WIDER Working Paper 2020/134

Rule of law and judicial independence

João Carlos Trindade*

October 2020

In partnership with

United Nations University World Institute for Development Economics Research

wider.unu.edu

This study was prepared under the Mozambique component of the Economic Development and Institutions (EDI) Programme funded with UK aid from the UK government in collaboration with the Inclusive Development in Mozambique (IGM) Programme funded by the Governments of Finland, Norway, and Denmark. The EDI Programme Directorate includes the following institutions that work in partnership: Oxford Policy Management, University of Namur, Paris School of Economics, and Aide à la décision économique.

Abstract: The rule of law and judicial independence are a project yet to be achieved in Mozambique. The different attempts made so far to reform the legal system, mainly after the change in political and strategic direction brought about by the Constitution of 1990, were always short-sighted and conjunctural in nature, under domestic and foreign pressure that was not always clear or well-intentioned. Real structural reforms need to be made for the judiciary to be able to affirm itself as a real power and, in this way, favour balanced growth of companies, increased productivity, investment and jobs and, at the same time, the defence of the rights and legitimate interests of individuals and groups with fewer economic resources.

Key words: economic development, rule of law, judicial independence, Mozambique, judicial reform

JEL classification: K40

Note: This is a translated version of the original paper in Portuguese, which is available here (disponível em Português).

*Retired judicial magistrate, current chair of the governing board of the non-governmental organization Centro Terra Viva – Environmental Studies and Advocacy (CTV), Maputo, Mozambique; joaocarlostrindade@gmail.com.

This study is published within the project on Inclusive growth in Mozambique—scaling-up research and capacity.

Information and requests: publications@wider.unu.edu

ISSN 1798-7237 ISBN 978-92-9256-891-7

https://doi.org/10.35188/UNU-WIDER/2020/891-7

Typescript prepared by Adriana Barreiros. Translated from Portuguese by Sofia Roborg-Söndergaard.

United Nations University World Institute for Development Economics Research provides economic analysis and policy advice with the aim of promoting sustainable and equitable development. The Institute began operations in 1985 in Helsinki, Finland, as the first research and training centre of the United Nations University. Today it is a unique blend of think tank, research institute, and UN agency—providing a range of services from policy advice to governments as well as freely available original research.

The Institute is funded through income from an endowment fund with additional contributions to its work programme from Finland, Sweden, and the United Kingdom as well as earmarked contributions for specific projects from a variety of donors.

Katajanokanlaituri 6 B, 00160 Helsinki, Finland

1 Introduction

This text deals with one of the most disturbing and controversial topics that states and democratic societies wrestle with, whatever their level of development or their place in the world system.[1]

The principles of the rule of law and the independence of the judiciary are values enshrined in the universal and regional declarations of human rights and the main pacts on civil, political, economic and social rights, so their adoption by all countries—including those that have recently been through democratic transition processes—are a demand of the international community, even accepting that the affirmation of these values presupposes a culture and a legal and cultural environment forged throughout lengthy processes of socialization and acculturation (Canotilho 1993: 8).

On a worldwide scale, courts today are pressured by two movements with opposing interests: one coming from the top down, and the other from the bottom up (Lauris and Fernando 2010: 135). The first calls for a professional, efficient and swift response from the judiciary, which is considered vital for achieving the aims of economic development and for the establishment of a climate of stability, predictability and legal certainty to encourage new investments (The World Bank 2004: 16; Dakolias and Said 1999: 1). The second demands capacity, legitimacy and independence from the judiciary so that it can take on its important role in the affirmation of constitutionally enshrined rights, freedoms and assurances and the inclusion of the poorest segments of the population in the social contract (B. S. Santos 2014: 35).

For either of these pressure groups to see their goals attained, it is vital that the state political organization is limited by the law and is provided with institutions, procedures for action and ways of revealing the powers and competences that, as stated by Canotilho (1999: 21), permit the safeguarding of 'the *freedom* of the individual, individual and collective *security*, the *responsibility* and *accountability* of those in power, the *equality* of all citizens and the *prohibition* of discrimination against individuals and groups'.

The analysis we propose of the actual configuration of the rule of law and judicial independence in Mozambique begins by identifying the main problems persisting in the institutional framework of the legal authorities, as well as in the formulation and implementation of public policies in the sector. Next, it attempts to explain to what extent the inefficiency of the judiciary is negatively reflected in economic and social development, particularly in the areas of the economy that are more likely to generate conflict between private agents and between these and the state. Finally, it gives an indication of the most relevant challenge that justice administration is going to face in the near future and in the longer-term, so that the structural reforms proposed will not become just one more failed exercise, but rather produce the results society is clamouring for.

[1] The concept of *world-systems* or *world-system*, based on the inter-regional and transnational division of labour, classifying countries as central, semi-peripheral or peripheral, was developed by Fernand Braudel and added to by authors such as Immanuel Wallerstein, Giovanni Arrighi and Samir Amin. For all of these, see Wallerstein (2004).

2 Characterization of the judicial system:[2] weaknesses and potential

The path followed by Mozambican justice since the first Judicial Organization Law[3] was approved has often been the subject of analysis and research work, more or less complete and wide-ranging, which allows us to be effectively aware now of the constraints and blockages that continue to affect its performance.

Of the different studies carried out over the last twenty years, two of them had a special impact, the *Research project on the plurality of justice in Mozambique* (1997–2000), undertaken through a partnership between the Centre of African Studies at the Eduardo Mondlane University (CEA-UEM), the Centre for Judicial and Legal Training (CFJJ) and the Centre for Social Studies at the University of Coimbra (CES)[4] and, more recently, the *Exploratory study on access to justice and the performance of the courts in Mozambique* (2018–19), a result of the cooperation agreement between the Mozambican Association of Judges (AMJ) and the CES.[5]

The conclusions of both show that there were no significant changes that would have affected the structure of the system in the intervening time. The reforms carried out at different times—broadly following the constitutional developments in 1990 and 2004—were always short-sighted and conjunctural, as a result of their partial, biased vision, under domestic and foreign influences in multiple senses. Three types of reforms can be identified, which are summarized below:

a) those whose aim was to increase the efficiency and response capacity of the courts and other judicial bodies in the requests put to them. These include the set-up of the higher courts of appeal and the sections specialising in commercial issues in the provincial courts, the introduction of new, alternative means of dispute resolution for commercial disputes[6] and computerized systems in the courts and prosecution units;

b) those that sought to increase the levels of probity and integrity in the system and assure the security and certainty of legal transactions, highlighting the fight against corruption and the consequent changes to the structure of the Public Prosecutor's Office and the current National Criminal Investigation Service (SERNIC);[7] and

---

[2] Whenever the terms *justice system, judicial system*, or simply *administration of justice* are used in this text, we are referring to all the bodies, entities, institutions or scopes of the state which directly or indirectly compete for the exercise of the jurisdictional duties exercised by the courts. This group includes, in addition to the actual courts, the Public Prosecutor, the criminal police, the Ministry of Justice, the Institute for Legal Representation and Assistance (IPAJ) and the Mozambican Bar Association, the National Prison Service (SERNAP), legal education and training institutions, Forensic Medicine services, social and community organizations and other bodies involved in assisting with these duties.

[3] Law No. 12/78, of 2 December.

[4] See Santos et al. (2003).

[5] See Fernando et al. (2019).

[6] See Resolution No. 1/CJ/2017, of 25 August, of the Judicial Council, which approves the Regulation on Mediation Services in Judicial Courts.

[7] Corresponding to the criminal police.

c) those aimed at broadening access to the law and justice, through reinforcing the structure of legal and judicial assistance and conflict resolution and the extension of the network of courts (Fernando et al. 2019: 275).

2.1 The creation of higher courts of appeal and commercial sections in provincial judicial courts

The most recent constitutional revision in 2004, as with the preceding reforms in 1990, brought important changes to the justice area, bringing renewed hope of a *qualitative leap in its operation*. We believe that of note are the recognition of legal pluralism as an undeniable sociological reality; the redefinition of the categories of courts existing in Mozambique, including community courts, which would now be formally endowed with constitutional dignity; the opening of a space for rethinking the hierarchy of the courts and jurisdictional specialization; the introduction, finally, of new management and disciplinary bodies for the judiciary—the Superior Council of the Judiciary of the Public Prosecutor's Office and the Superior Council of the Administrative Judiciary.

However, the new Judicial Organization Law (Law No. 24/2007, of 20 August)[8] fell very short of expectations. The slow and uncoordinated way the implementation was processed shows, once again, signs of some lack of strategic sense in the management of the public policies of justice. It is enough to mention, for example, that, with the law having set a deadline of one year after publication for the higher courts of appeal to come into operation, these only began being set up in 2011, under extremely precarious conditions, and it was only in 2015 that they began operating at full capacity in three regions in the country.

