. Available at: <https://www.globalintegrity.org/wp-content/uploads/2016/06/AI14-Findings-Mozambique.pdf> (accessed 9 November 2018).

18 Ibidem.

19 AfriMAP. Mozambique: Justice Sector and the Rule of Law. 2006. Open Society Foundations. Available at: <https://acjr.org.za/resource-centre/Mozambique%20Justice%20report%20-Eng.pdf/view> (accessed 10 December 2018).

20 Jornal Notícias, Tribunal Supremo pretende melhorar selecção de Magistrados. (27.06 2018).

21 Global Corruption Barometer. 2013. Mozambique. Available at: https://www.transparency.org/files/content/corruptionqas/Country_Profile_Mozambique_2016.pdf (accessed 10 December 2018).

22 U4 Expert Answer. 2016. Overview of corruption and anticorruption in Mozambique. Available at: <https://www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-mozambique.pdf> (accessed 10 December 2018).

23 U4 Expert Answer. 2012. Overview of corruption and anticorruption in Mozambique. Available at: <https://www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-mozambique.pdf> (accessed 9 November 2018).

Apart from research done by international organisations, there have been very few domestic efforts to examine judicial integrity. The 2010 National Analysis of the Perception of Corruption by the Ministry of Public Administration (Ministério da Administração Estatal) found that the police, licensing authorities, procurement units, customs as well as health, education and justice services were most affected by corruption, which is perceived to be endemic by households surveyed and the private sector.²⁴

Most of the available national studies focused on the overall phenomenon of corruption, rather than focusing on one sector. The only study focussing on corruption in the justice sector was done in 2006 by the Centre for Public Integrity (Centro de Integridade Pública) providing some important insights.²⁵

The study pointed out that buying and selling judicial decisions, bribes to secure a certain outcome in lawsuits, allegations of rampant corruption at the level of criminal investigations, and political interference in the work of courts were widely reported.²⁶ Some of the underlying causes were identified to be overall procedural slowness, antiquated legal procedures and their erratic application, inadequate remuneration of lawyers and officials, lack of human resources, inappropriate selection of candidates for the judicial profession, and poor education and training.²⁷ Thirteen years later many of these challenges remain, continuing to enable and support a range of corrupt and dishonest practices.

Bribery and extortion were seen in the 2006 study as the most prevalent forms of corruption in the judiciary and especially within the civil courts, with labour disputes being the most susceptible to corruption. The study highlighted the important fact that a large proportion of corrupt practices happen within the Court Registry (cartórios) involving clerks (escrivães) and their assistants, who manage the court roll. There was a strong perception expressed from different actors that without bribe money it is hard to get things done within judiciary (Só se ganham acções se se tem dinheiro. Tem de se dar dinheiro do policia ao juiz).²⁸

More than a decade later, it is important to assess whether and to what extent change has happened in the Mozambican judiciary. A nationwide household perceptions and experiences survey would give updated and more accurate data on the prevalence of and types of corruption in the justice sector, as well as geographical differences. This would enable the state and researchers to measure progress or the lack of thereof. Qualitative and quantitative data from different actors in the system, as well as from the users of judicial services will also reveal trends and opportunities for corruption that could inform and guide prevention efforts.

4. LEGAL AND INSTITUTIONAL FRAMEWORK

International legal framework

Mozambique has signed and ratified most of the international instruments against corruption; the most important being the UN Convention against Corruption (UNCAC). It is the only binding universal anti-corruption instrument and Mozambique signed it in 2004 and ratified in 2008. As per the Constitution of Mozambique, following ratification the UNCAC becomes an integral part of domestic law.²⁹

Article 11 of UNCAC deals specifically with measures relating to the judiciary and prosecution service. It states that the State party “shall take measures to strengthen the integrity and to prevent opportunities for corruption among members of the judiciary”. In efforts to promote and support the measures taken by States parties to effectively implement Article 11, UNODC has developed a Resource Guide on Strengthening Judicial Integrity and Capacity,³⁰ as well as an Implementation Guide and Evaluative Framework for Article 11.³¹

24 Centro de Integridade Pública, Chr. Michelsen Institute (CMI), U4 - Anti-Corruption Resource Centre. 2016. Os Custos da Corrupção para a Economia Moçambicana. Por que é que é importante combater a corrupção num clima de fragilidade fiscal.

