



CENTRO DE INTEGRIDADE PÚBLICA
Anticorrupção - Transparência - Integridade

GOVERNANCE AND INTEGRITY IN MOZAMBIQUE

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Eduardo Chiziane, Inocência Mapisse, José Jaime Macuane, Joseph Hanlon,
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Maputo, November de 2020

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ABBREVIATIONS

AT - FISCAL AUTHORITY

CEDSIF - DEVELOPMENT CENTER FOR INFORMATION SYSTEMS AND FINANCE

CFMP - MEDIUM TERM TAX SCENARIO

CTA - CONFEDERAÇÃO DAS ASSOCIAÇÕES ECONÓMICAS (CONFEDERATION OF ECONOMIC ASSOCIATIONS)

CRM - CONSTITUTION OF THE REPUBLIC OF MOZAMBIQUE

DUAT - RIGHT TO USE AND EXPLOIT THE LAND

EGFAE - GENERAL STATUS OF CIVIL SERVANTS AND STATE AGENTS

EMATUM - EMPRESA MOÇAMBICANA DE ATUM (MOZAMBICAN TUNA COMPANY)

EPS - PUBLIC COMPANIES

E-SISTAFE - ELECTRONIC STATE FINANCIAL ADMINISTRATION SYSTEM

FRELIMO - FRENTE DE LIBERTAÇÃO DE MOÇAMBIQUE

GIZ - GERMAN DEVELOPMENT COOPERATION

GFP - PUBLIC FINANCE MANAGEMENT

IGF - GENERAL INSPECTION OF FINANCES

INAMI - INSTITUTO NACIONAL DE MINAS (NATIONAL INSTITUTE OF MINES)

INSS - INSTITUTO NACIONAL DE SEGURANÇA SOCIAL (NATIONAL INSTITUTE OF SOCIAL SECURITY)

LAM - MOZAMBIQUE AIRLINES

MAEFP - MINISTRY OF STATE ADMINISTRATION AND CIVIL SERVICE

MAM - MOZAMBIQUE ASSET MANAGEMENT

MEF - MINISTRY OF FINANCE

MDM - MOVIMENTO DEMOCRÁTICO DE MOÇAMBIQUE

MISA - INSTITUTO DE COMUNICAÇÃO SOCIAL DA ÁFRICA AUSTRAL

MITADER - MINISTRY OF LAND, ENVIRONMENT AND RURAL DEVELOPMENT

MP - PUBLIC PROSECUTION

OMR - OBSERVATÓRIO DO MEIO RURAL

PES - ECONOMIC AND SOCIAL PLAN

PGR - ATTORNEY GENERAL

PQG - FIVE-YEAR GOVERNMENT PLAN

PR - PRESIDENT OF THE REPUBLIC

RENAMO - RESISTÊNCIA NACIONAL DE MOÇAMBIQUE

REO - BUDGET EXECUTION REPORT

RGIM - REPORT ON GOVERNANCE AND INTEGRITY IN MOZAMBIQUE

RLT - LAND REGULATION

UGEA - UNIDADE GESTORA E FISCALIZADORA DE AQUISIÇÕES (PROCUREMENT MANAGEMENT AND INSPECTION UNIT)

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PRESENTATION

The analyses presented here correspond to the singular vision of each one of their authors, adapted to the essential questions of the evaluation of the functioning and effectiveness of a National Integrity System (NIS), as defined by the organization Transparency International (TI).

The authors who produced the texts were selected taking into account their practical experience and consolidated in their respective areas of work. The purpose of this measure is to provide a closer view of reality with regard to the approach of the various issues analyzed.

However, in order to provide some harmony in the analyses made, they were limited to the following essential aspects of the evaluation of an NIS:

1. Resources;
2. Independence;
3. Transparency;
4. Accountability; and
5. Integrity.

Therefore, all the topics addressed had to adapt to the assumptions listed above.

Although there is knowledge that we could have expanded the analyses to other areas, the difficulties in finding experts who could present their thinking independently, ended up limiting our pretensions. Therefore, we hope this will be an important contribution to the beginning of a more structured discussion/debate for all those who are interested in the issues that are dealt with, especially for public decision-makers, in the search for improvements to make governance processes in the various sectors more efficient.

Therefore, this report is what it has been possible to draw up and we believe that, since it is not finished (and could not be), the issues addressed in it open up good prospects so that the current government, and others that will come, can somehow seek inspiration to introduce essential reforms in governance. Specifically, it aims to gradually reduce the scope for cases of lack of transparency and integrity in order to control corruption in the country, which is tending to worsen, according to the various international indices that focus on the phenomenon.

CHAPTER I

1. THE NATIONAL INTEGRITY SYSTEM IN THE CONTEXT OF PUBLIC FINANCE MANAGEMENT AND FISCAL DECENTRALISATION

By Celeste Banze

It has been widely recognized that corruption is rarely an isolated phenomenon and is not found only within a specific institution, sector or group of actors. On the contrary, it is generally of a systemic nature and, therefore, fighting it also requires a holistic and systemic strategy. Thus, a successful anti-corruption strategy is based on the involvement of various stakeholders, including government, civil society and other governance actors, since it requires, on the supply side, political will and civic pressure and, on the demand side, greater transparency and accountability (TI, 2011).

In Mozambique, the level of transparency of institutions and public finance management is weak, giving rise to cases of misuse of public resources and corruption, which have significantly damaged the State. The case of the illegal debts incurred outside of all legal provisions in force brought to light the form of action by public managers in the country.

This way of acting by the executive does not derive from the fact that the country has a weak legal framework. On the contrary, according to Francisco and Semedo (2018), the legal context of the public finances in Mozambique is sufficiently clear and established for the financial and fiscal system to function. The provisions included in the Constitution of the Republic and the Law on the State Financial Administration System (SISTAFE) have a wide range of related legal and administrative regulations.

What happens in practice is that existing legal provisions are not always taken into account, and the legislative body and the Supreme Audit Institution (ISA) are not strong enough to perform their role efficiently.

In turn, the process of financial decentralisation, when inserted into a system where several actors are operating, who, as a rule, do not comply with the criteria previously defined in the legislation, ends up generating more inefficiencies in its implementation and imposes greater challenges on institutions at the subnational level.

As for the methodology used in this analysis, fiscal decentralisation will be framed in a perspective of devolution, which implies the election of the mayors of municipal councils and not deconcentration. In addition, an assessment of the National Integrity System (SNI) will be carried out in terms of municipal finance management. For the purposes of assessing the SNI, within the scope of public financial management, this analysis will assess the legislature, the executive powers and the supreme audit institution.

In assessing the legislature, the focus will be on independence, accountability and their functions. As for the executive, the focus will be on transparency and integrity. In the supreme audit institution, the focus will be on resources, independence and transparency and, with regard to fiscal decentralisation, the focus will be on the role of the executive within the scope of its performance to carry out this process.

Box 1: Elements of SNI in the scope of the GFP and its functions

Interveniente	Papel Principal
Parlamento	Parlamento comenta e aprova PQG, PES e OE, além de relatórios sobre implementação de plano e orçamento do Estado. A aprovação dos instrumentos de gestão macroeconómica deve ser feita até o dia 15 de Dezembro.
Tribunal Administrativo	O relatório e o parecer do Tribunal Administrativo (TA) sobre a conta Geral do Estado devem ser enviados à Assembleia da República até ao dia 30 de Novembro do ano seguinte àquele em que a Conta Geral do Estado respeite. O TA actua no processo de gestão de finanças públicas como Órgão de Controlo Externo
Conselho de Ministros	O conselho de ministros aprova todas as políticas e documentos do governo antes de serem submetidos ao parlamento para consideração. O Governo deve apresentar (anualmente) ao Tribunal Administrativo a Conta Geral do Estado (CGE), até ao dia 31 de Maio do ano seguinte àquele a que a referida conta respeite
Governo Central	O MEF é a principal agência encarregada da planificação e orçamento. eles colectam informações e propostas dos sectores, coordenam esforços e compilam os principais documentos (CFMP, PES, OE) e as propostas do PES e OE devem ser submetidas a AR até dia 30 de Setembro. O MEF exerce também o papel de controlo interno através da Inspeção Geral de Finanças que deve Submeter ao Ministro que superintende a área do Plano e Finanças, até 31 de Outubro, a Programação do Controlo Interno para o ano seguinte;
Governo Sectores	Os sectores fornecem todas as informações detalhadas que alimentam os planos e orçamentos centrais, mas, ao mesmo tempo, realizam exercícios específicos de planificação e orçamento do sector
Governo Local	Papel limitado desempenhado pelo governo local, principalmente limitado a insumos nos processos centrais de planificação e orçamento sectorial, os municípios têm autonomia total.
Sociedade Civil	A sociedade civil tem o papel de dar comentários sobre as propostas do plano e orçamento quando o Governo submete a AR, através de plataformas específicas.
Parceiros	Assistência técnica e financeira

Source: Adapted from Renzio (2007) and SISTAFE Law

Stakeholder	Main Role
Parliament	The parliament comments on and approves the government's five-year plan, the yearly Economic and Social Plan (PES) and the State Budget (OE), as well as reports on the implementation of the State plan and budget. The instruments of macroeconomic management must be approved by 15 December.
Administrative Court	The report and the opinion of the Administrative Tribunal (TA) on the General State Account must be sent to the National Assembly no later than 30 November of the year following the year to which the said account relates. The TA acts in the public finance management process as an external control body
Council of Ministers	The Council of Ministers approves all government policies and documents before they are submitted to parliament for consideration. The government must annually submit to the TA the General State Account (CGE) by 31 May of the year following the year to which the said account relates.
Central Government	The MEF is the main agency in charge of planning and budgeting. It collects information and proposals from the sectors, coordinates efforts and compiles the main documents (CFMP, PES, OE). The draft PES and OE must be submitted to the National Assembly by 30 September. The MEF also exercises the role of internal control through the General Inspectorate of Finance, which must submit to the Minister who oversees the area of planning and finance, by 31 October, the programme of internal control for the following year.

Sector Government	The sectors provide all the detailed information that feed into the central plans and budgets, but at the same time, carry out specific sector planning and budgeting exercises.
Local Government	Limited role played by local government, mainly limited to inputs into the central planning and sector budgeting processes. Municipalities have full autonomy.
Civil Society	Civil Society has a role to comment on the plan and budget proposals when the government submits them to the National Assembly, through specific platforms.
Partners	Technical and financial assistance

1.1 Legislature: Independence and Accountability

The National Assembly (NA) is the highest legislative body in the Republic of Mozambique. According to article 187 of the Constitution of the Republic (CR), the NA can be dissolved if it rejects, after debate, the Government's program. This means that the parliament is not fully independent of Government.

However, in practice, even if this clause did not exist, what can be seen is that the NA functions as if it were an extension of the executive power, because, for example, it rarely disputes the budget/economic and social plan proposals, or any other document submitted by the Executive.

The fact that the NA is mostly composed of Frelimo MPs and there is no clear separation between the political party and the State, dissolves the role of the NA, as the critical debate is only conducted by opposition deputies. But in the end, with Frelimo holding the majority vote, most documents are approved.

The legislature has a key role in scrutinising implementation of the approved budget. This phase is divided into two parts: Supervision of budget execution and analysis of audit reports and questioning the parties responsible for the findings.

In practice, according to the Open Budget Survey (2019), the legislature offers limited oversight during the budget cycle, with a score of 58/100. This research points out as main barriers to an effective inspection the fact that the legislative power does not debate budgetary policy before the proposal is submitted by the executive; the fact that not all committees publish online the reports on their analysis of the executive's draft budget; and the fact that not all commissions publish the budget implementation monitoring reports during the year.

1.2 Executive: Transparency and Integrity

Public financial management in Mozambique is in line with the planning and budgeting cycle. It is here that several actors are called upon to intervene, in order to improve the levels of comprehensiveness, transparency and credibility of the State budget.

Overall strategic planning and budgeting in the Government of Mozambique (GoM) are coordinated by the Ministry of Economy and Finance (MEF), through the National Planning and Budget Directorate (DNPO), which is responsible for globalising all annual plans and budgets, at all levels, and enforcing all programming stages, namely the Medium Term Fiscal Scenario (CFMP), the Economic and Social Plan (PES), the State Budget (OE) or the Provincial Economic and Social Plans and Budgets (PESOPs) and the District Economic and Social Plans and Budgets (PESODs).

With regard to the publication of budget documents, the MEF must make public the CFMP, the draft PES-OE, the approved PES and OE, the Citizens Budget (OC), the Budget Execution Reports (REO), the Half-yearly Review (RS) and the General State Account (CGE) in a timely manner, obeying the deadlines established by law¹.

In practice, most budget documents are published in a timely manner with the exception of the CFMP, which has repeatedly been published late and, in some cases, produced for internal use, with no clarity on the assumptions used in the preparation of the PES-OE proposal, since the latter depends on the projections made in the CFMP.

In addition, in the range of budget documents required internationally, the country has been failing to publish the half-yearly review, which evaluates budget performance and revises macroeconomic indicators, six months after budget execution.

In terms of content and alignment between the documents, the draft PES-OE, a very relevant document for public debate, in general presents few details in its reasoning and the OE is not aligned with the PES proposal, a fact that constitutes a serious gap in terms of budget transparency. The country's score in terms of budget transparency, carried out in 2019, was 42/100, and was, therefore, limited.

In terms of revenue collection, the documents analysed point to trends to overestimate revenue, given that projections are not made using robust and credible projection models (OE vs. CGE, 2018-2019). In 2019, the State's revenue collection had an execution level of 91.4% of what had been planned, without considering the effect of capital gains.

In addition, the state revenue management process is still unclear, given the level of details of the tax aggregates that do not make it possible to understand the tax contribution of each economic agent. Furthermore, the process of repaying debts with arrears of VAT is not very transparent, which has penalized many small and medium-sized companies.

Progress was made with a view to increasing State revenue in compliance with the 2016-2019 Public Finance Strategic Plan, which provided for prioritising actions that can increase State revenue, with an emphasis on actions where the potential/risk for the collection of revenue is higher, as in the extractive sector. In this context, e-taxation modules are in the implementation phase ensuring the use of the tax payment system via banks. However, it is important that this system should be applicable to all taxpayers.

With regard to budget preparation, this remains the responsibility of the MEF, in coordination with the sectors without, however, having a formally defined moment in the planning and budgeting cycle that considers the discussion of the main tools of macroeconomic and social management with civil society platforms. As a result, the levels of budget allocation to social sectors, in real terms, have been decreasing in recent years, to the detriment of non-strategic sectors that do not directly affect the population (OE vs. CGE)².

Another weakness identified in the budgetary procedure is the lack of a portfolio of public investment projects that is prepared with the participation of civil society and the population and that presents indicators of economic and financial sustainability, according to the levels of public debt.

As for budget execution levels, these are below what was projected. The Budget Execution Reports (REO) and the MEF General State Accounts (CGE) present, in a disaggregated manner, the levels of execution by expenditure line. In these documents, it can be clearly seen that, in recent years, the Mozambican State has presented an unrealistic budget, that is, a political budget, with higher levels of execution for personnel expenditure and relatively lower levels for capital expenditure.

¹ See SISTAFE Law, Law no. 9/2002 of 12 February

² See: <https://cipmoz.org/2020/01/10/projecoes-irrealistas-e-fraca-alocacao-e-execucao-orcamental-condicionam-o-cumprimento-do-pgg-2015-2019/> (Accessed on 13 January, 2020 at 12:05 minutes)

For example, in the 2015-2019 period, the levels of execution of personnel expenses were, on average, 99.7% of what was planned but capital expenditure had an execution level of 76.5%. In the same period, expenditure on the priority sectors had the following level of execution: Education, 94.3%; Health, 83.3%; Infrastructure, 81.4%; Water 77.6% and Agriculture and Rural Development, 74.7%.

The weakness of the revenue and expenditure projections, led to the emergence of State debts with small and medium-sized companies that supply goods and services, constituting an obstacle to their development. The State's debt to suppliers of goods and services reached 19,109.12 million MT, of which 13.491.32 million MT (1.42% of GDP) were validated, 11,217.9 million MT at central level and 2,273, 4 million MT at provincial level¹.

The passivity of the internal and external control institutions is evident. They do not question the deviations in the execution of the State budget. These deviations have often led to increases in the levels of domestic debt, given the restrictions on foreign indebtedness due to the hidden debt scandal, which contributed to the reduction in the volume of credit in the economy, which could have financed the private sector. These deviations and consequent increases in expenditure, generally, are covered in the circulars² and decrees of delegations of powers, which give the Minister of Economy and Finance the power to make discretionary changes in the State Budget without prior approval by the National Assembly.

With regard to treasury management, there have been systematic delays in the disbursement of resources by the public treasury to the sectors, which has resulted in variations in balances and in the accumulation of unpaid expenses in the CGE. These factors have greatly conditioned the quality of execution of public expenditure and may be behind the lack of liquidity in the State coffers, whose execution model is based on cash and not on commitment.

Treasury management and coverage can also be improved if the State has a more exhaustive mapping of the number of State bank accounts in commercial banks and issues clear and well-defined guidelines for opening them.

With regard to public procurement, the Functional Procurement Supervision Unit (UFSA) was created as the body with the responsibility for coordinating and supervising all activity related to public procurement, for management of the centralized national data and information system, and for programming capacity building on hiring. UFSA was created through the Regulation for Procurement of Public Works Contracts, and the Supply of Goods and Provision of Services to the State, approved by Decree No. 5/2016, of 8 March.

The scope of UFSA's work is defined by Decree 142/2006 and also includes cooperation with internal (IGF) and external (TA) control bodies, in terms of controlling public expenditure through procurement and contracting.

Public tenders for the procurement of goods and services are launched and advertised on the UFSA website³, as well as in some newspapers with large scale national circulation. However, contracts and award decisions are not transparent, which reduces the credibility of this process. Additionally, the bureaucracy and the lack of a functional public procurement subsystem in e-SISTAFE have delayed the implementation of several public investment projects and have led to the accumulation of debts with suppliers by the State.

In procurement, it is important to include strategic actions to increase transparency, integrity and competitiveness. The selection criteria must also be improved, to counterbalance the weight given to the lowest price criterion.

¹ See: Public Debt Report 2019

² http://www.ufsa.gov.mz/query/Baixar_documento.php?nome=Circular%20de%20Admin%20Exec%20do%20Orcamento%20para%202019
(Accessed on 13 January, 2020 at 13:05 minutes)

³ www.ufsa.gov.mz

With regard to internal control, it is up to the MEF, through the General Inspectorate of Finance, IGF, (through the SISTAFE Law, Art. 63, Subsystem of Internal Control), to verify the application of the procedures, and compliance with legality, regularity, economy, efficiency and effectiveness, with a view to good management in the use of resources made available to State bodies and institutions, and the Government may submit State bodies and institutions to independent, specific or systematic auditing.

The audit reports produced by the IGF require authorisation in order to be in the public domain, but little or nothing is published to assess their performance in fulfilling their mandate. In addition, no specific report by this institution on a State body or institution has been identified. An Internet search was carried out¹, with no IGF web page identified that presents the results of the work that this institution has been carrying out and the treatment given to the processes audited by the IGF, as well as their transparency. Thus, it can be concluded that, as an integral part of the SNI, the IGF has not played its role nor contributed to greater transparency in the use of public resources and in reducing corruption.

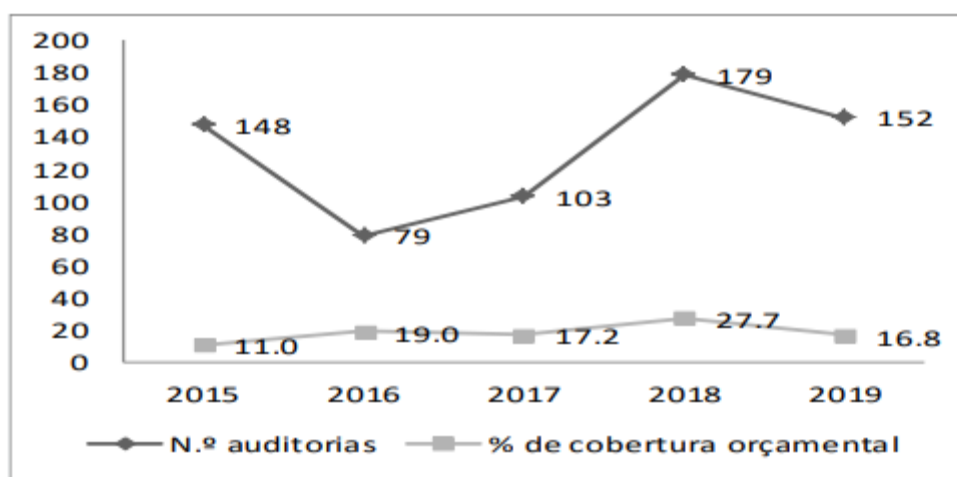
1.3 Supreme Audit Institution: Resources, Independence and Transparency

The supreme audit institution is the Administrative Tribunal, 3rd Section, the public accounts section. According to Art. 229 of the CR, within the scope of its powers, this institution must: Issue the report and the opinion on the CGE; previously inspect the legality and budgetary coverage of acts and contracts subject to the TA's jurisdiction; supervise, successively and concurrently, public money, and supervise the application of financial resources obtained abroad, through loans, subsidies, guarantees and grants.

Human, financial and material resources have always been a constraint for the TA, in guaranteeing audits and greater budget coverage. Graph 1, below, shows the evolution in the number of audits and budget coverage in the five-year period from 2015 to 2019².

Graph1:

Evolução do número de auditorias realizadas e cobertura orçamental das mesmas, no quinquénio (2015 a 2019)



Fonte: CCA

¹ <http://www.mef.gov.mz/>; <http://www.mef.gov.mz/index.php/instituicoes-tuteladas/igf>

² The data for 2019 are up to the 1st semester. Source: 1st Half 2019 Progress and Financial Report available at <https://www.ta.gov.mz/Publicacoes/Relat%C3%B3rio%20de%20Progresso%20e%20Financeiro/Relat%C3%B3rio%20de%20Progresso%20e%20Financeiro%20do%201.%C2%BA%20Semestre%20de%202019.pdf> (accessed on 19 January at 15:19 minutes)

The graph shows that the percentage of budget coverage was very low in the last five years, with the highest coverage being recorded in 2018, only 27.7%, in a total of 179 audits.

The Progress and Financial Report for the First Half of 2019 lists a number of constraints resulting from the lack of human, financial and material resources that have negatively influenced the exercise of TA powers.

With regard to human resources, the small number of technical staff in the support sectors (Accounting and Auditing (CCA), UGEA and CGE), due to the freeze on admissions of new staff in the public administration, particularly in the sectors mentioned above, influences the delays in the processing of cases and culminates in increasing them.

As for financial resources, the same document explains that the delay in the start of audits of the results-oriented public finance programme was due to the delay in the availability of funds by the financing agency – the World Bank.

In the field of material resources, the insufficiency of computer material, namely computers (desktop, laptop), overhead projectors, scanners, cameras and printers, hinders the operation and fluidity of certain activities, since the equipment assigned to a person has to be shared by several employees simultaneously, making it difficult to extract evidence during the course of CGE audits.

The law presupposes that the TA is an independent body, that its president can only be dismissed or suspended from exercising his duties due to proven physical or psychological incapacity or for serious moral, disciplinary and criminal reasons, but the fact that the president of the TA is appointed by the Head of State calls into question the independence of this body.

The TA should also increase the level of transparency and disclose the unlawful acts of public officials to discourage them. In addition, the Attorney-General's Office (PGR) must monitor the findings of the TA and activate the legal mechanisms for the criminal accountability of offenders, as well as making them public. The National Assembly must follow the TA's recommendations and demand strict compliance. The NA must exercise its power to urge the Attorney General's Office (PGR) to hold the offending public managers to account.

Although the TA results are included in reports published by the national press and on its website, Francisco & Semedo (2018) have warned of several irregularities that can be identified in public accounts (CGE), which have not been given due treatment by external control institutions, specifically the issue of "cash balance". Cash balances are a type of budgetary practice, which in public finance terminology has been called "de-budgeting", a neologism that has no clear translation into other languages, but which corresponds to what is known as "extra-budgetary resources" or off-budget (Francisco & Semedo, 2018). The authors attack this problem as a way of drawing attention, too, to the risk of inefficient use of resources that feed State institutions that are not covered by the State Budget¹.

The principle of "State Budget and General State Account" implies that all resources and expenses must be managed by a single system, taking into account the principles and rules of budget preparation and management defined by SISTAFE (Art. 54). The non-inclusion of some accounts of State institutions (including the supervised ones), with emphasis on public companies and subsidiaries, indicates a clear violation of procedures established by the SISTAFE Law and makes inspection and control difficult.

¹ institutes, funds, municipalities, public companies, public-private partnerships and similar

1.4 Fiscal decentralisation

The Ministry of State Administration and Public Service is responsible for coordinating decentralisation. This body should increase capacity in the management of municipal public finances and improve tax collection, through the Municipal Management System (SGA) compatible with SISTAFE, an action to be developed with CEDSIF.

However, until now, more than 20 years after the first municipal elections, the SGA is not yet operational in all municipalities. Thus it continues to be difficult to trace funds and there remains a lack of transparency in the management of municipal finances.

In this context, alternatively, some municipalities invested and installed their own GFP models with donor support (for example, Beira, Nacala, Mocuba), or entered into Public-Private Partnerships with a foreign company in charge of taxpayer registration and collection/tax administration (for example, in Pemba)¹. The difference in systems for the GFP is one of the weaknesses of interinstitutional action, because it makes it difficult to incorporate financial results into e-Sistafe, as well as monitoring and control by external control institutions (TA and NA).

With regard to intergovernmental transfers, this process occurs initially between the MEF, in collaboration with the Ministry of State Administration and Public Service and the National Statistics Institute. They calculate, allocate and distribute tax transfers in the intergovernmental system of transfers based on formulas via e-SISTAFE².

What happens in practice, according to Banze (2019)³, is that the system of transfer to the municipalities, which occurs through the Municipal Compensation Fund (FCA), and the Municipal Investment and Initiative Fund (FIIA) is not very transparent. It is unpredictable and further stimulates social inequalities between different municipalities. This is because the FCA and FIIA, instead of following the previously defined formula, based on population size and territorial area, make transfers based on other undisclosed indicators, that is, there are municipalities that receive more than they should receive and others, less than they should receive. It should be noted that, for the case of the recent model of provincial decentralisation, no formula for transferring resources from the central government to the decentralised provincial governments has been defined.⁴

Even with insufficient information in the public domain on the management of decentralised finances, the MEF must be aware of the entire accountability process of the municipalities, so it has all the information on municipal financial management, but even so, little information is published in budget documents. This gap is associated with the fact that there is no municipal financial management module compatible with SISTAFE, which also constitutes a failure and non-fulfilment of the MEF's duties.

Regarding the internal audit that must be implemented by the IGF in the municipalities, no information is made public.

To conclude, having presented all the gaps evident in the inter and intra-institutional interaction, it can be concluded that the SNI, in Mozambique, is not effective, because its institutions operate in an uncoordinated way and are not very committed to the fight against corruption. The legal framework is quite robust, but this aspect is not accompanied by practical actions that demonstrate commitment and responsibility for the full compliance with the powers of the different institutions involved in the SNI.

1 <http://www.iese.ac.mz/wp-content/uploads/2018/02/IESE-Econ-polit-descen-Moc.pdf> (Accessed on 18/01/2020 at 15h and 40 minutes)

2 <http://www.iese.ac.mz/wp-content/uploads/2019/01/pref%C3%A1cio.pdf> (Accessed on 18/01/2020 at 15h and 40 minutes)

3 http://www.iese.ac.mz/wp-content/uploads/2019/12/art_cbanze.pdf

4 See: <https://cipmoz.org/wp-content/uploads/2020/02/Executivo-deve-apresentar-fo%CC%81rmula.pdf>

1.5 Conclusions

At the GFP level, the case of illegal debts incurred outside of all current legal provisions has brought to light the way in which the executive in Mozambique acts, as well as the weak power (in practice) of legislative and supreme audit institutions.

This is reinforced by the fact that the National Assembly's independence from the executive is only theoretical, because practice shows that this body, in all legislatures, has been dominated by an absolute majority of the Frelimo party. This makes the performance of the NA similar to that of an organ that functions as an extension of the executive, due to the lack of critical debate on the part of the majority parliamentary group, which limits itself only to approving most of the documents sent to the NA.

In the TA, in turn, the lack of resources has greatly limited the number of audits and their budget coverage. In 2018, the percentage of coverage was only 27.7%, however it was the highest recorded in the five-year period 2015 to 2019.

As for fiscal decentralisation, the fact that the SGA is still in a pilot phase in only three municipalities, after long years of waiting, continues to make it difficult to trace municipal funds. This aspect, associated with the lack of compliance with the formula defined for transfers from the central government to the municipalities, in addition to exacerbating social inequalities, contributes to the lack of transparency and, consequently, to weak supervision.

So, overall, the SNI in Mozambique is not effective, because its institutions operate in an uncoordinated way and are not very committed to fighting corruption. Although the legal framework is robust, it is not a sine qua non for full compliance with institutional powers.

CHAPTER II

2. Can Mozambique's election management be independent and effective?

By Joseph Hanlon

The 2018 municipal elections and the 2019 general elections showed that the National Elections Commission (CNE) was not able to prevent abuse of power and misconduct. Civil Society Organisations in a 28 October 2019 statement said that 'the ruling party was able to hijack the electoral machine.' '<'partido no poder capturou e assaltou a máquina eleitoral,'>

In part this is the result of two wars and a series of elite bargains have left CNE open to capture. Frelimo won the 1964-74 independence war and established a one-party state based on the old colonial, fascist civil service. Frelimo's socialist policies drew support from the then Soviet bloc, and hostility from the capitalist West. This led to a 1981-92 Cold War proxy war with Renamo, created by Rhodesia and apartheid South Africa, being backed by the West. More than one million people died in the war and there was massive damage. With the end of the Cold War, external support for the two sides stopped, and there was an elite bargain between Renamo and Frelimo. The two became the main political parties in the new multi-party system. Unusually, Renamo was allowed to keep its own military force.