The higher courts of appeal saw their response capacity constrained because they were suddenly being expected to deal with the overwhelming majority of the cases pending in the Supreme Court, thus becoming congested from the outset.[9] And as the changes to procedural law and the management and internal organization of the courts were also unable to break down the barriers where they were being felt, it cannot be said that there were any substantial improvements, either in terms of speed or the quality of the service provided.

If we look at the table below, which compares the statistical data for the proceedings recorded in 2012 and 2013 (the first two years of operation of the higher courts of appeal) and the two most recent legal years (2018 and 2019), we can see that, generally speaking, there is a constantly increasing trend in the number of cases handled and, with regard to the higher courts of appeal, it was only last year that a slight reduction was seen. Even so, it remains significant that, after only seven years of operation, pending cases in these courts stand at around 5,000…

[8] This Law was later subject to two individual amendments, affecting some of its provisions, under the terms of Laws Nos. 24/2014, of 23 September, and 11/2018, of 3 October.

[9] Table 1, on the proceedings recorded in the courts, shows that, in 2012, the first year of actual operation of the higher courts of appeal, they received the weighty 'legacy' of 4,503 processes, which had previously been handled by the Supreme Court. Since then, despite all the efforts made, these pending cases have continued with little variation, reaching 4,901 cases in late 2019.

Table 1: Proceedings in the courts

2012				
	Pending	Received	Closed	Ruled on
Supreme Court	197	72	108	161
Higher Court of Appeal	-	4,503	479	4,024
Provincial Judicial Court	61,096	32,863	33,699	60,260
District Judicial Court	85,902	67,910	68,535	85,277
TOTAL	149,722	105,348	102,821	149,722
2013				
	Pending	Received	Closed	Ruled on
Supreme Court	161	42	117	86
Higher Court of Appeal	4,024	1,151	573	4,602
Provincial Judicial Court	60,260	30,943	30,605	60,598
District Judicial Court	85,277	72,576	73,060	84,793
TOTAL	149,722	104,712	104,355	150,079
2018				
	Pending	Received	Closed	Ruled on
Supreme Court	223	260	183	300
Higher Court of Appeal	4,998	1,165	1,100	5,063
Provincial Judicial Court	60,695	62,140	67,655	55,180
District Judicial Court	94,046	94,636	92,656	96,026
TOTAL	159,962	158,201	161,594	156,569
2019				
	Pending	Received	Closed	Ruled on
Supreme Court	300	338	257	381
Higher Court of Appeal	5,063	1,040	1,202	4,901
Provincial Judicial Court	55,180	63,020	55,236	62,964
District Judicial Court	96,026	91,213	86,442	100,797
TOTAL	156,569	155,611	143,137	169,043

Source: based on data provided by the Statistics Department of the Supreme Court.

As to the commercial sections of provincial courts, they usually deal with enforcement procedures for consumer debts but, even so, they are still facing a progressive increase in pending cases. Around twenty years ago, the study undertaken by the partnership between the CEA-UEM, the CFJJ and the CES had reached essentially identical conclusions (Santos et al. 2003, vol. I: 397). This is an indicator that the more complex disputes could be settled by extrajudicial means (national and international arbitration, mediation, etc.) and that the confidence of investors in the quality of state justice is still very low.

A careful and attentive analysis of the information collected by the *Doing Business* programme by the World Bank (2019: 66) makes it possible to conclude, with no great surprises, that despite the extremely important role it plays in the actual volume of legal cases and the human and material resources available to deal with them (quantitative data), it is the good or bad management and organization practices and the quality of the work done by its agents (qualitative data) that the performance of the justice system depends on, whether in the commercial jurisdiction or in other jurisdictions.

2.2 The introduction of new alternative means for the resolution of commercial and labour disputes

The transformations that took place in the country following the adoption of the market economy model and the intensification of international trade relationships in the late 1980s and early 1990s justified the approval of the first Law of Arbitration, Conciliation and Mediation (Law No. 11/99, of 8 July), aimed at allowing the legal subjects to use these different means and methods for conflict resolution, before, or as an alternative to, taking the case to court.

The law grants the freedom to set up and administer institutions for arbitration, conciliation and mediation, as long as their articles of association provide for: a) the representative nature of the institution responsible for the centre to be set up; and b) the reason for the constitution of the specialized centre of arbitration, conciliation, and mediation (Article 69).

Two centres of arbitration stand out in the national panorama, set up to intervene in two different areas of conflict: the Centre of Arbitration, Conciliation and Mediation (CACM) of the Confederation of Economic Associations of Mozambique (CTA), set up in 2002; and the Commission for Labour Mediation and Arbitration (COMAL), an institution under public law under the authority of the minister responsible for the labour area, in operation since 2011.[10]

In addition, the bodies operating in the area of legal and judicial assistance, such as the Institute for Legal Representation and Assistance (IPAJ), the Institute for Access to Justice (IAJ) of the Mozambican Bar Association, and the Centre for Legal Practices (CPJ) of the law faculty at Eduardo Mondlane University, have been carrying out, in practice, dispute resolution work using mediation and conciliation techniques. But, on a much smaller scale and without very significant results because the actual agents of these institutions recognize that they are not duly qualified or equipped for using such techniques (Fernando et al. 2019: 72).

This is a factor that must not be neglected, as any initiatives for reducing judicial involvement that are not accompanied with the required assurances of quality and professional work run the risk of leading to the institutionalization of justice of a lower quality for the economically and socially

[10] See Decree No. 50/2009, of 11 September, which approved the Regulation in question.

more vulnerable sectors and, what is worse, the 'enshrining of factual situations of repressive conciliation' (Fernando et al. 2019: 73).

2.3 The fight against corruption, the Public Prosecutor and the current SERNIC

The process of moving from a centrally planned economy to a free market economy, with the consequent process of privatization of public companies and financial participation by the state, price liberalization, monetary contraction, drastic cuts in social expenditure and making labour relations more flexible, as well as other measures, paved the way to the progressive spread of the phenomenon of corruption in Mozambique.[11]

To deal with the problem, while at the same time promoting the transparency and integrity of the public sector, which is essential for achieving political, economic and social stability and the reinforcement of legal security and certainty, the Anti-Corruption Unit was set up in 2002, under one of the specialized departments in the Office of the Attorney General. However, it was short-lived, as a result of not having foreseen an independent judicial-legal framework that would allow it to carry out its duties adequately. And so, following the restructuring measures from the Public Prosecutor's Office, determined by the constitutional revision in 2004, the GCCC – Central Office for Fighting Corruption (Law No. 6/2004, of 17 June) was set up, under the auspices of the Attorney General and with specific powers under the scope of criminal investigation and preparatory investigation of the crimes of corruption and unlawful economic participation.[12]

In its most recent Corruption Perceptions Index of 2019,[13] the Transparency International organization gave Mozambique 26 points, putting the country in 126th place (in 2018 it had been given 23 points and was in 158th place) on a list of 180 countries. According to the Public Integrity Centre (CIP)—an NGO set up in 2005 with the aim of contributing to the promotion of transparency and integrity in Mozambique—the fact that the GCCC had taken significant steps in the criminal proceedings related to 'hidden debts'[14] and, consequently, was able to make various arrests of the people accused in the case, decisively contributed to this improvement in results. In addition, there was also a positive change in the political anti-corruption discourse, given the fact that the President of the Republic is apparently placing the problem of corruption at the top of his governance agenda (CIP 2020: 1).

---

[11] Economist Toke Aidt summarises the three main conditions for the persistence of cases of corruption in the public sector as follows: '1. **Discretionary power**: the relevant public officials (bureaucrats, politicians, etc.) must possess the authority to design or administer regulations and policies in a discretionary manner. 2. **Economic rents**: the discretionary power must allow extraction of (existing) rents or creations of rents that can be extracted. 3. **Weak institutions**: the incentives embodied in political, administrative and legal institutions must be such that public officials are left with an incentive to exploit their discretionary power to extractor create rents' (Aidt 2011: 16—bold text by the author).

[12] Currently, Law No. 4/2017, of 18 January, defines it as a body specialising in the prevention of and the fight against the crimes of corruption, embezzlement and extortion (Article 78).

[13] The Corruption Perceptions Index (CPI) from Transparency International is a global barometer that seeks to assess the perception of citizens as to the level of corruption in all the countries in the world. The assessment is carried out based on a table of points going from 1 to 100 – using different, previously defined criteria – with the countries with classifications closer to 100 being considered the least corrupt and, conversely, those that are furthest away from that figure deemed to be the most corrupt.

[14] Name by which the case is commonly known, beginning in mid-2015. It involved a set of loans contracted from some international banks based on sovereign guarantees issued by the government of former President Armando Guebuza, and aimed at financing the companies *MAM*, *Proindicus* and *EMATUM*, all linked to state security services, without authorization from parliament, as determined by the Constitution (Article 179(2)(p)).

But more must be done. The CIP has called attention to the fact that these arrests were not accompanied by the recovery of the assets unlawfully diverted, nor by the approval of a criminal policy to make the fight against this phenomenon more effective, which is recognized by the actual Office of the Attorney General as one of its weak points (Buchili 2020).