25 CIP. 2006. Corrupção no sector da Justiça em Moçambique. Documento de Discussão no.3.

26 Ibidem.

27 Ibidem.

28 Ibidem.

29 Article 18 of the CRM.

30 United Nations Office on Drugs and Crime. 2011. Resource Guide on Strengthening Judicial Integrity and Capacity. Available at: https://www.unodc.org/documents/treaties/UNCAC/Publications/ResourceGuideonStrengtheningJudicialIntegrityandCapacity/11-85709_ebook.pdf (accessed 10 December 2018).

31 United Nations Office on Drugs and Crime. 2015. The United Nations Convention against Corruption Implementation Guide and Evaluative Framework for Article 11. Available at: https://www.unodc.org/documents/corruption/Publications/2014/Implementation_Guide_and_Evaluative_Framework_for_Article_11_-_English.pdf (accessed 10 December 2018).

Other relevant international documents, decisions and resolutions include:

- Bangalore Principles of Judicial Conduct, endorsed by the United Nations Economic and Social Council in its resolution 2006/23;
- ECOSOC Resolution 2006/23 on Strengthening basic principles of judicial conduct;
- General Assembly resolutions A/RES/40/32 of 29 November 1985 and A/RES/40/146 of 13 December 1985, endorsing the Basic Principles on the Independence of the Judiciary;
- Commission on Human Rights resolution 2003/43, on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers;
- Commission on Human Rights resolution 2003/39 on the integrity of the judicial system.³²

There are also two regional instruments, being the African Union Convention on Preventing and Combating Corruption, and the SADC Protocol against Corruption. However, both make no specific reference to the judiciary.

National legal framework

The Constitution, in article 134, states that the President, the National Assembly, the government, the courts and the Constitutional Council shall govern by the principles of separation and interdependence of powers, and shall owe obedience to the Constitution and the laws. The intention of this principle is to prevent the concentration of power in only one branch of government and provides for checks and balances. This is an important principle in a democratic state where the rule of law must be respected. Chapter 2 of the Constitution refers specifically to judges. Article 217 protects their independence, while article 218 states that judges may be held responsible in civil, criminal and disciplinary proceedings for acts committed in the discharge of their duties and only in cases specified by law. Article 219 states that judges in office may not undertake any other public or private work, except for teaching, legal research or other activities of scientific, literary, artistic and technical dissemination or publication, with prior authorisation from the Superior Council of the Judiciary. These constitutional provisions represent the basis on which the legislative framework on the judicial integrity has been constructed. The Mozambican government undertakes the fight against corruption as one of the main pillars to promote good governance since the first Programme for the Evaluation and Reduction of Absolute Poverty (Programa de Avaliação e Redução da Pobreza Absoluta 2001-2005).

Although the Penal Code of 1886 provides for the criminalisation of corruption, the first ever corruption-specific legislation was adopted in 2004 as the Anti-Corruption Law (Law n. 6/2004). It was an important step in government's commitment and efforts and to tackle corruption. However, the legislation had many flaws, including not being sufficiently comprehensive in identifying and describing the types of and practices amounting to corruption. This law also created the Central Office to Combat Corruption (Gabinete Central de Combate à Corrupção) as a specialized institution to investigate corruption. However, it did not give the Office powers to prosecute people implicated in the crimes it investigated and there is weak protection for whistle-blowers. Law 6/2004 remains in force, although articles 7 to 14 have been repealed by the new Penal Code, Law 35/2014.³³

Since 2012, Parliament (Assembleia da República) has made significant efforts to promulgate the so-called "Anti-Corruption Package" which includes:

- Law 16/2012, of 14 of August 2012, or Public Probity Law (Lei da Probidade Pública);
- Law 15/2012, of 14 of August 2012, or Protection of Victims, Witnesses, Whistle-blowers and Experts in Criminal Proceedings Law (Protecção das Vítimas, Testemunhas, Denunciantes e Peritos em Processos Criminais); and
- Law 35/2014, of 31 December 2014, or Penal Code (Código Penal).

³² See text available at: <https://www.unodc.org/unodc/en/corruption/judicial-integrity.html> (accessed 10 December 2018).

³³ Articles 7 to 14 defined, among other aspects, active and passive corruption and its sanctions. New provisions introduced by the new Penal Code are explained on the next page.

The Public Probity Law confirms the supremacy of public interests over private interests. It defines conflicts of interests and prohibits the acceptance, by the holders of public office, of any gifts, that may jeopardize their independence. It also establishes the duty of holders of public office to declare their assets and also to update their asset registers annually and at the end of their term of office. It also sets sanctions for violations in this regard. Articles 85 to 88 provide for disciplinary, civil and penal sanctions depending on the violations.