Any idea of power sharing was rejected by both sides; an elected winner-take-all system was adopted because both sides expected to win. The agreement involved an elected strong president and a parliament elected on a party list system. The centralised colonial civil service structure was maintained with the President appointing ministers, governors, and district administrators.

The only decentralisation was the election of some municipal governments which began in 1998.

Frelimo has largely won all the multi-party elections. This has facilitated the maintenance of Frelimo control over the civil service, which has tightened in recent years.

Since the first elections there have been on-going elite negotiations between Renamo and Frelimo, often over the electoral law and composition of the CNE. Through this period the Renamo leader was the former military commander turned party leader Afonso Dhlakama (who died in 2018), and his main negotiating tactics were boycott and return to small-scale warfare. He boycotted the first day of the first multiparty election in 1994 as well as the first municipal election. Renamo guerrillas resumed small scale attacks in 2013-14, followed by a 2014 agreement to change the electoral laws. Attacks resumed in 2016-17, leading to further electoral law changes and the agreement to allow elected provincial governors (with very limited powers, and most power retained by a centrally appointed secretary of state in each province). During this period government hit squads killed and injured several Renamo leaders and twice came close to killing Dhlakama. Yet, during this entire period, Renamo members of parliament continued to attend sessions.

Negotiations over the CNE were shaped by the strong distrust of the two sides for each other, by Renamo's belief that if it had more and more people inside the electoral machine it would prevent Frelimo misconduct, and by Dhlakama's belief that he would become president and thus did not want to weaken a highly centralised system he expected to one day control.

The shape of the CNE was always a major issue of the boycotts, attacks on road traffic, and negotiations. Dhlakama

always demanded half of a large CNE so that Renamo had a veto, but he never won it.

Each election has had a more politicised electoral administration. For the 2014, 2018 and 2019 elections the CNE has been composed of 17 members: 10 named by the parties in parliament (5 Frelimo, 4 Renamo and 1 MDM) and 7 chosen from people nominated by civil society. But civil society is also highly polarised, so 4 come from Frelimo-linked civil society and 3 from Renamo-linked civil society, which gives Frelimo 9 members and thus a majority. This system and Frelimo majority is replicated at provincial and district level. The technical administration of the registration and elections is managed by a secretariat, STAE, which is part of the civil service (and thus politicised). In response to that Renamo won the right to have 26 party nominated people inside STAE: 2 deputy directors (1 Frelimo and 1 Renamo), 6 deputy directors of departments (3 Frelimo, 2 Renamo, and 1 MDM) and 18 other staff (9 Frelimo, 8 Renamo and 1 MDM). This, too, is replicated at province and district level.

The polling station is the centre of the election on voting day. Each polling station has a register of up to 800 voters and a staff (known as the mesa) of 7 people, again politicised. Four are chosen through the civil service hiring process and 3 by the parties (1 each by Frelimo, Renamo and MDM). Ballots are counted within the polling station immediately after voting stops. In addition each party has the right to two delegates (poll watchers) in each polling station. And there are sometimes journalists, foreign observers, and civil society observers. Just as civil society is polarised, some observers are openly local Frelimo officials while others are named by groups clearly opposed to Frelimo.

Renamo has not been able to use the extensive politicization it demanded; too often the people it names see this as simply a way to gain money by working for Renamo, and the party has also been unable to train its people in STAE or in polling stations to know what to look for.

Negotiating the electoral laws in this way was often confusing - and was further complicated because elections are regulated by a set of at least eight different laws, which are overlapping and often contradictory. After the 2009 election, the Constitutional Council called on government and parties to agree a unified electoral code - a proposal that was widely accepted. Suddenly the donor community, in a bizarre intervention in early 2010, successfully withheld aid for three months to force government to reject the Constitutional Council proposal, and retain the collection of separate laws.

It seems hard to imagine how such an overweight and politicised system could be made to work even with good will. With hostility and antagonism, it clearly does not.

2.1 SNI and the National Elections Commission

Transparency International (TI) developed the idea of a Sistema Nacional de Integridade (SNI, National Integrity System, NIS) which divides the government into pillars (one of which is the National Elections Commission) and then asks a series of question about each pillar. For election management, the areas are resources, independence, transparency, accountability, integrity, campaign regulation, and election administration. TI does not include parties and candidates, so we add a section on that. {Transparency International, 'NIS Assessment Toolkit', 2012, and 'NIS Indicators and Foundations', 2013. <https://www.transparency.org/whatwedo/nis>} In the remainder of this paper, we follow that model, taking into account the difficulties caused by the politicised system.

2.2 Resources

The electoral management body is the CNE and the STAE (Technical Secretariat for Electoral Administration) is the administrative body under CNE. At national level they are permanent and STAE is subordinate to CNE. There are similar pairs of management and administrative bodies at provincial and district levels, which work only at periods around elections. The unusual political structure of these bodies is noted above in the introduction.

In broad terms, the electoral system is adequately resourced with sufficient money, facilities, and trained people. Mozambique's on-going economic crisis meant that key funding was often delayed, which in turn delayed training and tendering. Management of tenders remains an issue. For example, registration in many rural areas was delayed because solar panels and laptop computer registration kits were purchased on time, but in many cases the delivered transformers did not correctly link computers to solar panels.

There is probably enough technical staff, but the politicised nature of the electoral bodies has an impact. Often opposition party nominees do not work - either because they see their post as a sinecure and reward for prior party work, or because they are marginalised by members named by Frelimo, the ruling party.

2.3 Independence

By law, the CNE is an independent body subject only to the Constitutional Council, the highest court which also serves as the highest electoral court. STAE, although part of the civil service, is subordinate to the CNE.

The practice is very different because of the highly politicised nature of both bodies. CNE members take instructions from the parties, in some cases by mobile telephone during CNE meetings. In earlier elections there was some attempt by the chair (Presidente) of the CNE to reach consensus and to be seen to be impartial. The ruling party, Frelimo, has a majority on the CNE, and for the 2018 and 2019 elections there was not even a pretence of impartiality, and many more things were decided by majority vote.

At local level this became even more extreme. During 2018 municipal elections, in several municipalities the city tabulation was done at a secret meeting with only the Frelimo majority present, where it was decided that Frelimo had won, even though parallel counts showed an opposition victory. This was illegal, but local courts and the CC rejected challenges on technical grounds.

Recruitment of polling station staff was particularly contentious in 2019. Recruitment is done by party dominated district elections commissions and STAEs, and in many cases the head of the polling station (Presidente) just happened to be a local senior Frelimo person. Opposition parties complained that the people they nominated, who by law should have seats on the polling station staff, were not included.

Party control also meant CNE was unable to impose its will on lower level bodies. Thus provincial elections commissions gave thousands of observer credentials to Frelimo aligned 'civil society' observers, but refused to give credentials to 3000 independent civil society observers who were supposed to carry out a parallel vote tabulation. The CNE could not force provincial elections commissions to obey the law, because at lower level district elections commissions ignored instructions - as they know they could because the Frelimo majority on the CNE would not penalise them.

It is also noted that the CNE devolved to STAE many things, such as vote tabulation, that by law should be done by the CNE.

The SNI manual says that a number of questions should be raised, including: 'Does the electoral management body (EMB) have the confidence of ... citizens?' 'Is the EMB perceived to be independent, impartial, accountable and

efficient?’ and ‘Can the EMB operate in a professional and on-partisan manner?’ The answer to all three of those questions must be no.

2.4 Transparency

By law, Mozambique’s elections are extremely transparent. ‘Electoral observation covers all stages of the electoral process, from its inception to validation and proclamation of results by the Constitutional Council.’ <’A observação eleitoral abrange todas as fases do processo eleitoral, desde o seu início até a validação e proclamação dos resultados pelo Conselho Constitucional.’> (Art 245, lei 2/19)

Voters are registered in books of up to 800 people, and each book has its own polling station (often a school classroom). When voting is finished the count is carried out immediately in the polling station, and a results sheet (edital) posted on the classroom door. The entire process in the polling station is open to journalists and observers. Results sheets are then sent to district level where they are tabulated, and the law specifies that the district count is also open to observers and party agents, as is the provincial tabulations.

The CNE has a website. It is largely used for pictures. A searchable version of the electoral register was posted so people could check they were on the register and get their polling station number if they had lost their voters card. Results were posted.

At a basic level, the system works well. Key dates are publicised and widespread information and civil education campaigns tell people where and when to register and vote. Voting and counting in the polling station are usually open to press and observers, and the results sheet is usually posted.

Beyond that, however, there is no transparency.

Despite the law saying ‘observation covers all stages’, all activities of STAE are treated as administrative and not open. CNE meetings are not open, and minutes and even decisions are often not public (unless they involve something of direct public relevance, such as a change in date). In 2019 the CNE approved a set of deliberations (which were reluctantly made public) which transferred most of the tabulation process at district, provincial and national level to STAE and thus made it closed. In effect the only thing carried out by the election commission at each level was to read the results given to them by STAE, and this was sometimes done at a meeting open to observers and party agents. A Constitutional Council ruling on 11 November 2019 confirmed that the national tabulation is not open to party agents.

In violation of the law, the CNE did not even publish the full details of the 2019 election. Detailed results by province were published for the presidential and parliamentary results, but no detailed results were published for the third election, for provincial parliament. The CNE only showed how seats had been distributed, but not the votes per district.

The electoral law contains only one reference to publication of decisions, and requires that it must post lists of candidates accepted and rejected. (art 183 law 2/19) The CNE approved instructions to districts as to how to carry out the district tabulation. This includes instructions on how some polling stations were to be excluded - said to include polling stations with over 100% turnout and those with arithmetic mistakes which cannot be corrected. The head of the CNE told observers the instructions would be made public, but they never were.

Elections commissions consider that they have the right to change results in secret, and a list of those changes and the reasons has never been made public for any election. STAE carries out a parallel tabulation of the polling station results, and this has been partially made public in the past, but was not in 2019.

For elections up to and including 2009, results were tabulated on a polling station basis and distributed to a restricted group at the time of the next election; 2009 results distributed in 2014 were the last time this was done. A cd rom of the 2014 results has been compiled and is in informal circulation, but has never been formally released.

The 2019 election saw further reductions in transparency. More than 3000 civil society observers were refused credentials, so could not observe. In many polling stations observers, including international observers, were not allowed to watch the count, and even party delegates were expelled from polling stations. Observers reported general confusion during the completion of the polling station counts and during the district tabulation, and observers also reported polling station staff completing results sheets outside the polling station and even in the back of lorries on the way to the district.

The law has always required that documentation related to candidates be deposited with the Mozambique Historical Archive, but this has never been done. The same section of the law (art 273 law 2/19) requires STAE to maintain an archive of 'all' documentation of the electoral process. If this has been done (which we doubt), it is secret and not accessible to the public. So far as we know, there has never been a formal freedom of information request to the CNE or STAE.

In conclusion, there is an almost total lack of transparency in these elections. Public, media and observers cannot obtain some of the most basic information and the elections commissions change the results in secret.

2.5 Accountability

Mozambique has not, in general, dealt seriously with accountability. There is a view, for example in the judiciary, that independence is the same thing as being unaccountable - that it is impossible to be independent and still accountable to some rules or groups.

The law makes the CNE accountable only to the Constitutional Council (CC) and only requires that final results be submitted to the CC. CNE decisions can be appealed to the CC if they have violated the law, but no appeals have been upheld.

Under pressure from opposition parties, in the past decade the electoral laws have been twice modified to create an electoral court system. District tribunals are the courts of first instance. They operate 24 hours a day during electoral periods and any complaints about electoral management must be made within 48 hours. This applies to all electoral management bodies (EMBs), ranging from polling stations to STAE to district and provincial elections commissions. The law says there is no specific format for an application, but that it must contain all the evidence needed. The district tribunal must rule within 48 hours. The decision can then be appealed directly to the CC within 3 days. As part of the Mozambican view of independence, it is held that no law can impose a time scale on the CC, so there is no deadline for the CC to act. The CC in 2019 rulings imposed three restrictions on this system. First, that any alleged criminal action (which includes many forms of misconduct, notably at polling stations) must be dealt with by the public prosecutor (Ministério Público) and not be the electoral court system. Second, the CC will not accept any additional evidence and will only look at what was submitted to the district court. Third, the CC can simply drop consideration of a case if it has delayed its consideration to a point where it is no longer useful (for example a challenge to the district election commission tabulation after the date at which those totals have been incorporated in the provincial result by the provincial elections commission).

The electoral court system has not worked well. Opposition parties have had difficulty putting together adequate cases and presenting them within 48 hours. Many cases are rejected on questionable technicalities. For example, a district tribunal refused to consider a case against the district count on the grounds that it had not been submitted to the tribunal within 48 hours. On appeal, the CC ruled that the district tribunal had counted the time incorrectly and should have considered the case. But it refused to look at the details of the case or return it to the district tribunal because the provincial elections commission has already used the challenged district count in its tabulation. Opposition parties accuse the electoral court system of being rigged against them, and of the courts being politicised.

Transparency International (TI) raises a number of questions about accountability: 'To what extent are there provisions

in place to ensure that the EMB [Electoral Management Body] has to report and be answerable for its actions? Does the legal framework adequately define the EMB's relationships with external stakeholders? ... Is the EMB required to file reports? How comprehensive are they required to be? Are these reports required to be publicly available? ... Does the EMB have regular meetings with parties, the media and observers to answer queries on delays/decisions/disputes?

The answer to all of those questions is largely no. The law specifies very few accountability mechanisms, in part because the CNE is said to be independent. Accountability is a question little raised in Mozambique.

There was one major accountability debate in 2019 which underlined that accountability is to the President and party. The National Elections Commission (CNE) reported that it had registered 1,166,011 voters in Gaza. The National Statistics Institute (Instituto Nacional de Estatística, INE) published the data given to the CNE before the registration saying there were only 836,581 voting age adults in Gaza. This province votes overwhelmingly for Frelimo, and the extra 300,000 "ghost" voters gave Gaza (and thus Frelimo) 5 extra seats in parliament. On 17 July Arão Balate, INE national director of census and statistics, made public the document that had been sent to the CNE with voting age populations by province. He told a press conference that even the 2007 census showed that Gaza's population would not reach the levels registered by the CNE until 2040.

On 16 August President (and Frelimo presidential candidate) Filipe Nyusi forced the resignation of Rosário Fernandes, the head of the National Statistics Institute (Instituto Nacional de Estatística, INE). In a speech at the Ministry of Economy and Finance headquarters on 16 August, he launched a vitriolic attack on Fernandes. "We cannot have people who say what they want, what they think, that they know more." He continued: "My father said that on a farm, it is easy to use your hand to pull out the grass that grows higher on its own. But you cannot pull out all the grass that has grown together. ... We must pull out the tall grass that grows alone." And he criticised the Economy minister, standing next to him, for allowing the INE to publish statistics without approval. In October Arão Balate was also dismissed. Both Balate and Fernandes were highly respected and the census was widely seen as well done. Both defended the integrity of the statistical system. "I am leaving this post to someone better able to acquiesce to the pressures," Fernandes told the independent newspaper Savana (23 Aug), adding "I am committed to professional ethics and international standards." Their dismissals were a harsh warning to any official who speaks out on integrity. And Nyusi made clear that the only accountability in this matter was to him and his party.

2.6 Integrity

The law (art 9 law 9/14) specifies that the CNE guarantees that registration and electoral processes are carried out 'ethically and in conditions of full freedom, fairness and transparency.' It also says that the CNE 'ensures equal treatment of citizens' and 'ensures equal opportunity and treatment of political parties.'

{ 'se desenvolvam com ética e em condições de plena liberdade, justiça e transparência'

'Assegurar a igualdade de tratamento dos cidadãos'

'Assegurar a igualdade de oportunidade e de tratamento dos partidos políticos' }

Thus the law sets high goals of freedom, fairness and transparency. Transparency International (TI) asks: 'Do staff sign a contract, declaration or swear an oath to uphold the guiding principles of independence, impartiality, integrity, transparency, efficiency, professionalism and service-mindedness in conducting their duties?'

But these are not highly prized values in the Mozambican electoral system. Instead the prized values are support of parties and institutions. The politicization of the electoral system means that neutrality and impartiality are no longer the goals of many who work in the electoral system.

2.7 Candidates and parties

Presidential candidates are approved by the Constitutional Council (CC). All candidates for President (whether independent or part of a political party) must present a set of documents plus 10,000 notarised signatures of registered voters. The system works well and the CC gives a detailed report on rejection of candidates (usually for fake signatures).

All assemblies are elected on the basis of a party list system. Only registered political parties can put forward lists for national parliament (AR, Assembleia da República). Registered parties as well as citizens' lists can put forward lists for provincial and municipal assemblies. The heads of the lists that receive the most votes are automatically municipal mayors and provincial governors.

Every candidate must present authenticated photocopies of their identify card and voters registration card, a certificate of no criminal record, a declaration that they agree to stand, and a separate declaration that they are not ineligible to stand.

The CNE and provincial elections commissions approve candidates. In 2018 some opposition candidates were rejected because of complex and overlapping laws against changing parties and against resigning a seat and standing for the same seat in the next election. An entirely different court system, the Administrative Tribunal, also becomes involved in some instances.

The lack of a single electoral code continues to create confusion. Under law 14/92, political parties register with the Justice Ministry. Under law 9/14, they then register with the National Elections Commission for each election. Under law 2/19, the CNE approves party names, acronyms, and symbols; registers party agents (mandatários); approves party coalitions; and approves candidates.

Especially for the 2018 municipal elections, it was argued that the CNE acted in a partisan way to exclude candidates, including heads of a party and a citizens' list.

The presidential candidates' position on the ballot paper is determined by a draw (sorteio) by the CC. The law specifies that the CNE does a draw for the position on the ballot paper of parties standing for national parliament and provincial assemblies. But it does not specify how this is to be done. At the draw for the 2019 ballot papers, the CNE simply announced that the first four places on the ballot paper would be the same as for president, which put the ruling party, Frelimo at the top of all ballot papers. The draw was then only for other parties. As part of the lack of transparency, there was no public discussion of this decision, which does appear to violate at least the spirit of the law, which calls for a draw for 'candidates' and not just some candidates. (art 9 1. p law 6/13 revised and republished)

Candidates and parties are not part of the TI SNI assessment indicators for electoral management bodies, but we consider the issue important and include it here.

2.8 Campaign finance and regulation

The only limit on party finance is that electoral campaigns cannot be funded by foreign governments, government organisation and institutions, and foreign or national public companies. (art 37, law 2/19) Foreign political parties and NGOs are specifically allowed to contribute to campaigns. Otherwise, there seem to be no restrictions on political party finance. Parties must publish annual financial reports, which includes the sources of funds (Art 19 of law 7/91), but this is not done.

The government also provides party finance. The 15 October 2019 elections were considered to be three separate elections - president, national parliament, and provincial assemblies. The government distributed 60 mn Meticais (\$972,000) to parties in each of the three elections. Money was distributed late, after the campaign had started, as happened also in the 1999, 2004, 2009 and 2014 elections. The law (art 38 law 2/19) says that the CNE decides how

to distribute the money, 'taking into account the proportion of candidates presented according to the seats to be filled'. This has been interpreted in the past as meaning the amount of money for each election is simply divided by the number of candidates in that election. For the four presidential candidates each received 15 mn of the 60 mn Meticais for the presidential election.

However the CNE decided in 2019 not to follow that model for the parliament and provincial assemblies. In a decision which was never published, it decided to first divide the 60 mn Meticais equally between the constituencies - 13 for the national parliament election (10 provinces, Maputo city, and single seats for Africa and Europe) and 10 for provincial assemblies (just the 10 provinces have provincial assemblies). Each candidate standing for the single parliament seat for Africa received 345,000 MT (\$5587), while each candidate for one of the 45 parliament seats in Nampula received only 5,000 MT (\$81). This clearly is not proportional and would appear to violate the law. The CNE never published its distribution of funds in 2019.

Parties are required to account for the use of funds, but a study by the Centro de Integridade Pública (CIP) showed that most parties do so, but some do not. At least one party which did not account for funds in 2014 received money in 2019. The funding is subject to strict rules set by the CNE, and can only be used for campaign publicity and travel costs. But the CNE only publishes summary accounts, so it is impossible to see if these criteria are met. 'CNE does not appear to be an appropriate or technically competent body for the accountability of money allocated by the State for political party campaigns. The sanctions provided for in electoral legislation for political parties that do not provide accounts to the CNE are not enforced,' CIP concludes. < Aldemiro Bande, Magda Mendonça e Sheila Nhancale, 'Financiamento Público à Campanha Eleitoral: Não há transparência, prestação de contas nem responsabilização', CIP, Maputo, 2019 >

All candidates have slots for publicity on state-owned radio (Rádio Moçambique) and television (TVM) and this is organised, successfully, by CNE and STAE. State-owned media are required during the campaign period to be 'governed by criteria of absolute impartiality and rigor, avoiding misrepresentation and any discrimination between the different candidates.' < 'devem reger-se por critérios de absoluta isenção e rigor, evitando a deturpação dos assuntos a publicar e qualquer discriminação entre as diferentes candidaturas.' > There is no enforcement or accountability mechanism for this. International observers who have checked tend to find the Radio Moçambique does adhere to the regulations, but TVM and the daily newspaper Noticias are more biased toward the governing party.

More than half of local community radios are run by a government agency, the Instituto de Comunicação Social (ICS). There have been some issues of bias and political pressure. In the 2019 elections ICS banned its reporters from working for any other media - a move aimed in part at the Mozambique Political Process Bulletin, which had a pool of more than 400 correspondents, many from community radio, and had the best election coverage. In practice, the ban was only enforced in Zambézia and Niassa provinces.

During the campaign the law allows parties to use public facilities such as school halls, as long as it does not disrupt other activities. Access to both government facilities and privately owned but open-to-the-public facilities such as halls and theatres must be granted to candidates on an equal basis. There is no defined oversight or accountability mechanism, but there are few complaints and the system works well.

Most other issues are the campaign are monitored by the police because violence, obstruction and tearing down campaign posters are crimes. In many areas the system works well, with police accompanying party parades and preventing disputes. But there has also been many complaints about police bias in favour of the ruling party.

2.9 Election administration

TI gives a set of guiding questions, which we divide into three groups: generally true, serious problems, and questions not asked.

The answer to these two questions is almost always yes:

- Do voters (and parties) have an opportunity to check their names are registered correctly?
- Does the EMB run/oversee voter education programs?

But on these points, there were serious problems in more areas in 2019 than in past elections:

- Is the EMB able to ensure that all eligible voters ... can register to vote and know where to vote? [In Zambézia province and elsewhere, particularly in opposition areas, people were unable to register.]
- Are a considerable number of voters who come to the polling station unable to vote for any reason (on wrong register/lack of time/materials/security)? [There were more complaints about this, and the CNE was forced to issue an instruction late on polling day that people with voter's cards but not on the register must be allowed to vote. The instruction was issued too late in the day to benefit many excluded voters.]
- Are sensitive electoral materials (ballots, seals, tally sheets) tamper-proof and accounted for? [There were many reports of ballot papers outside polling stations, of improperly sealed ballot boxes, and of tally sheets - editais - being completed outside the polling station.]
- Are observers and parties allowed access to observe all stages from polling to counting to result aggregation? [More than 3000 domestic observers never received credentials and could not observe. There was reports of domestic and even international observers being intimidated and forced to leave polling stations.]

An additional questions not on TI's list is about the organisation of polling stations and district counts. STAE is largely responsible for the organisation of the more than 20,000 polling stations, and there were many reports of organisational failures that violated the electoral law. There was evidence of political bias in the selection of polling station staff - both of Frelimo militants being chose as polling station heads (presidents) and of opposition-nominated people being improperly excluded.

TI's key question is:

Is the EMB able to account for and aggregate results accurately and efficiently and objectively validate election results?

The answer must be no. During the count within the polling stations, there were widespread reports of procedures not being followed, including staff taking a break for dinner (which is not permitted) and leaving ballot boxes unattended. There were also reports of sloppiness in procedures which created space for fraud. And there were huge problems with the tabulation at district level, where the results sheets from all polling stations are added together. In some places, the district tabulation was open, organised and efficient. But in too many others, observers reported that there seemed to be no guidelines and each district did it differently. The control of results sheets and other materials was often very poor and it was difficult to see precisely what district STAE staff were doing. Observers were sometimes excluded.

2.10 Conclusion

TI argues that a well functioning National Integrity System (NIS, Sistema Nacional de Integridade, SNI) is a key to preventing and fighting corruption, as part of the larger struggle against abuse of power, malfeasance, and misappropriation in all its forms. Government is divided into pillars, and the election management body - CNE and STAE in the case of Mozambique - have been analysed within the NIS system.

On the surface, the 2019 election was a success: millions of people were registered and voted. But the systemic lack of integrity means the outcome of the election is questionable. The election management pillar of the national NIS is lacking integrity.

The decision to create a politicised system may, in the short term, have avoided a return to war, but it has also created a system that is only accountable to political elites and cannot be independent. The CNE and STAE can violate the electoral laws with impunity, ranging from inflated registration, to not following the law on party funding, to political interference at polling station level. This is compounded by an almost total lack of transparency.

In doing this investigation, we were told by opposition figures that Mozambique is so polarized that it is impossible to create a neutral CNE. Civil society, and even religious bodies, are polarised, they argue. Because CNE and STAE members are nominated by parties, they are beholden to those parties and the parties believe they have a right to give instructions to the people they name.

The South Africa Independent Elections Commission is composed of people nominated by a panel consisting of the head of the Constitutional Court and representatives of the Human Rights Commission, the Commission on Gender Equality and the Public Protector. But the opposition argues that all the equivalent people in Mozambique have been appointed by Frelimo and cannot be neutral.

There cannot be integrity and neutrality in electoral management within the current system and mind-set.

On election day observers are always impressed by the majority of polling station staff who are dedicated, hard-working and committed to a fair election. Within civil society and religious organisations, there are people working for change in ways that are not linked to parties. Would the main parties allow or accept an election commission and election management body that they did not control? Probably not.

‘The National Elections Commission is a body independent of all public and private powers,’ says article 3 of law 6/13. ‘The members of the National Elections Commission, in the performance of their duties, do not represent the public or private institutions or the political or social organizations of their origin.’

< A Comissão Nacional de Eleições é um órgão independente de todos os poderes públicos e privados. ...

Os membros da Comissão Nacional de Eleições, no exercício das suas funções, não representam as instituições públicas ou privadas, organizações políticas ou sociais da sua proveniência >

But when people are appointed to the CNE and STAE by political parties precisely to protect the interests of those parties, they will always represent those interests, and that part of the law becomes only a fantasy. Without a belief that elections management should be impartial and neutral, there is no way that elections management can be a pillar of a National Integrity System.

CHAPTER III

3. Access to Information as an Element of Participation in Public Management

By Lázaro Mabunda

The approval and promulgation, in 2014 and 2015, of the Freedom of Information Act (RIA) and its regulations were celebrated as a victory against the concealment of information and as the end of the era of government secrecy about information of public interest. In fact, in any country, a law on access to information represents a step forward, not only in fighting corruption and building integrity, but also as a democracy, since it provides citizens with basic conditions to participate in political decision-making.

One of the recommendations of the last two Governance and Integrity Reports in Mozambique (2008 and 2013) was that the approval of the Freedom of Information Act was urgent, since without it the enjoyment of the constitutionally enshrined right to information would remain a mirage.

Six years after the approval of the Freedom of Information Act, the results of several studies assessing its implementation show that the law has not changed the status quo: information remains inaccessible, public officials do not respect the law, and there is no evidence of any sanction against any public servant as a result of the refusal to provide information.

In contexts of lack of information, the exercise of citizenship and the fight against corruption become limited, just as the quality of democracy is far from what is desired, because “healthy democracy depends on access to quality information”¹.

In this article we intend to show the barriers and constraints in implementing the Freedom of Information Act, factors that prevent citizens from accessing public information and participating in public management. The work will focus on two institutions: the National Documentation and Information Centre of Mozambique (CEDIMO) and the Administrative Tribunal.

3.1 The SNI and Access to Public Information

In many countries like Mozambique, the ineffectiveness of anti-corruption policies is accompanied by a discrediting of the justice system, the parliament and the government. The most recent example is the call by civil society, specifically the Budget Monitoring Forum, FMO, (a platform that brings together a dozen National Non-Governmental Organizations), to the South African Justice Minister not to extradite the former Minister of Finance, Manuel Chang, to Mozambique. The FMO opposed his extradition to Mozambique on the grounds that “there is no guarantee” in the country that, without a formal accusation, Chang would have a fair and transparent trial².

In a democracy, the principle that “access to information is the rule; secrecy is the exception” prevails - that is, the idea that non-disclosure or refusal to make information available should always be based on the regime of legal exceptions and restrictions (Law 34/2014, article, 11). Thus, as Patricia Hoch states, “information is the oxygen of democracy.” This premise supports the principles 1) of maximum disclosure, 2) transparency, 3) democratic participation and an open public administration (Law 34/2014, articles 6, 7, 8 and 10)³. All these principles contribute towards two important purposes: the transparency of public acts and the public participation of citizens in key state decisions.

Accessible information allows the growing engagement of people and entities, mainly NGOs and the press, in the daily life of the State, providing for growth in the movement for the transparency of public accounts and the concept

1 You can read the statements of Helena Martins, Google Portugal public policy officer, here: <https://observador.pt/2019/02/18/democracia-de-pende-do-acesso-a-informacao-de-qualidade-afirma-google-portugal/>

2 Information published on DW 6/12/2019, available at <https://www.dw.com/pt-002/d%C3%ADvidas-ocultas-chang-s%C3%B3-pode-ser-extraditado-com-garantias-de-julgamento/a-51565064>

3 Law 34/2014 of 31 December - Law on the Freedom of Information. Maputo. National Press

of accountability¹.