An essential instrument for supporting the investigation work and criminal prosecution by the Public Prosecutor's Office is its excellent auxiliary body, the criminal police, which was known in Mozambique for many years as the Criminal Investigation Police (PIC). The main judicial players—courts, Public Prosecutor's Office, Bar Association, IPAJ—and the civil society organizations interested in the prevention and repression of criminal groups—the CIP, human rights and women's human rights organizations, etc.—have been calling for sweeping reforms of the PIC that would return the institution to the 'dignity and grandeur of the Criminal Police' (Correia 2014: 86).

For a long time, one of the most hotly debated issues on this topic was the institutional inclusion and the internal organization of the PIC. Some believed that

> its subordination to the Public Prosecutor's Office is essential for it to be able to better carry out its auxiliary role. Its existence makes more sense as a criminal police force, with qualified human resources, led by a judge who is well-equipped and valued, and with agents who are regularly assessed. This is also relevant to the fight against crime, which we would all like to see being crowned with more success. (Timbane 2016)

In a text published in 2012, which analysed the implementation of the Strategic Policing Plan, Francisco Alar says that

> the debate on whether the investigative branch should remain subordinate to the PRM or be transferred to the Public Prosecutor's Office or to the Ministry of Justice, as it was during the Portuguese era, has been dragging on for many years. The argument to remove it from the PRM[15] is that it does not enjoy the same independence as other administrative and legal institutions, leaving it exposed to operational interference from the police commissioner and the Ministry of the Interior (MINT). In 2002/2003, it seemed that the idea of separating the investigation branch from the PRM would be successful and that new investigators would be recruited. However, when discussions on the appropriate legislation began, the Minister of the Interior rejected the idea, arguing that there was no such separation in the other countries in the Southern African Development Community (SADC). This discussion on the subordination of the PIC adversely affects the relevant debate on policing resources and technical capacity. However, some changes are in force. At least internally, there have been reflections and studies on how investigation capacity can be improved. (Alar 2012: 181)

In 2017, with the approval of Law No. 2/2017, of 9 January, and in what seems to have been a political compromise solution, the PIC ended up being discontinued and gave way to a new

[15] The police of the Republic of Mozambique includes the PIC and the following special operations and reserve branches and units: the Public Security and Order Police; the Border Police; the Coast, Lake and River Police; the Rapid Response Unit; the High-Level Protection Unit; the Counter-Terrorism Operations and Hostage Rescue Unit; the Canine Unit; the Mounted Police Unit; and the Bomb Disposal Unit (see Article 13 of Law No. 16/2013, of 12 August).

structure, the National Criminal Investigation Service (SERNIC). Criminal investigation went from being a branch of the PRM to being a 'public service of paramilitary nature, an auxiliary of the administration of justice, endowed with administrative, technical and tactical autonomy, without prejudice to the authority of the Minister responsible for the area of public order, security and tranquillity, in matters that do not affect its autonomy' (Article 3 of Law No. 2/2017, of 9 January). It remained functionally subordinate to the Public Prosecutor's Office (Point 4 of the same law), as had been the case, but did not advance towards organic integration.

The main constraints to the operation of SERNIC in its three years of existence, despite the removal of criminal investigation as a branch integrated into the General Command of the PRM, were, and all indications point to these continuing, the lack of financial autonomy, the shortage of staff with the necessary qualifications, and the insufficiency of resources and instruments for adequately carrying out the duties they are responsible for.

2.4 The widening of access to law and to justice: institutionalization of structures for the administration of justice and legal and judicial assistance and extension of the network of judicial courts

If any doubts remained about the coexistence of different regulatory and conflict resolution systems in Mozambican society, they were dissipated by the constitutional recognition of legal pluralism. Therefore, any analysis of the administration of justice in Mozambique must take into account the two axes or dimensions it is divided into: *state*, including the courts, the Public Prosecutor's Office, the Bar Association, the IPAJ and other institutions in the judiciary, and *non-state*, involving community courts and other local dispute resolution tribunals.[16]

The development of state justice has had its ups and downs, on a winding road which will be celebrating the 45th anniversary of national independence (or, if preferred, the 42nd anniversary of the first Judicial Organization Law), and is still far from enjoying the confidence of society and achieving the level of performance that citizens and legal entities demand. Its coverage is deficient, and the quality of the service provided is far from satisfactory for those who resort to it.

The President of the Supreme Court, in the last legal year opening session, did not shrink from admitting that 'we still have twenty-four districts in our country without courts operating locally, which means the citizens have to go to other nearby districts in order to resolve their disputes' (Muchanga 2020). For our part, we continue to argue that the problem is not the coverage of twenty-four districts that still do not have courts. More important than this is rethinking the legal map, providing more rational coverage of the country, taking into account the real needs of legal and judicial authority, the size of the population, the nature of the disputes and their degree of complexity, and not working from abstract criteria on the political and administrative organization of the country. A careful study could come to the conclusion that there are districts whose level of economic and social development, population density, infrastructures in place, etc., would justify the existence of more than one court with the powers due to the district courts in their geographic area, while others would only need a more organized and better distributed network of non-state or community tribunals.

The intense efforts that are being made by the managing bodies of other institutions in the judiciary in the task of concluding the slow process of physical establishment of the courts and support structures in the field are not being ignored, nor are those of the entities charged with training the

[16] See Article 4(212)(3) and Article 223 of the Constitution and Articles 5 and 6 of Law No. 24/2007, of 20 August.

judges, court officials and system managers. We know that there are now 157 courts, of different levels, operating all over the country and that the ratio of courts to 100,000 inhabitants has improved slightly, going from 1.1 in 2014 to 1.3 in 2019. The average time taken for dispute resolution fell from 17 months in 2014 to 12 months in 2019, and the resolution rate, which was 37.6 per cent in 2014, was always higher than 45 per cent in the following four years.[17] But these figures cannot hide the truth that there is still a lot to be done and consolidated so that the universal principals of the rule of law may be achieved.[18]

As to the provision of legal consultancy and assistance services, this is the responsibility of two bodies: the Mozambican Bar Association (OAM), constituted by Law No. 7/94, of 14 September, as a legal person under public law, representing the people holding law degrees and practising law, independent of the state bodies, having administrative, financial and patrimonial autonomy; and the Institute for Legal Representation and Assistance (IPAJ), set up by Law No. 6/94, of 13 September, as a state institute aimed at ensuring the right to defence, providing lower income citizens with the legal representation and assistance they need.

Since it was set up in 1994, the OAM has grown exponentially. Ten years later, more precisely on 20 May 2005, 246 lawyers were registered with the bar association, with 226 of them having offices in Maputo, 9 in Beira, 6 in Nampula, 2 in Tete, 1 in Chimoio, 1 in Matola and 1 in Quelimane (OAM 2005). In late February 2020, the database on the Bar Association's webpage (https://www.oam.org.mz/advogados-inscritos/) had 1856 lawyers, with around 73 per cent practising in Maputo. Despite the rapid growth in the list of lawyers practising in the provinces (Sofala, Nampula and Tete have the highest figures), over recent years, one of the greatest challenges to the Bar Association has been to offer private legal services at district level, as well as in less populous urban centres.

The IPAJ in turn went through an initial period with enormous operating difficulties, whose main causes were the absence of political priority, poor management and budget insufficiency (Santos et al. 2003, vol. II: 56). In 2007, when a survey was carried out on the IPAJ, this institute had 80 legal assistants and 400 other staff. It also had 10 provincial offices and 57 district offices (Bila 2008). The following year, the approval and establishment of the Strategic Plan for Legal Defence for Disadvantaged Citizens (PEDLCC) was decisive for the institution to be able to grow and consolidate itself, promoting organizational and institutional development and improving the efficiency and effectiveness of legal assistance and representation (Lauris and Araújo 2015: 94).

A new organic statute was adopted in 2013,[19] with the aim of making the operational structure adequate to the new conditions that had since been provided. However, the challenge of reaching

[17] All the quantitative data referred to here were taken from Muchanga (2020: 8).

[18] The *World Justice Project* (https://worldjusticeproject.org), a self-proclaimed, independent, multidisciplinary, non-profit organization that works for the advancement of the rule of law in the world believes that it is defined by four universal principles: **Accountability** – the government and private entities are accountable under the law; **Just laws** – laws must be clear, publicized and stable, applied evenly, and should protect fundamental rights, including the security of persons and contracts, property and human rights; **Open government** – the processes by which laws are enacted, administered and enforced are accessible, fair and efficient; and **Accessible and impartial dispute resolution** – justice must be delivered in good time, by competent, independent, ethical and neutral representatives who are accessible, have adequate resources and reflect the makeup of the communities they serve (*World Justice Project*, n.d.).