The law on the Protection of Victims, Witnesses, Whistle-blowers and Experts in Criminal Proceedings was created to provide, amongst others, the necessary protection to people reporting corruption, and to anyone who has had any corrupt interaction in which their life, physical integrity or employment was threatened. On this specific law the Centre for Public Integrity says:

This law has not been applied. One of the reasons that led to its creation and consequent approval was the intention to increase the number of reports of cases of corruption without recourse to anonymity. Thus, there are no legal or practical outcomes in approving an important law to combat crime and in particular crime of corruption, and then not apply it to concrete criminal situations of daily life. It is therefore just another cosmetic law.³⁴

However, the new Penal Code contains provisions to punish people for corruption even in the private sector.³⁵ The previous legislation (prior to 2014) did not refer to the punishment of corruption offences in the private sector, reserving the criminalization and punishment to the public sector when one of the parties (corruptor or corrupted) is a public official. The new Penal Code further introduced the criminalisation of acts related to influence peddling (trafego de influências)³⁶ and illicit enrichment (enriquecimento ilícito).³⁷ The Penal Code specifically provides for corruption of magistrates (judges and prosecutors) and detectives:

1. Magistrates, elected judges and detectives who, by themselves or through another person, request or receive money or promised of money or any patrimonial or non-patrimonial advantage in criminal matters, to declare or not to declare, to judge or fail to judge, condemn or absolve, accuse or refrain from accusing, arrest or refrain from arresting, or stop investigating, shall be imprisonment for between two and eight years and a fine of up to two years.³⁸

In line with legal reforms, the first Anti-Corruption Strategy (2006-2010) was developed as part of the Global Strategy for the Public Sector (2001-2011) aimed at improving service delivery to citizens and developing an environment for growth in the private sector. The Five Year Plan of the Government 2015-2019 (Programa Quinquenal do Governo) reaffirmed the fight against corruption in its Strategic Objective number 5.

There are legislative packages dealing specifically with the integrity of the judiciary. The Law on the Judicial Branch (Law 7/2009 amended by Law 3/2011 and Law 8/2018), which includes the Statute of the Judicial Magistrates (Estatuto dos Magistrados Judiciais) being one of them.³⁹ The Statute calls for the independence of all the judges and that judges should judge according to the Constitution, the law and their conscience and not being subjected to interference from third parties, with the exception

³⁴ Centro de Integridade Pública. Informe do Procurador-Geral de 2018 Demonstra Contínua Inoperância/ Ineficácia do Ministério Público. Anticorrupção - Transparência Integridade. Ed. No. 6. April 2018. Pg. 2 e 3. Available at: https://cipmoz.org/wp-content/uploads/2018/08/Informe_do_Procurador-Geral_.pdf (accessed 20 December 2018).

³⁵ Penal Code, Articles 501 - 503.

³⁶ Penal Code, Article 508.

³⁷ Penal Code, Article 511.

³⁸ Penal Code, Article 504. Unofficial translation by the authors from the following: 1. Os magistrados, os juízes eleitos e os agentes de investigação criminal que, por si ou interposta pessoa, solicitarem ou receberem dinheiro ou promessa de dinheiro ou qualquer vantagem patrimonial ou não patrimonial, para, em matéria criminal, pronunciarem ou não pronunciarem, julgarem ou deixarem de julgar, condenarem ou deixarem de condenar, acusarem ou se absterem de acusar, prenderem ou deixarem de prender alguém, deixar de investigar, serão punidos com pena de prisão de dois a oito anos e multa até dois anos.

³⁹ See available at: http://www.csmj.gov.mz/images/documentos_pdf/Lei72009de11deMarcoestatutodosmagistradosjudiciais.pdf (accessed 10 December 2018).

of the lower courts that must comply with orders of the higher courts (article 4). Judges are also not responsible for their decision with the exceptions provided for in law.⁴⁰

Chapter 9 of the Statute of Judicial Magistrates relates to disciplinary actions if a judge violated their professional responsibilities and the decorum and dignity necessary to exercise of their functions.⁴¹ Judges found guilty of such violations are subject to the following penalties: warning; recorded reprimand; fine; demotion; compulsory transfer; suspension; compulsory retirement; dismissal and expulsion. The disciplinary process is independent from the criminal one.⁴²

The Organic Law of Public Prosecution (Law 4/2017 of 18 of January 2017) deals specifically with member of the prosecution service – which includes the Statute of the Public Prosecution (Lei Orgânica do Ministério Público e que aprova o Estatuto dos Magistrados do Ministério Público).⁴³ The Statute of the Prosecutors (Chapter II) state that prosecutors must perform their duties with independence, honesty, loyalty, immunity, zeal and dignity; confidentiality and behave in private and public life in accordance with the dignity and prestige of the position.⁴⁴ Prosecutors found guilty of infractions are subjected to the same penalties as the judges, as listed above.