There is some evidence that, as in the rest of the world, in Mozambique, Civil Society, the Press and civil society organizations are those that most exercise the right of access to public information, particularly for the exercise of accountability and transparency of that information.

The Ombudsman's 2015 report reveals that, in Mozambique, supervision of the Public Administration by citizens is still carried out only through participation in consultations or public hearings, suggestions, and reporting irregularities, among others².

Access to public information, given the context of institutions with a heavy legacy from the one-party period, where the culture of secrecy, fear and centralism were dominant features, is still a huge challenge in Mozambique (MISA Mozambique (2016:15)³. The most recent reports evaluating implementation of the Freedom of Information Act (MISA Mozambique 2017, 2018), also reinforced the thesis that public information remains inaccessible, due to the legacy of the one-party period, which makes it difficult to monitor transparency in public acts⁴.

3.2 Resources

It is not lack of human resources and space that prevents the availability of public information, but the poor distribution of resources and lack of will, because in almost all institutions, there is a place to store information, either departmental archives or libraries, as stipulated in the Regulation of the Freedom of Information Law (Article 22). The MISA study (2018) shows that the information stored is generally very old and is not updated frequently; institutions do not have staff or employees specialised in classifying information and responsible for managing it. Roughly speaking, they take advantage of the staff of communication and image departments to do these activities in part. However, these departments are more concerned with projecting the organization's image, in terms of marketing, and much less with managing and exposing the organization's internal activities⁵.

The Freedom of Information Law clearly establishes the mechanisms for access to public information, more specifically the type of information that is accessible to the public (Article 3). The Regulation of the Freedom of Information Law establishes the means by which information must be made available (Article 10), the forms of disclosure (Article 23) and the deadlines for its availability (Articles 11 and 13).

However, the Ombudsman states, in his 2015 report, that in the districts there is great difficulty in providing adequate space for the intermediate archive, which is in some cases in conditions of total abandonment, which can make it difficult for citizens and officials to access information quickly, and with a high risk of losing the information.

To date, public institutions still do not have structures such as consultation rooms, as provided for in article 22 of the Regulation of the Freedom of Information Act: "Public and private entities that hold information of public interest must have adequate conditions to carry out the consultation referred to in these Regulations". However, they do not even have an information officer and personnel hired to handle responses to citizens' requests for information⁶.

¹ Salamon, L.(1998). The emergence of the Third Sector - a global associative revolution. *Revista de Administração*, 33(1). Available at <http://www.spell.org.br/documentos/ver/18152/a-emergencia-do-terceiro-setor----uma-revolucao-associativa-global>

² See Ombudsman's reports 2015, 2016 e 2017, in <http://www.provedor-justica.org.mz/>

³ MISA Mozambique (2016). Open and Closed Institutions. Analysis Report on the level of implementation of the Freedom of Information Law in Mozambique 2016. Maputo: MISA Mozambique.

⁴ MISA Mozambique (2017). Open and Closed Institutions. Analysis Report on the level of implementation of the Freedom of Information Law in Mozambique 2016. Maputo: MISA Mozambique.

⁵ MISA Mozambique (2018). Open and Closed Institutions. Analysis Report on the level of implementation of the Freedom of Information Law in Mozambique 2016. Maputo: MISA Mozambique.

⁶ Decree n° 35/2015, December 31st - Manual Rules of Procedures. Maputo: Press.

A further finding of the Ombudsman (in the 2016 report) is that there is a general lack of understanding of the National System of State Archives and the guidelines of the National Documentation and Information Centre of Mozambique (CEDIMO) ¹ on the production, classification and archiving of documents.

The reports on implementation of the Freedom of Information Act show that sometimes institutions have not provided the requested information, not because the culture of secrecy has prevailed, but mainly because of the organizational difficulty of locating and supplying the requested information.

Other institutions do not provide information because they know that they will not suffer any punitive action. This suggests the need to establish accountability mechanisms for officials who refuse to share the information of public interest requested by citizens. The Ombudsman also recognizes that there are bodies that do not respond within the required time frame to requests, only doing so after letters insisting on a response. This compromises speed in handling complaints. This is the systematic practice of some judicial magistrates, in relation to the provision of information about delays in processing cases that have been distributed to them (Report of the Attorney General of the Republic - 2016).

For this reason, and in an attempt to mitigate the effects of this harmful conduct on the interests of citizens, the Ombudsman states that he has gone through the Higher Councils of the Judicial and the Administrative Magistracies (the disciplinary bodies for judges) to obtain replies from 11 (eleven) courts and the Administrative Tribunal, for subsequent provision to citizens who have requested this information.

Furthermore, in his 2017 report, in the chapter on the implementation of the Freedom of Information Act, the Ombudsman notes that the duty to make the information available has not been promptly fulfilled, without him sending a note requesting the information. He adds:

“On the other hand, nowhere in the report of the Central Director for the National Archives System of the State is there any indication of the requests received, granted and, denied, even with the Ombudsman’s Office drawing attention to the need to correct this crass omission. Hence the Central Director for the National System of State Archives has clashed with the principle of legality, obedience to which necessarily implies the conformity of administrative action with the law – see article 4 of the Norms for the Operation of Public Administration Services, approved by Decree no. 30/2001, of 15 October”².

It must be recognized that there is an effort to make public information more accessible, but this effort fades into the culture of secrecy, fear and centralism installed in state institutions. For example, MAEFP and CEDIMO have developed annual awareness raising activities that include the production of campaign materials (brochures, leaflets, and CDs), as well as training the staff of public institutions on methods of proactive dissemination of information. As part of these actions, nine thousand leaflets on the Freedom of Information Law were produced and distributed in 2016, as well as 1,869 CDs containing the brochure on the Freedom of Information Act, Regulations, the Manual of Procedures and other leaflets on Public Administration legislation. In the same year, 10,900 leaflets were produced containing the contents of the Freedom of Information Act. Also, the Methodology for the Preparation of Classifiers of Classified Information of Activities was approved, a fundamental instrument for refusal of access to information to be based on the law. A total of 361 trainers were trained, who are responsible for the dissemination of the Freedom of Information Act at national level.³ And in 2019, five thousand leaflets containing information on access to information

¹ This is a public entity responsible for organizing the system ,documentation, registration, State archives and public administration information, with legal personality and administrative autonomy.

² See the Ombudsman’s 2017 Report. p.8, available at <http://www.provedor-justica.org.mz/>

³ Information also available at <http://www.cedimo.gov.mz/index.php/acesso-a-informacao/implementacao-da-lei-do-direito-a-informacao>

were printed and distributed by State institutions at all levels.

Since 2017, MAEFP has been leading the celebrations for International Access to Information Day, which is celebrated on 29 September each year. The event, jointly organised with civil society, has been the watchword for bringing together hundreds of public officials to discuss access to information.

Likewise, according to the Ombudsman's report of 2017, in 2016, the Minister of State Administration and the Public Service sent letter no. 266/MAEFP/GM/024.11/2016, which exhorts the leadership of all bodies, ministries and local State bodies, on the need to comply with the law, particularly in the proactive dissemination of information of public interest.

In 2019, CEDIMO trained, in partnership with MISA Mozambique, and support from Oxfam IBIS, about 70 website managers at all levels. Within the same partnership, web pages were designed and improved and Content Management managers of State and public institutions were trained.

As can be attested, there is a considerable effort by the Government to raise awareness and train managers on the need to render information available. However, between the effort and the desired reality there is a great distance.

The courts are faced with a shortage of human resources to respond to a greater demand for processes, in addition to a limited presence at the provincial level. As an example, the Administrative Tribunal, which must decide on challenges to rejected requests, only exists in the provincial capitals, which limits the ability of people in the districts, who are unable to pay procedural costs to gain access to the Tribunal.

3.3 Independence

In the context of implementation of the Freedom of Information Act, CEDIMO has the role of disseminating and coordinating actions to implement this law and other complementary legislation (Article 4, Decree No. 20/2017). It is responsible for promoting and supervising the fulfilment of the obligation to publicise the law (article 5)¹. CEDIMO is an entity subordinate to MAEFP. Its budget is defined by the government and it has no financial autonomy.

CEDIMO works with two bodies: the Board of Directors with management functions and the Technical Council with advisory functions. These bodies are appointed on the basis of political trust by the supervising Ministry. Although it formally enjoys administrative autonomy, in practical terms this autonomy is a great challenge

The Administrative Tribunal is given the role of overseeing legality, and it is up to this institution to decide on judicial impugnation of rejected requests (Decree 34/2014, article 33). The independence of the Courts and their judges is established by the Constitution, which states that "in the exercise of their functions, judges are independent and only owe obedience to the law". It also guarantees that they are immovable, and they may not be transferred, retired or dismissed, except in situations provided for by law (article 216, Constitution of the Republic).

Although formally the Constitution of the Republic establishes the principle of separation of powers, materially, the judiciary depends financially on what the Executive power is willing to make available, during the budgeting process. As Osvalda Joana, an advisory judge to the Supreme Court, states, "during the execution of the budgets allocated to the courts, the Executive is the one which decides on whether or not to disburse funds to meet the expenses of its operations," with the actions of the courts being conditioned by the Executive. Financial independence is, therefore, one of the central conditions for the courts to function independently of the executive power.

Another conditioning factor is the way in which the Presiding Judge of the Administrative Tribunal is appointed, which does not protect him from possible influence and pressure from the Executive, since the appointment can be based on political trust.

¹ See Decree No. 20/2017 of May 22, which redefines the nature, powers and responsibilities of CEDIMO. Accessible at <http://www.cedimo.gov.mz/index.php/o-cedimo/atribuicoes-e-competencias-do-cedimo>

The report of the European Union Observers (2020) also refers to the lack of independence of the courts in the following terms: “The electoral process took place in a polarized and complex environment in which cross-party violence and mistrust were prevalent, as well as a lack of confidence in the ability of the electoral administration and judicial bodies to be independent and free from political influence.”¹

3.4 Transparency

CEDIMO is a public sector body. In this context, the public sector has a mechanism to guarantee transparency. Its accounts are subject to the scrutiny of, above all, the Administrative Tribunal and the General Inspectorate of Finance. Transparency is also guaranteed by the Law of Public Probity (Law No. 16/2012 of 14 August) and also by the Freedom of Information Act (Law No. 34/2014 of 31 December) and its regulations.

The Freedom of Information Act and its respective regulation establish the mechanisms for access to information by the public and the proactive availability of information by public entities. CEDIMO has a website² with various categories of information, such as Documents and State Archives, Access to Information, Planning and Cooperation, Administration and Finance, Human Resources, UGEA, among others. It should be noted that the website has been redesigned to meet the implementation of the Freedom of Information Act. However, some of the categories contain little or no information, and some of it is quite old. As an example, the UGEA category includes the following sub-categories: public procurement plan and budget, public contracts in effect, public tenders, award notices, and award minutes (see the table below).

Table of Documents Published by CEDIMO 2015-2020

Sub-categories	Number of published documents	Type of document	Year of update
Public Procurement Plan and Budget	2	Hiring Plan - 2016; 2020 Hiring Plan	2016, 2020*
Public contracts in force	3	Public Contracts in force - June 2016; contracts executed in 2018; contracts executed in 2019	2016, 2018*, 2019*
Public Bidding	0	0	0
Announcements of Adjudication	1	Announcement of Award of Competitions 1, 2 and 3 of 2016	2016
Adjudication Minutes	0	0	0

* Documents not available

As can be observed, the documents that are generally contested due to the lack of transparency in their decision-making processes, such as contracts, tenders, award notices and award minutes, defined by the Freedom of Information Act as public, are not published by the fundamental entity in the implementation and monitoring of implementation of the law. Some appear as published, but are not available, which does not contradict article 5, no. 2 of Decree no. 20/2017, of May 22, which redefines the nature, duties and powers of CEDIMO, as well as the Act that is the object of CEDIMO implementation.

The Administrative Tribunal, another body responsible for ensuring access to information, is divided into 3 sections,

¹ Electoral Observation Mission (2019, p. 12). Final Report on the General and Provincial Assembly Elections 15 October 2019. Maputo: European Union.

² <http://www.cedimo.gov.mz/index.php>

namely the 1st Section, responsible for administrative litigation, consisting of three judges; the 2nd Section, which deals with Tax and Customs Litigation; and the 3rd Section responsible for overseeing public revenue and expenditure. This section consists of 12 judges, distributed by decision of the Presiding Judge of the Administrative Tribunal, according to the procedural movement, one of them being the President of the Section.

The rulings of the Administrative Tribunal are public. They are published on its website (www.ta.gov.mz).¹ A total of 2116 rulings of the 1st and 2nd sections had been published, by 10 February 2020. These include rulings on appeals submitted by civil society contesting the refusal by state bodies to release information of public interest. Also published are the Opinions of the Administrative Tribunal on the General State Account, by the 3rd Section, which oversees public revenue and expenditure.

Also available on the same website are the State's General Accounts, resulting from the supervision of the execution of the budget of public and State bodies. However, there is no information on the management and functioning of the Administrative Tribunal itself. The Administrative Tribunal is, alongside the Constitutional Council, the Supreme Court, and the Attorney General's Office, among the bodies with powers to authorize: a) the redistribution of budget appropriations of the respective bodies and institutions, within each of the aggregated groups of expenditure, of the same activity of operating expenditure, provided that the activity is under its management; b) the transfer of budget appropriations between activities or between projects entered in the State Budget, in duly substantiated cases, including with regard to changes in planned results, provided that the activities or projects are under its management; and c) the redistribution of appropriations between the items of the same project of the internal component of investment expenditure of the respective level².

Like CEDIMO, the Administrative Tribunal does not publish on its website processes that are usually contested, due to lack of transparency in the decision making process, and those submitted for obtaining a "Visa" or prior authorisation by the Administrative Tribunal, or relevant documents or contracts that the Tribunal has initialled with other entities, as established in article 3 of the Freedom of Information Act.

An audit of the Administrative Tribunal's 2012 accounts, carried out by the donors, found that this institution was the protagonist of a violation of the Regulations on Public Works Contracts, and the Supply of Goods and Provision of Services to the State; it had made a problematic contracting of services from the company Linhas Aéreas de Moçambique, EP (LAM); had paid irregular monthly allowances to top employees, amounting to 2,380,294.00 MT, to assist external consultants; its employees benefited from a monthly amount for mobile internet services that was not regulated, and some magistrates and employees exceeded the limit to a total of 746,082.00 MT; and had made advance payments to suppliers, among other irregularities³.

CEDIMO is an entity that supervises implementation of the Freedom of Information Act, but without any legal force to impose on public and State entities the obligation to make information available to citizens or to publish it on their websites. But it can give an opinion on whether or not certain information requested by the citizen or private entity can be made available, if an institution holding the requested information requests it. It is the Administrative Tribunal that has the task of imposing the availability of information. However, it should be noted that between the implementing entity and the one that has the power to enforce the law, there is no channel of interaction. There is no work done between the two institutions in order to coordinate actions to access information successfully.

1 See all the rulings published in <https://www.ta.gov.mz/Pages/Jurisprudencia.aspx>

2 See Circular No. 2 of May 13, 2018 of the Ministry of Finance. Accessible at http://www.ufsa.gov.mz/query/Baixar_documento.php?nome=Circular%20de%20Adm.%20e%20Exec.%20Orcamento%20do%20Estado%202018

3 Nuvunga, Adriano (2013). Administrative Court: the guardian of the legality of public accounts wrapped in illegalities. Maputo: CIP Newsletter. Available at <https://cipmoz.org/2013/08/11/tribunal-administrativo-o-guardia%CC%83o-da-legalidade-das-contas-publicas-envolto-em-illegalidades/>

3.5 Accountability

The Administrative Tribunal is the highest body in the hierarchy of the provincial and Maputo city administrative tribunals, the tax courts and the customs courts. Under Article 24 of Law No. 7/2015 of 6 October, the Administrative Tribunal operates in plenary, in sections and in sub-sections. The Provincial and City Administrative Tribunals can only decide validly in the presence of three quarters of their judges (Article 46). In turn, Law No. 24/2013 of 1 November, states that the Administrative Tribunal can only function in plenary with the presence of 50 per cent plus one of the Judge-Councillors (article 24)¹. There is legislation that establishes the guidelines for the action of the Administrative Tribunal and its judges, such as Law No. 7/2015 of 6 October (Organic Law of the Administrative Jurisdiction), the Statute of Judicial Magistrates. Likewise, the Anti-Corruption Law and the Law on Public Probity contain provisions that prevent public servants from receiving bribes.

The Anti-Corruption Law and the Public Probity Law apply to all public employees and managers. CEDIMO, in addition to these two instruments, must be accountable not only to the supervising Ministry, but is also audited by the Inspectorate of Finance and the Administrative Tribunal.

3.6 Integrity

The Law on Public Probity and the anti-corruption legislation were established precisely not only to prevent acts of corruption, but also to guarantee the integrity of public institutions and their employees.

The integrity of court judges is guaranteed by the Constitution when it states that “in the exercise of their functions, judges are independent and only owe obedience to the law. It also guarantees that they are immovable, and they cannot be transferred, retired or dismissed, except in situations provided for by law (article 216, Constitution of the Republic). Nevertheless, the decisions of the judges of the Administrative Tribunal show, in some cases, according to a note from Civil Society, a “lack of the impartiality, objectivity and legal rigor that should characterize it, as the law requires”².

The note from civil society comes after the Administrative Tribunal refused appeals against the denial of information requested from public bodies, namely the Ministry of the Interior, the Ministry of Health and the Ministry of Land, Environment and Rural Development. Relevant information of public interest had been requested, but the Administrative Tribunal alleged that there is no adequate administrative or litigious procedure to protect the interests for which the request was intended. According to the Administrative Tribunal, “recourse to the procedural means provided for in articles 144 and following requires that a fear of violation of a fundamental right has been founded in the face of action or inaction by the administration, so that the Public Prosecution Service or any person whose interest in the violation causes an offense worthy of judicial protection may request (...) that he or she engage in conduct or abstain from conduct in order to ensure, respectively, compliance with the rules or duties in question or respect for the exercise of the right. That is, for the Administrative Tribunal, it is not enough to request information if there is evidence that some right is being violated or may soon be violated”³.

For the Administrative Tribunal, the right to information obeys the mechanisms defined in article 106 et seq. of the Law Regulating the Procedures Related to Litigious Administrative Processes, which determines that “in order to allow the use of administrative or contentious means or the right of access to information, the competent administrative authorities must provide consultation of documents or files and issue certificates, at the request of the interested

¹ See in <https://www.ta.gov.mz/Legislacao/Leis/Lei%20n.%C2%BA%207-2015.%20de%206%20de%20Outubro.pdf>.

² Sekelekani et al (2020). Monitoring Report on the Implementation of Law 35/14 of 30 October 2014 (2020). Maputo: Mozambique Bar Association (OAM), Sekelekani, MISA Mozambique and Observatory of Rural Environment.

³ See Ruling No. 2/2018 - Process n°176/2017- 1^a (p.6).

party or the Public Prosecution Service, within ten days, except in the case of secret or confidential matters”. It adds: “According to paragraph 3 of the same article, the purpose for which documents or files are to be consulted must be stated in the respective applications”.

In this context, unless otherwise understood, it is useless to request the Administrative Tribunal to overturn denial of the request for information, without a) justifying its relevance on the basis of evidence of violation or imminent violation of fundamental rights, and b) indicating the purpose for which the information is intended. This argument poses serious challenges to access to information, given that the Freedom of Information Act only refers, in its principles, to the “public interest”, that is, that “Every citizen has the right to request and receive information of public interest” (article 14) and that the citizen is exempt from indicating “the purpose for which the information is intended, except for the restrictions provided for in this Law and other legislation”, nor does the citizen need to “demonstrate a legitimate and direct interest in its access” (article 10, no. 2).

For those civil society organizations, “the Administrative Tribunal is, in a way, helping and encouraging public entities not to make available information of public interest, which does not constitute a State secret or classified material.”¹

They also point out that the refusal to provide information of public interest reveals that the culture of secrecy around matters of general interest still prevails in public institutions. They emphasize that it is remarkable that the culture of closure and/or of secrecy is maintained and cultivated, even when it goes against the Constitution and the Freedom of Information Act. The report adds, “the Administrative Court, at least at the level of the First Section and the Plenary, is taking a stance to nurture this culture of closure of information of public interest by interpreting the Freedom of Information Act and the Law Regulating the Procedures Related to Litigious Administrative Processes sometimes in the sense of dismissing judicial proceedings brought by the non-governmental organizations concerned, allegedly because the procedural means used are not adequate, or because the Tribunal will not make any decision on cases already processed.”²

For civil society, the information requests submitted to public entities also showed the lack of technical and organizational readiness of the relevant institutions to respond to requests for information within the legal deadlines³.

In part, this problem noted by civil society organizations may be the result of political control over the justice system through the budgetary process and the appointment of the Court structures mentioned above. The obvious case is that of the hidden debts, in which the Administrative Tribunal took an eternity to advance the process, which is likely to culminate in the financial accountability of public managers and State-owned companies, on the grounds that it was “a complex and sinuous process”.

3.7 Impunity and Bureaucracy, Incentives for Denying Information

While CEDIMO monitors implementation, without being able to enforce the law on those who deny requests, the Administrative Tribunal is an entity that guarantees legality, and may oblige the holders of information to make it available to applicants. However, there are few cases reported (judged by the rulings produced) in which citizens have resorted to the Administrative Tribunal since the law came into force. Some of the most likely factors that discourage citizens from appealing are 1) the bureaucratisation of the process and the waiting time, 2) the costs of impugnation and 3) the low level of schooling. Regarding the first factor, it should be noted that the citizen must wait 21 days, the maximum time limit for the official to provide information. At the end of this period, the applicant follows a process

1 Sekelekani et al (2020). Monitoring Report on the Implementation of Law 35/14 of 30 October 2014 (2020). Maputo: Mozambique Bar Association (OAM), Sekelekani, MISA Mozambique and Observatory of Rural Environment.

2 Sekelekani et al (2020). Monitoring Report on the Implementation of Law 35/14 of 30 October 2014 (2020). Maputo: Mozambique Bar Association (OAM), Sekelekani, MISA Mozambique and Observatory of Rural Environment.

3 Ibid

that can take at least six months. The rejection decision can be challenged by the applicant through the following procedures: a) Appeal to the same officer who took the decision, within five days, from the date of notification; b) Challenge by appeal to a hierarchical superior, within ninety days, from the date of notification of the rejection; c) The hierarchical appeal must be decided within fifteen days, from the date of its reception; d) the decision on the hierarchical appeal must be preceded by an opinion from the Document Evaluation Commission of the respective body or institution, which must include its legal grounds and; e) the document evaluation commissions have five days to produce the opinion referred to in the previous paragraph.

As can be seen, this process of impugnation, within the hierarchy of the public administration, may take about six months to be decided. That is, 136 days, in case there is no celerity (Decree n° 34/2014, articles 34 and 34).

If the option is the judicial impugnation by the Administrative Tribunal (without stipulated deadlines to decide), the process may take between four months and more than one year, for the citizen to have the answer, as we can prove from the judicial impugnation carried out by the Mozambique Bar Association, Sekelekani, MISA and the Rural Environment Organization. The application was submitted to the Administrative Tribunal on 13 June 2017 and the ruling was issued on 19 September 2018, one year, three months and six days later (463 days)¹.

Another example is Case No. 176/2017 – First submitted on 13 June of the same year, and with the ruling dated March 20, 2018. It took 10 months and seven days for the organizations to have the decision, also unfavourable, of the TA².

The fastest ruling was case n° 164/2017, 1st, which only took four months and 11 days³.

In these judgments, civil society organizations not only waited a long time for decisions, but also saw their appeals dismissed, and were forced to pay costs, ranging from 4,000 to 5,000 meticaís.

Another factor that probably prevents citizens from contesting the decisions may be related to the costs of waiting a long time for a response, the preparation of the application to submit to the bodies defined as responsible for guaranteeing access to information, and the costs inherent to this. Both hierarchical and judicial appeals require the citizen to spend time and some amount of money, to send or transport the case, from where it is located, to the appeal instances. Administrative Tribunals only exist in the provincial capitals, as well as provincial directorates for cases of requests made in districts, administrative posts or localities. Sometimes, it is the citizen himself who must personally take the process from his district to the provincial capital.

These factors probably end up discouraging citizens from appealing to higher authorities whenever their requests are rejected.

Although it is not enough, the introduction of severe sanctions and clear structures of staff accountability in the event of a refusal to provide information may be a way to change the status quo. In other countries, such as South Africa, Kenya, or India, proof of deliberate denial of the provision of information requested by the citizen may lead to sanctions against the official concerned.

¹See the ruling of the Administrative Court, Case No. 177/2017 - 1st, to the judicial challenge submitted by Sekelekani, MISA Mozambique, Mozambique Bar Association and Rural Environment Organization (OMR), accessible here: <https://www.ta.gov.mz/Jurisprudencia/Jurisprud%C3%Aancia/Ac%C3%B3rd%C3%A3os/1.%C2%AA%20Sec%C3%A7%C3%A3o%20-%20Contencioso%20Administrativo/2018/Ac%C3%B3rd%C3%A3o%20n.%C2%BA%2090-2018%20-%20Processo%20n.%C2%BA%20177-2017-Ordem%20dos%20Advogados%20de%20Mo%C3%A7ambique.%20Sekelekani,Misa,Observat%C3%B3rio%20Rural.pdf>

² See Ruling No. 2/2018 - Case No. 176/2017- 1st, of the Administrative Court on a legal challenge by some civil society organizations, in <https://www.ta.gov.mz/Jurisprudencia/Jurisprud%C3%Aancia/Ac%C3%B3rd%C3%A3os/1.%C2%AA%20Sec%C3%A7%C3%A3o%20-%20Contencioso%20Administrativo/2018/Ac%C3%B3rd%C3%A3o%20n.%C2%BA%2002-2018%20-%20Processo%20n.%C2%BA%20176-2017%20-%20Ordem%20dos%20Advogados%20de%20Mo%C3%A7ambique.pdf>

³ See Ruling no. 108/2017, Case no. 164/2017- 1^a of Administrative Court, of October 24th, 2017. Available at www.ta.gov.mz

In Mozambique, the Freedom of Information Act (Article 15) does not clearly define the sanctions applicable to a State employee or agent who intentionally does not provide information to the applicant. Likewise, the sanctions for institutional leaders who, having received the request, have not guided their subordinates to grant information to citizens are not clear. The law only establishes that the refusal to provide information, consultation or passage of documents, must be based on legal exceptions and restrictions. The applicable sanctions, contained in the General Statute for Public Servants, are not sufficient, and there is a need to institute others that may involve fines, imprisonment or even removal from office, in the case of officials.

Since the law came into force, it is estimated that civil society organizations such as MISA Mozambique, Sekelekani, the Mozambique Bar Association, OMR, CIP, among others, have made tens of hundreds of requests, most of which were rejected or not answered. However, no sanctions have been applied to officials or officers who have refused to provide the information.

In short, the Freedom of Information Act in Mozambique is still not producing the results expected five years after it came into force. Several factors are determinant in this, including the culture of fear and secrecy that is maintained to this day, coupled with the lack of readiness and technical capacity of institutions to provide information of public interest.

3.8 Political Control of the Media and Access to Information

RGIM 2013 recommended that 1) the mechanisms for appointing the Chairpersons of the Boards of Directors of public radio and television stations, namely Rádio Moçambique (RM) and Televisão de Moçambique (TVM), should be changed in order to make a public tender for curriculum evaluation compulsory. The current model for appointing directors and financing public bodies allows them to be dependent on the executive power, which uses them for propaganda acts.

Another problem is the absence of a regulatory body in the media, which leads the Mozambique Information Office (GABINFO) to run the regulation and licensing of the media and all activity, which creates conditions for undesired government intervention to restrict press freedom.

The media play an important role in the context of democratic consolidation. They “have an obligation to provide relevant information, analyse it and, in addition, present substantive opinions to the public, while serving as a platform for debate and discussion. The media must also fulfil their oversight role, promoting transparency so that electoral fraud is avoided”¹.

Control over the press, which now includes kidnappings and brutal attacks on journalists and political commentators, and threats against and arrests of journalists, has increased, limiting press freedom and access to information. Between 2017 and 2018, some 50 cases of press freedom violations have been reported². In 2013, a list of 40 individuals, previously selected, was published to participate in all programs of debates in public and private news media³. Some of them have subsequently been appointed to the editorial boards of Mozambique’s main news media agencies and to various bodies of justice, such as the Higher Council of the Judicial Magistracy (CSMJ) and the Higher Council of the Administrative Magistracy (CSMJA).

The latest Freedom House study demonstrates that anti-democratic leaders in fragile democracies have introduced a

1 See “Guidelines for Electoral Media Coverage in the SADC Region”, Johannesburg, 26 September 2012, Conference on Social Communication and Elections, organized by MISA.

2 MISA (2019). Report on the State of Freedom of Press and Expression in Mozambique 2018. Maputo: MISA-Mozambique

3 See the list at <https://ambicanos.blogspot.com/2015/04/lista-do-famoso-g40.html> e https://macua.blogs.com/moambique_para_todos/2014/08/g40-toma-de-assalto-%C3%B3rg%C3%A3os-das-magistraturas-judicial-e-administrativa.html

new Toolbox to try to control the media, which includes economic, legal, and extra-legal measures, to silence critical journalists and strengthen news outlets conducive to the power of the day¹.