[19] See Decree No. 15/2013, of 26 April.

the more disfavoured populations, mainly in the regions far from large urban centres, will require continued efforts towards institutional growth and consolidation.

But access to justice is not only through state mechanisms or institutions. In recent years, particularly since the early 1990s, some civil society organizations have taken on increasing importance for access to justice and the law, seeking to make up for the difficulties faced by the state. These are organizations that provide different kinds of support to citizens, in particular legal assistance and representation, legal information and advice and conflict resolution. They have a wide field of intervention. Some are general in scope, while others specialize in certain rights or in providing support to more vulnerable citizens, or work in particularly problematic areas, such as cases of human rights, women's human rights, access to land and other natural resources.

With regard to community courts, it is worth mentioning that within the many non-judicial mechanisms for dispute resolution that interact in Mozambican society, these are the ones that appear to be best placed to promote local justice and contribute to desirable links between state and non-state systems and for the administration of justice. They are different from all the others, fundamentally because they are an emanation of the actual state, through a formal regulatory act—Law No. 4/92, of 6 May—which was enacted to allow citizens to resolve minor disputes within the community, contribute to the harmonization of different legal practices and to enriching the rules, habits and customs that 'lead to a creative synthesis of Mozambican law' (see the Preamble to this act).

As it happens, although this law has been in force for 30 years, it has never been regulated. And there was no shortage of alerts from different sectors of society as to the risk of this lack of regulation and the unfeasibility of the application of the law without it. There is a set of related organizational issues, for example, with the procedure for electing the members of community courts (Article 9(2) and Article 13), with the establishment of these courts (Article 12) or the forwarding of the 'appeals' left unresolved to the district courts (Article 4). The incomprehensible legislative inertia of the government served, after all, as a pretext for the generalization of the illegal practice of substituting elections for member (judge) co-option processes, with the involvement of agents of local authorities (heads of administrative posts, neighbourhood secretaries, village presidents, etc.), without the direct intervention of the voters—the people.

We see this situation as highly problematic, with no explanation other than serving for the purpose of ensuring party political control of the community structures. This is controversial (and, from our point of view, unconstitutional), as is the current framework of the community courts under the authority of the Ministry of Justice, Constitutional and Religious Affairs, mainly since the Constitution of 2004 included them in the list of type of courts in the Republic of Mozambique (Article 223(2)), with all the guarantees of independence, impartiality and objectivity these sovereign bodies should enjoy. It is unclear what legal basis the Civil Registry services use to organize and manage the establishment of the community courts when this responsibility is assigned to the district courts (Article 14 of Law No. 4/92, of 6 May).

These serious deviations from the spirit and the letter of the law, to which we could add disrespect for other regulations, such as articles 10 (on the mandate of the members of the community courts), 11 (on the payment of the members) and 12 (on the establishment of these bodies), contribute largely to their becoming discredited in the eyes of citizens and to the crisis of legitimacy that has taken over the system (Trindade and José 2017: 31).

3 Implications for social and economic development

The blockages and dysfunctions in the performance of the Mozambican judiciary could not but affect, to a greater or lesser extent, the process of development in the country, both in economic and financial terms and in social terms. There seems to be no doubt of this. But its impact can be assessed from two different perspectives, corresponding to the top-down and bottom-up pressure groups referred to in the introduction.[20]

Thus, for those who favour the first perspective, a well-structured, independent judicial system enjoying the confidence of the legal and business community is the decisive factor for stimulating growth, protecting property rights and maintaining control of free competition and the operation of the market economy.

The specialized literature[21] usually highlights some of the virtues of this good administration of justice. We highlight the following:

- favouring voluntary compliance by the parties to contracts under private law, reducing the costs of transactions and encouraging economic agents to increase the volume and distribution of their businesses;
- permitting the accumulation of production factors, encouraging an increase in investment in physical and human capital, given that entrepreneurs will feel that their property rights are assured and protected;
- reducing the risk of administrative arbitrariness, mainly in the cases of sustained, long-term private investment in public utility services, such as telecommunications, energy, etc.;
- contributing to wider dissemination of knowledge, not only technological knowledge, but also knowledge of adequate management, marketing and financial practices, as the expansion of the market will bring stronger competition between companies, allowing them to make higher profits and sales and invest in innovation, whether through development of or the acquisition of technology.

The basis for this line of thinking, according to Susana Santos (2014: 5), is the predominance of economic rationality, defined by criteria of effectiveness and efficiency that can be quantitatively measured. The author explains that according to this logic, the more rational the service in question is, the more productive it will be, in other words, the more gains it will make. In the justice sector, we are talking about the number of cases closed, the number of investigations, the number of hearings, etc., carried out by each system agent (judge, prosecutor, court official) or by each body in the system (court or tribunal or prosecution unit).

This is one of the principles of the *institutional re-engineering* that Hammergren (2006: 18) refers to as 'focusing on the results and not on the method'.

Taking different assumptions into account, those that highlight the importance of the bottom-up perspective, while recognising the central role of the judicial system in the development of democracy and in social and economic development, argue that structuring topics such as access

---

[20] Boaventura de Sousa Santos calls these two fields *hegemonic*, because they are essentially carried out by the World Bank, the International Monetary Fund and large international development aid agencies, and *counter-hegemonic*, because they are led by citizens, organizations and social movements that progressively became more aware of their rights and the need for them to be defended and respected (B. S. Santos 2014: 33-35).

[21] For all these, see Castelar (2009: 15-25) and the authors he cites.

to justice, recruitment, selection, training and career progression for judges, the quality and transparency of the legal acts cannot be planned or dealt with in purely economic or financial terms (B. S. Santos 2013). Here, the highest value to be preserved must be the jurisdictional authority over the civil, political, economic and social rights enshrined by the Constitution and whose enjoyment requires courts to be independent, the procedural law to be rapid, fair and straightforward, and asymmetry in access to be eliminated.

Anyone subscribing to this line of thought is led to criticize the excessive focus on issues of productivity, the imposition of bureaucratic models based on scripts for 'good practices' and quality certification, insofar as this model produces a perverse effect on the organizational dynamics of legal institutions. In effect, we must not neglect the fact that the system is fuelled by a web of relationships between different players with different weights and powers inside the same structure, where attention is centred on economic growth and free market development, which can lead to latent conflicts between professionals who see their identity diminished in the face of standardized aims and irrespective of their position in the structure (Susana Santos 2014: 7).

In addition, efficiency cannot be recognized as structuring and the courts will never engage in their duty to 'educate the citizens and public administration regarding voluntary, conscious compliance with the laws, establishing fair and harmonious social coexistence' (Article 213 of the Constitution) if the performance of the judiciary remains selective and if the view of the people and the community persists with the idea that 'justice is for the wealthy'.

4 Challenges for the future

The diagnoses made of the performance of the justice administration system in different studies and research papers that have been produced over the years show a clear persistence of problems long since identified.[22]

It is evident that the importance of these diagnoses must not be undervalued, in the same way that it is not a good idea to neglect the reports from international organizations and national business associations, concerned with improving the business environment and the performance of the economy. But, as Nuno Garoupa, a full professor at the University of Illinois says, 'there is no doubt that justice is important for economic and social development, but it is not a miracle solution. The quality of the judicial system, the courts or the judicature in China or in Central and Eastern Europe is catastrophic, but that does not stop these countries from attracting foreign investment or presenting enviable growth rates […]' (Garoupa 2008: 1).

[22] According to Boaventura de Sousa Santos (2005: 77), there are three different ways of diagnosing justice problems. The first is the *sociological diagnosis*, based on sound, stringent assessment of the performance of the judicial system and the perception of the citizens as to the operation of the courts and related institutions. The second is the *political diagnosis*, made by political decision-makers and by analysts and commentators on social media. Diagnoses such as this are based on rules and assumptions that are very different from those used for the first, and sometimes have very little to do with it. The third is *operational diagnosis*, made by participants in the judicial system: judges, lawyers, employees, professional associations and Superior Councils of the judiciary. They all have their own importance and reveal their own 'truth'.

As we have said, what the Mozambican judicial system needs is real structural reform, which it has never seen before. The political powers that be have recognized this more than once, in the voice of their highest representative, the President of the Republic.[23]

But what should 'structural reform' consist of, from our point of view?

The topics we will be summarising below—given that the limits of a text of this nature do not allow for a more in-depth analysis—constitute some of the elements that we believe are the essential basis for this idea, without which we do not believe it will be possible to move on to another platform for debate on this topic and, thus, the desired paradigm shift.

4.1 Shared strategic vision

In the first place, the effectiveness, speed and accessibility of justice can only be sustainable if the different entities in the sector share a systemic, integrated vision that permanently links the formal, professional judiciary and the different non-judicial mechanisms for conflict resolution recognized by the State, under Article 4 of the Constitution. For this to happen, it will be necessary to pursue 'the committed quest for solutions so that justice in Mozambique will be predictable and accessible to all, administered within an economically and socially tolerable time and with standards that are more aligned with the collective conceptions of justice that are prominent in our society' (Correia 2014: 108).