According to the Statute of the Judicial Magistrates and the Statute of Public Prosecution, judges and prosecutors are granted immunity in criminal matters. They cannot be arrested and detained with the exceptions of cases in flagrante delicto (in the act of the commission of the crime) and if the crime is punishable with a prison sentence of two years or more.⁴⁵ In case of imprisonment, they shall be immediately presented to his/her superior. Pre-trial detention of prosecutors shall occur separately from other prisoners.⁴⁶ A full bench of the Supreme Court is responsible for trying members of the Attorney General's Office.⁴⁷ Judges cannot be accountable for their judgments and sentences, with the exception of cases provided for in law.⁴⁸ The immunity of judges and prosecutors can be lifted by their management and disciplinary structures (these will be discussed in the following section).

The most recent legislation in this respect is the Law 9/2017 - Law on Justice Officials and Assistants to Court Officers, Constitutional Council and the Public Ministry (Estatuto dos Oficiais de Justiça e de Assistentes de Oficiais de Justiça dos Tribunais, Conselho Constitucional e do Ministério Público).⁴⁹ This was an important step to include in the legal framework and regulate lower ranking public servants in the justice sector. Article 14 of the act states that they must perform their duties with legality, honesty, seriousness, dignity and impartiality. They have to, amongst others, behave in private and public life in accordance with the dignity and prestige of their position; execute orders with decisiveness and integrity, not disclose details of a case; maintain confidentiality and ensure the efficient proceedings. Failure to comply with these requirements may result in disciplinary action.

Institutional framework

As part of Government's efforts to combat corruption and as provided by both international and national legislation, several institutions were established.

Law 6/2004 established the Office for Combating Corruption in Maputo. Regional offices were established

40 Law of the Judicial Magistrates, Article 5. Among those exceptions is the crime of prevarication, as foreseen by Article 477 (1) of the Penal Code, which states that "a judge who, by favour or hatred, pronounces a manifestly unjust sentence, shall be punished if the sentence is condemning someone for a criminal offence, by imprisonment of between two and eight years ...". [unofficial translation of the authors from the following: o juiz que, por favorecimento ou por ódio, proferir sentença definitiva manifestamente injusta, será punido se a sentença for condenatória em causa criminal, na pena de prisão maior de dois a oito anos [...]]

41 Article 61.

42 Article 63 of Law 7/2009.

43 Available at: https://reformar.co.mz/documentos-diversos/lei_4_2017_pgr.pdf (accessed 10 December 2018).

44 Article 141 of Law 4/2017.

45 Article 48(1) of Law 7/2009 and Article 151(1) of Law 4/2017.

46 Article 151(3) of Law 4/2017.

47 Article 153 of Law 4/2017.

48 Article 5 of Law 7/2009.

49 Available at: <https://reformar.co.mz/documentos-diversos/estatuto-oficiaisde-justica.pdf>

in the provinces of Sofala (covering the central provinces) and Nampula (covering the northern provinces). Another office was subsequently established in Inhambane, in an effort to gradually cover the whole country. In provinces where anti-corruption offices have not yet been set up, there are focal points. The Director is appointed by the Attorney General as it resorts under the Attorney General's Office. The Office and provincial offices are responsible for investigating corruption complaints and charge suspects. The Attorney General's Office reported that in 2016 the Office for Combating Corruption dealt with a total of 1,235 cases.⁵⁰ In 2015, the total number amounted to 1,051 cases, an increase of almost 18%. However, the Office has complained about the lack of human, material and financial resources. Another problem the Office faces is the so-called culture of bribing (refresco) and impunity for corruption cases. While people continue offering bribes to public servants for any public service, and while corrupted people are not tried and held accountable, corruption will not be addressed.⁵¹

The Strategic Plan of the Office for Combating Corruption for 2018-2022,⁵² titled "Strengthening the fight against corruption for a better Mozambique" (Fortalecer o combate à corrupção para um Moçambique melhor), foresees harsher punishment to deter corruption. It prioritises punishments with heavy fines and the full recovery of money lost as a result of embezzlement and political corruption, as additional to a prison sentence. One of the innovations of this Strategic Plan is the possible creation of specialized courts for corruption cases with the aim to expedite these cases.