According to this study, the use of financial and economic pressure is an effective means of co-opting markets. The advantage of this technique is that it takes advantage of the evolution of the media business model, which has left many points of sale without money. Occasionally, governments pass laws and regulations to intimidate or interfere with journalists' work, or to take resources away from them.

In Mozambique, the tools for media control include commercial agreements, injection of advertising, and purchase of space for governance activities and acquisition of shares in some media outlets. As recommended by the last RGIM, it is urgent to define mechanisms for financing and appointing the leaders of public media outlets, but also the mechanisms for distributing advertising from public institutions to public and private media outlets, in order to ensure their sustainability and independence.

The other tactic used is the approval of legislation that aims to control and suffocate the media and their journalists. On 24 July 2018, for example, the government approved, without any consultation with media houses, Decree No. 40/2018 of 23 July². This decree reinforces the anti-democratic laws that have not yet been revoked and that violate freedom of expression, freedom of the press and the right to information, namely Law no. 12/79 (State Secrecy Law) and Law no. 19/91 (which considers defamation of the President of the Republic, ministers, general secretaries of political parties, etc. as a crime against State security).

The Decree not only violates a number of fundamental rights such as Freedom of the Press, of Expression and the Right to Information, but can also lead to the bankruptcy of most of the media, with greater gravity for the community media, which has served as the voice of the people and, in many cases, the only means of information available in the area. This situation can cause unemployment for hundreds of journalists, including national and foreign press correspondents, who have this activity as their only source of income, in addition to depriving communities of access to information³.

Likewise, according to Freedom House, authoritarian governments resort to extra-judicial instruments to silence the press, such as harassment, allowing those who threaten journalists to go unpunished, defaming journalists by individuals hired to threaten and defame, and politicising the appointment of public media leaders, among other measures. Over the past five years, this phenomenon has been widely reported in Mozambique, including kidnappings and assaults of journalists and political analysts, including Ericino de Salema and José Jaime Macuane. The arrests of journalists such as Estácio Valoi, Amade Abubakar and Germano Adriano and Amnesty International researcher David Matsinhe are also reported.

The problem in Mozambique is not the absence of legislation that prevents the full functioning of the NIS, but defective and sometimes non-existent implementation, all derived from the political control of the executive over the instances responsible for the implementation and supervision of the actors in the public administration.

In general, both the media and the judiciary, as well as civil society, operate in an atmosphere of authoritarian rule and under strong political control of the authoritarian party. The increase in authoritarianism, which has been taking

1 VerCsaky, Zselyke (2019:16). A New Toolbox for Media Cooptation. Washington, DC/New York: Freedom House. Available at https://freedom-house.org/sites/default/files/FINAL07162019_Freedom_And_The_Media_2019_Report.pdf

2 Decree 40/2018, of 23 July, establishes the licensing, renewal, registration, advertising inserts by the print, radio and television services, including digital platforms, as well as the accreditation of journalists and national correspondents, foreign and autonomous employees in Mozambique. You can access at https://www.open.ac.uk/technology/mozambique/sites/www.open.ac.uk.technology.mozambique/files/files/Decreto_40-18_GabInfo_Texas.pdf

3 See Press Freedom Report 2018, MISA Mozambique

place since 2015, according to the Democracy Index (2019), cannot be dissociated from the environment of endemic corruption in Mozambique. Where acts of corruption and organized crime, among other phenomena harmful to society, predominate, there is always a tendency for the actors involved to radicalize.

3.9 Recommendations

The Freedom of Information Act and its respective regulations are still far from producing the desired results. Institutions continue to violate the law by not providing the information or publishing it on their websites. A culture of fear and secrecy prevails in the institutions, which prevents them from sharing information of public interest. They also reveal a lack of technical and organizational preparation to respond to requests for information within the legal deadlines. We also noted the lack of articulation between CEDIMO (implementer) and the Administrative Tribunal (guarantor of legality).

Kidnappings, threats and aggression have increased the culture of fear in the media, which makes it impossible for the media to fulfil its role as watchdogs and disseminators of information of public interest. In this context, we recommend the functioning of the NIS based on coordinated and independent action from its component bodies and without political interference. In this context, it is fundamental to:

- a) Review the Freedom of Information Act in order to introduce new severe punitive measures for State officials and public servants who deny information to applicants, and to reduce the steps for appealing against the denial of information.
- b) Establish a clause obliging public bodies to publish documents on their administrative and financial management and sanctioning their managers for violating this clause.
- c) Article 106 et seq. and 144 of the Litigious Administrative Procedure Law (LAPL) should be reviewed or interpreted so that they are in harmony with article 10, No. 2 of the Freedom of Information Act, which 1) exempts the citizen from indicating the purpose for which the request for information is intended and that; 2) only the public interest prevails, without conditions that led to fear of violation of a fundamental right, in the face of action or inaction by the administration.
- d) A channel of interaction between CEDIMO and the Administrative Tribunal should be created for greater coordination and articulation of forces in the implementation of the Freedom of Information Act.
- e) All anti-democratic laws that violate freedom of expression, freedom of the press and the right to information, namely Law no. 12/79 (State Secrecy Law) and Law no. 19/91 (which considers defamation of the President of the Republic, ministers, general secretaries of political parties, etc. a crime against State security), should be repealed.
- f) The public media should be financed through Parliament and not through program contracts with the Government, in order to safeguard the editorial independence of their journalists, as well as for the purpose of reducing the levels of unpredictability in financial flows.
- g) The figure of information manager should be created in each entity, responsible for managing requests, and processing and making available information of public interest.
- h) Information managers and administrative magistrates should be trained on the Freedom of Information Act.

CHAPTER IV

4. Local Governance and Intergovernmental Relations

*By Nobre Canhanga**

Local Governance and Intergovernmental Relations are concepts that form the basis for analysing and understanding the organization of the State at local level and the mechanisms for the distribution of resources (power, money, goods and services), the existing capacities and opportunities for the representation of local elites in the political structure, as well as seeking to understand the coordination mechanisms established at the central levels of the State. In Mozambique, the complex institutional scenario of local governments is influenced by the historical, constitutional and structural process (the marks of a bureaucratic and centralized state inherited from Marxism Leninism, politico-military conflicts and a framework of institutional agreements founded on a rational basis of losses and gains) and by the tendencies of excessive control of central over local levels. Structuring factors resulting from deviant practices, such as corruption and fragile accountability, weaken the balance and the necessary adequacy in the income distribution system, aggravate local asymmetries and are the source of politico-military conflicts.

The analysis presented in this chapter is developed within a context marked by profound institutional transformations that occurred after 2015. The research methodology is brought from the indicators of the National Public Integrity System (SNI) that prioritises some reference indicators, including functions and resources, independence, transparency in the financial system, accountability and integrity of local governments and intergovernmental relations. Although these indicators have been the object of macro-political analysis, here they have been adjusted to understand the dynamics of Local Governance and Intergovernmental Relations. These indicators were evaluated based on a methodology that assigns a minimum score of 1 point and a maximum of 5 points. In cases where, at the various decentralised levels, there are no favourable formal and informal mechanisms for Local Governance and Intergovernmental Relations, the SNI assigns a minimum score of 1 point. In cases where such mechanisms exist and are not in operation, the National Integrity System assigns a median score of 3 points. A score of 5 is assigned in cases where formal instruments exist and are being implemented in favour of Local Governance and Intergovernmental Relations. In the domain of Local Governance and Intergovernmental Relations, the overall analysis we have done of those indicators places Mozambique in a middle position. This position stems from the fact that, in the period under analysis, the country has advanced with profound institutional changes that have changed the functional structure of local governments. However, the efficiency and effectiveness of institutional reforms, and how applicable they may be, are challenges which could take some time.

4.1 Function and Resources

The legal framework on Local Governance and Intergovernmental Relations is enshrined in the Constitution and other normative instruments. Among the main functions legally assigned to decentralised bodies, the most important are those in the economic area: trade-industry, agriculture-fisheries-livestock-forestry, hospitality-tourism, public transport and roads-bridges that correspond to local, provincial and district interests. The functions of social areas are: primary health care; primary, general and technical-vocational education; water and sanitation, housing, culture and sport, food security and nutrition; land management, protection of the environment, preventing and combating natural disasters, among others defined and limited by law. However, a study presented by the National Association of Municipalities (ANAMM, 2016) showed that, in the municipalities, not all services described by law were provided

with the corresponding resources for the decentralised actors to function. This limits the decentralised bodies to the following functions: organisation and construction of markets; licensing of local economic activities; management of municipal land, including land use licenses (DUAT and construction licenses); construction and maintenance of local roads; solid waste management; municipal police and cemetery management. Only in exceptional cases do municipalities participate in the management of water supply, urban electrification, basic health services and primary education.

The above shows that the levels of autonomy attributed to decentralised bodies remain a challenge resulting from the inertia of central bodies that resist the transfer of functions, powers and resources to the meso and micro levels of the State administration. In addition to the municipalities, the impact on the provision of district services remains limited, given the lack of institutional autonomy worsened by the weak structure of the tax base and the availability of investments at their disposal. The central state and public companies, through local delegated agencies, retain the responsibility for providing public services through decentralised and deconcentrated units of territorial administration. The degree of decentralisation of functions and resources remains very low. Hence, another piece of research on public expenditure concludes that, although district governments have explicit roles in providing local services in education, health, water and sanitation, solid waste management, agriculture and rural development, the services provided are at a basic or almost non-existent level because the districts are located mainly in rural areas and lack resources. Most of the deconcentrated expenses are allocated to current costs: staff expenses, purchase of fuel, goods and services and few are channelled to capital costs (BM 2014: 112).

At municipal level, the Municipal Tax Code defines the following sources that form the basis for municipal taxation or own revenue: Personal Municipal Tax (IPA), Municipal Property Tax (IPRA), Municipal Tax on Vehicles (IAV), Municipal Sisa (IASISA), Contribution for Improvements. Non-tax revenue sources are also defined, such as: License Fees; Fees for Economic Activities (TAE); Municipal Fees for DUAT and Annual Fees paid for land use. In addition to these sources of funds, the Municipal Compensation Fund (FCA), the Municipal Initiative Investment Fund (FIIA), the Road Fund and the Strategic Urban Poverty Reduction Programme (PERPU), are some of the intergovernmental transfers allocated by the Central Government to the municipalities.

However, the levels of intergovernmental transfers face structural challenges. Only on two occasions (2008 and 2011) did the municipalities receive the total percentage of FCA transfers to which they were entitled. In all, total transfers from FCA and FIIA correspond to a maximum of 2.3% of national tax revenue. Taking into account the total Mozambican budget, that is, the national tax revenue plus budget support from Public Development Aid, the percentage transferred to the municipalities would be lower (around 1% in the case of FCA). PERPU, although transferred through e-SISTAFE, does not represent a conditional fiscal allocation that benefits the municipal budget. The challenges to manage PERPU properly are the same as in the case of the District Development Fund. The average annual growth rates for all municipal allocations were in double digits, except for Transfers for Investments in Infrastructure, defined to cover additional capital transfers to the FIIA and including the Road Fund.

From the point of view of the municipal response capacity to the challenge of increasing the demand for public infrastructure and services, due to the high rate of urbanisation, this trend remains worrying. Compared to other contexts, this puts Mozambique on an equal footing with Burkina Faso, but not with its peers in the region and East Africa where local governments enjoy a considerably larger share of national spending. See some cases: Botswana: <10%; Ethiopia: 40%; Tanzania: 27%, Uganda: > 40% (Dickovick & Riedl, 2014).

For the Mozambican case, intergovernmental transfers deteriorated from 2015, when there was a drastic drop in transfers of all categories, due to the fiscal and economic crises that the country faced caused by odious debts and the economic recession. However, at the moment, with the exception of GIZ, through its Good Financial Governance

program and the Kreditanstalt für Wiederaufbau (KfW), several international partners are exploring the possibility of returning support to decentralisation in Mozambique. The current context of COVID-19 imposes financial challenges that will impact the dynamics of how the national economy functions, with a greater effect on the various sectors of local development. This context will have a negative impact on the capacity of local actors to mobilize resources for investment and current or operating expenses, at decentralised levels. This unfavourable context is becoming worse as the outcome of the problem of odious debts, not declared by the State to its development partners, remains open and unpredictable, contributing to the uncertainties regarding the resumption of support to the country.

4.2 Independence

The constitutional and legal framework approved for the functioning of Local Governance and Intergovernmental Relations provides for a democratic model for the separation of the decision-making powers (exercised by the Provincial and Municipal Assemblies), from the bodies of executive power (exercised by the Provincial Governors and the Mayors). The decision-making bodies are elected by universal, direct, equal, secret, personal, periodic suffrage and in accordance with the principle of proportional representation. They have a five year term of office. From the political and administrative point of view, those bodies have the responsibility to take decisions within the scope of their provincial governance duties, to oversee the activities of decentralised governance and to approve the management instruments: namely, the Annual Activity Plan and Budget (PAO) and the province and municipality annual accounts, as well as preparing and approving the statutes, rules and regulations that define the interaction between the government and citizens. The provincial and municipal executive bodies are responsible for implementing the governance program approved by the respective Assemblies, Provincial or Municipal. The composition, organization, functioning and other powers of decision making bodies are established by law.

The most recent reforms in the normative framework relaunched the debate on political and administrative independence, of Provincial Governors and of Mayors, and the intergovernmental relations at the various levels of the State. According to the Constitution, the Provincial Governor and the Mayor are the Head of the List of candidates of the political party or coalition of political parties or group of citizen voters which obtain a majority of votes in the elections for the Provincial or Municipal Assembly. In essence, the legislation defines the limits of intergovernmental relations between bodies at the central level and the State administration with Local Authorities, and safeguards the principle of independence between the various bodies created in the context of the reforms that took place under decentralisation. However, the constitutional and normative provision stresses the role of the Provincial and Municipal Assemblies, reducing the importance and independence of the executive powers represented by the Provincial Governor and the Mayor. The new organizational structure opens space for a strong dependence and party-political control over executive bodies at decentralised levels of the State.

In addition to the endogenous analysis on independence in Local Governance and Intergovernmental Relations, this issue can be debated in an exogenous dimension, within the Legal Framework of State Tutelage over the Provincial and Local Government Decentralised Governance Bodies. Under this point, the procedure for sacking a Mayor and the scale of independence of the various actors involved are analysed. Initially, it is up to the Council of Ministers to sack members of the Assembly and members of municipal bodies. With this normative command, enshrined within the scope of the State's tutelage, the decentralised bodies are placed in a situation of dependence on the Central Government. However, the legislator alleviates this dependence by providing that the decision of the Council of Ministers is open to challenge at the Plenary of the Administrative Tribunal by the Mayor or member of the Municipal Council concerned. Thus, the administrative body, to whom the contentious appeal must be submitted, and in the event of loss of office, is the Plenary of the Administrative Tribunal, with the hypothetical possibility that the Decree of the

Council of Ministers may be annulled by the Tribunal Plenary. In addition to the stabilising and balancing role of the Administrative Tribunal, in the relationship of dependency between decentralised governance bodies and the Central Government, the legislator assigned a determinant role to the Constitutional Council. To this end, it appears that, once the dissolution of the Municipal Assembly has been validated by the Administrative Tribunal, the Council of Ministers must decide on the holding of elections within 120 days, counted from the date of notification of the Constitutional Council ruling. However, to strengthen the notion of separation of the Executive and Legislative powers, the legal framework establishes that if the Constitutional Council rejects dissolution, this implies that the Municipal Assembly resumes functioning. Thus, the decision of the Council of Ministers and of the Administrative Tribunal would be annulled. This provision ensures the independence and separation of Deliberative (legislative), executive and judicial powers in the management of administrative litigation related to the Loss of Office of the holders of decentralized bodies.

Another point worth mentioning is that the Municipal Assembly may dismiss the Mayor for failure to comply with the municipal programme and poor management of the local authority. This assumption, “non-compliance with the municipal programme and poor management of the local authority”, and the consequent effect on the Loss of Office of the Mayor, is not consistent and is not in line with Law 6/2018 (Legal Framework for the Implementation of Local Authorities), which also defines the conditions for Loss of Office¹. Thus, a hypothetical Loss of Office, conditioned by the non-compliance with the Municipality Programme, would require the definition of precise indicators, clear measurement criteria, and predefined evaluation deadlines. The subjectivity of these criteria can be a risk factor for the stability of decentralised governance bodies. Therefore, it is necessary to clarify: when and how to measure the compliance and quality of the programmes of those bodies, and who does this task.

The previous paragraph looks at the issue of independence and the separation of powers under the Public Probity Law, when, in cases of violation of the public probity rules established by law, it is up to the courts to decide on the matter. Therefore, to separate the functions of the Executive/Government from the functions of the Judiciary, it is necessary to ensure that it is up to the Plenary of the Administrative Tribunal to declare cases of violation of the Public Probity rules established in the Law, thus taking this responsibility away from the Council of Ministers. In order to offer more independence to the procedure for loss of office, the Legal Framework for State Tutelage over the Provincial and Local Decentralised Governance Bodies should strengthen the argument that the Mayor loses his office if the violation of public probity rules is proven to the satisfaction of a court. This reconstruction of the article can: a) safeguard the democratic doctrine of separation and independence of executive, judicial and legislative powers; and b) prevent misinterpretations that make the holders of decentralised governance bodies vulnerable to political and partisan motivations.

As for the independence of decentralised bodies, the recent constitutional amendment approved a framework of normative instruments to regulate Local Governance and Intergovernmental Relations. Law 4/2019 of 31 May established the legal framework for the provincial decentralised governance bodies. Law 5/2019 of 31 May established the legal framework for State tutelage over the decentralised governing bodies of the provincial and local authorities. Law 6/2019 established the principles, rules of organization, powers and functioning of the executive body for provincial decentralised governance. The Ministry of State Administration and Public Service, under its powers, identified and redistributed the decentralised powers to the provincial levels. However, the interinstitutional relations

¹ Serious and willful violation of the Constitution of the Republic and other legislation applicable to municipal management; practice of acts that undermine national unity and the unitary nature of the State; violation of the rules of public probity established by law; responsibility for the non-performance by the municipality of the attributions referred to in article 8 of Law 6/2018; failure to submit for approval by the Municipal Assembly the proposals for plans and budget and other essential instruments for the functioning of the local authority; indebtedness above the limits legally authorised by the Municipal Council; personnel costs exceeding the limits stipulated in the Law; definitive conviction by a court of crimes punishable by a prison term for proven violation of budget and financial management rules; imprisonment for preventive or security measures; an incompatibility that was not declared and not corrected within 15 days after taking office (see Article 102 of Law 6/2018).

between the Provincial Governor and the Secretary of State in the Province are not clearly defined and create space for uncertainty and institutional conflicts. The overlap and role of the Secretary of State, appointed by the President of the Republic, over and above the democratically elected Governor of the Province, distorts the real sense of independence of the bodies of decentralisation and democratisation and challenges the integrity of the decentralisation reforms, distancing itself from the teleological principles that were present at the time of the debate on the recent constitutional amendments.

4.3 Local Governance and Intergovernmental Relations: Financial System and Transparency

The leitmotiv of the constitutional and normative reforms, carried out in the period under analysis, aimed at the establishment of optimal institutional arrangements that, in addition to safeguarding peace and political stability, allow a fair representation of local elites in State institutions and ensure an equitable distribution of public goods and services at local level. These teleological assumptions, which were present in the context of the constitutional amendment, refer to the scrutiny of the normative instruments intended to improve the management of existing public resources, allocated or transferred from the central levels to the meso and micro levels of the State administration. An analysis of the most recent regulatory framework for reforms in Local Governance and Intergovernmental Relations shows that the institutional and structuring transformations introduced under the new decentralisation model paid little attention to the necessary changes in the financial system. This is how, in the context of the Constitutional Amendment, a system of bifurcation of political decentralisation (local authorities) was established, with financial, administrative and patrimonial autonomy and administrative decentralisation (provinces and districts), with strong vertical subordination. This model did not favour the institutionalisation of a standardized administration with financial management systems that covered all local governments. Recently, the Law that defines the Financial and Assets Regime of Provincial Decentralised Governance Bodies was approved. The legal regime sets out the principles of financial, administrative and patrimonial autonomy for the Provincial Decentralised Governance Bodies. It also defines the spaces for coordination between the central and provincial levels as well as the issues of financial protection that are reflected in the Constitution. However, the Financial and Assets Regime of Provincial Decentralised Governance Bodies, recently approved, becomes subjective and complex when it does not define a formula for the transfer of the volumes of resources to be switched from central to provincial levels.

The framework of the financial structure was shaped along the lines of unitary regimes where economic doctrine provides for the establishment of uniform structures. For this reason, the management of activity plans and their respective budgets feeds back instruments at the macro level and is subject to multiple levels of political scrutiny (Provincial and Municipal Assemblies, Advisory Councils) and technical-legal-administrative scrutiny (Ministries of Financial Tutelage, Ministry of Economy and Finance and the Administrative Tutelage exercised by the Ministry of State Administration and Public Service). These institutions, traditionally intended to supervise the administrative and financial system, remained in the new form of financial decentralisation in Mozambique. However, in practice, the financial system within the structure of decentralised institutions, at the meso level (decentralised governance at the provincial level) and at the micro level (municipalities and districts), is complex. Its functioning denotes an effective absence of institutional leadership in matters related to local governance in the sense that decentralisation is institutionally exposed to multiple guidance commands and the central control of the State, which weakens the financial, administrative and patrimonial autonomy of local bodies.

In this structural framework of financial decentralisation, the political and administrative efficiency of the institutions of internal and external control have been the object of profound questions. To what extent can supervisory institutions work towards their noble objectives, without compromising the various levels of autonomy defined in the doctrine

and legal framework of decentralisation in Mozambique? In addition, to what extent do internal and external control institutions act within the financial system and allow for the increase, sharing/redistribution and control of revenues and optimise the allocation of public expenditure, ensuring the improvement of investments made available to local governments? In response to these challenging questions, some international cooperation partners (World Bank, Embassies of Denmark, Ireland, Sweden and Switzerland) funded studies to feed the design of a financial system applied to Local Governments. The results of the study showed the need to build a management model that safeguards the independence and autonomy of Local Governments. A conceptual model and a business model have recently been presented to international cooperation partners, provincial governments and municipal governments and it is expected that this will function as a financial management subsystem at decentralised levels of the state. Although the conceptual and business model is still waiting for the approval of the Council of Ministers and the National Assembly, its structure and composition bring together all the elements of the planning, budgeting, expenditure execution and accountability cycle. By the end of the current term of office (2019-2024), the financial subsystem is expected to be functioning in the 53 Mozambican municipalities¹. The model is also expected to be an instrument for enhancing transparency in the management of the public good and electronic transfers, increasing perspicuity in the management of public resources and quality in the distribution of urban goods and services, at the meso and micro levels of State administration. The intent of these objectives, in part, will depend on the identification, characterisation, resource management and consequent improvement in the collection and management of taxes and fees available at decentralised levels.

However, if on the one hand the institutionalisation of the financial subsystem favours transparency by modifying part of the administrative procedures permeable to deviations from the norm and ethics, at decentralised levels, on the other hand, the question arises about the impact of the functioning of a financial subsystem centrally controlled and its implications for the doctrine of protective decentralisation of greater autonomy at decentralised levels. To what extent can the functioning of a financial subsystem, centrally supervised by the Ministry of Economy and Finance, favour levels of financial autonomy without jeopardizing the objectives of decentralisation in Mozambique? For this reason, as mentioned in previous reports, the notion of administrative tutelage, which runs through all the normative instruments that govern the decentralisation process, should not be confused with the idea of hierarchical control and interference by central levels over local government.

The government approved Law No. 16/2019, which defines the Financial and Assets Regime for Provincial Decentralised Governance Bodies. The law is in line with the principles of the Constitutional Amendment approved in May 2018. It enunciates the principles of financial, administrative and patrimonial autonomy for the Provincial Decentralised Governance Bodies. It also defines the spaces for coordination between the central and provincial levels, as well as the issues of financial tutelage, enshrined in the Constitution. This law leaves open aspects that should be consolidated soon. For example, it does not draw up a formula for calculating the volume of resources to be transferred from central to provincial level. At the provincial level there are different categories of investments, some of a local, national and even international nature. However, the financial regime defines the powers of the Provincial Decentralised Governance Bodies in the collection of fees for licenses granted, in the provision of services and others. It is not clear whether the Provincial Decentralised Governance Bodies, in addition to charging licenses for Small and Medium investments, can also collect revenues from Mega-investments. It is also not clear who is responsible for charging fees for licenses granted. There is a lack of clarity about administrative and financial autonomy in the Provincial Decentralised Governance Bodies. The Five-Year Plans of the Provincial Decentralised Governance Bodies are prepared based on national sector principles, policies, strategies and programmes. In this legal provision, there is no mention of the coordination of the Five-Year Plans with the priorities of each of the Provincial Decentralised Governance Bodies, which seems to contradict the doctrine and essence of decentralisation. If, on the one hand, the

¹ A pilot process is currently underway in the municipalities of Maputo, Matola and Boane. Its results will consolidate the model and allow it to expand to other subnational levels.

Plans of the Provincial Decentralised Governance Bodies are approved by the Provincial Assembly, on the other hand they must be ratified (validation, authentication and approval) by the Minister who oversees the areas of Planning and Finance. The lack of clarity about the concept of ratification can strengthen the central government's power of control over decentralised bodies and weaken the administrative and financial autonomy of the Provincial Governments. At this point, it becomes relevant to question the legal implications that may occur if the Minister does not ratify the province's Plan and budget.

4.4 Accountability in decentralisation

The debate around the issue of Local Governance and Intergovernmental Relations assesses the effectiveness of normative instruments favourable to the establishment of environments conducive to accountability and greater transparency in the management of the public good. In this case, public agents and civil servants must adjust and conform to conduct that is commonly accepted and validated within a framework of rules and public ethics. Combinations of the formal and informal dimensions determines effectiveness and efficiency in the management of existing resources at the decentralised levels of public administration.

In Mozambique, vertical accountability, at decentralised levels, is ensured through formal institutions, including the Administrative Tribunal (TA), the General Inspectorate of Finance (IGF), the Procurement Management Units (UGEA) and the Functional Procurement Supervision Unit (UFSA). Within the scope of its powers, the TA judges actions leading to litigation arising from legal-administrative relations at decentralised levels. To this end, the TA supervises the legality, coverage of public revenues and expenses of administrative acts and contracts subject to its jurisdiction. In cases of infringements, the actors involved are subject to a disciplinary, administrative or judicial action. In addition to the TA, UFSAs guarantee the supervision and implementation of regulations for the procurement and contracting of public goods and services and strengthen accountability mechanisms at decentralised levels. UFSAs are centrally supervised by the National Directorate of State Property. However, a recent study revealed that UFSA is less effective than necessary as a result of two combined factors: a) its organic incorporation into the central architecture of the MEF, which boosts interference in and dependence of decentralised entities; and b) strong political interference in the day-to-day management of the decentralised bodies, not allowing the effective accountability of deviant practices existing in various departments of the state's public sector and at the decentralised levels. To strengthen accountability and responsibility, state and government budget units have established Procurement Management Units (UGEA). They are responsible for the acquisition of goods and services, at central level (ministries, directorates, institutes, EPs), and at the meso (provinces) and micro levels (districts and municipalities). These bodies coordinate their activities and inform UFSA of all unethical practices detected in implementing public procurement codes and procedures for the acquisition of goods, services and supplies. A recent study confirms that in Mozambique there are less than 200 UGEAs at local (district and municipal) level. Despite the importance of UGEAs in seeking transparency and reinforcing accountability, their effect is still limited. On this subject, some studies denounce the involvement of agents of these organizations in corrupt practices, clientelism, nepotism and the capture of public contracts by the dominant elite. The widespread perception of these structural pathologies enlisted in local governments is reinforced in the annual reports of the Administrative Tribunal and in the Municipal Governance barometer that denounce recurrent cases of public officials, assigned to Local Governments, involved in deviant practices constituting a high fiduciary risk in decentralisation.

Outside the formal mechanisms, at the decentralised levels there are structures of social accountability, designed and implemented by civil society organizations, which establish coordinated initiatives and in articulation with different local groups and decentralised bodies. Examples of this are the Local Governance Monitoring Initiative, Social Accountability, the Municipal Barometer, the Citizen's Score Card and other existing initiatives that strengthen

public engagement and dialogue at local level, which are more favourable to transparency and accountability. Those initiatives have contributed to better governance at the decentralised level, resulting in civic engagement and transparency in the management of the public good. Initiatives of this nature, often little known, must be encouraged for two main reasons: first, because they ensure the establishment of strong and regular mechanisms for internal and external control and routine procedures for monitoring the quality of the financial and fiscal management practices of local governments; second, because they strengthen the accountability of local governments, removing opportunities to decentralise corruption, and capture by the elite and consequently boost the legitimacy of state institutions.

4.5 Local Governance and Integrity Control

The levels of integrity in decentralisation are assessed by the degree of alignment, adherence to values, principles and ethics that are ethically accepted and shared to defend the public and private interest (OECD, 2015). Integrity analysis, in Local Governance and Intergovernmental Relations, is based on the dynamics of institutional arrangements that prevent deviations from objectives, ensuring that the expected results reach the beneficiaries in an appropriate, impartial and efficient manner. The validation of the applicability of appropriate codes of conduct for employees at decentralised levels that ensure the control and prevention of deviant practices, management instruments that regulate conflicts of interest between local government officials during and after their term of office, are some of the fields of analysis and control of public integrity presented in this research.