As we have seen, there were successive attempts at judicial reform over the last thirty years. The worldwide reformist movement arrived here though programmes and initiatives almost always focused on searching for solutions to solve the unfathomable problems of celerity and procedural simplification, providing the organizations with more human, material and infrastructure resources and introducing alternative dispute resolution methods.

Nowadays, there seems to be some tacit recognition that the results did not live up to expectations. The complexity of litigation, the scarcity of resources and the absence of this strategic vision superseded the greater or lesser desire for change, whether genuine or feigned.

It is then necessary to definitively break this cycle, it is necessary to go beyond 'more of the same' measures (more courts, more judges, more resources…) and look at the judicial system from another perspective.

Structural reform will only introduce greater efficiency, effectiveness and quality in the administration of justice if it is looked at as a complex, integral system. The focus will have to be

[23] In two of his most recent speeches on topics of Justice, the Head of State spoke about the need for structural reforms: first, at a commemorative session for the Day of Legality, on 5 November 2019, stating that 'there is a need to ensure greater efficiency and credibility of the judiciary and this should include legal reform […] The introduction of changes to the structure and organization of the judiciary will permit greater transparency and control over participants in the judiciary, whether by their peers or by society' (President of the Republic 2019). Then, at the ceremony for the opening of the 2020 Legal Year, he reiterated that 'the reform of the Law and Justice is a pressing need, in order to ensure the effectiveness of the rights and duties of citizens, making the system a factor in the promotion of citizenship, cohesion and social peace […] Justice must facilitate the business environment and make the national market more attractive and competitive and safer for national and foreign private investment' (President of the Republic 2020). The only question is if his understanding of 'structural reform' is the same as the one we are sharing here. We are rather doubtful about that.

aimed at a gradual, but persistent, change in work methods, better, more streamlined management of human and material resources and processes and better coordination between all the participants in the system. This can only be achieved if, with every change that has to be made, we look at the various components it is made up of, as it is distributed among different state bodies and the community and requires the definition of common medium- and long-term objectives.

As stated by Conceição Gomes (2018: 746), 'it is fundamental to lend substance to the idea that legal proceedings take place in a very broad, polycentric framework, with both internal judicial players (judicial magistrates and magistrates from the Public Prosecutor's Office, employees) and external players (police, social workers, experts, etc.) playing a part in them. Some of the time taken in court, indeed a significant amount in some proceedings, is the time of these latter professionals'.

4.2 Consensus between relevant players

This shared vision assumes the agreement to a broad consensus between the different state powers, the police forces, the judiciary and society in general so that justice is understood as a public good of primary importance, the discussion and formulation of which should be above all the differences and private or corporate interests of each one.

This is a fundamental agreement that, in some cases, has been called a *Regime Pact* (Figueiredo 2017; B. S. Santos 2005: 77) and, in others, a *State Pact* (Representatives of the PP and PSOE-Spain 2007) and which, bearing in mind the scope and scale of the reform, will imply, as only necessary, specific revision of the Constitution. This will have to be a constitutional revision broadly recognized as necessary, one that is patiently refined and not imposed by any actual power for the benefit of private and conjunctural interests.

4.3 Central role of the judiciary in the different stages of reform

The success of the reform can only be attained if the participants from all the bodies, entities or institutions in the justice administration system play a central role as active agents of change, as they are the main vehicle for conveying knowledge between the judicial reality and the common citizen (Garoupa 2008: 2). The commitment of these agents and the setting aside of a period of adaption to the reform measures, accompanied by targeted training courses are of prime importance and should not be neglected (Gomes 2018: 747). One of the weaknesses pointed to in the case of the reform initiatives so far undertaken is, precisely, the lack of preparation of the conditions necessary for their later implementation, both in terms of training and in terms of technical and financial resources.

These weaknesses will make it difficult to break own resistance, alter routines and change obsolete methods.

4.4 The independence of the judiciary as a fundamental right

Contemporary legal systems are broadly grouped around two fundamental models of organization of the judiciary: the legal profession model seen in countries with an Anglo-Saxon tradition

(common law)[24] and the judicial career seen in countries with a tradition of European continental law (Romano-Germanic family).[25]

Despite their differences, the conceptual framework regarding the independence of the judiciary, according to A. Santos Carvalho (2016: 16), makes a distinction between substantial independence, personal independence, external independence, and internal independence. Substantial independence refers to the circumstance of judges, when acting in their judicial role, being subject only to the law and their conscience, free from any and all outside influence. Personal independence means the judges cannot be held accountable for their judgements and decisions, except in the cases where this is especially provided for by law, and they enjoy the assurance of their irremovability from office. External independence means the removal of executive control from the system management mechanisms and the preparation of their budgetary assumptions. Finally, internal independence assures judges of their freedom to directly or indirectly disregard pressure from other judges when making their judgements.

This conceptual framework helps to understand that only a judicial power with a high capacity for operation, free of excessive formalities and endowed with functional autonomy from the other powers can meet the demands for greater efficiency, independence, impartiality, speed and proximity that are required of them. Therefore, the right to have independent courts is also a fundamental human right which should not be looked at as a privilege of judges, but rather as an assurance for society and a primary condition for citizens, organizations and companies to be able to trust the judicial system, the law and the state.

4.5 Paradigm shift in legislative production

Legislative production in Mozambique is also in need of substantial improvements. As is the case in other latitudes, whose model has served as an inspiration, and in the words of Garoupa (2008: 3), Mozambican legislators have shown themselves to be *frenetic* (legislating everything even when it is not necessary), *schizophrenic* (legislating erratically) and *sloppy* (legislating and repealing without regulating).

This impulse to legislate is followed without first assessing the existence of other legislation already in force and which could need only to be amended or have its application improved. Or without pondering another solution that does not include adding to the normative or regulatory burden.

Those who have the power to create regulations should, first of all, analyse the legislative framework in force and see if there are other solutions for achieving the desired aims, respecting the different phases of the legislative process. Charles-Albert Morand proposes that this process should be in seven stages: i) identifying the problem; ii) determining the aims; iii) choosing the options; iv) *ex ante* assessment; v) adopting the legislation; vi) implementation; and vii) *ex post* assessment (Morand 1999).

---

[24] According to Carvalho (2016: 12), this model is characterized by an extensive guarantee of the independence of judges, there being no distinction between judges and lawyers or a judicial career. The magistrates are removed from the civil liability mechanism, rather being subject to ethical rules and the application of the same disciplinary responsibility to all the professions in the legal community.

[25] Which, according to Carvalho (2016: 14), is characterized by a weak guarantee of the independence of judges, by the professional difference between judges and lawyers, by the existence of a judicial career, with judicial magistrates normally being subject to the rules of civil liability.

The quality of the laws made depends on various factors and it is very true that there are no perfect laws. However, it is possible to perfect the legislative process, provided those procedures and methodologies, which will certainly contribute to making the laws more comprehensive, less difficult to interpret and apply, more effective and suitable to the reality they are intended to regulate. Of these methodologies, *ex ante* and *ex post* assessment studies of the legislative impact and the participation of citizens, legal persons and companies at the law preparation stage and in access to the elements that are the grounds for the political decision take on especial importance. As stated by Sónia Rodrigues, 'if easy access to the law that regulates their daily lives is crucial for citizens, simplification and the reduction of context costs is vital for the economic competitiveness of companies' (Rodrigues 2017: 1038).

A step that we deem to be indispensable for assuring this methodological development includes the creation of a Law Reform Commission, not like the old Inter-Ministerial Law Reform Commission (CIREL),[26] but rather according to the model for the South African Law Reform Commission, which is presided over by a judge and is made up of law professors, magistrates and lawyers with the power to carry out studies and research into all the branches of law, or have these carried out, with the aim of presenting recommendations and projects for the improvement, modernization or reform of national and provincial legislation, including the repeal of obsolete or unnecessary provisions, the standardization of laws all over the country, the consolidation or codification of any branch of the law and measures aimed at making the laws more readily available to the public. In short, the Law Reform Commission is an advisory body whose aim is the reform and the continued improvement of the legislation in South Africa.[27]

4.6 The judicial government: fundaments and management

In an interesting publication which discusses what should be understood by *judicial government*, Alberto Binder, a law professor at the University of Buenos Aires, puts forward some controversial ideas, but which we believe to be attractive, arguing that it is necessary to clearly differentiate the judiciary from the other state powers, as well as from the different duties and tasks existing within judicial organizations, which are more or less diverse according to the country (Binder 2006: 12).

In his opinion, the true fundament that sustains the idea of *judicial government* is the need to preserve the independence of each one of the judges, taken individually. All the other reasons that might be invoked, such as assuring efficient management of the resources allocated, monitoring activity programmes, preparing budget proposals, planning campaigns, being answerable to society, etc., can only indirectly or tangentially justify the call for a judicial government. On the other hand, the implementation of the judicial government, like any other political institution, cannot be done in a vacuum, but rather under the scope of the historical setting of the specific judicial systems.