The Public Probity Law also provides for the creation of the Central Commission of Public Ethics.⁵³ This institution works with difficulties, mainly due to logistical and budgetary constraints. The budget comes from the Ministry of Justice, which has proved to be insufficient.

The Higher Council of the Judiciary (Conselho Superior da Magistratura Judicial) oversees the judiciary.⁵⁴ One of the powers of the Higher Council is to take disciplinary action against judges⁵⁵ and justice officials.⁵⁶ It is in charge for hearing complaints against judges and justice officials.⁵⁷

The Higher Council of the Judiciary assesses complaints against judges and court officials and may propose an inquiry (processo de inquérito ou sindicância) if there is uncertainty to ascertain the facts, or it can institute disciplinary procedure (processo disciplinar). For the disciplinary procedure, the Higher Council can propose different measures, as provided for in the legislation.⁵⁸ Any judge may file a complaint against another judge (but not against the President of the Court) or against a court official. Disciplinary proceedings must be completed within 150 days once it has started. Parties may appeal decisions of the Higher Council to the Administrative Court. Cases involving criminal offences are referred to the Attorney General's Office.

In 2017 the Higher Council of the Judiciary examined 46 disciplinary matters: 12 against judges and 34 against justice officials. With regard to cases involving judges, four resulted in expulsion, one judge was asked to resign, two judges were demoted, one was reprimanded, and four were acquitted. The number of cases brought to the Council in previous years is not available, however, annual reports from the Supreme Court indicate that the number has increased over the years, probably due to more awareness about judicial integrity.

Similar to the Higher Council of the Judiciary, there is the Higher Council of the Public Prosecution (Conselho Superior da Magistratura do Ministério Público) is in charge of overseeing prosecutors.

50 See available at: http://www.pgr.gov.mz/images/documentos/informe-anual/Informe_pgr_2017.pdf (accessed 10 December 2018).

51 See available at: <https://www.dw.com/pt-002/mo%C3%A7ambique-ainda-est%C3%A1-longo-de-eliminar-a-corrup%C3%A7%C3%A3o/a-46650687> (accessed 10 December 2018).

52 See available at: <https://www.dw.com/pt-002/novo-plano-estrat%C3%A9gico-de-combate-%C3%A0-corrup%C3%A7%C3%A3o-prev%C3%AA-agravamento-de-puni%C3%A7%C3%B5es/a-42868889> (accessed 10 December 2018).

53 Article 50 of Law 16/2012.

54 Article 220 CRM.

55 Article 138(b), Law 7/2009)

56 Article 29, Law 9/2017)

57 Article 138(b), Law 7/2009. Article 139 of Law 7/2009 states that the CSMJ functions in Plenary (Plenário) and in Permanent Commission (Comissão Permanente). The CSMJ meets in plenary four times per year with additional sessions when necessary. The Permanent Commission meets twice a month and when necessary.

58 Article 63, Law 7/2009.

Prosecutors found guilty of violations are subject to the same penalties as for judges, being written warning, reprimand, fine, downgrading, compulsory transfer, suspension, compulsory retirement, resignation and expulsion (article 162 of Law 4/2017).

In 2017, the Higher Council of the Public Prosecution examined the total of 42 disciplinary cases, 14 against prosecutors and 28 against other officials in the Prosecution Service. The following penalties were applied: reprimand of two prosecutors; fines for four prosecutors; suspension of one prosecutor; and transfer of one prosecutor. Among other officials, two were expelled, one was asked to resign, fines were given to six officials and a public reprimand to one official. Four cases were closed for lack of evidence, and the remaining cases were still pending at the time of writing.⁵⁹

The existing institutional framework in the fight against corruption should be strengthened through a deeper understanding of the work and performance of these institutions. Detailed annual reports must be available to the public and assessments undertaken to measure their effectiveness, but also to understand the challenges and guide future developments.

5. MEDIA REPORTING ON JUDICIAL INTEGRITY

The media reports daily on current political and social affairs. Corruption scandals, different allegations concerning violations of public integrity are obvious topics of national interest that the media reports on.

The purpose of this analysis was to assess the frequency with which cases of judicial misconduct are dealt with and appear in the media, as well as to analyse the typology of such cases in the judicial system.