In Mozambique, the asset declaration system or the system of income and assets is an important and indispensable element for successfully building a set of procedures favourable to the culture of integrity in the exercise of public duties. In addition to preventing conflicts of interest, strengthening integrity practices serves to combat deviant actions that foster corruption and illicit enrichment. In this context, Mozambique approved the general law that regulates the Declaration of Assets of Public Office Holders with decision-making powers. The law, in addition to covering office holders in Central and Local Administrative State Bodies, covers the Provincial Governors, Secretaries of State in the Province, District Administrators and Mayors. Thus, public office holders, in the exercise of their duties, are subject to the declaration of rights, income, bonds, shares or any other type of assets and values located in the country or abroad. However, these formal elements are, in themselves, ineffective in defeating structuring elements configured in the culture and practices opposed to the values of ethics and public integrity. Recognising the inefficiency in the application of the Public Probity Law, the Council of Ministers recommended the approval of a decree that would fill gaps and create punitive parameters when officials delay in meeting the legal deadline for declaring assets. In order to make this instrument efficient, recommended by the Council of Ministers, it is necessary to ensure its extension to the decentralised levels, covering a greater part of the employees who work in the Local Governance bodies.

The existence of a law that regulates access to information is also decisive in boosting the principle of public integrity and intergovernmental relations, at the various levels of State administration. However, at a decentralised level, the law has been very little publicised, with lack of knowledge and mastery of it. There is also a perception that the law that regulates access to information applies to institutions at Central level, excluding Local Governments. The research recognises that the instruments that should ensure control of public integrity are not operating. Difficulties in sharing information on the part of public servants, poor knowledge of citizens' rights and duties, compounded by the resistance of public office holders to providing information and declaring their assets, compromise efforts in the pursuit of public honesty, especially at decentralised levels.

CHAPTER V

5. THE THREE STATE POWERS: CONSTITUTIONAL FRAMEWORK AND ETHICAL EVALUATION

*By Justino Felizberto Justino **

The Democratic Rule of Law that Mozambique has been building, due to the 1990 constitutional transition, requires that political power, even if legitimate, be limited¹. This paper will focus on the functional division or separation of powers². As a preliminary aspect, it is important to review the main conclusions and recommendations of the previous reports (2008-2013) on Governance and Integrity in Mozambique (RGIM).

As for the topic “The Three State Powers”, the 2008 and 2013 reports (RGIM) sought to demonstrate the negative effects of the presidential [government] system on the functioning of the three State Powers, culminating in suggesting a constitutional amendment that would accommodate a transition “from the current presidential regime to a streamlined parliamentary regime”. At the same time, it was recommended that “the Parliament’s role be strengthened, namely through increased control over the activities of the Executive and, in particular, over the enforcement of laws” (RGIM 2008, p. 25). None of the recommendations set out in that first report were followed (cf. RGIM 2013, p. 16).

The second report brought up the topic of partisanship in the Public Administration (RGIM 2013, pp. 16-17,19, 20-21), thereby maintaining an idea that “there is no reciprocal control of the sovereign bodies in Mozambique” nor a “system of separation of powers in Mozambique”, but the concentration of powers in the PR” (RGIM 2008, p. 17).

From this perspective, a set of questions to be answered is raised in the first part of this paper: (i) would a constitutional transition, introducing a system of “streamlined parliamentary” government, be, in itself, suitable to modify the current deficit of “reciprocal control of sovereign bodies in Mozambique”? (ii) Is there a lack of instruments for Parliament to control effectively “government activities” and “law enforcement”? (iii) Is the partisanship of the Public Administration exclusive to the majority party or does it also involve the “opposition” parties, when they are in the majority in terms of political and municipal decentralization?

5.1 Separation and interdependence of powers in the government system

The President of the Republic is the first of the sovereign bodies. He has his own powers, such as those of the Head of Government, powers to appoint the Attorney General and Deputy Attorney General, and to appoint the ambassadors and diplomatic envoys of the Republic of Mozambique³ ”. He has shared powers, namely, to decide on holding a referendum on the proposal of the National Assembly (NA); to conclude international treaties, subject to ratification/denunciation by the NA; to declare a state of siege or of emergency, after consulting with the State Council and the National Defence and Security Council, and subsequent approval by the NA; to appoint the chairpersons of the Supreme Court and the Administrative Tribunal, after consultation with the Higher Councils of the two magistracies, and subsequent ratification by the NA, to appoint the Vice-Chancellors and Deputy Vice-Chancellors of public

¹ Articles 134, 73, 146 nos. 3 and 4, 170 no. 1, 184

² Article 134 of CRM

³ Articles 133, 145 no. 3, 158, 138 nos. 1 & 2, 139 no. 2, & 161 al. c) & d) of CRM.

Universities “on the proposal of the respective governing bodies^{1, 2}.

The Constitution grants the National Assembly the power to elect certain bodies, namely, the Ombudsman, five of the members of the Constitutional Council and of the Higher Councils of the Magistracies³; as well as the powers to amend the Constitution and to pass laws⁴⁵, including functions of representation, control, inspection and authorization⁶.

5.2 Supervision of government activities

Does Parliament lack instruments for effective control over “government activities,” and “law enforcement”? The answer is “No!” based on the control, inspection and authorisation functions of the NA.

The control function is exercised through (i) questions and queries⁷; (ii) inquiries⁸; (iii) control of petitions, complaints and claims⁹.

The supervisory function ranges from the control and monitoring of government activity - approval of the Government Program¹⁰; deliberation on the activity reports of the Council of Ministers¹¹; financial control of the State accounts¹²; or the appreciation of Decree-Laws¹³ - up to the inspection of states of siege and of emergency¹⁴.

The National Assembly (NA) is entitled to give authorization to the Government to contract or grant loans¹⁵, and to legislate in certain areas¹⁶.

Now, when a Parliamentary Commission of Inquiry concludes, in its control and inspection functions, that its authorizing function had simply been obliterated, as was the case with the so-called “hidden debts”, it recognises the unconstitutional nature of the acts in question, but instead of drawing legal consequences from these violations, it ended up following the path of “purging that which was null”¹⁷ in the acts of the Government in question. Thus, the lack of instruments for effective control of “government activities”, and of “the enforcement of laws”, cannot be invoked, but rather, their non-use: *legem habemus*, it is important to use it, and comply with it!

Could the transition from a presidential government system to a streamlined or semi-presidential parliamentary system, make the principle of separation and interdependence of powers more effective?

The current Mozambican government system is characterized by a lack of balance of powers among the three relevant entities in the government system, given that the balance clearly tends to fall towards the PR, in an essentially presidential system, with some elements of a parliamentary government system.

In fact, the key issue is not in the government system, as an isolated object, but in the nature of the electoral system and its party system. The functioning of a system will be positively influenced by the presence of an opposition party that

1 Articles 136 no. 2 f), 178 no. 1, 161 b), 178 no. 2 e), 160 a), 165 b), 265 a) and b), 178 no. 2 g), 159, 225 nos. 2 & 3, 228 nos. 2 & 3, 178 no. 2h), 159 no. 2 of CRM.

2 145 no. 2 b) & 162 no 1 of CRM.

3 Articles 178 no. 2 i), 241 no. 1 b), 220 no. 1 d), 237 no. 1 f) of the CRM, 42 no. 1 of Law 42017.

4 Articles 299 n°1 & 178 n°2 of CRM

5 Articles 178 no. 1 of CRM

6 Articles 178/2, 179 no. 2 & 194

7 Cf. Paragraph d), e) of article 172 & paragraph f), i) of article 196 of the CRM.

8 Cf. Paragraph g) of article 196 no. 1 of CRM, article 95, 96 & 99 of the NA Regulation (**RAR**).

9 Article 116 & 117 of RAR

10 Paragraph j) of article 178 no. 2 of CRM

11 Paragraph k) of article 178 no. 2 of CRM.

12 Paragraph l) & m) of article 178 no. 2 of CRM

13 Article 180 of CRM & article 170 ss of RAR

14 Paragraph g) of article 178 no. 2 of CRM & article 160 of RAR

15 Paragraph p) of article 178 no. 2 of CRM

16 Article 178 n°3 of CRM

17 NA: *Final Report of the Parliamentary Committee of Inquiry to ascertain the situation of Public Debt, of 30 November 2016, p. 36.*

can present itself as a legitimate and credible government alternative. Where a given party usually obtains an absolute majority of seats on its own, an eventual constitutional transition to a “streamlined parliamentary government system” would do no more than shift the central axis from the PR to the Prime Minister. Mutatis mutandis for the transition to a semi-presidential system.

5.3 Partisanship of the Public Administration

Is the partisanship of the State and Public Administration exclusive to the majority party or does it also involve the “opposition” parties? In the CRM, the people’s decision-making powers are not restricted to election¹. The Political parties and the continuation of their activities in State bodies are “inevitable”. The Mozambican reality shows that the top places in the Central Government and in the municipalities under the management of the government party are dominated by “cadres” connected to it. In municipalities under opposition management, as in the case of Quelimane, Beira, Nampula and Ilha de Moçambique, the decision-making positions are occupied by cadres “linked” to the respective winning parties.

With regard to the question of interference of parties in the State’s life, especially party discipline, raised in previous reports, it is irrelevant whether this comes from the ruling party or the opposition parties. The main issue cannot be posed in the concrete rules of the parties, but in the rules of the State itself, since² the party resolutions or party divisions that affect the behaviour of its members in public positions are not legally binding.

The Mozambican legal framework³ emphasises the “organised participation” of citizens in solving national problems through (i) “forms of association with affinities and own interests”, (ii) administrative decentralisation, (iii) consulting the entities with the right to participate or the right to be heard in certain legal procedures. It is about marking a “fourth pillar” to the principle of separation and interdependence of the State powers.

In relation to judicial access, there is still a deficit of protection in access to constitutional justice, either through an appeal to declare a particular provision unconstitutional, or through a petition for relief, or similar measure⁴. The same can be said about the “organised participation” of citizens in solving sector or even national problems. This provision for class action⁵ has been waiting since 2004, for its legal regulation.

5.4 Integrity of the three powers

With regard to the integrity of the three powers and other public servants, progress has been made with the entry into operation of the Central Public Ethics Commission and the other Public Ethics Commissions provided for in Law No. 16/2012 (Public Probity Law), as of 2013. The composition of the Central Public Ethics Commission by 9 members appointed by the Government, NA and Higher Council of the Judicial Magistracy⁶ shows the need for the three powers to be involved in preventing and combating unethical conduct within their bodies, in public institutions and among other public servants. The powers of the Central Public Ethics Commission, expressed as “managing the system of conflicts of interest, establishing rules and procedures for preventing and combating situations of conflict of interest, monitoring the occurrence of conflicts of interest, including guiding and coordinating the sectorial commissions of

1 Articles 73, 74, 78 no. 1, 79, 96 of CRM

2 As inferred from articles 167 no. 2, 216 no. 1, 218 of CRM, 2 of Law 31/2014 & 37 of The Judicial Magistrates Act.

3 Articles 78, 249 no. 2, 252 no. 3, 267 of CRM, paragraph c) of article 124 of RAR

4 Articles 213 & 246 of CRM

5 Articles 81 of CRM

6 Articles 50 no. 2 of Public Probity Law.

public ethics, and presenting complaints and criminal participation to the Public Prosecutor's Office¹”, suggest the existence of a national system of public integrity.

Despite the institutionalisation of the public integrity system and the constitutional provision of the principles of separation and interdependence of bodies and the democratic participation of citizens, in the period between 2013 and 2019, there were situations that violated the right of citizens to participate, the separation and interdependence of bodies and public integrity. The three powers were characterized, among others by, (i) the existence of a discrepancy between the constituted right and reality, (ii) a certain promiscuity and deficit in mutual control within the framework of ensuring legality and public integrity: for this reason, “scandals” arose in the national economy involving “top government officials”, notably the case of the “hidden debts”, (iii) the lack of mechanisms for planning, evaluation and joint monitoring in the integrity domain.

As for the weaknesses of the Mozambican Parliament that occurred in the period between 2013 and 2019, the following stand out:

- a) Approval of laws without effective public consultation: the principle of citizen participation in the affairs of the Nation² has not always been respected. A constitutional amendment was approved by Law 1/2018 without public consultation. In addition to the absolute lack of consultation, and as stated by the CTA President³, consultation, over and over again, has been a merely formal procedure, consisting of (i) asking organizations, institutions and other interested public bodies to formulate their point of view within an unreasonable period, (ii) no consideration of the contributions of citizens and bodies interested in the approved laws. The promotion of effective consultation has depended on the sensitivity and “good mood” of the members of specialized committees of the NA. To put an end to this state of affairs, the CTA proposed a law on public consultation in 2017, which has yet to be approved⁴;
- b) Lack of public appreciation of the budget and the General State Account: in the period under analysis, citizens and civil society organisations were not called upon to present their point of view on the draft budget laws and the resolutions on the state account; despite the fact that sovereignty lies with the people, that they pay taxes and own natural resources that serve as a source of state revenue, they do not participate directly, but do so through representation, in the acts related to the use of these resources;
- c) Approval of laws for the benefit of parliamentarians against the voice of civil society: The Parliament passed Law 31/2014 on the statute, security and welfare of the Members of Parliament, ignoring the petitions and demonstrations of civil society that opposed the law, regarding it as unreasonable, given the level of poverty in which the majority of the population is living;
- d) Legalisation of unconstitutional and unethical debts and disregard for the opinions of the Administrative Tribunal (TA) and the Parliamentary Commission: Resolution No. 11/2016 approved the General State Account for the 2014 financial year despite the opinions of both the TA and the Parliamentary Committee of Inquiry⁵, denouncing the existence of loans contracted in favour of Ematum, MAM and Proindicus, without prior approval by the NA;
- e) Lack of clarity on the admissibility of political and judicial control of Parliament's resolutions. For this reason, in the TA reports and opinions on the State Accounts for the years 2013, 2014, 2015 and 2016⁶, reference was made to the existence of loans (MAM, EMATUM and Proindicus) not authorized by the NA. However, these accounts were “laundered” by NA resolutions, on the grounds that they were political issues!⁷

1 Article 50 no. 1 of Public Probity Law.

2 Article 73 of CRM, and paragraph c) of article 124 of RAR.

3 <https://cta.org.mz/cta-deposita-proposta-de-lei-de-participacao-publica-no-processo-legislativo-em-mocambique/> and <http://opais.sapo.mz/falta-de-consulta-publica-na-criacao-de-leis-prejudica-ambiente-de-negocios>

4 Idem.

5 Final Report of the Parliamentary Commission of Inquiry to ascertain the situation of Public Debt, of 30 November 2016. It is true that the commission, after identifying the defects, proposed, in contradiction, the approval of the Account.

6 Available at <https://www.ta.gov.mz/Pages/RelatoriosPareceresCGE.aspx>

7 Cf. Ruling of the Constitutional Council no. 5/CC/2019, of 3 June.

The following aspects constitute negative marks of the judiciary:

- a) The Attorney General, who heads the Attorney General's Office (PGR), which is the highest Public Prosecution¹ body, reports to the Head of State, who is simultaneously the head of the government² and provides information to the NA instead of responding to it³. This raises doubts about the true legal nature of the PGR, within the framework of functions of the State, namely whether it is a magistracy; and on the PGR's autonomy from the Executive and the desirable objectivity of the PGR's personnel in controlling legality;
- b) "Intolerance" in the relationship among the three powers: one example of this was the public declaration by the Supreme Court (SC) spokesperson, in February 2019, who, alleging the SC's powers, repudiated the fact that the NA repaired the mistake of quoting revoked legislation, contained in the request for application of a coercive measure to a Member of Parliament (MP), former Finance Minister Manuel Chang⁴, made by the SC;
- c) Inefficient control of the Executive's acts by the TA: the CRM and the legislation on the administrative jurisdiction⁵ establish that loan contracts are subject to prior inspection by the TA. This provision was already in place, in the previous legislation⁶. Nevertheless, the TA did not inspect, and thus prevent the effectiveness, of loan contracts entered into in favour of the companies MAM, Ematum and Proíndicus in 2013 and 2014⁷;
- d) Budgetary dependence of administrative tribunals on the provincial governments: The provincial administrative tribunals carry out the prior inspection of acts performed by the provincial governments. On the other hand, the administrative tribunals depend on these governments to confirm their budget, to provide for employees and to conclude necessary contracts for the functioning of the tribunals. This relationship can generate situations in which the Public Administration conditions the confirmation of funds on the granting of an authorisation by the tribunal thus, jeopardizing the independence of the tribunals;
- e) "Subordination" of courts and prosecutors to Local State Bodies in the protocol domain. This practice consists of (i) the courts and prosecutors organize "mandatory" courtesy visits to the provincial governors and district administrators, during legality week, (ii) they depend on the provincial governors and district administrators to conduct the local judicial year opening ceremonies.

The following, negatively, characterized the performance of the Council of Ministers, among others:

- a) Approval of Decrees without a preceding law as required by paragraph 2 of article 209 of the CRM "the decrees-laws and decrees ... must indicate the law under which they are being approved". Examples include Decree 31/2013 on the regularization of State employees, Decree 42/2018 on State assets and Decree 30/2018 on the career and remuneration system;
- b) Approval of regulatory acts without public consultation or without hearing the interested parties. This was the case of (i) Regulation for the Licensing and Functioning of Higher Education Institutions (HEI) approved by Decree 46/2018, (ii) Regulation for the HEI Inspection approved by Decree 18/2018 and (iii) Regulation for Licensing Industrial Activity approved by Decree 22/2014;
- c) Lack of preventive political and jurisdictional oversight of decrees of the Council of Ministers. This is likely to allow the entry into force of normative instruments of dubious constitutionality and legality. For example, (i) the Expenditure Containment Regulation approved by Decree 75/2017, whose constitutionality was called into question by the Association of Judicial Magistrates⁸, for whom the regulation constitutes interference by the Executive in the powers of the NA, (ii) the Regulation for the Licensing and Operation of Higher Education Institutions - HEI, which prescribes financial penalties not provided for in the Higher Education Law;
- d) Borrowing and executing loans (Ematum, MAM and Proíndicus) without prior authorisation from Parliament, nor prior inspection by the TA and in violation of the Constitution, between 2013 and 2014.

1 Articles 9 no. 1 & 13 no. 1 of Law 4/2017, 233 no. 1 & 236 of CRM

2 Articles 238 no. 2 & 145 no. 3 of CRM

3 Article 238 no. 3 of CRM

4 Cf. o País Newspaper, available at <http://opais.sapo.mz/supremo-ja-enviou-pedido-de-extradicao-de-manuel-chang-para-mocambique>

5 Articles 229 no. 2 b) & 227 no. 2 of CRM, strengthened by articles 4 no. 1 c), 33 no. 1 a), b), e) and j) of Law 24/2013 in the wording of Law 7/2015, in conjunction with articles 59 a) & 60 no 1 c) of Law 14/2014

6 Articles 34 no. 2 a) of Law 25/2009 & 61 no. 1 c) of Law 26/2009

7 If such inspection had occurred.

8 <https://canal.co.mz/2018/02/decreto-de-contencao-de-despesa-coloca-magistrados-em-rota-de-colisao-com-o-governo/>

There was a lack of interest from the judiciary and the PGR in responding to the Ombudsman's requests regarding petitions, complaints and claims from citizens, concerning the actions of the judiciary and the PGR. The lack of response lasted in some cases, for about 2 years. As stated in the Ombudsman's report to the NA, for the period from April 2016 to March 2017¹, about 41 requests to the law courts and the Supreme Court (SC), 7 to the Administrative Tribunal (AC) and other administrative tribunals, and two to the provincial public prosecutors, had not been answered.

5.5 Recommendations/challenges

- a) Approval of the law that institutionalises effective public consultation, as an essential requirement of the legislative procedure, in order to validate laws and decree-laws;
- b) Approval of the law on the right to class action, as required by paragraph 1 of art. 81 of the CRM, in order to allow citizens, personally or through associations, to safely and legally exercise this right effectively;
- c) Provision of jurisdictional control mechanisms for the resolutions of the NA and the Council of Ministers;
- d) Release the courts and prosecutors from financial dependence, including protocol dependence on the local state bodies and local authorities;
- e) Creation of liaison mechanisms among the three powers, the Ombudsman and the Central Public Ethics Commission, for receiving and following up on citizens' petitions and complaints;
- f) Provision of accountability for managers of public and state institutions who do not respond to the Ombudsman's requests.

¹ https://www.google.com/search?ei=qwc3XsLgJJG6gAawxZGoAQ&q=provedor+de+justi%C3%A7a+mo%C3%A7ambique+-+informe+2016&oq=provedor+de+justi%C3%A7a+mo%C3%A7ambique+-+informe+2016&gs_l=psy-ab.12...5734384.5768925...5772331...0.0..0.788.14137.3-9j7j8j4.....0....1..gws-wiz.....0..0j0i22i30j33i160j33i21.5PPOyT99deY&ved=0a-hUKewiC4qiGs7PnAhURHcAKHbBiBBUQ4dUDCAs

CHAPTER VI

6. The Law Courts: internal control system and the performance of the judges

By: André Cristiano José

We want a fair justice in which the provision of services is based on a benchmark of honesty, rectitude and impartiality¹

In contemporary societies, law courts play a role that goes far beyond merely resolving conflicts and promoting the exercise of rights. The Constitution of the Republic of Mozambique immediately recognizes that the courts also have an educational and social regulation function, being understood as institutions that mobilize citizens to comply voluntarily with laws and to build social peace. As institutions that convey performative utterances, the courts will also fulfil symbolic functions, given that their power also comes from their ability to organize and act in ways that are recognized as being accessible, transparent, impartial, and fair – in one word, righteous. The so-called symbolic effectiveness of the courts will, therefore, be achieved by the communication of images of justice, equality, security and other values seen as fundamental to life in society.

Mozambican law courts are called upon to respond to an increasingly complex and diverse set of demands, which incorporate objectives that are not always successfully reconciled, such as the legitimation and reproduction of political and economic power, the predictability and security of commercial transactions, the promotion of social stability, the restoration of social relations, the protection of the most disadvantaged social strata, the defence of collective and diffuse rights, greater accessibility, efficiency and effectiveness, etc. In addition to the demands in question, there are requirements of integrity, normally understood as an indispensable condition for the complete fulfilment of the constitutional and legal mandate that is recognized for them and for the implementation of the Democratic Rule of Law.

Since it is recognized that integrity has multiple characteristics and that it will be conditioned by a variety of structural factors, we have chosen to focus the present work on the internal control mechanisms installed in the law courts and their relationship with the integrity of the judges.

The “judiciary”, as a guarantee of legality, is therefore one of the essential pillars of the national integrity system. Normally, the assessment of the integrity of the “judiciary” involves the analysis of a variety of indicators such as: the regulatory framework for careers and the remuneration regime; the financing and availability of working conditions; the legal framework related to the independence of magistrates and its application; access to information by citizens; accountability; the existence and effectiveness of internal mechanisms that contribute to integrity; etc. These indicators are broken down into several other issues that, taken together, allow for a more complete picture of the “judiciary” in the context of the national integrity system.

In this article, we will try to answer only one of the questions, namely the question of the extent to which institutionalized internal control makes it possible to prevent, mitigate or combat factors that may compromise the integrity of judges. We highlight control in a double dimension, namely, with regard to ethical compliance and the performance of judges. For this reason, the discussion of the matrices of the integrity system – resources, independence, transparency, accountability, integrity, investigation and complaints, information – is adapted to the specificity of the theme.

¹ Phrase extracted from the speech of the President of the Supreme Court at the opening of the 2017 judicial year.

6.1 Resources

In the “resources” dimension, we take into account the legal framework, specifically the analysis of the institutional framework related to internal control and the availability of human resources necessary for its implementation. The first component – the institutional framework – is divided into two sub-themes, namely “internal control bodies” and “classification rules”; and in the second (human resources) we refer the discussion to the composition of the Judicial Inspectorate and geographic distribution of the inspectors.

6.2 Internal control bodies

The Constitution of the Republic enshrined a set of structuring principles of the democratic rule of law which aim to safeguard the integrity of the courts, namely: the courts as one of the organs of sovereignty¹; autonomy of the courts in relation to other State powers²; prevalence of the Constitution over other normative acts, so that the courts cannot apply laws that offend against the Constitution³; mandatory compliance with court decisions and their prevalence over decisions by other authorities⁴. At the same time, the judges are granted constitutional guarantees of independence (and strict compliance with the law), impartiality and immovability (they cannot be transferred, suspended, retired or dismissed, except in the cases provided for by law).⁵

The Constitution of the Republic also provides for a body that manages and disciplines judicial magistrates, the Higher Council of the Judicial Magistracy (CSMJ), in order to ensure the independence of judges⁶. It is therefore up to the CSMJ to assess the professional merit of judges and probation officers and exercise disciplinary powers over them, with the support of the Judicial Inspectorate, which is responsible for supervising, identifying the difficulties and needs of the courts, collecting information on the merit of the magistrates and probation officers, verifying the degree of compliance with the programmes and activities of the courts and providing technical support to the judges.⁷

The composition of the CSMJ is relatively broad, including actors external to the justice administration system, which, in theory, contributes to strengthening the transparency and external control of the courts⁸. However, the functioning of the political system and the rules for the nomination and election of members of the CSMJ may limit the plural participation of external actors.

The constitutional guarantees described above were duly incorporated in ordinary legislation, namely in the Statute of Judicial Magistrates, which also defines, among other matters, the rules for entry and career development, the classification criteria, the range of rights, duties and incompatibilities, and the rules on disciplinary responsibility⁹.

1 Article 133°.

2 Article 134°.

3 Article 213°.

4 Article 214°.

5 Article 216°.

6 From an administrative point of view, the approval of Decree No. 1/2018 of 24 January contributes to reducing the dependence of the law courts on the government (especially the provincial governments). As a result of that Decree, the entire budget allocated to the courts started to be channeled directly to the Supreme Court, and it is up to the latter to distribute it according to the priorities. The same measure applies to the Administrative Tribunal, the Constitutional Council and the Attorney General’s Office, and it is up to these institutions to redistribute the budget to the respective provincial units, where they exist.

7 Decree 63/2019, of 29 July.

8 The CSMJ is composed of the President and Deputy President of the Supreme Court, two members appointed by the President of the Republic, five members elected by the National Assembly according to the criterion of proportional representation, seven magistrates from the various categories elected by their peers. Probation Officers elected by their peers are also part of the CSMJ for the discussion and deliberation of matters related to professional merit and the exercise of discipline over them (Article 220 of the Constitution of the Republic).

9 Law No. 7/2009 of 11 March, as amended by Law 8/2018, of 27 August.

6.3 Rules for the classification of judges

The Statute of Judicial Magistrates establishes that, for the classification of judges, account must be taken of the way in which magistrates perform their function, their technical performance, intellectual capacity and civic aptitude. The classification must be done at least once every three years. If the magistrate is not classified within that period, the law assumes that he/she has been classified as “Good”. However, the magistrate has the power, on his own initiative, to request inspection, in which case it must be carried out. Also according to the Statute, the results of previous inspections, inquiries, investigations or disciplinary proceedings to which the magistrate may have been submitted, the length of service provided, the work published in the area of law, annual reports, the working conditions and any complementary elements that are in the possession of the CSMJ, are elements of evaluation.¹

Until late 2019, in practice, the classification of judges was based on the annual activity reports sent by the magistrates themselves and six judgments chosen by themselves². It was a manifestly inadequate model for accurately assessing the merits of magistrates, as well as for assessing other elements of evaluation especially those related to professional integrity.

Resolution No. 3/CSMJ/P/ 2019, of 16 December, the new Regulation on the Judicial Performance Evaluation Criteria, which makes operational the Statute of Judicial Magistrates, details the classification elements and defines the respective valuation weight. For example, the quality of decisions is limited to 30% of the total score and speed to 20%. As for quality, among other criteria, it is judged based on the assessment of decisions on appeal in the courts of second instance, which is questionable, since objectively nothing guarantees that in these courts the decision is technically correct. In fact, in most cases, with the possibility of appealing to the Supreme Court, the latter may, in theory, reconfirm a decision of the first instance, even though there was a contrary decision in the second.

However, Resolution No. 3/CSMJ/P/2019, of 16 December, introduces some modalities for gathering information for the purposes of classifying judges, which raise issues that seem relevant to us. Under the terms of the Resolution, the “human capacity” of the judges will be assessed on the basis of information gathered from other bodies or institutions that intervene in the administration of justice, namely the Public Prosecutor’s Office, the Bar Association, the Legal Aid Institute and any civil society organizations that, by the nature of their functions, maintain links with the courts.³

It is an open wording that gives the decision-making body the discretion to define exactly which civil society organizations should be consulted. Given the imprecision of what the term “maintain ties with the courts” means, this forces us to question what organizations we are talking about (which also forces us to discuss what civil society will be). Equally important, there is a need to reflect on whether the power of assessment is being dangerously endorsed to diffuse entities that do not guarantee impartiality or representative opinion: how will organizations be selected? Does each organization speak in relation to all the judges? How do we measure that it is aware of the “human capacity” of the judges?⁴ How will any problems of conflict of interest (including the conflict of interest of members of the organization) be addressed? What guarantees of impartiality are there? Who has the legitimacy to convey the opinion of the organization? How is the diversity of opinion taken care of among the members of the organization? etc. Similar questions can be raised in relation to the other institutions that, according to the Resolution, should be consulted through a questionnaire.

¹ Articles 29 to 32 of Law No. 7/2009 of 11 March.

² According to Resolution no. 8/CSMJ/2001, of 12 December.

³ Article 30.

⁴ It should be noted that, according to the Resolution, “human capacity” is measured through multiple elements including intellectual capacity; civic suitability; independence, impartiality and dignity of conduct; relationships with other procedural stakeholders and the general public; professional and personal prestige; the serenity and reserve with which a judge performs his/her duties; the ability to understand the specific situations in question and a sense of justice vis-à-vis the socio-cultural environment where his/her duties are performed; capacity and dedication in the training of magistrates (Article 30, paragraph 1).

Bearing in mind the issues it raises, it is questionable whether Resolution No. 3/CSMJ/P/20019, of 16 December, does not compromise the spirit and principles of the Constitution of the Republic and the Statute of Judicial Magistrates, namely those aimed at safeguarding the independence and integrity of the courts.