Therefore, Binder argues that any judicial government should be radically separated from the Supreme Courts, given that there is no reason for a judge from the higher courts to have the prerogative of acting and making decisions on behalf of the other members of the judiciary. In a judiciary with a democratic government, the president of the judiciary, apart from being completely separate from the President of the Supreme Court, should be an elected official. Each magistrate (irrespective of their seniority or the court they serve in, as these qualities do not give them special qualifications for administration or government) should have one vote and elect the president of the judiciary for a certain period of time. To those who raise the spectre of internal politicization

---

[26] Created by Presidential Decree No. 3/2002, of 26 August.

[27] See https://www.justice.gov.za/salrc/index.htm.

of the judiciary, he replies that this is not necessarily negative because, although politicization is impossible to avoid, it is not harmful in itself,[28] it does exist and it is better for it to be transparent and accountable. A democratically elected president of the judiciary has more power, legitimacy, room for manoeuvre and a greater ability to defend the independence of the judges than any other person taking up the position merely because it is part of the job.

In short, the author proposes the following configuration of the judiciary:

a) A president of the judiciary without a judicial role, elected by all the judges, with no qualified votes and without excluding any judge, for a mandate lasting from four to five years, not coinciding with general elections (presidential, parliamentary or local authority elections);

b) A set of technical offices under the president, responsible for ordinary administration, planning, budget management, the internal disciplinary regime, the development of the information system, the management of human resources and infrastructures, etc., with sufficient scope to combine greater legitimacy with greater efficiency and feasibility;

c) A supervisory and monitoring body, also elected for the same mandate, of collegial composition, with the responsibility for approving accounts and managing and assessing complaints, in other words intervening in *ex post* situations. This monitoring board should consist of a certain number of judges (percentages can be established per areas, courts, etc., but never by categories), according to the characteristics of the judicial system.

In this context, the President of the Supreme Court will continue to be first among equals in the highest court of the land, but will no longer be the representative of the judiciary, unless democratically elected as the President of the Superior Council of the Judiciary, on the same footing and with the same opportunities as any other judge.

We said early that we believe this is an attractive proposal. From what we have found in the literature and in judicial practices around the world, there is no news of a more democratic configuration model that has better assurances of safeguarding the independence of the judiciary. The absence of an important mechanism can be mentioned, which is external control of the judiciary, but there too, this issue can be circumvented, allowing for some members of the monitoring board to be individuals outside of the judiciary, with a certain number of requirements and elected separately, while always maintaining a majority of judges on the judicial government bodies.

We are aware that in a country where the idea of centralization and a tight hold on political power is widely predominant, it will not be easy to put a project like this into practice. But the idea is there, as our aim is to find innovative ways to ensure effective and sustainable judicial independence.

4.7 A democratic judicial culture

The conceptual note for the research this text is part of refers to the aim of scrutinising the roads that could lead to positive institutional change, in other words, the way the institutions could contribute to growth and an improvement in economic and social results.

[28] The author points out that it is important not to confuse *politicization* with *partisanship*.

We have attempted to show that changes in the Justice area will only be possible with structural reform based on a systemic vision, shared and coordinated by the entire judiciary. But it is important to be aware that reform—any reform—cannot resolve the problems found if it is not based on a judicial and organization culture that is open and receptive to innovation. A system where the main players resist change is doomed to isolate itself and protect itself from opinions and criticisms aimed at it from outside.

Around twenty years ago, the research project on the plurality of justice in Mozambique concluded that Mozambican courts 'are dominated by a regulatory, technical and bureaucratic culture, based on three main ideas: the autonomy of the *law* – an idea that the law is an autonomous phenomenon in relation to society; a restrictive view of what that law is or which proceedings the law applies to; and a bureaucratic or administrative view of the cases' (Trindade and Pedroso 2003: 64–65). Despite some developments seen during the time that has since elapsed, as a result of the initial and continuous training programmes set up by the Centre for Judicial and Legal Training, this kind of technical and bureaucratic culture still persists in many judges and others working in the system and it is seen in different and varied ways. One of these, perhaps the one with the most perverse effects, is confusing independence with self-sufficient individuality and, consequently, being extremely averse to teamwork, resisting the introduction of management by objectives in court, rejecting interdisciplinary cooperation and fuelling an idea of exclusivity that is not willing to learn and benefit from other abilities and areas of knowledge.

It is vital to oppose this idea through a democratic, political and judicial culture that uses justice as a strategy. Justice must be at the service of social cohesion and democratic development. The complexity of the new duties will require a long learning process. The sociology of law has shown that, as new social relationships are given legal status—and this phenomenon is increasingly present in society—the gloss on the legal view of these relationships will get thinner and thinner and be released from dogmatic rigidity. Therefore, it is important to search other areas—economics, psychology, anthropology, political science, etc.—for analysis tools that will help understand the reality, and this is part of the democratic culture.

4.8 Reinforcement of training for judicial agents: judges, court officials and other employees

In the context of the new democratic judicial culture, training cannot continue to have the same general profile, nor can it remain shackled to old, obsolete teaching methods. It needs to be differentiated. There is an increasing need for people engaging in activities in the courts requiring specialized skills to have specific training, with specific access conditions and specific examinations—this is the case of the criminal and supervisory courts, as well as administrative, maritime, commercial, arbitration and tax courts. Specialization must then be accompanied by closer monitoring of the quality of the training process throughout all its phases.

Universities, which are where jurists, future agents of justice, are trained and graduate from, will have to include this reality and undergo more or less in-depth transformations. Transformations of a political nature, which will make them look at law as a social phenomenon and the broadening and defence of human rights, as well as the transparency of democratic life, as the main objectives. Transformations of a sociological nature, which will allow knowledge of society as a constituent part of the law (*ubi societas ibi jus*) to be broadened. Practical transformations that will lead to their modernization, so that part of the course programme—normally the last year or the last two years of degree courses—may be devoted to practical work, in the form of 'legal clinics' or similar initiatives, where the students are given the opportunity to experience and learn about social

problems first hand. Transformations then to the actual course structure and teaching and learning methods, covering not only the graduation phase, but also the post-graduation phase.

At the Centre for Judicial and Legal Training, it is necessary, on the one hand, to pursue—or resume in those areas where it has been lost—a multidisciplinary approach to the programme content, capable of revealing the social contexts underlying legal regulations and relationships and, on the other, to experiment with new working methods that will encourage the trainees to participate actively in the teaching and learning process, through teamwork, seminars and research activities.

It would also be a good idea for the main objectives of the training to be aligned with the particular learning or skills development needs of the students, whether they intend to go into the judiciary or any other legal profession. To this end, it is important to be aware, insofar as possible, of their training experiences, their interests and future specialization projects, in order to bring about a *participatory reaction* in them and ensure that the 'results of the training were not acquired superficially or temporarily, but rather *have become* […] *engrained* in the habits and learning abilities of the actual student' (Guadagni 2000: 8).

And, for this teacher/student interaction to occur, it is also a good idea to develop an environment conducive to their relationship being one of 'dialogue and cooperation, of equality where there is mutual respect, where opinions are consciously respected. Because they know more about and have more skills in certain areas, [teachers] have the role of supporting and facilitating the acquisition of new knowledge or perfecting the knowledge of others' (Cabral and Soares 2000: 4).

More than just absorbing knowledge about legislated law and becoming aware that they live in a reality that is plural in the sense that they come into contact and interact with the different regulatory systems within it, these future professionals must be prepared to take on the implementation of the ideal of justice, constantly updating this. To this end, training that values a structural understanding of the institutions of justice and legal institutes will serve to show them to be an integral part of a certain political project. Thus, each act, each procedure, each way of interpreting the rules, each decision, will not be limited to itself alone, it will not be neutral, rather it will be the practical implementation of an ideal of justice, in other words, the construction of a certain type of state.

4.9 Management of alternative conflict resolution mechanisms and community justice

We have already expressed our opinion on the current inclusion of community courts in the Ministry of Justice, Constitutional and Religious Affairs and the role the Civil Registry services have been playing in their management. We believe that this authority is, at the very least, illegal, because it is contrary to the provisions of Article 5 of Law No. 24/2007, of 20 August,[29] if not actually unconstitutional, as it violates the principle of separation of powers proclaimed in Article 134 of the Constitution.

[29] Which states: 'Community courts are **independent** non-judicial, institutionalized tribunals for conflict resolution, whose judgements are in accordance with good sense and equity, informal, not professional in nature, privileging oral proceedings and bearing in mind the social and cultural values existing in Mozambican society, with respect for the Constitution' (bold text ours).

Because we still believe in the solution presented around fifteen years ago by the former Law Reform Technical Unit (UTREL)[30]—at least we have not heard of any other that is more well-founded and structured—we will reproduce it here through a summary of its more general features. We have taken into account only the preliminary proposals of the *Basic Law of Judicial Organization* and the *Organic Law of Community Courts*, as it is these that have a more direct bearing on the point being analysed.