Due to the logistical, time and resource constraints the focus was on seven national printed newspapers: Notícias, O País, Savana, Canal de Moçambique, Zambeze, Magazine and Diário de Moçambique between January 2017 and October 2018.

The initial screening process identified more than 40 articles, using keywords such as corruption, misconduct, judiciary and justice. Many articles, however, were reporting in general terms about the state of corruption in the country, or government's efforts in that regard. As we wanted to focus on the judicial sector only, more detailed analyses of the sampled articles revealed that only 15 articles reported on issues specifically relating to judicial integrity. Among those, three themes emerged:

- Acknowledgment of corruption in the sector and/or an acknowledgment of the importance of strengthening judicial integrity (five articles);
- Examples of corruption in the judicial sector (six articles) and
- Criminal behaviour (other than corruption) involving judges (four articles).

The recognition of corruption in the judiciary comes from the people within the sector itself. The Attorney General, Beatriz Buchilli, acknowledges that there are “corrupt colleagues without integrity” who undermine and threaten the fight against corruption and organised crime in the country. In her words “the existence of corrupt judges facilitates the infiltration by criminals of state institutions, jeopardizing investigations as well as the safety of colleagues”.⁶⁰ The same report appeared in two newspapers.⁶¹

The President also called for “corrupt individuals to be punished as examples, requiring the justice

⁵⁹ Annual Report of the Attorney General to the Assembly of the Republic, March 2018, p. 9. Available at: <http://www.pgr.gov.mz/index.php/informacao-anual-a-assembleia-da-republica> (accessed on 10 December 2018).

⁶⁰ Jornal Notícias, Corrupção não se combate com magistrados corruptos. (24.11.2017)

⁶¹ Also on the O País, Não podemos combater a corrupção com colegas corruptos. (24.11.2017).

administration bodies to fulfil the responsibility of detecting and punishing corruption.” Without making any allegations, he emphasized that the judiciary has to be “the example of integrity and transparency that is intended to restore public confidence ...”.⁶² Without making any allegations, he stressed that the judiciary has to be “the example of integrity and transparency that one aspires to in order to re-establish the confidence of the citizens...”.⁶³

Some counter-arguments were also raised. Carlos Mondlane, president of the Mozambican Association of Judges (Associação Moçambicana dos Juizes), does not agree that there should be any distrust in the courts. That distrust he explains comes from the “lack of understanding of what the courts are and how they work”.⁶⁴ However, a report of the Higher Council of the Judiciary noted that corruption continues to “undermine the Mozambican judicial system”.⁶⁵

In terms of the actual examples of judicial corruption, the newspapers reported on the following issues: bias, bribes for favourable decisions (3 articles), and conflicts of interest (2 articles).

One of the examples that appeared in both the on-line and printed media in 2017 was the case of Judge Judite Luís Mahoche Simão from the District court of Marracuene. It was alleged that in performing her duties she violated the principles of honesty, dignity and impartiality by holding informal meetings with people involved in a particular case (known as the Milhulamete case). The Higher Council of the Judiciary dismissed the judge.⁶⁶ However, in May 2018, the Administrative Court of Maputo Province overturned the decision of the Council.⁶⁷ It is unknown whether the judge resumed her duties at the same court.

In the Provincial Court of Nampula, it was reported that during the so-called “pre-trial citizen’s campaign trials” (julgamentos de campanha)⁶⁸ 20 cases of unlawful releases from prisons were reported after bribes were paid.⁶⁹ It was reported that an investigation was under way to determine the involvement of judicial officials in the releases. However, no other reports were found regarding these cases.

In 2017, Judith Lidia Bicudo Abdul, presiding judge of the District Court of Montepuez, was accused of having received land as a bribe to free the wife of the chairperson of the Municipal Assembly who was accused of cheque fraud.⁷⁰ No further information was found regarding this case.

In another report, a lawyer, Maximo Dias, said that “there are judges who impose sentences according to the money they receive”.⁷¹

A prosecutor in Tete, Ivania Taibo Mussagy, presented a false medical certificate to be absent from work, but in fact participated in a FRELIMO congress in Matola.⁷² The Law of Judicial Magistrates of the Public Prosecution prohibits any prosecutor or judge from exercising active membership in a political party. However, a FRELIMO spokesperson said that “she was only enjoying her constitutional right”.⁷³

A conflict of interest was reported about Alexandre Chivale, lawyer of the former president of the country, Armando Guebuza. Chivale is also member of the Higher Council of the Judiciary. As member of the Council, Chivale appoints, transfers and even institutes disciplinary action against judges. As a lawyer, working in the same courts, he can influence the decisions of the judges and so their impartiality. It was claimed that he had been acting unlawfully (against the Public Probity Law). In addition, he owns