In the face of opposition from within the magistrates and recognition of the limitations of the evaluation regime for judges, the Higher Council for the Judicial Magistracy approved a new resolution that removes the need to collect information from other institutions or external actors¹. Consequently, a new evaluation regulation will be discussed and approved.

Precisely because the evaluation system has a fundamental role in the internal independence of the judges, and in the transparency and credibility of the justice system, it must be based on objective and clear criteria that avoid manipulation of the system and/or other perverse effects. Although it is desirable that the courts open up to society, we do not think that the right path has been found.

What seems common between the current and previous classification model is that the CSMJ will continue to have a partial (in the sense of limited) and indirect knowledge of the reality of the courts, due to being strongly conditioned by the intermediation of judges and external actors that certainly will not be equipped with adequate tools to issue an objective, impartial and representative opinion.

6.4 Legal Inspectors

The performance of the Higher Council for the Judicial Magistracy will also be conditioned by the number of judges placed in the Judicial Inspectorate. Currently, five magistrates are serving in the Inspectorate. This number of inspectors is insufficient to cover the whole country, as well as to guarantee the complete fulfilment of the goals for which the Judicial Inspectorate was created, namely, to supervise, identify the difficulties and needs of the courts, gather information on the merits of magistrates and probation officers, check the degree of compliance with the programmes and activities of the courts and provide technical support for the judges.²

All the inspectors live in Maputo city, and their performance has been reactive to external stimulus, namely to the complaints and reports submitted. It is, therefore, far from able to cover all courts and monitor the performance of all magistrates. Decree 63/2019, of 29 July provides for the possibility of creating judicial inspectorate offices throughout the country, but this has not yet happened. However, just as important as the question of the number of inspectors and their territorial implantation, is the question of the extent to which the institutionalized inspection model is adequate to fulfil the objectives for which the Judicial Inspectorate was created.

Associated with the model is the question regarding the profile of inspectors. Within the judicial magistracy, there has been a strong opinion that there is a trend to place in the Judicial Inspectorate the worst judges or those who may be associated with corruption or other questionable practices. In fact, the deliberations of the 11th Plenary Session of the Higher Council of the Judicial Magistracy, held on 28-29 May 2020, seem to confirm this fact. A magistrate was expelled who had been placed in the Judicial Inspectorate following suspicions of corrupt practices.

More than 25 years after the creation of the Inspectorate, it seems to us that the results advise rethinking the model.

1 Resolution No. 70/CSMJ/P/2020, of 21 August.

2 Decree 63/2019, of 29 July.

6.5 Transparency

The number of disciplinary proceedings initiated by the CSMJ indicates that, despite the existence of rules favourable to safeguarding integrity in the courts, the organizational and functional conditions that enable implementation of this same legal framework are not guaranteed. For example, in 2018, the Higher Council of the Judicial Magistracy¹ examined 27 disciplinary proceedings, 5 against magistrates and 22 against probation officers². Of the proceedings filed against magistrates, 3 were closed because the disciplinary procedure expired and in 2 cases disciplinary measures were applied. As for the probation officers, 12 cases were dropped because the disciplinary proceedings expired; in 8 cases, disciplinary sanctions were applied and 3 cases were closed because no disciplinary offence was proved.

Of the total number of cases, 83% were dropped because the disciplinary procedure expired, pursuant to article 115, paragraph 5 of Law No. 10/2017, of 1 August, which determines that, 150 days after the beginning of the disciplinary procedure, if the case has not been closed, the disciplinary power of the Public Administration is extinguished.

This picture reveals that the body of judges and probation officers remains permeable to acts that compromise professional integrity and that the institutional response to the problem has not been satisfactory. It should be noted that all judicial magistrates, regardless of whether they are inspectors or not, are potential prosecutors, since they can direct disciplinary proceedings against lower ranking judges. The mere fact that a substantial number of disciplinary proceedings are extinguished because they have not been closed within a maximum period of five months, reveals the inability of the management and discipline body to respond, but also – more seriously – it may indicate that a certain corporatism reigns in the judicial system that is complacent. This attitude is to be condemned from the ethical point of view

Probably for this reason, 46% of the judges consider that the inspection system is neither transparent nor fair; and 48% indicate that having “good relations” or “good contacts” within the judiciary is crucial for the career of judges (Fernando et. al., 2019: 155-156).³

6.6 Integrity

Integrity will comprise a set of factors that reflect the magistrates’ attitude towards the law and the ethical duties to which they are bound. For this reason, the assessment of integrity may be made through several court analysis windows. Here, because it is directly related to internal control and classification rules, we are only interested in discussing the issue of assessing the so-called productivity of judges.

“Productivity” is rarely associated with the integrity of judges and probation officers because it tends to be dissolved in explanations – legitimate, that is to say – related to the reasonableness of the numbers in view of the complexity of the cases, the conditions under which the courts function, the legal framework etc., factors that potentially cause procedural delays. However, it will be no less correct to say that, in addition to institutional conditions and procedural laws, judges and probation officers, as actors who set the proceedings in motion, will also have an influence on the performance or “productivity” of the courts. The attitude of the judicial actors, before the judicial demand, will not be indifferent for the purpose of promoting procedural speed.

¹ In 2017, the Higher Council of the Judicial Magistracy had analyzed 46 disciplinary cases (12 against judicial magistrates and 34 probation officers).

² According to a speech by the President of the Supreme Court on the occasion of the opening of the 2019 judicial year. Accessed on the page http://www.ts.gov.mz/images/Discurso_do_Venerando_Presidente_do_Tribunal_Supremo_-2019_.pdf on September 27, 2019.

³ Fernando, Paula; José, André Cristiano; Soares, Carla; Gomes, Conceição (2019). *Estudo exploratório sobre o acesso à justiça e o desempenho funcional dos tribunais em Moçambique – Exploratory study on access to justice and the functional performance of courts in Mozambique*. Coimbra: Center for Social Studies, University of Coimbra.

It is known that procedural delays result, among others, in the erosion of evidence, the delay (and sometimes impossibility) of reinstating violated rights, the increase in social and economic costs for the parties and act as a disincentive for resorting to the courts.

Recognizing the need to define minimum performance standards for judicial magistrates, individual targets were set, and a number of cases must be decided on a monthly basis¹. For judges and Judge Counsellors, the goals vary from 2 to 5 monthly cases, depending on the section to which they are assigned. In the other categories, the minimum number of cases ranges from 18 to 60, varying according to the category of the court, the province in which the court is located and the jurisdiction². Despite the targets, the response capacity of the law courts has been very limited, as evidenced by the high number of cases pending at all levels and in all jurisdictions. In 2017, the district and provincial law courts, as a whole, registered around 120,000 pending cases³; the higher courts of appeal had about 5,000 pending cases, the Supreme Court had about 150. Since 2015, the number of cases filed has exceeded the number of cases closed at the Supreme Court, revealing a gradual growth in pending cases (Fernando et al. 2019: 234-243).

The causes of delays will naturally be multiple and confluent, and may be of a legal, organisational, endogenous, intentional or unintentional nature, etc. With regard to intentional delay, it is customary to point out that the manipulation of proceedings in the interests of the parties is the cause. As suggested by Pedroso *et al.* it is necessary to investigate the extent to which broad strata of the legal profession organise or profit from their activity based on the delay in the proceedings and not despite it, and to what extent and for what purposes the magistrates and judicial officers manage the rhythms of the proceedings (Pedroso *et al.*, 2003: 560-574)⁴. And here the organisational system of the law courts takes on relevance, particularly the system of targets.

If, on the one hand, the district and provincial courts are faced with a range of situations that can negatively interfere with their functioning and, consequently, with the fulfilment of the goals: inadequate facilities, limited number of courtrooms (in most cases, a single one to serve multiple judges), lack of means to carry out due diligence, lack of equipment, lack of basic work material (such as, for example, books of legislation, and paper), lack of vehicles to transport imprisoned defendants, etc; on the other hand, judges tend to decide, primarily, the simplest cases that can expire for formal reasons, that is, without discussing the merits of the case. And this, regardless of the fact that older cases are pending in the same court or section.⁵

In view of the lack of rules for the progress and prioritisation of cases and the absence of an efficient management of notaries and of the judges' agenda, the possibility of reaching an outcome in the most complex cases will often depend on the parties' ability to "pressure" the court, creating a favourable context to question the rationality underlying the selection of cases for trial or decision. But the pressure of the parties, depending on the interests at stake, may even be in the sense of delaying the decision (or simply "forgetting" the case). Intentional delays, therefore, may be selective in terms of the type of case and/or the profile of the litigants, not to mention another important variable, which is the expectation of payment of fees⁶. This reality erodes the image and credibility of the courts, usually associated with corruption or other practices that jeopardise their integrity.

1 Order 1/TS/GP/2018, of January 31, set the minimum monthly individual goals for Judges.

Order No. 1/CJ/2015, of 4 December sets the minimum monthly performance targets for the judges of the district and provincial courts, in the latter case, excluding the judges assigned to the appeal sections.

2 Given the specificity, the target of the Maputo City Police Court (competent to judge violations) was set at 350 monthly cases.

3 In 2012, there were about 140,000 pending cases. This number decreased mainly due to the relative stability of the labor and minor proceedings brought in, many of which were diverted to other instances of conflict resolution such as the Labor Mediation and Arbitration Commission and civil society organizations.

4 Pedroso, João; Trindade, João Carlos; José, André Cristiano; Santos, Boaventura de Sousa (2003). "Characterization of the performance of the courts: a roadmap of the blockades of the judicial system. In Santos, Boaventura de Sousa; and Trindade, João Carlos. Conflict and social transformation: a landscape of justice in Mozambique - *Conflito e transformação social: uma paisagem das justiças em Moçambique*. Porto: Afrontamento, pp. 519-612.

5 A more recent discussion on the formalism of judicial decisions in Mozambique is made in Fernando *et al.* (2019).

6 The relationship between case management and the judges' remuneration regime – which is not discussed in this paper – is discussed in depth in Fernando *et al.* (2019).

The words from the President of the Supreme Court indicate a recognition of this problem:

It is essential, and even urgent, that Justice moves quickly to the digital age, adopting technological tools that allow controlling the time taken processing cases, correcting anomalies in a timely manner and holding accountable those whose actions do not fit into the vision of an accessible, independent, honest, fast and quality justice system¹.

Since the late 1990s, the senior officials of the judicial system have announced the computerisation of the courts, and some models of computer management have also been tried. In recent years, the computerisation of courts is associated with the need to promote the business environment. However, even in this specific and very reductionist approach, computerisation still seems to be a mirage.

The system for evaluating magistrates is therefore blind to the actual dynamics of the courts, even though judges in office are part of it and are well aware of the dilemmas and constraints of everyday life. The menu of annual requirements (number of cases filed, prosecuted and pending; number of trials, orders, sentences; number of postponed judgments; etc.) is met with a more or less extensive list of numbers, even if these are sterile as to the quality of justice provided to citizens or the problems underlying these quantitative data.

6.7 Accountability and information

The issue of accountability and information has sparked discussions in the most varied forums, especially when combined with the issue of the independence of the courts. Positions include addressing issues such as the composition of senior counsellors, assessment of judicial activity and administrative and financial management, lack of accountability of judges, etc., each of which deserves a particular discussion. In this article, we only need to check if and how accountability is carried out in relation to specific activities developed within the scope of internal control.

At the outset, the enlarged composition of the Higher Council of the Judicial Magistracy – which includes five members elected by the National Assembly – at least in theory, contributes to the scrutiny by that body, albeit with the limitations inherent in (in)direct representation. In any case, the Higher Council of the Judicial Magistracy makes available to the general public the deliberations of its Plenary and Standing Committee, in addition to Resolutions, Circulars and other relevant information. At the same time, the President of the Supreme Court (who also chairs the Higher Council of the Judicial Magistracy, under the Constitution of the Republic), presents annual information to the public, on the occasion of the opening of the judicial year.

6.8 Conclusion

The rules and methods of classifying magistrates are not very consistent, a fact that not only discourages compliance (with damage to the quality and efficiency of the administration of justice), but can potentially distort the conditions for the career development of judges. On the other hand, the Judicial Inspectorate is not properly structured, it is not equipped with the human resources necessary for the complete fulfilment of its mandate and it does not always include magistrates with the desired technical and ethical profile. It does not, therefore, even in the opinion of judges, guarantee an impartial performance.

¹ Speech by the President of the Supreme Court at the opening of the 2019 judicial year.

What seems certain is that the guarantee of judicial independence will hardly be achieved if the Judicial Inspectorate and the Higher Council of the Judicial Magistracy are not provided with the conditions that make them more efficient and transparent. It will be necessary that the political will that is insinuated in speeches, drives effective and consistent investment in the system of the administration of justice.

The adoption of clear, objective classification rules that are in harmony with the nature of the judicial function and with the constitutional and legal guarantees provided to judges, is one of the indispensable conditions for the promotion of efficiency, transparency and integrity. Only then will the disjunction between the objectives for which the CSMJ and the Judicial Inspectorate were created and the practical exercise of their respective mandates cease to occur. This will be one of the ways to reinforce the symbolic effectiveness of the law courts, as they will be better able to communicate a solid image of justice and equality both inside and outside the system.

CHAPTER VII

7. Governance and Integrity Report in Mozambique 2019: Public Sector

By José Jaime Macuane

This chapter presents the public sector elements of a National Integrity System (NIS)¹, in light of a request by Transparency International (IT) for an analysis of this sector. This represents a slight change in approach compared to the Governance and Integrity reports of 2008 and 2013, which did not follow the same structure. Thus, some themes from previous reports have been removed and new content added. However, in order to obtain an insight into the evolution of public sector integrity issues since the date of the last report, the analysis covers the 2014/15 period up to where the most recent data availability allows, more precisely 2018 in many cases, and 2019 in some.

The analysis is essentially based on documentary and bibliographic review. All elements of the NIS are analysed in their normative and practical components. The former refers to the existence of a legal framework for this purpose, while the second deals with the application of the norms and their effectiveness. Brief conclusions and recommendations are presented at the end of the chapter.

7.1 Resources

The Mozambican public sector is made up of all bodies directly and indirectly financed by the State². In addition to sovereign bodies, this includes the Public Administration as a whole, the State business sector, public institutes and other bodies that benefit from public resources.

The resource component is analysed in the area of public spending and human resources.

Public sector spending in Mozambique reached a peak of 42.5% of Gross Domestic Product (GDP) in 2014 and dropped to 31.16% in 2018³. For 2019, growth is estimated to reach 37.04% of GDP and a in 2024 to decline to 26.93%. But taking into account the GDP growth and public revenue from gas investments in the Rovuma basin, there will be nominal and real growth in public expenditure in this period.

The Mozambican public sector is facing a persistent budget deficit, which in 2014 was equivalent to 22.7% of GDP, before grants.⁴ In recent years, the financing of the budget deficit has moved from foreign aid to public debt. This grew from about 37% of GDP recorded in 2014 in the Government's Five-Year Plan⁵ to 117% of GDP in 2019, after reaching a peak of 125.6% of GDP in 2016⁶. The debt crisis, triggered by the discovery of hidden debts in 2015, contracted outside of the limits approved by the Assembly of the Republic, was one of the causes of this vertiginous increase, which revealed the weakness of the institutions in this area. One of the direct consequences of the hidden debts was the cutting of external support and the ending of direct support to the state budget by cooperation partners, some of whom began instead to give their support through bilateral projects. The deficit was financed by loans (72.1%) and grants (27.9%) in 2018. The following year, loans and grants financed 78.6% and 21.4% of the deficit, respectively⁷.

1 Used as a reference for this report.

2 Inter-ministerial Commission on Public Sector Reform (2001). Global Strategy for Public Sector Reform. Maputo, Republic of Mozambique).

3 Data taken from <https://www.statista.com/statistics/507339/ratio-o-government-expenditure-to-gross-domestic-product-gdp-in-mozambique/> (accessed on February 23, 2020).

4 Republic of Mozambique (2015). Government Five Year Plan 2015-2019. Maputo, Republic of Mozambique.

5 Idem

6 World Bank (2019). Mozambique Economic Update: Mind the Rural Investment Gap (Portuguese). Mozambique Economic Update. Washington, D.C: World Bank Group. <http://documents.worldbank.org/curated/en/565181581086015871/Mozambique-Economic-Update-Mind-the-Rural-Investment-Gap>

7 Republic of Mozambique (2020). State Budget Execution Report, January to December 2019. Maputo, Republic of Mozambique. pp. 19-20.

In the same year, 64.5% of the budget was for operating expenses and 23.5% for capital costs¹.

Spending on the areas defined by the Government as priorities, from the point of view of human development and economic growth - education, health, agriculture, social welfare; water, sanitation & hygiene; infrastructure; defence and security - showed an average growth rate of 6% between 2009 and 2016, but decreased between 2015 and 2016 and in relation to GDP². In 2018 and 2019, spending on priority sectors was 14% and 16.5% of GDP, respectively. In the latter year, much of this spending was in response to tropical cyclones Idai and Kenneth.³ However, there are still regional differences in resource allocation⁴.

On human resources, the most recent official data, which cover the period up to 2017⁵, indicated that the Mozambican public administration consisted of 365,826 State employees, of whom 11% were in central agencies and 89% in local state agencies. About 61% of the public servants were men and 39% women. As for the level of education, 11.9% of public servants have elementary level, 18.5% basic level, and 46.9% mid-level. 22.7% have higher education. The expansion of civil servants to meet the demands of human resources between 2015 and 2017 was 10% on average. The largest growth of public servants was the group with higher education, which expanded by 20.8%, and the second highest growth was in the group with mid-level education which grew by 11.8%. This shows that there is a gradual improvement in the level of qualification of public servants. However, with the fiscal crisis triggered by the public debt, growth rates have declined, since the hiring of public employees has been restricted to the priority sectors as mentioned above. Even in these sectors, growth was at rates below what was necessary, with implications for the quality of services. For example, the education sector projected the hiring of only about 6,000 new teachers in 2020, out of a total of more than 12,000 required⁶.

However, the Mozambican public sector wage fund has increased from 8% in 2010 to 11.3% of GDP in 2016 and is expected to reach 12% in 2021, which is above the average for countries at the same level of development.⁷ This growth in expenditure is due to wage increases for promotions of existing public servants and does not necessarily mean more recruitment of staff essential for the improvement of public services⁸. Even so, **public sector wages** are lower than in other economic sectors⁹. This makes it difficult to retain qualified staff, who are still vulnerable to recruitment by the private sector, mainly by multinational companies investing in the country, as well as by international development organizations and some national NGOs with external funding and higher salaries. In general, the trade unions consider the minimum wage in the formal sector in Mozambique, which is negotiated annually in the Labour Consultative Commission, a tripartite body between the government, the trade unions and the Confederation of Business Associations (CTA), as below the minimum level for subsistence. In the case of public sector employees, their unionisation has been delayed for a long time, which reduces the negotiating capacity of this group. In the past, wage negotiations have been carried out by specific groups, and in 2013 a strike by doctors led to selective wage increases for this professional group. As indicated in the 2013 Governance and Integrity report, this

1 Ibid

2 UNICEF (2019). Analysis of the Fiscal Space. Maputo, UNICEF Mozambique. <https://www.unicef.org/mozambique/sites/unicef.org/mozambique/files/2019-04/2019-Analise-espaco-fiscal.pdf>

3 World Bank, 2019.

4 Ibid.

5 Ministry of State Administration and Public Service (2018). Statistics of State Employees and Agents (2016 -2017). Maputo, Republic of Mozambique.

6 <https://www.rm.co.mz/rm.co.mz/index.php/component/k2/item/8444-pais-defice-na-contratacao-de-professores-primarios-para-o-proximo-ano.html> (accessed on 10 February 2020).

7 International Monetary Fund (2018). Republic of Mozambique: Selected Issues. IMF Country Report no. 18/66. https://www.elibrary.imf.org/doc/IMF002/25010-9781484345634/25010-9781484345634/Other_formats/Source_PDF/25010-9781484345689.pdf (accessed on 15 February 2020).

8 UNICEF (2019). Analysis of the Fiscal Space. Maputo, UNICEF Mozambique. <https://www.unicef.org/mozambique/sites/unicef.org/mozambique/files/2019-04/2019-Analise-espaco-fiscal.pdf> (accessed on 19 February 2020).

9 With the exception of the baking industry, which has the lowest average wages. For details see European Union, Labor Advisory Commission and ISCOS (2016). Study on Wages in Mozambique. <http://www.iscos.eu/it/wp-content/uploads/2017/09/Estudo-Salario-Mocambique-Salary-Survey.pdf> (accessed on 20 February 2020).

form of negotiation leads to selective and inconsistent increases, depending on the bargaining power of each group and, in addition to creating distortions between the different groups, makes it difficult to forecast spending on wages, and the expenditure itself becomes unsustainable. This situation still prevails.

The pattern of public sector financing has a negative impact on the access to and quality of some public services, for example, teacher-pupil ratios and access to basic health services. Access to medicines is still critical, due to logistical problems, reduced budget allocations from partners, implementation problems, and even poor allocation of human resources¹. Data from 2018 show that the pupil/teacher ratio still remains high in some grades, with 64 pupils per teacher nationally in primary schools, with some provinces reaching over 70 pupils/teacher (Cabo Delgado, Nampula and Niassa) and a few with 50 or less (Gaza and Inhambane)². In secondary schools the ratio drops to 33 students per teacher³. The quality of education is still low. For example, according to the Government, only 5% of children in elementary school (1st to 5th grade) can read and write properly and only 7.7% have essential skills in arithmetic⁴. Despite the existence of inclusive education policies, access to education for people with disabilities is still low. Public services for this group of people also tend to be poorly funded, concentrating on a few types of disability and on the distribution of means of compensation, without complementary measures, such as the adaptation of infrastructure and the existence of means for maintenance, which reduces the effectiveness of these services⁵.

However, despite the critical elements of public service delivery, opinion polls point to an improvement in services in recent years. In national Afrobarometer public opinion polls from 2015 to 2018⁶, the percentage of people who reported easy access to education, health, water/sanitation and electricity services increased from 62% to 75%, from 55% to 65.7%, and from 45.4% to 50%, respectively. The number of people who reported knowing a family member who was left untreated several times, or always, in the health services, fell from 44% to 40%, in the same period.

Briefly, although there has been a considerable reduction in its funding after the interruption of support from development partners, the public sector has been growing, in terms of public spending in general and wages in particular, and in the number of public employees, as well as in their academic qualifications. Persistent budget deficits have been increasingly financed by domestic resources. Opinion polls point to the perception that some public services aimed at citizens are improving, but more qualitative surveys and quantitative performance indicators⁷ show the existence of critical elements in the provision of basic services. In addition, there are still challenges in terms of improving the capacity of the public sector, especially with regard to the recruitment of public servants and their retention, as well as the financing of public spending and a more equitable allocation across the different regions of the country.

7. 2 Independence

Mozambique has **normative elements to guarantee the independence of the public sector and its protection against political interference**. These elements are defined generically in the Constitution of the Republic of Mozambique (CRM) and in the relevant legislation.

1 Matine, Jorge (2020). The Lack of Medicines is also associated with the Precariousness in the Operation of Pharmaceutical Logistics in the Public Health System. Maputo, Center for Public Integrity. <https://cipmoz.org/wp-content/uploads/2018/07/A-FALTA-DE-MEDICAMENTOS.pdf> (accessed on 10 February 2020).

2 National Statistics Institute (2019). Statistical Yearbook 2018, Mozambique. Maputo, National Statistics Institute.

3 Ibid.

4 Ministry of Education and Human Development (2019). Education Sector Performance 2018 (Report/Final Version). Maputo, Ministry of Education and Human Development. <https://www.globalpartnership.org/sites/default/files/document/file/2020-05-Mozambique-ESP-IR.pdf> (accessed on 01 July 2020); and <https://www.portaldogoverno.gov.mz/por/Imprensa/Noticias/Leitura-e-escrita-passam-a-ser-o-foco>, accessed on 22 February 2020.

5 See Macuane, José Jaime; Vembane, João e Andrade, Rafaela (2019). The Political Economy of the Disability Area in Mozambique. Maputo, Civil Society Support Mechanism Foundation (MASC).

6 Afrobarometer (2015). Afrobarometer Round 6 Summary of Results for Mozambique, 2015: Survey Overview, The Quality of Democracy and Governance in Mozambique; Afrobarometer (2018). Afrobarometer Round 7 Summary of Results for Mozambique, 2018: Survey Overview, The Quality of Democracy and Governance in Mozambique.

7 Like the pupil/teacher ratio.

In this context, besides the principle of legality in public administration decisions, the process of selection, recruitment and promotion of public servants is subject to its own legislation, which in principle guarantees independence from political interference. Public servants have guarantees against arbitrary behaviour, with a stress on the right to resist illegal orders or those that offend against rights, freedoms and guarantees, as indicated in Article 80 of the Constitution of the Republic of Mozambique¹. The General Statute of Civil Servants - approved by Law No. 10/2017 of 1 August - indicates legality (art. 5) as one of its general principles and gives public officials the right not to comply with illegal orders (art. 44). Law 14/2011 of 10 August, in its article 18, defines guarantees for private individuals and collective persons, however managed, in relation to decisions of the public administration, which include various forms of complaint and appeal, as well as administrative litigation.

For administrative litigation cases, the country also has an administrative jurisdiction, made up of the Administrative Tribunal (TA) and the provincial administrative tribunals. The creation of the latter, in 2009, as courts of first instance, increased the possibilities for public servants to appeal against arbitrary decisions from the local level. The Law on Public Probity - LPP (Law 16/2012 of August 14) - in its article 27, prohibits the exercise of political activities within public offices and during working hours. Article 30 of the same law defines as general principles of the action of the office holder or member of any public body the defence of the public interest above any other interest, including political ones. This law was one of the responses to the realization that Frelimo party branches operating in public institutions (something pointed out in the first report (of 2009) of the African Peer Review Mechanism, MARP) were contributing to the partisan nature of the State.

In addition to the above elements, public officials may also file complaints related to non-compliance with their rights in the public administration with the Ombudsman, as well as petitions to Parliament, which has a specific commission that deals with petitions.

These legal and institutional elements protect public servants from punishment, dismissal and discrimination on account of political interference and constitute the framework that, in theory, can guarantee the independence of the public administration from political interference.

However, the practice is more challenging. Appointment to managerial and leadership positions is still made on the basis of trust, in many cases, with respect to the legal requirements required in the public service for this purpose. Few managerial and leadership positions are subject to competitive procedures. One of these positions is that of permanent secretary of a ministry, for which a public tender is opened and a selection committee, made up of ministers and chaired by the Minister of State Administration and the Public Service, is created. However, the minister of the area to which the competition is directed is consulted in the selection process. In practice, the ministers, who hold a political position, have interfered in the sphere of action of the permanent secretaries, and have even influenced their selection. Recently, the public company Electricidade de Moçambique has introduced a public and competitive selection process for its management positions, but this practice is not followed consistently in the selection and appointment of the chairpersons of the board of directors.

Despite the existence of public sector legislation that prevents political interference in the appointment and promotion of public servants, there is a strong perception that this still exists, especially at provincial level. Apart from the regular reporting of the receipt and handling of the declaration of assets by the Attorney General's Office, the LPP is not being monitored and there are no reported initiatives to monitor the use of public sector resources for political purposes, or of the ban on party branch activities in the public administration. Political interference in the public sector is still considerable.

In practical terms, the formal elements of independence are not guaranteed. For example, transfers of public servants

¹ Constitution of the Republic of Mozambique, republished by Law No. 1/2018 of 12 June 2008.

on account of their political activities are often reported. Elected office holders have the power to appoint their managers, so there is often a change of officials in management and leadership roles, which in itself does not mean that it is for political reasons. This is not the case with community authority appointments, which, although depending on legitimation by the communities, have historically been manipulated by the power of the day, including at municipal level. For example, in addition to the transformation of the old Frelimo-led party-state structures into community authorities and records of appointments of people convenient to the power of the day, a practice dating back to colonial times, there are references to appointments of new community authorities in municipalities governed by the opposition¹.

The Ombudsman's recommendations in his reports to Parliament, which include a section on the rights of public servants, have been systematically ignored. This body has systematically pointed out the lack of collaboration of public institutions. Since the Ombudsman's recommendations are not binding, their effectiveness in promoting an independent public service is limited.

Therefore, apart from legal safeguards and the possibility of recourse to administrative procedures and administrative jurisdiction for the purposes of administrative litigation, as described above, there are no specific and effective institutions to safeguard the public sector from political interference, both in its normal functioning and in the recruitment and promotion of public servants. The various mechanisms in place have some potential, but are not in themselves sufficient to stimulate practices that promote the independence of the public sector and defend its employees from political interference.

7. 3 Transparency

The public sector is endowed with mechanisms that guarantee transparency in its acts, namely in financial management, human resources and information management. As far as financial management is concerned, the particular instrument for this purpose is the State Financial Administration System (SISTAFE) and its electronic application, e-SISTAFE. Municipal legislation also obliges municipal entities to make their revenue and expenditure available to the public for consultation, as well as plan and budget implementation reports. The State Budget is a public document, as are the budget execution reports, the General State Account and the Report and Opinion on the General State Account drafted by the Administrative Tribunal.

With the Law on Public Probity (Law 16/2012 of August 14), public servants with appointed positions are now required to submit annual declarations of their assets, which are deposited in the reception and verification committees of the Attorney General's Office and, in the case of public prosecutors, the Administrative Tribunal.