The first of these preliminary proposals defined a structure for the judicial system, according to which, without prejudice to the powers of the Constitutional Council, common justice would be assured by the Supreme Court and other courts, by community courts and, under the terms of that law, by courts of arbitration.[31] And it recommended the enshrining and materialization of a principle of proximity and access to justice, through adequate coverage by legal institutions, in particular courts, community courts, agencies of the Public Prosecutor's Office, of the Public Institute for Access to Justice and the Law (which was replaced by the current IPAJ) and the entities that would be associated with compliance with their duties.

Community courts would deal with conciliation, processing, judging and implementing: a) cases arising from family relationships resulting from unions constituted according to traditional rules and not registered according to the Family Act; b) cases of other natures whose debt value, compensation requested or damages claimed were not greater than three times the national minimum wage; c) offences against property where the damage caused was not greater than two times the minimum wage and bodily injury, except in cases involving: i) a risk to life; ii) permanent disability; iii) temporary inability of the victim to work or to carry out their normal activities for longer than 15 days. Nor would they be permitted to decide on issues attributed by law to other courts, or cases regarding people's ability, the validity or interpretation of wills, the dissolution of civil marriages or adoption.

The management and administration of community courts and the disciplining of their judges would be in the hands of the bodies entitled Provincial Councils for the Coordination of Community Justice, to be set up in each province in the country. These councils would be run by the presidents of the provincial courts and would have the following composition: a) a provincial prosecutor, appointed by the Superior Council of the Judiciary of the Public Prosecutor's Office; b) two district court judges, appointed by the Superior Council of the Judiciary; c) one representative of the legal assistance public service, appointed by the Director of the Public Institute for Access to Justice and the Law; d) eight representatives of the community courts, elected by their peers, with mandates of two years; and e) three representatives of the community authorities, elected by their peers, with mandates of two years.

These Provincial Councils for the Coordination of Community Justice would be responsible for: a) proposing the set-up of community courts to the Minister of Justice; b) participating in the assessment of the performance of these courts; c) disciplining the judges and other staff of these

---

[30] UTREL, which worked as an operational instrument of CIREL (see Note 26), went into a technical partnership with the CFJJ to prepare a set of preliminary proposals for the law that was to embody a comprehensive reform of the administration of justice: the Preliminary Proposal for the *Basic Law of Judicial Organization*, the *Organic Law of Courts,* the *Organic Law of Community Courts* and the *Law of Access to Justice and the Law*. Only the second would be sent to parliament and approved, albeit with substantial alterations.

[31] The remaining courts (administrative, tax, customs, maritime, etc.) would certainly be part of the **jurisdictional power**, in terms of the bodies to which *jurisdictional duties* (of 'declaring the law of the case') are entrusted, but not **the judiciary**, which is more restrictive, referring only to *common justice*, provided with *general jurisdiction* (see Canotilho 2003: 661).

courts; d) supervising the activity of the community courts; and e) proposing the implementation of training courses for the judges and other staff of the community courts.

Candidate judges would be proposed by civic associations and social, cultural, and professional organizations operating in that constituency, or by groups of citizens, and it was to be assured that at least one third of the judges proposed were women.

The preliminary proposal for the *Basic Law* also enshrined the **principle of non-prohibition** of the remaining local conflict resolution mechanisms unless their actions or the type of penalties applied violated the principles, standards or values contained in the Constitution.

Another important and innovative measure that this preliminary proposal included was a reform Monitoring Commission, which included representatives of the institutions with specific duties of monitoring the operation and quality of the system of administration of justice and the Centre for Judicial and Legal Training. The function of the commission—inspired by the British law commissions model—was to prepare the entry into force of the reform, and monitor and assess the degree of achievement of the aims and implementation of the measures established in the *Basic Law*.

Under the terms of the preliminary proposal for the *Organic Law*, the material powers of community courts would be defined bearing in mind the type of cases that these courts traditionally deal with, in conjunction with constitutional requirements and the need for jurisdictional effectiveness. Thus, these courts would deal with conciliation, processing, judging and implementing: a) cases arising from family relationships resulting from unions constituted according to traditional rules and not registered according to the Family Act; b) cases where the compensation requested or damages claimed were not greater than three times the national minimum wage; c) offences against property where the damage caused was not greater than two times the minimum wage and bodily injury not resulting in serious injuries.

Cases of bodily injury would be excluded from the purview of the community courts whenever there was a risk to life, permanent disability, or temporary inability to work or to carry out normal activities for longer than 15 days. Irrespective of the value of the case or the damages, community courts were also disallowed from deciding on issues attributed by law to other courts, as well as cases regarding the status of people and the validity or interpretation of wills.

The current relevance of all these proposals is unquestionable, even though it is around a decade and a half since they were prepared and presented. If they were to be adopted—irrespective of any improvements or updates to be introduced—we would have better justice as the basis for the judicial system, there, where the vast majority of Mozambicans live.

5 Conclusions

The rule of law and judicial independence are a project yet to be achieved in Mozambique. Their feasibility depends on the extent to which political decision-makers are capable of taking on the challenges that only a systemic, integrated and coordinated view among all the players can provide.

The different reform attempts made so far, mainly after the change in political and strategic direction, brought about by the Constitution of 1990, were always short-sighted and conjunctural in nature, under domestic and foreign pressure that was not always clear or well-intentioned. This 'baby steps technique', as Garoupa (2008) calls it, must be contrasted with structural reform

capable of bringing about more drastic transformations in the institutional and regulatory frameworks that determine the operation of the legal authorities. The judiciary needs to assert itself as the real power, the system of checks and balances must be able to sustain itself in practice, in all its grandeur. This means the democratization of the constituent methods and processes and the operability of the judiciary. And, as is well-known, more efficient, speedier performance by the courts and other legal institutions will ultimately be an important stimulus for the economy and for the balanced growth of companies, as it will help to increase productivity, investment and employment.

On the other hand, from the point of view of citizenship, the defence of the rights and legitimate interests of individuals and social groups with fewer economic resources will tend to be more accessible and more effectively exercised.

Structural reform assumes a democratic judicial culture that will replace the current technical and bureaucratic culture that still prevails. For this to happen, it will be essential to focus on and invest seriously in sound training for citizenship, aimed at the relevant players in the system: judges, lawyers, court officials, the police, assistants and others.

Although our analysis was almost exclusively on the administration of common justice, the same concerns and the same sense of the measures that embody reform should apply, adapted as necessary, to the other branches of the judiciary, such as the Constitutional Council and the administrative, tax and customs courts, etc.

And, so that all of these ideas can make sense, there is a condition that Carlos Lopes[32] (2020) recently referred to during the ceremony to launch his book *Africa in Transformation: Economic Development in the Age of Doubt*, at the Polytechnic University in Maputo:

> All African countries have the possibility to make structural changes, but they can only do this successfully if they have capable, disciplined leaders who have focus and the notion that they have to change the mentality and stop being lazy, rentier countries.

References

Aidt, Toke S. (2011). 'The causes of corruption'. *CESifo DICE Report, Journal for Institutional Comparisons*, 9(2): 15–19. Munich: Institute for Economic Research (IFO).

Alar, Francisco Inácio (2012). 'O Plano Estratégico da Polícia e sua Implementação'. *In* Helene Maria Kyed; João Paulo Borges Coelho; Amélia Souto and Sara Araújo (orgs.), *A Dinâmica do Pluralismo Jurídico em Moçambique*, pp. 176–196. Maputo: Centro de Estudos Sociais Aquino de Bragança (CESAB).

Banco Mundial (2019). *Doing Business in Mozambique 2019*. Washington, DC: Banco Mundial. License: Creative Commons Attribution CC BY 3.0 IGO. Available at https://www.doingbusiness.org/content/dam/doingBusiness/media/Miscellaneous/SubNational/Doing-Business-em-Mo-ambique-2019_Pt.pdf (accessed on 12 January 2020).

[32] Former executive secretary of the United Nations Economic Commission for Africa (2012–2016) and adviser to the then Secretary-General Kofi Annan. He is currently a visiting professor at the Nelson Mandela School of Public Governance at the University of Cape Town.

Bila, Josué (2008). 'Pessoas desfavorecidas: Assistência Jurídica custará cerca de 8,6 milhões de USD'. *Bantulândia* (blog), 12 November 2008. Available at https://bantulandia.blogspot.com/2008/11/pessoas-desfavorecidas-assistncia.html (accessed on 14 February 2020).

Binder, Alberto (2006). 'Gobierno Judicial y Democratización de la Justicia - Observaciones a las propuestas de Juan Enrique Vargas'. Revista *Sistemas Judiciales*, (10): 11–13. Santiago, Chile: Centro de Estudios de Justicia de las Américas (CEJA).