62 Jornal Diário de Moçambique, Nyusi exige punição exemplar a corruptos. (07.11.2017).

63 Jornal Diário de Moçambique, Nyusi exige punição exemplar a corruptos. (07.11.2017).

64 O País, Tribunais devem ser escolas que criam um direito novo. (17.04.2018).

65 Jornal Savana, CSMJ desvenda marcas de corrupção na classe dos juizes. (14.04.2017).

66 Jornal Savana, Juíza acusada de corrupção. (09.06.2017).

67 Jornal Notícias, Caso milhulamete Tribunal Administrativo da Província de Maputo anula a expulsão da juíza. (03.05.2018).

68 Julgamentos de campanha represent a measure that the Ministry of Justice, in collaboration with the Supreme Court has regularly organized to tackle overcrowding in prisons. Trials are organised in prisons. The last Julgamentos de campanha were held in 2018.

Jornal Notícias, Nos tribunais de Nampula: detetada venda de solturas. (22.07.2017).

70 Jornal Savana, Juíza acusada de corrupção. (09.06.2017).

71 Jornal O País, Há magistrados que fazem sentenças de acordo com o dinheiro que recebem. (08.03.2017).

72 Jornal Zambeze, Procuradora de Tete pontapeia estatutos da Magistratura. (25.08.2017).

73 Ibidem.

a private company rendering services to the Higher Council of the Judiciary.⁷⁴

The same concern was raised in the case of Filipe Siteo, a lawyer and member of the Higher Council of the Judiciary. He is also advising the parliamentary office of FRELIMO.⁷⁵

Another problem comes with so called “private-time misconduct”, or as we will see from some examples, engagement in criminal behaviour (other than corruption and outside of work) among members of the judiciary. Three newspapers reported on the same case, where a prosecutor in the province of Manica, Tinosse Felipe Majeje, was convicted for domestic violence.⁷⁶ Another example is a recent report (October 2018) regarding the prosecutor Sanito Joaquim Começar who was sued for sexual offences against two children aged 14 and 15 years. The same prosecutor was already involved in three previous disciplinary processes (all in 2017) related to driving offences, unseemly behaviour and absence from work without permission.⁷⁷ While the Higher Council of the Public Prosecution had already sanctioned the prosecutor for previous misconducts, it was reported that the Council would consider the prosecutor unfit to hold office. A criminal case would be filed independently of the disciplinary case.

Judges must comply with and enforce the laws in order to materialise and guarantee justice. In line with professional ethics, it is absolutely necessary that they behave ethically in the performance of their duties. This requirement is incompatible with having a criminal conviction. According to the Constitution and other laws, they are not immune from criminal responsibility.

As can be seen from the examples above, they all concern the conduct of judges and prosecutors. There has been no mention in the media about any misconduct of lower-ranking justice officials. It is understandable that stories involving more senior people will attract more media attention. However, it is important to remember that earlier research highlighted especially high levels of corruption among other officials in the judiciary and particularly registrars (*escrivães*),⁷⁸ which deserves to be reported on.

74 Canal de Moçambique, Advogado de Guebuza em maus lenções, promiscuidade e indícios de corrupção no CSMJ. (04.07.2018).

75 Ibidem.

76 Jornal Notícias, Procurador condenado a sete meses de prisão. (01.11.2017). Jornal O País, Procurador condenado por violência doméstica. (01.11.2017). Diário de Mocambique, Procurador condenado por violação doméstica. (01.09.2017).

77 Jornal Notícias, Magistrado processado por violar menores. (27.10.2018).

78 See *Supra* note n. 8.

6. CONCLUSION AND RECOMMENDATIONS

Corruption is recognised as a major problem, and the fight against it is, at least in principle, a political priority. However, to move from an official declaration to active legislative, institutional reforms and full implementation is a long one. Legislative and institutional frameworks exist, but need to be strengthened in order to promote and strengthen integrity, and punish corruption and other forms of misconduct by public officials.

From the examples provided it can be seen that judicial misconduct and corruption continue to be a serious problem. What is not clear, however, is how institutions deal with such cases. The Higher Council of the Judiciary seems to punish some of the alleged perpetrators violating the principles of integrity, but it is not clear how strict and consistent these punishments are. Information about all the cases originating from the Higher Council of the Judiciary and the Higher Council of the Public Prosecution, such as the transgressions and the final result are not available in the public domain. Even when perpetrators are punished, appeal structures have the power to overturn these decisions, often sending a confusing message to the public who may not be familiar with the inner workings of the Councils. Political interference and conflicts of interest continue to be a problem, with some high-level political figures protecting each other and not acknowledging the underlying issues.