The public sector has specific legislation on the classification of information and conditions for access to it, as defined in the National State Archives System (SNAE), approved by Decree 36/2007 of 27 August and complementary legislation making the system operational. The provision of information in the public sector, from the citizen's perspective, is formally guaranteed by the Freedom of Information Act (Law 34/2014 of 31 December) and its regulations, approved by Decree 35/2015 of 31 December. These provisions define principles of access to and availability of information, including the need for the public sector to make available information of public utility to citizens, without bureaucratic or other obstacles. The same provisions encourage the public sector to be proactive in providing information to the public, including on tenders and the award of public contracts. Regarding the latter, there is the Regulation on Public Works Contracts, and the Supply of Goods and Services to the State, approved by Decree 5/2016 of 5 March. The hiring of public servants is also subject to competition, according to the General Statute of Public Servants.

¹ <https://www.jornalnoticias.co.mz/index.php/politica/36243-ignorando-recomendacoes-do-maefp-edil-de-nampula-nomeia-novas-estruturas-de-base.html>

In practice, there has been an improvement in the availability of financial information, but not the more general information held by the public sector. In general, access to public information is still limited. Monitoring studies by MISA Mozambique on the openness of public institutions show that they are still closed and few comply with the provisions of the law on freedom of information. The same is true for electoral procedures¹.

The availability of financial information improved with the expansion of e-SISTAFE, which in 2019 covered 1516 (93%) of the 1631 existing beneficiary entities (Beneficiary Management Units, UGBs), a portion of the State Budget and 152 (99%) of the 154 districts in the country². In this context, the Government has made the State Budget document and the respective Budget Execution Reports (BER), as well as the General State Account (GSA), available regularly and in a timely manner to the relevant bodies and the public on the website of the Ministry of Economy and Finance. The Government has also published a more simplified version of the budget, the citizen's budget, which was already in its 8th edition in 2019, thus improving access to a wider and lay public.

The budget transparency index improved from 38 to 41 (on a scale of 0 to 100, a higher number meaning more transparency) between 2015 and 2017³ but only went up one point, to 42, in 2019⁴. The Administrative Tribunal, the body responsible for the analysis of public accounts, also makes available its Report and Opinion on the General State Account. There is discussion and pressure to make available the audit reports from the Administrative Tribunal and the General Inspectorate of Finance, but these have not yet been answered positively. The discovery of loans made on the basis of State guarantees vastly in excess of the ceilings on such guarantees laid down in the Budget Law, and without the approval of Parliament, in 2013 and 2014, to the amount of US\$ 2.2 billion - the so-called hidden debts - show the opacity of this type of operation. In 2017, the Government approved a specific decree for greater transparency in debt management (Decree 77/2017, of 28 December, on the process of issuing and managing public debt and State guarantees). In 2019, it prepared and published the fiscal risk report, but information on public debt management, which should be quarterly and public, is only available up to 2017⁵. Up to 2018, both domestic and external debt service arrears were not included in the budget⁶. The debt of public companies is another area where the availability of public information is limited⁷.

As far as the assets of public officials are concerned, the Law on Public Probity is not being fully complied with. After a significant improvement in the submission of declarations, which reached 96.8% between 2016 and 2018, from that year to 2019 there was a drop to 82.7%. In the case of Public Prosecutors, who are the main institution responsible for receiving and verifying the assets of public servants, compliance with the LPP in this regard through sending declarations to the Administrative Tribunal registered increases and decreases in the 2015-2019 period, and currently stands at 83.8%, which is the best rating since the approval of the LPP (figure 1). Therefore, as can be seen in figure 1, over the last five years, between 40% and 16% of Public Prosecutors have not declared their assets. The perception that the law is not being complied with led the Government to adopt, in 2020, measures to sanction officials who do not submit their declarations of assets, including loss of salary.

1 MISA Mozambique (2020). Monitoring of Access to Electoral Information in the 2019 General and Provincial Elections in Mozambique. <http://www.misa.org.mz/index.php/publicacoes/relatorios/eleicoes-2019/95-pesquisa-de-monitoria-de-acesso-a-informacao-nas-eleicoes-gerais-e-provinciais-de-2019-em-mocambique> and MISA Mozambique (2019). Mozambique, Evaluation of Transparency 2018: The citizens' analysis on government openness.

2 Interview with the Center for the Development of Financial Information Systems (CEDSIF).

3 2015 Open Budget Survey: Mozambique. <https://www.internationalbudget.org/wp-content/uploads/OBS2015-CS-Mozambique-Portuguese.pdf>, Open Budget Survey 2017: Mozambique. <https://www.internationalbudget.org/wp-content/uploads/mozambique-open-budget-survey-2017-summary-portuguese.pdf>

4 International Partnership for the Budget (2019). Open Budget Survey 2019, Mozambique. <https://cipmoz.org/wp-content/uploads/2020/04/Mozambique-2019-en-FINAL.pdf>

5 CIP (2020). After the hidden debts: the Ministry of Economy and Finance is still not accountable for Public Debt Management. Anticorruption - Transparency - Integrity - Issue 10/2020, March 2020. <https://cipmoz.org/wp-content/uploads/2020/03/Depois-das-di%CC%81vidas-ocultas.pdf>

6 CIP (2018). The government continues to hide important financial operations of the state from the citizen. A Look at Public Expenditure. Anticorruption - Transparency - Integrity - Issue 2/2020 - March <https://cipmoz.org/wp-content/uploads/2018/07/O-Governo-continua-a-esconder.pdf>

7 Ibid

7.4 Accountability

The Constitution of the Republic of Mozambique and relevant legislation define the accountability mechanisms of the Government and public servants, including on corruption issues.

The Government must report regularly to Parliament, through the Prime Minister and the ministers of the specific sectors that comprise the Council of Ministers. Parliamentary committees and the Assembly have the right to call public servants and other citizens to account for their activities and provide other information described as important. According to the Law on Public Probity, the Criminal Code (Law No. 35/2014 of 31 December) and the Anti-Corruption Law (Law 6/2004 of June 17), public servants are prohibited from receiving bribes or using their position to obtain advantages such as illicit economic participation. The public sector has supervisory mechanisms, such as the General Administrative Inspectorate of the State, the General Inspectorate of Finance and the Administrative Tribunal, which are responsible for supervising and auditing compliance with existing regulations. The scope of these bodies extends to public companies. In the area of public procurement, there are complaint mechanisms established in the procedures, both from the contracting entities and the Procurement Management Units (UGEAs), and from the sector's supervisory body, the Functional Procurement Supervisory Unit (UFSA). Information on public tenders can also be consulted.

In the country there is a generic mechanism for denouncing abuses and for witness protection, formally created by the Law for the Protection of Victims and Whistle-blowers (Law No. 15/2012 of August 14), which provides for the existence of a Central Office for its implementation.

The practice is rather different. Accountability in Parliament is conditioned by party alignment, meaning that although the government does report regularly, it benefits from the protection of the ruling party, which by virtue of the Parliamentary Standing Orders has more time to intervene, allowing it to better control the debate, as well as having power over the approval of reports and accountability measures. There is also confusion as to the real accountability responsibilities of State-owned companies. For example, in the context of the hidden debts, the request by opposition parliamentarians to question the company EMATUM, which benefited from State guarantees, was rejected by the majority while the company itself claimed that it had no duty to report to Parliament. This position eventually prevailed, despite legislation providing that whenever State funds are used there is room for parliamentary oversight and accountability. The accountability of the State business sector is generally weak.

The Central Office for the Protection of Victims and Whistle-blowers (Law 15/2012) has not yet been established. However, the Attorney General's Office, through the Central Office for Fighting Corruption, has a green telephone line for receiving complaints about corruption. On a regular basis, the UFSA publishes lists of companies included in the public procurement blacklist, as well as the financial volume of public procurement.

7.5 Integrity

The LPP has mechanisms for the promotion of public integrity, which seek to prevent cases of conflict of interest, illicit enrichment and the use of public resources for private purposes. This law also defines restrictions on the use of public resources for private purposes (articles 27 and 28). Bribery of public officials is also a crime under the Penal Code, as already indicated. The regulation of public procurement provides for the inclusion of anti-corruption clauses in contracts. The issues of conflict of interest are addressed by the Central Public Ethics Commission and by the sector public ethics committees, which are responsible for issuing non-binding opinions on these matters. The mechanisms for preventing illicit enrichment are the annual declaration of assets and the verification commissions of the Attorney General's Office and the Administrative Tribunal. The country also has the Central Office for the Fight against

Corruption, which falls under the Attorney General’s Office, which is the body responsible for the investigation and prosecution of corruption.

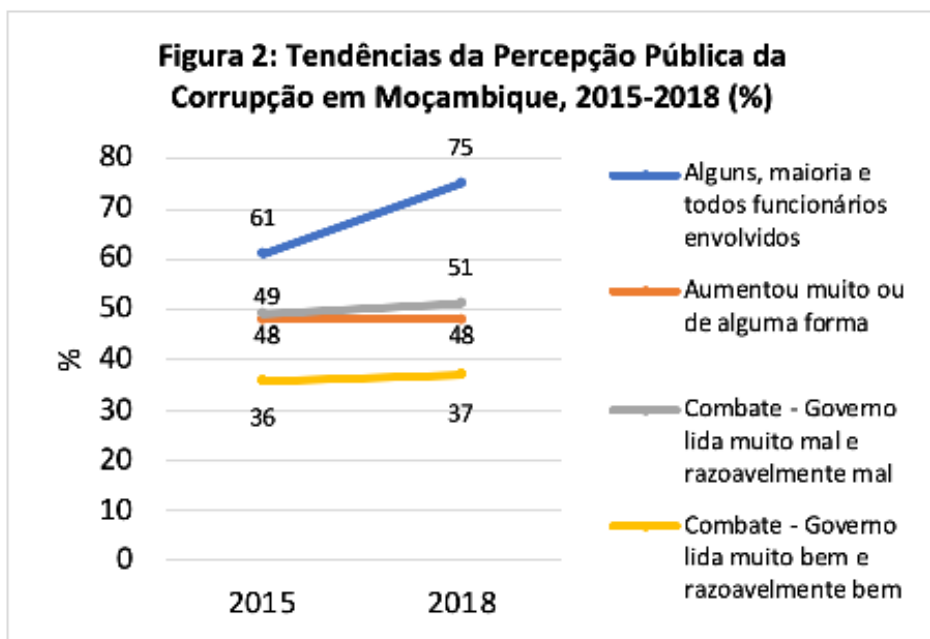
The practice has mixed results as regards the effectiveness of integrity mechanisms in the public sector. Strengthening integrity in the public administration is part of the Public Administration Reform and Development Strategy (ERDAP), 2012-2025. The Government, through the Ministry of Economy and Finance, conducted a Study on Transparency, Governance and Corruption in 2019 , from which actions were derived for implementation, including the review of anti-corruption legislation, especially the LPP, as well as strengthening its application and relevant bodies such as the Central Office for the Fight Against Corruption. The Attorney General’s Office has a Strategic Plan to Fight Corruption.

However, in this area, there have been advances and setbacks. On the positive side, according to Afrobarometer opinion polls, from 2015 to 2018 the percentage of people who reported paying bribes or providing favours in exchange for education and health services on some or many occasions fell from 16.3% to 11.4% and from 12.4% to 8.2%, respectively. Transparency International’s Corruption Perception Index improved slightly from 23 to 26 points (on a scale of 0 to 100 points) between 2018 and 2019, with the country climbing from 146th to 126th in the world corruption ranking. This is the first rise in the last four years, but still below the 31 points of 2014 and 2015.

Contrary to the positive trends, the opinions of the Central Public Ethics Committee, since they are not binding, have not been taken into account. For example, in 2016 the Central Bank’s pension fund was involved in the purchase of a bank in which it intervened, Mozabanco. When the matter was referred to the Public Ethics Commission, it declared the existence of a conflict of interest. However, no action was taken and the deal continued with the aforementioned pension fund, which is still one of the shareholders of the bank. This example shows a certain ineffectiveness of this body as an institution of integrity.

Public perceptions of corruption tend to be negative in general aspects, such as the involvement of public officials and the government’s commitment to fighting corruption. Between 2015 and 2018, the number of people who think corruption has increased has not risen, but there is a growing general perception that public officials are involved in corruption and that the Government is dealing with it badly (figure 2).

Figure 2: Trends of Public Perception of Corruption in Mozambique, 2015-2018 (%)



Source: Afrobarómetro Mozambique, Rounds 6 and 7 – 2015 e 2018

Procurement documents, as well as public contracts, contain anti-corruption clauses, but it is not clear that they are being complied with. According to a World Bank study, between 2007 and 2018, companies reported a growth in the need for bribes for water and power connections, and for building permits, and for more than a third of them corruption is the main obstacle to their business¹.

7.6 Public Education on Corruption

There are some anti-corruption campaigns in the media and the President has indicated this area as one of his governance priorities. The Central Office for the Fight against Corruption has also released contact numbers for allegations of corruption.

However, some citizens still do not know where to complain about corruption. The Afrobarometer study of 2015 pointed out that some of the main causes for people not reporting corruption cases is not knowing where (13%), or how they can do it (14%) and because they think it will make no difference (14%). The proportion of people who responded by not reporting corruption for fear of reprisals grew from 19% to 55% from 2015 to 2018, which is another obstacle to people's involvement in these kinds of initiatives.

7.7 Cooperation in Preventing and Fighting Corruption

There have been some initiatives of cooperation between the public sector and civil society in fighting corruption. For example, the Integrity Pact against Corruption (BIPAC)² and the National Business Integrity Agenda (BICA)³ are among these initiatives, but they have not made significant progress. BIPAC was initiated by the Institute of Directors of Mozambique, now called the Institute of Corporate Governance of Mozambique (IGCM), and aimed to create a pact between companies and the public sector of commitment to an anti-corruption agenda in the area of procurement. Some companies joined BIPAC, but the initiative did not continue and, at this moment, there are no actions under way. BICA is a pilot initiative of the Centre for Public Integrity (CIP), which has even created a committee bringing together representatives of government, civil society, and the private sector and development partners. The first study was published in 2016, and there were some follow-up initiatives, but they did not move forward with the initial momentum.

Other initiatives at local and sector level are school councils (in the education sector) and health facility co-management committees, which also look at corruption issues in public service delivery. These sector initiatives also depend on the proper functioning of participation structures, which in recent times has declined due to the closure of civic space and the deterioration of civil and political freedoms and democracy in general. This deterioration of democratic governance, already mentioned in international indices that describe the country as an authoritarian regime⁴, has reflexes in the weakening of participation mechanisms, in society's supervision of governmental and partnership acts, such as development observatories and local advisory councils, thus reducing the arenas of collaboration. Another hindrance to their effectiveness is the fact that these participation initiatives, mainly community-based, depend on development partners and Non-Governmental Organisations (NGOs) operating in these sectors. With the change in the decentralisation framework (see the respective chapter in this report) and the realignment of relations between participation structures and governmental institutions, the participation of civil society and citizens in the public sector will be affected.

¹ World Bank, 2019.

² The acronym comes from the original name in English - Business Integrity Pact against Corruption. <http://iodmz.com/apresentacao-do-projec-to-bipac/>.

³ Acronym comes from the original name in English - Business Integrity Country Agenda.

⁴ Such as the Economist Intelligence Unit and Freedom House.

As part of the dialogue between the private and public sectors, in 2015 the Government and the Confederation of Business Associations (CTA) committed themselves to a greater endeavour by the latter to denounce acts of corruption, involvement in tax evasion and abandonment of public works by its members¹. These actions were to be monitored within the framework of plans agreed between the parties, but there is no public record of the report on this action. Another relevant intervention, implemented between 2014 and 2019, was the project “Collective Action to Fight Corruption in Mozambique”, financed by the Siemens Integrity Initiative. This project was aimed at training ethics managers and creating mechanisms for ethics management in public and private sector organisations, as well as a coalition in this sector, bringing together the public and private sectors and involving organizations such as the Order of Accountants and Auditors of Mozambique and the Institute of Directors of Mozambique. This initiative has contributed to the training of ethics managers in the above sectors, but it is still premature to predict its impact². A second phase of the same initiative was launched on 30 June 2020, with the title Coalition for Organizational Integrity in Mozambique and it should be implemented by 2024.

7. 8 Integrity in Public Procurement

Over the last 15 years, the country has approved three different regulations, the last one in 2016, through Decree 5/2016 of 8 March - the Regulation of Public Works Contracts, and the Supply of Goods and Services. The public procurement system is coordinated by a supervisory entity, the Functional Unit of Procurement Supervision (UFSA). At the level of the contracting entities there are the Procurement Management Units (UGEAs) that are responsible for procurement and contract management. The legislation provides for various forms of public procurement, with public tenders being the general regime, but there are exceptional regimes, which include more restricted tenders and direct contracting or direct agreement. The different regimes are indicated in the above mentioned decree.

The exceptional forms of contracting are only accepted in cases defined by the legislation and the annual Budget Law indicates the limits of the contract values that can be carried out on the basis of direct contracting.

The procurement legislation provides for the disclosure of the winners to whom the contracts related to the tenders were awarded, as well as the contracts awarded by direct agreement. It also provides for the submission of complaints and their treatment by the contracting entities, as well as the sanctioning of bidders involved in corruption, fraud, collusion and coercion. Sanctions may involve fines and bans on contracting with the State for a period of 1 to 5 years, depending on the seriousness of the infringement. Employees involved in illicit procurement practices are also subject to disciplinary procedures provided for in the EGFAE, without prejudice to other sanctioning measures provided for in legislation.

As for the practice, there are advances and challenges. Under e-SISTAFE, the installation of the procurement module in the State’s patrimony subsystem is being concluded, which has the potential to contribute to an improvement in transparency. The expansion of e-SISTAFE allows the extraction of statistical information on the various forms of tendering and contracting, including by direct contracting, which is disclosed on the UFSA website and thus contributes to increasing transparency in the sector. There is also an increase in the number of bodies that disclose the contracts awarded, which is a requirement laid down in the Procurement Regulation. One of the consequences of this is the growing public scrutiny of contracts awarded, both by non-competitive modalities, and to suppliers that in principle do not have a relevant social object for the tenders that have been won³.

1 See Center for Public Integrity (2016). National Business Integrity Agenda (BICA): Mozambique Assessment Report.

2 MAP (2019), Collective Action against Corruption in Mozambique: End of Project Evaluation for Siemens Integrity Initiative, Financing Round II. Report commissioned by The Ethics Institute (South Africa), unpublished.

3 Companies have frequently appeared with contracts in areas that differ from their corporate purpose, which raises questions about the integrity of procurement.

Moreover, there are challenges in promoting integrity in this area. The 2015 analysis of Public Finance Management¹ pointed out that 52% of the contracts awarded in 2014 were through non-competitive state purchases. This percentage was maintained until 2018, with 52% of the acquisitions made by direct agreement and 48% by competitive regimes, corresponding to a total of 68% and 32% of the volume of the acquisitions for the year, respectively². The excessive use of direct contracting in public procurement has been systematically reported by the Administrative Tribunal in its analysis of the General State Account, which shows reduced competitiveness and potentially less transparency in public procurement. There has also been a recurrence of the hiring of staff, contracts and services without compliance with public procurement rules.

However, a more specific assessment of the levels of integrity in the area of public procurement will require more specific work, which can clarify the conditions under which the public sector chooses the modality of direct contracting involving two thirds of the volume of purchases. A recent CIP study on the health sector³ shows the existence of practices that violate the integrity of public procurement, among them the excessive use of direct contracting and the existence of a group of companies that systematically benefit from contracts awarded with signs of biased application of the rules.

7.9 Conclusions and Recommendations

The public sector integrity system has a good legal framework, but its critical point is effective implementation. This problem has persisted for a long time and had already been identified in BICA in 2016. This suggests that it is important to pay more attention to the effectiveness of the mechanisms of the National Integrity System. Over the past five years, the public sector has faced a strong fiscal crisis, but at the same time, democratic governance is deteriorating, with implications for restrictions on citizens' freedoms and rights. This has implications for the degree of participation in governance, transparency, accountability and levels of integrity in the public sector.

A set of recommendations for this area follows from the above, namely:

- It is important to pay attention to the mechanisms of participation in governance in general and in the public sector in particular, mainly by revitalising the spaces for community and civil society participation, which have been eroded in recent years. These mechanisms have the potential to promote integrity through the monitoring of public spending and services, and the demand for transparency and accountability.
- Revive partnership initiatives between civil society, the private sector and the Government in areas that promote public integrity, such as procurement, for greater monitoring of their performance and joint definition of strategies for its improvement.
- Improvement of mechanisms to promote integrity, such as the accountability of public officials, the control of conflicts of interest and the declaration of assets. In this context, one could use the opportunity to revise the Law on Public Probity, already expressed by the Government, to improve the effectiveness of existing institutions, such as the Public Ethics Commission and the Ombudsman.

1 AECOM/CESO (2016). PEFA Assessment of Public Finance Management Performance, Mozambique, 2015. PEFA Secretariat.

2 e-Sistafe data taken from the UFSA page: http://www.ufsa.gov.mz/estat_sistafe-18.php

3 Center for Public Integrity (2020). Who benefits from the errors/faults of the Public Procurement of the Ministry of Health? Maputo, Centre for Public Integrity. <https://cipmoz.org/wp-content/uploads/2020/05/Procurement-Pu%CC%81blico-do-Ministe%CC%81rio-da-Sau%CC%81de.pdf>

CHAPTER VIII

8. LAND POLICY IN MOZAMBIQUE: GOVERNANCE AND INTEGRITY

By: Eduardo Chiziane

8.1 Legal and institutional framework for land governance¹

The goals and fundamental principles of the National Land Policy (NLP)² have remained unchanged for 24 years. A land policy and legal reform process was launched at the last “Land Consultations” forum, organized, in October 2017, by MITADER. At this point, a decision had already been taken to start the process of reflection and preparation for the reform³.

The NLP establishes the following primary goals:

- Boost food production and ensure food security;
- Create conditions for family sector agriculture to develop and grow, both in volume of production and in productivity indices, without lacking the main resource, the land;
- Promote private investment, using the land and other natural resources in a sustainable and profitable manner, without harming local interests;
- Preserve areas of ecological interest and manage natural resources in a sustainable way, in order to ensure quality of life for both present and future generations; and
- Update and improve a tax system based on occupation and land use that can support public budgets at various levels.

The NLP takes into account the main uses of land, which include agriculture, urban land use, mining, tourism and productive and social infrastructures, while taking care of environmental protection. The basis of the NLP is consensual and establishes the mechanisms by which natural resources can be exploited in an equitable and sustainable manner.

The fundamental principles of the NLP are as follows:

- Maintenance of land as State property, a principle enshrined in the Constitution of the Republic;
- Ensuring access to and use of land for both the population and investors. In this context, customary rights of access to land and land management for resident rural populations are recognized, promoting social and economic justice in the countryside;

¹ We followed the article very closely: “Legal Implications of the Debate on the Implementation of Land Law”. <http://www.fd.ul.pt/portals/o/Docs/Institutos/ICJ/IusCommune/EduardoChiziane.pdf>, Maputo, 2008.

² Resolution of the Council of Ministers no. 10/95, of 17 October, approves the National Land Policy, and Maria Conceição Quadros “Land Handbook”, CFJJ, 2004, pp. 6 -10. Also presented in the last CIP Report. Cf: CIP “Governance and Integrity in Mozambique: Practical problems, and real challenges”, 2013. pp. 67 and et seq.

³ Under Ministerial Diploma no. 56/2018, of 12 June, of the Minister of Land, Environment and Rural Development, the National Land Policy Review Commission (CRPNT) was created, defined as “a body for coordinating, elaborating and conducting consultations on the review of the National Land Policy and Implementation Strategy, including the respective regulatory and institutional framework”.

- Ensuring the right of access to and use of land by women;
- Promotion of national and foreign private investment, without harming the resident population and ensuring benefits for this population and for the national public purse;
- Active participation of Mozambicans as partners in private ventures;
- Definition and regulation of basic guiding principles for the transfer of land use and benefit rights, among Mozambican citizens or Mozambican companies, whenever investments have been made on the land;

Sustainable use of natural resources in order to ensure the quality of life for present and future generations, ensuring that the areas of total and partial protection maintain the environmental quality and the special purposes for which they were created. This includes coastal areas, areas of high biodiversity and strips of land along inland waters.

These guiding principles and the NLP's goals are summarized in the following statement¹: Ensuring the rights of the Mozambican people over land and other natural resources, as well as promoting investment, and the sustainable and equitable use of these resources.

From the debate, we concluded that the principles and goals set out in the NLP are no longer as valid after 24 years of policy implementation. Therefore, taking into account the economic, social and political transformations that have taken place, namely regional integration with the constitution of the Free Trade Area, it is necessary to assess the possibility of introducing a new guideline for access and land use, namely the institutionalization of the “land tenure market”².

The National Land Policy contains some innovations in relation to the legal framework in force in 1995. The main innovations are:

- Recognition of customary land rights;
- The need for flexibility in the law; and

Formalizing the informal.

The recognition of customary rights had already been suggested by the amended constitution of 1990, when it defined that “the State recognizes and protects the rights acquired by inheritance or occupation”.

According to the NLP, the customary systems integrated into community management are already an unquestionable resource and offer a “public” service at almost zero cost to the State Budget in the administration and management of land, in rural areas. For example, these systems work effectively, in reintegrating displaced populations, in inland areas, including returnees from neighbouring countries. The NLP recommends that “these practical systems, which already apply in the vast majority of land occupation and use cases, should be considered in land legislation”.

The NLP stressed the need for a flexible law, which did not specify what to do in each different cultural situation, but which admitted the principle that, in each region, the respective system of customary rights could operate, according

1 Cf. Resolution of the Council of Ministers no. 10/95, of 17 October, which approves the National Land Policy, Point no. 1 et Seq.

2 According to the late Professor José NEGRÃO, in “What land policies for Mozambique?” National Land Conference, Núcleo de Estudos da Terra, 1996, p. 6. “... there is a distinction between land markets and land tenure markets. While in the first the transfer of property is negotiable, in the second the use and exploitation tenures are transferred, but the State remains, always, as the owner of the resources, although the use rights may be negotiated between third parties ...”. It is true that there is an argument against that claim that communities would easily be deceived and even be forced to sell their land for a pittance, which would jeopardize the food security of large numbers of peasants. The State, therefore, has an obligation to protect its citizens, and cannot, therefore, allow the full liberalization of the land tenure market.

to the local reality. This flexibility should also allow it to be updated over time, without resorting to periodic reviews, mainly with regard to registration of the family sector.

During the 23 years of implementation of the Land Legislation, we can say that some principles set out in the NLP were relatively well implemented. For example:

- The maintenance of land as State property;
- Access to land and its use by the population - the right of Mozambican people to land and other natural resources was ensured;
- The promotion of national investment, namely in the exploitation of natural resources;
- Promotion of women's right to land access and use;
- The reduction of conflicts over land in rural and urban areas¹.

The way in which these successful aspects of implementation of the land legislation have been demonstrated must be measured through a thorough and critical multidisciplinary study.

8.2 Integrity and legal constraints

At this point, we deem the problems and positions expressed by stakeholders (interested parties) in the issue of "land" to be valuable. In this exercise, it was possible to identify the main gaps, weaknesses and contradictions that result from the practical application of that legislation.

It was found that the matters and inconveniences commonly raised were as follows:

- Poor institutional coordination of the sectors that make up the National Integrity System to deal with problems of integrity and corruption associated with land governance,
- Lack of knowledge and application of procedures related to Community Consultation² in the context of land allocation in rural areas;
- The administrative procedures relating to allocation, transmission and revocation of Land Tenure Certificates (DUATs) are complex and pose problems in terms of integrity and good administration;
- Systematic violation of the principles of transparency, by the Public Administration, making the access to public administrative information related to land governance difficult;
- Deficient contribution of the land legislation in promoting foreign private investment and in ensuring benefits for the population and for the national public purse³;
- Unsustainable use of natural resources in order to ensure quality of life for present and future generations⁴;

1 It does not mean that, with our option, there are no potential land conflicts as a result of the country's development process and competition for its best resources. For further development see Christopher TANNER "The sociological and political bases of the Mozambique Land Law", FAO and CFJJ, 2004, p. 1.

2 Sometimes it is not a matter of ignorance, but rather a problem associated with holding consultations in order to benefit A or B. Is it reasonable that Public Administration officers, almost 10 years after the approval of consultation procedures in the scope of land allocation, have not mastered the legal framework?

3 The difficulties that are demonstrated in the consultations with local communities in the scope of Land Tenures (DUAT), have considerably affected the entry of foreign investment into the country. This aspect deserves, however, better studies and statistical evidence.

4 See Christopher TANNER and Sérgio Baleira "Conflict in access and management of natural resources in Mozambique", CFJJ and FAO, 2004, pp. 2 -8.

- Poor knowledge and application of land legislation by the Public Administration¹. For example, during the construction of the Maputo ring road, residents saw their farms and some infrastructure destroyed in the Intaka neighbourhood, in Matola municipality, without having been properly informed about the extinction of their land rights. There seems to have been no proper communication between the parties. The citizens, according to the Land Law (art.18), must be compensated and/or indemnified².

Looking at the dynamics of public land administration, and land use in urban and rural areas, including the general implementation of land legislation, we note that the main governance and integrity problems affecting the land are related to:

- Public land management;
- Acquisition of land rights or Land Tenure (DUAT);
- Modification of land rights or DUAT transfer; and

Extinction of land rights or DUATs.

8.3 Independence in land management

Today, the Land Administration is faced with a multiplicity of public bodies that have powers and competences in their management. - for example the Ministry of Agriculture, the Ministry of Environment, the Ministry of Mineral Resources, the Provincial Governor, the District Administrator, the Municipal Mayor, etc. This situation was aggravated by the approval of the new decentralisation model³, generating positive and negative conflicts of competences between the aforementioned bodies. For this reason, some bodies of opinion justifiably defend the creation of a body with broader and cross-cutting powers in the area of land management.