Buchili, Beatriz (2020). Intervenção da Procuradora-Geral da República na Abertura do Ano Judicial de 2020. Maputo. Available at http://www.ts.gov.mz/images/Intervenc%C3%A3o_da_Procuradora-Geral_da_Rep%C3%BAblica_na_abertura_do_Ano_Judiucial_2020.pdf (accessed on 14 February 2020).

Cabral, Zaida and Soares, Maria do Carmo (2000). *Formação Jurídica e Educação de Adultos em Moçambique*. Communication presented at the 'Jornadas sobre Formação Profissional na Área da Justiça'. Maputo: CFJJ.

Canotilho, J. J. Gomes (1999). *Estado de Direito*. Lisboa: Gradiva.

Canotilho, J. J. Gomes (2003). *Direito Constitucional e Teoria da Constituição*. 7.ª Edição. Coimbra: Almedina.

Carvalho, António Santos (2016). 'A independência dos tribunais e dos juízes'. Revista *Oriente Ocidente*, (33) II Série: 12–17. Macau: Instituto Internacional de Macau.

Castelar, Armando (org.) (2009). *Judiciário e Economia no Brasil*. Rio de Janeiro: Centro Edelstein de Pesquisas Sociais. https://doi.org/10.7476/9788579820199

CIP – Centro de Integridade Pública (2020). Moçambique registou melhorias no Índice de Percepção da Corrupção da Transparência Internacional-2019, mas tem que fazer mais. Available at https://cipmoz.org/wp-content/uploads/2020/01/Percepc%CC%A7a%CC%83o-da-Corrupc%CC%A7a%CC%83o-3.pdf (accessed on 30 January 2020).

Correia, Gilberto (2014). *Pontos de Ordem. Compilação de Intervenções sobre Advocacia, Justiça, Estado de Direito, Direitos Humanos e Cidadania*. Maputo: W Editora.

Dakolias, Maria and Said, Javier (1999). *Judicial Reform – A Process of Change Through Pilot Courts*. Washington D. C.: The World Bank Legal Department.

Fernando, Paula; José, André Cristiano; Soares, Carla and Gomes, Conceição (2019). *Estudo exploratório sobre o acesso à justiça e o desempenho funcional dos tribunais em Moçambique*, study carried out by the Permanent Observatory of Justice of the Centre of Social Studies of the University of Coimbra, at the request and in conjunction with the Mozambican Association of Judges. Coimbra: CES.

Figueiredo, Guilherme (2017). 'Bastonário dos advogados pede "pacto de regime" para Justiça'. Jornal *Diário de Notícias*, edition of 20 May. Lisboa.

Garoupa, Nuno (2008). 'Reforma da Justiça e Reformas na Justiça'. *Iprisverbis*, newsletter of the Instituto Português de Relações Internacionais e Segurança, (3). Lisboa: Instituto Português de Relações Internacionais e Segurança (IESE).

Gomes, Conceição (2018). 'Tribunais e transformação social: desafios às reformas da Justiça'. *In* Maria de Lurdes Rodrigues, Nuno Garoupa, Pedro Magalhães, Conceição Gomes and Rui Guerra Fonseca (org. e coord.), *40 Anos de Políticas de Justiça em Portugal*, pp. 733–751. Coimbra: Almedina.

Guadagni, Marco (2000). *Monitorização e avaliação para o planeamento: estratégias institucionais e percursos individuais*. Communication presented at the 'Jornadas sobre Formação Profissional na Área da Justiça'. Maputo: CFJJ.

Hammergren, Linn (2006). 'Apuntes para Avanzar en el Debate sobre cómo Mejorar el Gobierno Judicial.' Revista *Sistemas Judiciales*, (10): 14 –21. Buenos Aires: Centro de Estudios de Justicia de las Américas (CEJA).

Lauris, Élida and Araújo, Sara (2015). 'Reforma Global da Justiça, Pluriversalismo e Ilegalidade Subalterna: Reflexões Teóricas e Empíricas a Partir de uma Ecologia de Justiças no Brasil, em Moçambique e em

Portugal'. *Cronos – Revista do Programa de Pós-Graduação em Ciências Sociais da UFRN*, 16(2): 87–113. Natal: Universidade Federal do Rio Grande do Norte *(UFRN)*.

Lauris, Élida and Fernando, Paula (2010). 'A dupla face de Janus: as reformas da justiça e a lei tutelar educativa'. Revista *Julgar*, (11): 135–146. Lisboa: Associação Sindical dos Juízes Portugueses (ASJP).

Lopes, Carlos (2020). Intervention at the launching of the work *Africa in Transformation: Economic Development in the Age of Doubt*, Universidade Politécnica. News from the onnline newspaper Mediafax, no. 7014, of 26 February 2020, p. 4. Maputo.

Morand, Charles-Albert (1999). *Légistique formelle et matérielle.* Aix-en-Provence: Presses Universitaires d'Aix-Marseille (PUAM).

Muchanga, Adelino (2020). Opening Speech of the Judicial Year. Maputo. Available at http://www.ts.gov.mz/images/Discurso_de_Abertura_do_Ano_Judicial_-_2020.pdf (accessed on 14 February 2020).

OAM – Ordem dos Advogados de Moçambique (2005). *Relação dos Advogados*. Maputo: OAM.

Presidente da República (2019). 'PR moçambicano defende reformas estruturais para credibilidade do poder judicial'. News published by the Lusa agency on November 5th. Available at https://www.sapo.pt/noticias/atualidade/pr-mocambicano-defende-reformas-estruturais_5dc1a8134090fe02a6b1ceb8 (accessed on 7 November 2019).

Presidente da República (2020). Speech given at the opening ceremony of the Judicial Year. Available at http://www.ts.gov.mz/images/Discurso_do_Presidente_da_Rep%C3%BAblica_de_Mocambique_proferido_na_abertura_do_Ano_Judicial_2020_VF.pdf (accessed on 18 February 2020).

Representantes do PP e do PSOE (2007). 'Pacto de Estado para a Reforma da Justiça (Espanha)'. Revista *Julgar*, (1): 183–192. Lisboa: Associação Sindical dos Juízes Portugueses (ASJP).

Rodrigues, Sónia (2017). 'Análise quantitativa da produção legislativa'. *In 40 Anos de Políticas de Justiça em Portugal*. Unpublished version. Available at https://ial-online.org/wp-content/uploads/2019/03/SoniaRodrigues_40anosJustica_vers%C3%A3o-n%C3%A3o-publicada.pdf (accessed on 17 February 2020).

Santos, Boaventura de Sousa (2005). 'A justiça em Portugal: diagnósticos e terapêuticas'. Revista *Manifesto*, (7): 76–87, Lisboa.

Santos, Boaventura de Sousa (2013). 'A Justiça Armadilhada.' Revista *Visão*, 14 November, Lisboa.

Santos, Boaventura de Sousa (2014). *Para uma Revolução Democrática da Justiça*. Coimbra: Almedina.

Santos, Boaventura de Sousa and Trindade, João Carlos (orgs.) (2003). *Conflito e Transformação Social: uma Paisagem das Justiças em Moçambique*, 2 vols. Porto: Afrontamento.

Santos, Susana (2014). 'Novas Reformas, Velhos Debates: Análise das Políticas de Justiça e dos Seus Impactos no Sistema Judicial.' *Configurações – Revista de Sociologia* [*Online*], (13). https://doi.org/10.4000/configuracoes.2364

The World Bank (2004). *Initiatives in Legal and Judicial Reform*. Legal Vice Presidency: Washington D. C.: The World Bank.

Timbane, Tomás Luís (2016). Speech of the President of the Bar Association at the Opening of the 2016 Judicial Year. Maputo. Available at http://www.ts.gov.mz/images/pdf_files/Interven%C3%A7%C3%A3o_do_Baston%C3%A1rio_da_Ordem_dos_Advogados_na_abertura_do_Ano_Judicial_de_2016.pdf (accessed on 23 November 2019).

Trindade, João Carlos and José, André Cristiano (2017). *Os Sistemas (Des)integrados de Justiça na Província de Cabo Delgado*. Maputo: Ministério da Justiça, Assuntos Constitucionais e Religiosos; Fundación Internacional y para Iberoamérica de Administración y Políticas Públicas (FIIAPP).

Trindade, João Carlos and Pedroso, João (2003). 'A caracterização do sistema judicial e do ensino e formação jurídica'. *In* Boaventura de Sousa Santos and João Carlos Trindade (orgs.), *Conflito e Transformação Social: uma Paisagem das Justiças em Moçambique*, vol. I, pp. 259–317. Porto: Afrontamento.

Wallerstein, Immanuel (2004). *World-Systems Analysis: an Introduction*. Durham; London: Duke University Press. https://doi.org/10.1215/9780822399018

World Justice Project (n.d.). 'What is the rule of law?'. *World Justice Project*. Available at https://worldjusticeproject.org/about-us/overview/what-rule-law (accessed on 8 February 2020).