The following are recommendations to strengthen judicial integrity:

1. Research

A prerequisite for the development of any strategy or measure to strengthen judicial integrity is to know as much as possible about the situation. There has only been limited research focusing on judicial integrity and this gap needs to be addressed.

A nation-wide household perception and experience survey would give updated and accurate estimates of the prevalence and types of corruption, as well as geographical trends. We should be able to see the progress made or the lack thereof. Qualitative and quantitative data from different actors in the system, as well as from court users would reveal trends and opportunities for corruption that could guide prevention efforts. Attention should be paid to lower ranking officials and the extent of their involvement in corruption.

2. Legal framework

The existing legislation has to be properly implemented, and implementation monitored and evaluated with reports available to the public.

In particular, the Law on the Protection of Victims, Witnesses, Whistle-blowers and Experts in Criminal Proceedings has to be implemented to protect people reporting corruption.

3. Strengthening Institutions

Institutions have responsibility to promote and preserve integrity of its staff. They have to send a clear message about values, codes of conduct and rules that guide the institution, and that any violations of those rules would not be tolerated. That can be achieved through on-going training of all officials in the judicial system, and strong transparency and accountability measures.

Institutions, including the Office for Combating Corruption, the Higher Council of the Judiciary and the Higher Council of the Public Prosecution, must be completely transparent about the complaints they

receive, their investigation and final results. These reports have to be as detailed as possible and be available to the public. They will reveal important information that could help in guiding prevention. Finally, all public officials must be held accountable for their actions. Concealing, omitting or failing to act against the perpetrators of any violations or misconduct need to be held accountable.

4. Criminal responsibility and punishment

Corruption in the judiciary cannot be dealt with only through disciplinary action. More serious cases of abuse of power must be criminally prosecuted and punished accordingly. Punishments must be predictable and consistent, sending a strong message to perpetrators.

5. Public awareness

Corruption always involves two or more players. The public must be made aware of the negative impact and consequences of corruption not only in the judiciary, but in general, and that all citizens have a responsibility not to engage in corruption. Accountability and punishment should be as strict, predictable and consistent in these cases.

6. Strengthening media investigation and reporting

The media should report regularly on the effect of corruption and lack of integrity in the public sector, including the judiciary. They should be informed and knowledgeable about corruption, including its causes and the negative impact on society. Civil society can play an important role in disseminating information and training journalists on the issue.

In addition, investigative journalism must be a strong partner in the fight against corruption. Journalists need to be trained and empowered to conduct their investigations into judicial corruption and report on discovered incidents.

7. Anex 1. – Media Screening around judicial integrity 2017-2018

	Date of the article	Title of the journal
JORNAL NOTÍCIAS		
1.	24.11.2017	Corrupção não se combate com magistrados corruptos
2.	01.11.2017	Procurador condenado a sete meses de prisão
3.	03.05.2018	“Caso milhulamete” Tribunal Administrativo da Província de Maputo anula a expulsão da juíza
4.	22.07.2017	Nos tribunais de Nampula: detetada venda de solturas
5.	27.10.2018	Magistrado processado por violar menores
JORNAL O PAÍS		
6.	24.11.2017	Não podemos combater a corrupção com colegas corruptos
7.	01.11.2017	Procurador condenado por violência domestica
8.	08.03.2017	Há magistrados que fazem sentenças de acordo com o dinheiro que recebem
9.	17.04.2018	“Tribunais devem ser escolas que criam um direito novo”
JORNAL CANAL DE MOÇAMBIQUE		
10.	04.07.2018	Advogado de Guebuza em maus lenções, promiscuidade e indícios de corrupção no CSMJ
JORNAL ZAMBEZE		
11.	25.08.2017	Procuradora de Tete pontapeia estatutos da Magistratura
JORNAL DIÁRIO DE MOÇAMBIQUE		
12.	01.09.2017	Procurador condenado por violação domestica
13.	07.11.2017	Nyusi exige punição exemplar a corruptos
JORNAL SAVANA		
14.	14.04.2017	CSMJ desvenda marcas de corrupção na classe dos juizes
15.	09.06.2017	Juíza acusada de corrupção



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