This aspect leads us to analyse the legal implications of the multiplicity of public bodies that intervene in land management. Let us take, as an example, the confrontation of (F1) functions on coordination of “spatial planning”, of “territorial planning” and of “territorial management system”, on the one hand, and the (F2) functions of “responding to requests on the land”, on the other. Now, Law No. 19/2007, of July 18, the Law on Spatial Planning, confers powers to the Ministry that oversees the Environmental area (now the Ministry of Land and Environment) for coordinating F1 tasks.

Today, the decisions taken within the scope of Land Tenure (DUAT) requests that contradict the spatial planning instruments may be reduced.

¹ The rules on land allocation and extinction of land tenures provided for in Law No. 19/1997 (LL), are not observed by the Public Administration, see the “Entrepuesto Comercial” Judgment in Gilles Cistac. TA Judgments Collection - 1st Vol. The Public Administration (PA) does not follow scrupulously the provisions of Article 18 of the Land Law (LL), in the extinguishing of land tenures for construction purposes, for example, of public infrastructures, see the case of riots in Matemo (Tete), and in Maputo (construction of the Maputo Ring Road).

² Notícias Newspaper, p.2. : 06/11/2012.

³ Order No. 90 /MTA/GM/001.1/2020, of the Office of the Minister of Land and Environment (MTA), of May 21, 2020. It appears that the Instructions issued here by the MTA interfere with the administrative organization of the country, and that is the Legislator’s task first. This Order removes the management of land from the jurisdiction of the Governor, namely the power to decide on land requests, and the Order attributes this power to the Secretary of State in the Province. This may be a source of exclusion of the Governor’s intervention in “land” issues. However, the Constitution states in Art. 276, n.1, subparagraph b) that one of the Governor’s duties is to intervene in “land management”.

However, for the professionalisation of land management, a National Land Administration Authority can be considered. This option is not new in our administrative system; see the case of the Tax Authority.

The National Land Administration System is based on the development of a service that can be summarised in five essential responsibilities: legal, regulatory, fiscal, cadastral and conflict resolution. The State's capacity to perform these functions must, however, be strengthened

- The legal function guarantees the rights inherent to a particular category of possession; as clearly defined in the law (mainly in the Constitution of the Republic and in the Land Law of 1997) and, in practice, resources are made available for the allocation of land tenures, adjudication, demarcation, registration and record keeping - all of them essential to ensure security of land tenure;

- The regulatory function is concerned with the execution and maintenance of standards, for example: the supervision of land professionals (surveyors, cartographers and registrars) necessary to safeguard land and real estate, including ensuring that the interests of landowners are safeguarded;

- The fiscal responsibility of the land administration service recognizes the financial value of properties, both for the owner and for the State as a source of revenue in the form of taxes on land, rents, transmission rights, etc. The revenues generated by an efficient land management can pay a significant part of government expenditure in the sector. In many countries, land-related revenue is an important source of income for local government, especially in urban areas;

- The cadastral responsibility of the land administration is responsible for registering those who own or control the land, where it is located, its use and, eventually, its value. In Mozambique, it is also important for the government to identify the boundaries of public domain lands, whether in the context of the State (for example National Parks), municipalities (public buildings, roads, other spaces in cities) and communities (areas of common use, such as forests and some pastures, social goods and spaces) as required by Article 98, No.3, of the Constitution of the Republic;

- Dispute Resolution refers to the responsibility of the land administration service to ensure peaceful enjoyment by landowners of their rights to use and occupy land and natural resources.

However, the services, functions and responsibilities described above are sometimes performed by the same body. For example, the fiscal and cadastral functions are exercised by the National Land Directorate. This reality can, in some cases, damage transparency and integrity.

¹ Ibid, p. 12 et seq.

8.4 Accountability in land governance

Several studies and reports¹ have shown that various problems related to strategic land use in Mozambique affect land governance, namely:

- Need for a better allocation of powers to authorise land requests in rural areas (The Administrator is excluded from the real exercise of governance. He/she only issues opinions. This reality makes the administrator irresponsible in land management, when in fact he/she has extensive land areas under his/her jurisdiction);
- Complex administrative procedures for the assignment of Land Tenures (DUATs);
- Absence of inspection and weak capacity for revenue collection by the State (It was only in 2018 that the Ministry launched and executed a wide-ranging inspection campaign);
- Lack of a National Land Authority, with functions, powers and competences (Legal analysis of implications of the multiplicity of public bodies that intervene in land management and identification of legal and institutional solutions for the restructuring of land administration in Mozambique);
- Lack of a policy for de-concentration and decentralisation of competences of State local bodies, including municipal bodies in the scope of land management;
- Need to reform the SPGC, National Land Registry and Municipal Land Registries;
- Need to reformulate matters related to spatial planning.

The above problems can be grouped into four, as follows:

- 1) Public land management: need for a better allocation of powers to authorise requests for land in rural areas, combined with the lack of a National Land Authority with functions, powers and competences and; lack of a policy for de-concentration and decentralisation of competences of State local bodies, including municipal bodies, in the scope of land management.
- 2) Acquisition of Land Tenures or DUATs: complex administrative procedures for allocation of DUATs.
- 3) Changes in Land Tenures or DUAT transfer.
- 4) Extinction of Land Tenures or DUAT.

¹ Gilles Cistac & Eduardo Chiziane “Legal, Economic and Social Aspects of Land Use and Utilisation”, Imprensa Universitária- UEM, Maputo, 2003. MINAG (DNTF) and MCA –Mozambique «Assessing the needs of land administration», October, 2010 MINAG (DNTF) and MCA –Mozambique «Analysis of Policies and Legislation Framework on Mozambican lands: Proposed Roadmap for Consultation Process», October, 2010;

8.5 Transparency in land management and access to public information

The right of access to information has the legal nature of a fundamental right, enshrined in the Constitution of the Republic, in the chapter on fundamental rights. If the enshrining of the right to information does not raise doubts as to its qualification as a fundamental right, the same cannot be said about its content and scope¹. The constant association and consequent subordination of the right to information in relation to the freedom of expression and the press is a paradox. One thing is certain, the right to information, as well as the right of access to information, are autonomous rights with their own legal dignity. Their exercise can only have the purpose of obtaining a given piece of information, without intending to use it for journalistic purposes. It is in this sense that there are no doubts regarding the qualification of all information related to “an administrative process for Lend Tenure (DUAT) requests”, and it should be allowed, unreservedly, to be accessed by all interested parties because it is information which assumes, in our legal system, the designation of “administrative information”.

The current Land Law of 1997, in its articles 22 and 23, establishes the entities with powers to authorise and revoke a DUAT namely: the Council of Ministers, the Minister who oversees the land area, the Provincial Governor, the District Administrator² and the Municipal Mayor. These authorities, therefore, have powers of an administrative nature.

In this way, the set of information or documents held by non-classified land administration bodies is in the public domain and may be subject to the right of access to information. This right of access to information covers two areas:

- The services, functions and responsibilities described above are sometimes performed by the same body. For example, the fiscal function and the cadastral function are exercised by the National Land Directorate. This reality can in some cases damage transparency and integrity;
- The formal domain - which is related to the form of expression and material support, in which public information of an administrative nature can be found.

The lack of specific provisions that regulate the access to administrative information in matters of land management means that, in this sector, access to information is governed by the provisions contained in Decree no. 30/2001, of 14 October and Law no. 14 / 2011, of 10 August, which establish the rules for the functioning of State bodies and administrative procedures, respectively. From that legal diploma, there are some principles and rules that regulate the matter of access to information and the mechanisms of access to information.

Any public body must respect the principle of transparency in its functioning, which implies the obligation to publicize its acts, in terms of Article 7 of Decree No. 30/2001, of 15 October and Art. 15 of Law no. 14/2011, of 10 August. The public nature and the emphasis on the collective interest of the functions exercised by Public Administration bodies justify the need to publicize some of the acts related to its functioning. Publicising such acts has a legitimate role in the exercise of public functions, giving the body concerned credibility and authority vis-à-vis the general public³.

However, the transparency of Public Administration is not limited to the publicity of its acts. It is a means of access to information for the citizens being governed. For this reason, the principle of public administration transparency is of particular interest when combined with the right of access to information. Private individuals, under the terms of

1 Ibid, p. 1.

2 Within the perimeter of the district capital, when there are Registration Services and an Urbanisation Plan.

3 Paulo Comoane, ob. cit., p. 4.

Art. 106 et seq., of Law No. 07/2014 of 7 February (administrative litigation), have the power to request the Public Administration to provide information or consult documents, as long as they are not classified as confidential.

Accordingly, any useful information of an administrative nature (community consultations, administrative contracts with an impact on individuals, etc.) and which is in the possession of the Public Administration can be requested. The archives containing relevant documents can also be consulted, as long as they are not part of the list of classified documents.

The principle of transparency of public bodies can mitigate the negative effects that may result from lack of knowledge of the reasons which determined, for example, the reduction of a certain area of land in the resettlement of populations allowing projects for the exploitation of natural resources. In fact, individuals have the right to request and obtain information on land-related issues as it is of a public nature. Therefore, by resorting to the provisions of Decree no. 30/2001, of 15 October, such individuals may request the same information considering it as of an administrative nature, which may fall under the right to information and consultation of documents.

In general terms, the right to information takes effect through the exercise of freedom of access to information and the right to consult documents. The provisions of Article 8 (1) (a) of Decree 30/2001, 15 October and paragraph 1) of Art. 9 and 67 et seq. of Law no. 10 of August, establish that, in the performance of their duties, the bodies and institutions of the Public Administration, collaborate with individuals by providing them with oral and written information, as well as the clarifications they request, in matters of land.

In terms of administrative information, there is a very large deficit in the law, as it is left to the discretion of each entity to classify it. In the area of land, where the transparency of administrative entities must be maximum, it seems to us that the listing of information that can be classified is the most desirable¹.

The land legislation does not privilege the mechanism of direct and oral request for information², but seems to favour access to written, structured information. Thus, the information on the process of applying for DUATs can, in general terms, be requested by individuals, in writing, using other rules that govern the functioning of public bodies. In such a case, the said information must also be provided in writing.

The mechanism of requesting documents is of particular interest, when political parties wish to file a complaint or appeal against an act /decision in matters of land management. In fact, in order to allow the use of litigation the competent authorities must ensure consultation of documents or processes, provided that they are not protected by the classification provisions³.

From all the above, we can conclude this point by paraphrasing Comoane, in the following terms: “There is no democracy that can survive at the expense of withholding public information, as it becomes illegitimate and discredited by citizens. Indeed, modern democracies live on the basis of citizenship that presupposes participation in public affairs. However, this participation is dependent on being able to access public information that is relevant to the community”⁴

1 Conflicts arising from the refusal to provide information of an administrative nature: the Pro-savana project, Sabié Game Park Lda. and Safaris de Moçambique, Lda.

2 In the same sense, Articles 8, No. 1, paragraph a) of Decree No. 30/2001 and 9, No. 1, paragraph a) of Law No. 14/2011, of 10 August.

3 See Article 93 of Law No. 9/2001, of 7 July.

4 Paulo Comoane, ob. cit. p. 7.

8.6 Recommendations

The legal framework and practices on land governance present some setbacks, problems and gaps. Thus, it is recommended that some measures of a purely administrative nature and others of a legal reform nature be adopted to strengthen transparency and integrity in the following terms:

In terms of administrative intervention:

- Strengthen, through training, the State's capacity to carry out strategic responsibilities in public land management, namely in the following areas of intervention: legal (National Assembly- legal reform of the Land Law), approval of specific regulations (Government), tax (Public Administration - collection of fees), cadastral (Public Administration) and conflict resolution (Public Administration and Courts).
- Make reforms in the administrative procedure: create a diagram that clearly shows the sequence of acts and formalities that take place from the time the application for land is filed until the decision is taken, given the relative complexity of the content of articles 24 - 33 of the Land Law Regulations (RLT-1998).
- Simplify the Administrative Procedures (AP) related to the allocation and recognition of DUATs and clarification of the system aiming, essentially, at reducing the current complexity that characterizes the acquisition of Land. Thus, taking into account the provisions of Law No. 14/2001, of 10 August, it is proposed that the Central Registry Services take the following administrative measures: first, adjust the AP to 25 days and secondly, produce an informative note for the sectors dealing with land administration.
- In municipalities and towns, approve in advance Urbanisation Plans and create or improve the cadastral services (as established in article 23 of Law No. 19/1997), in order to minimize the problems of double or multiple allocations of DUATs. While those two conditions are being created, it is recommended that the processes of land allocation or DUAT attribution be suspended, until the urbanisation plan is approved and the cadastral services are created.
- The State must assume the central role in the activity of land demarcation and must not place all the responsibility on individuals. The individuals must cover the costs by paying fees for the service.
- The land administration must ensure access to information of a public nature without limitation.

In terms of legal reform:

- Revoke Decree No. 50/2007, of 16 October, and recommend that the previous legislation be restored, in which the Provincial Governor would be, exclusively, the competent authority, in issuing the Final Order for Land Tenures (DUAT) in favour of communities, as a way to boost the recognition of the land rights of local communities: in the interest of good land management.

- The Council of Ministers must create an autonomous public land management body, the National Land Authority, which will be a legal entity with administrative, financial and patrimonial autonomy. This option may contribute to the development of the National Administration System, and reduce the multiplicity of bodies with duties and competences in the area of land management.

- Review article 22 of the Land Law (LT-1997), and include the District Administrator in the functions of land allocation, in requests for areas up to the limit of 100 hectares, as a way of promoting a better division of powers in the administrative authorization of land requests in rural areas, among the central, provincial and district levels. Thus, the principle that deems the District to be the basis for the country's economic development planning can gradually take shape.

Reduce the concentration of cadastral, fiscal and control functions at the same entity, as is the case with the National Land Directorate, thus reducing conflicts of interest.

CHAPTER IX

9. Extractive Industry and Administrative Decentralization

By Inocência Mapiisse

Over the past two years (2018 and 2019), developments in the extractive industry in Mozambique, particularly in the mining and hydrocarbon sectors, clearly show the trampling of transparency and accountability, which are crucial requirements for good resource management in this particular sector.

The fact that the government has signed addenda to the contracts for oil and gas projects without putting them in the public domain¹, the constant amendments to the legislation in favour of concession companies operating projects in the Rovuma basin, the granting of tax benefits, including in oil & gas and mining projects, the weak oversight of the sector's activities, focusing on tax issues, and the non-publication of the Extractive Sector Transparency Initiative report are among several examples that show a lack of transparency and accountability.

Up until 2013, the mining and hydrocarbon sectors operated under Law 3/2001 of 21 February. However, in order to adapt the legal framework of oil and mining activities to the country's economic situation as well as to ensure competitiveness and transparency, to safeguard national interests, to guarantee the protection of rights and to define the obligations of holders of mining rights, in 2014 Parliament approved the Mining Law and the Petroleum Law (laws 20/2014 and 21/2014, respectively). Since then, these laws have guided the governance of the extractive sector and have defined, in a general way, the actors of this system.

According to Transparency International's methodology², the analysis of the extractive sector and administrative decentralization fall under the executive pillar, since the main actor in the sector is the Ministry of Mineral Resources and Energy (MIREME). The executive is the main actor in the exploration process, since it is the one that negotiates and signs contracts with the companies (through MIREME) and, simultaneously, ensures the regulation of the sector through the National Petroleum Institute (INP) and the National Mines Institute (INAMI).

Besides MIREME, the Ministry of Economy and Finance (MEF) and the Ministry of Land, Environment and Rural Development (MITADER)³ operate in the extractive sector⁴. However, MIREME is in charge of practically all the dynamics of the extractive sector.

9.1 Resources

MIREME directs and ensures the implementation of government policy in geological research, exploration of mineral and energy resources and the development and expansion of infrastructure for the supply of electricity, natural gas and oil products. One of the tasks of the Ministry of Mineral Resources and Energy (MIREME) is to ensure the inspection and supervision of the sector's activities and to control the implementation of technical safety, hygiene and environmental protection standards. Despite the above mentioned tasks, there is no public record of a report that proves their implementation. After analyses undertaken by civil society organisations⁵ and several other positions related to the

1 In June 2020, the National Petroleum Institute (INP) published part of the addenda to the contracts signed for Rovuma basin projects. However, the addendum to the area 1 contract remains outside the public domain. <http://www.inp.gov.mz/>

2 https://www.transparency.org/files/content/nis/NISIndicatorsFoundations_EN.pdf

3 Approving environmental impact assessments and granting environmental and land use and permits.

4 MEF takes part in evaluating the projects' economic and feasibility studies, as well as approving the companies' tax benefits. It also audits and carries out tax execution through the Tax Authority.

5 See the analysis of the extractive sector at <https://cipmoz.org/category/industria-extractiva/>

dynamics of the sector, it can be concluded that MIREME has not yet said anything on the issues, either to clarify the aspects that have been raised or to assert its role as a controller of extractive sector activities.

Weak technical, human and financial resource capacity is presented as one of the main arguments for the weaknesses in the extractive sector. The executive recognizes the need to improve MIREME's capacity to better target the exploitation of mineral resources in the country and that existing resources have been underused. For example, in cooperation with international partners such as Norway, MIREME, particularly the INP professionals, benefit from capacity building in the management of the extractive sector, but the results of this capacity building are very little reflected in improved management.

So far, issues such as the certification of costs in the oil sector and the publication of the relevant information remain a gap in INP (and Tax Authority) functions. This has been one of the points raised by the Administrative Tribunal, in its capacity as external auditor, but which has had a weak reaction from the institutions responsible (INP and TA).

After pressure from civil society, and from the Centre for Public Integrity¹ in particular, INP has published part of the report certifying the compliance of recoverable costs. In the same document, INP states that 2% of the approximately \$2 billion declared as recoverable costs are not eligible for such treatment. Despite this progress, civil society believes that, for purposes of transparency, the report should be published in full.

Another example that mirrors the weak institutional capacity is the revenue projection prepared by the MEF, which is very far from reality, specifically in the case of projected tax revenues from the gas project operated by Sasol in Pande and Temane. In the first 12 years, the country has raised less than 50% of the expected annual revenues (USD 50 million)². This shows that the forecasting capacity is far from what is expected.

9.2 Independence

The role of INP and INAMI as regulators of the oil and mining sectors, respectively, are highlighted in this point. They are supervised by MIREME. INP was created by ministerial decree (Decree No. 25/2004 of 20 August), which means, for example, that INP does not have enough legal force to exercise its powers and ensure the maximization of appropriate gains through impartial assessment, especially regarding the independently carried out supervision and regulation of activities. In 2017³, CIP had already warned about INP's weaknesses as a regulator of the oil and gas sector.

Supervision and regulation are critical activities to meet the numerous challenges in the sector, especially those related to tax issues and ensuring the inflow of significant revenues to the State treasury.

On the one hand, sophisticated methods of illicit withdrawal of capital are currently used, such as abusive transfer pricing, which makes the role of the supervisor very relevant. But on the other hand, MIREME and INP participate in trips and expeditions paid for by companies operating in the extractive sector, which compromises their role as supervisors of the sector's activities. For instance, the auctions organized by the mining company Montepuez Ruby Mining in Singapore have counted on the presence of MIREME but, because of the way it is financed, its legitimacy

1 <https://cipmoz.org/2020/02/02/certificacao-de-custos-governo-corre-o-risco-de-perder-receitas-por-fiscalizar-72-mil-milhoes-de-dolares-em-custos-referentes-aos-projetos-da-bacia-do-rovuma/>

2 <https://cipmoz.org/2018/01/18/sasol-continuara-a-enriquecer-e-o-estado-moc%cc%a7ambicano-a-vaca-leiteira/>

3 <https://cipmoz.org/wp-content/uploads/2018/08/INP-LONGE-DE-SER-AUTORIDADE-REGULADORA.pdf>

as a supervisor is compromised.

An alternative to the weaknesses detected in MIREME's work (INP and INAMI), would be the establishment of the *Alta Autoridade da Indústria Extractiva (AAIE)* (High Authority of the Extractive Industry). Since 2014, when the AAIE was created by law, this institution has never actually been set up. Although, in 2019, a proposal for an AAIE Establishment Decree was submitted to the Parliament, there are still many aspects to be taken into account, among them the need for this institution to report directly to Parliament, as well as the composition and appointment of the staff who will form part of it.

9.3 Transparency, Accountability and Integrity

The country is endowed with laws and other legal and governance instruments that are significant for the promotion of transparency in the extractive sector. Examples of this are Law 34/2014 of 31 December, the Law on the Freedom of Information and its regulations, and the country's membership of the Extractive Industry Transparency Initiative (EITI), whose standards revolve around transparency and accountability. However, the existence of laws which are not implemented, and where there is a lack of political will, shows that transparency and accountability still represent a challenge.

A close look at the contracts signed in this sector shows that one of the common denominators is the tax benefits to projects (a reduced rate of tax and/or exemption from tax), often affecting the first 10 years of the project's life. To be more precise, only MIREME (and the National Hydrocarbon Company, in the case of State participation in the project) represents the government in the act of signing the contract, which in itself is not a problem. However some concerns can be raised:

- a) MIREME acts, on the one hand, as the counterpart in signing the contracts and, on the other hand, it is the supervisor (through INP and INAMI). This may result in a conflict of interests in supervision, because it both establishes the rules, and does the supervision, acting simultaneously as "player and referee";
- b) Coordination with other relevant institutions is not clear. For instance, the granting of tax benefits should be a widely discussed and reasoned act with the institution responsible for public finances, the Ministry of Economy and Finance (MEF), because of its role in the planning of financial resources. It should be noted, however, that MEF is limited to exercising its role as a tax collector (through the Tax Authority) and allocates resources to sectors through the State Budget, with very little included in the area of more structural issues.

It is important to stress that the country has given away significant revenues through tax benefits. For example, due to the very comfortable tax terms for companies, Mozambique has given away about 1.5 billion meticaís in production tax alone over an 8-year period.¹The granting of these same benefits is not a matter that has been duly substantiated and coordinated by other institutions in the same sector. Hence, it can be considered that the strategy should be reviewed and discussed by various stakeholders, since the main argument behind this strategy is to attract investment to the country in a post-war context.

With regard to the country's membership of EITI (Extractive Industry Transparency Initiative), this initiative, rather than just publishing reports, should help to promote deep reforms that make resource management more transparent and public managers more accountable. But in practice, very little has been done, and many of the resource management decisions are taken in a non-inclusive way. For example, the actions of the State's business arm in the oil sector,

¹ <https://cipmoz.org/2019/08/21/e-urgente-a-revisao-do-contrato-da-kenmare-moma-mining/>

the National Hydrocarbon Company (ENH), and the respective forms of financing are discussed without taking into account the opinion of other stakeholders, such as civil society.

Another example of lack of transparency is the signing of addenda to the contracts for one of the Rovuma basin projects that could change the tax clauses described in the contract and distort the whole logic behind the Mozambicans' forecasts and expectations. Nevertheless, the government insists on keeping part of these addenda a secret.

Parliament is one of the main players in the integrity system and plays a key role in extractive sector governance. The Parliament is a sovereign State body and the highest legislative body. As stated in the oil and mining laws, it is responsible for defining mechanisms for the sustainable and transparent management of revenues from resource exploration, taking into account the satisfaction of current and future needs. It is also the Parliament's responsibility to monitor government actions and administrative acts, through motions of censorship, fortnightly meetings with the Prime Minister and questions to the government on sector (and general) matters. It also legislates on internal and external issues related to the sector.

For the extractive industry, the role of the Parliament's Fifth Working Commission, the Agriculture, Economy and Environment Commission, is relevant, because of the powers granted to it¹. However, in terms of proposing laws, the Parliament has been quite absent, notably in defining the mechanism of sustainable and transparent management of revenues, on which it has not yet given its opinion, and in the process of creating a sovereign wealth fund, as a mechanism for managing revenues from the extractive sector, which has been left "in the hands" of the Bank of Mozambique.

The role of the business sector has been limited to efforts to participate in the extractive sector as a supplier of goods and services, through the protection of the local content law.

9.4 Administrative Governance and Decentralization of the Extractive Sector

Decisions on the extractive sector are taken at central level. MIREME is one of the main actors, taking proposals for discussion by the Council of Ministers. Afterwards, the proposals are submitted to Parliament, which exercises its role of supervisor. Almost always, the proposals submitted are approved and implemented by the actors.

The role of provincial governments in the governance of the extractive sector is minimal/incipient. All decisions are made mainly at central level, although some aspects highlight communities, such as issues related to the resettlement of the population affected by the projects. The mining and hydrocarbon laws mention a percentage of the revenues from the exploration of mineral and hydrocarbon resources that should be allocated to the communities where the projects are located.

Although the communities are mentioned, almost all structural decisions on allocation and management are taken at central level. It is up to the local government to participate in defining the projects to be financed by this resource, which were previously defined centrally.

Additionally, it can be said that EITI is the most inclusive platform in the sector's governance system. The initiative is made up of representatives of the government, extractive companies and civil society organizations. However, the

¹ The Fifth Commission is in charge of, among others, promoting and defending formal trade, developing internal and international economic relations, creating complementarity between industrial production and the country's natural resources, promoting and defending national industry, increasing its competitiveness at internal and international levels, substituting imports by national production, exploiting wind, thermal and solar resources, electrifying the country and integrating local generation networks into the national grid, as well as national exploitation and internal valuing of mineral resources.

role of EITI has been quite limited. In addition to publishing information on taxes paid by companies in the extractive sector to the state, this initiative could have a more relevant role in promoting transparency and accountability.

9.5 Conclusion

The strategies of the government, represented by the institutions with “relevant weight” in the governance of the extractive sector (among them MIREME and MEF) have been based on the granting of redundant tax benefits, clearly without coordination with the other institutions with a crucial role in ensuring the integrity of the sector, as well as constant changes in legislation, with the clear intention of protecting the interests of big business.

Decisions on the extractive sector are taken at central level, with MIREME as one of the main actors. The role of the provincial governments is minimal and consists of implementing decisions taken elsewhere.

Transparency, accountability, and coordination among institutions remain among the greatest challenges of the extractive sector integrity system.

CHAPTER X

10. Public Procurement in Mozambique: Law Reforms without Effect on Fight against Corruption

By Borges Nhamirre, Researcher, and Edson Cortez, PhD, researcher

Public Procurement is the area where the most important cases of corruption in the Mozambican Public Sector occur, taking into account the cases reported in the last three government terms of office (2005-2020). In this context, the importance of corruption cases must be understood in terms of their size, which in turn is measured by the amount of money involved and the hierarchical position occupied by the people involved, from the political elite, including holders of public offices, top public officials and employees assigned to Procurement Units (UGEAs), who are the ones dealing with public procurement procedures on a day-to-day basis.

Public procurement corruption is notorious across the public sector, from Agriculture, Health, Public Works, Defence and Security, and Transport and Communications. It occurs in several ways, notably over-invoicing in the procurement of services and goods by the State, with the subsequent payment of commissions. This practice doubly harms the State. On the one hand, it makes the State pay higher amounts than the real cost of services/goods, and on the other, there is a high risk of contracting low quality services/goods, since the final criterion for choosing the supplier is no longer the combination of quality versus price, but the willingness of the supplier to enter into over-invoicing and commission negotiations with the contracting entity.

There are other forms of corruption in Public Procurement, such as the choice of bidder based on his/her political influence over the person who decides on the award, or by nepotism: choice of a family member, friend or any other person related to the procurement decision-maker.

Conflict of interest is also one of the main forms through which corruption in public procurement tenders is expressed. Public servants occupying the position of Competent Authority, often make use of their privileged position to create companies that later participate in tenders. They win the tenders and provide services to the same public entities for which they work. These Competent Authorities have the power to decide who will be awarded the contract.

Bribes and extortion are other forms of corruption in public procurement procedures. If, on the one hand, the payment of bribes is a common practice on the part of companies, extortion has been usual on the side of civil servants who, even when they know full well that the companies have complied with all the procedures required in technical specifications, always find a way to demand payments from entrepreneurs.

The concern about the lack of integrity in Public Procurement is notable in the successive legal reforms of the Public Procurement Regulation, which has been reviewed three times (2005, 2010 and 2016) in about a decade. However, this effort has yet to translate into a significant reduction in corruption in the procurement for public works contracts, or for supply of goods and provision of services to the State.

Public Procurement is addressed in the National Integrity System (NIS), as a broad subsector of the public sector.

10.1 Resources

In Mozambique, the key role of public procurement is performed by the Procurement Unit (UGEA), which is in charge of managing procurement processes, from planning and preparation to contract execution, under the direction of the Competent Authority. In terms of structure, UGEA can be a Directorate, Department or a Division, depending on the framework established in each State institution. There is no central UGEA. Each State institution, whether central, provincial, district or even municipal, has its own UGEA. However, there is a Functional Procurement Supervision Unit (UFSA), with powers to coordinate and supervise the State's procurement. It is established at the National Directorate of Assets, in the Ministry of Economy and Finance.

In this context, assessing the public procurement sector's capacity in terms of qualified human and material resources for performing its mission is ambiguous. UGEA managers in the Ministry of Health, for example, can be qualified, with mastery of public procurement procedures of international standards and may have adequate material means to perform their duties. However, the managers of UGEA at the District Health Directorate of Mueda, in Cabo Delgado, may not even have the mastery of the most basic public procurement rules and may not have a computer to prepare technical specifications for a public tender.

In general, the technical capacity of UGEA managers and staff at various levels is deemed to be low, for two main reasons.

First, UGEA managers and staff are appointed by the Competent Authority of each institution, based on subjective discretionary criteria.

The competent authority consists of the senior civil servants who represent the Contracting Authority, who may be the Permanent Secretary, the National Directors, the Provincial Directors, or the Directors of the District Service. Thus, the change of a competent authority almost always implies the change of UGEA managers and staff of the institution, in order to allocate people trusted by the new manager.

The creation of the Functional Procurement Supervision Unit (UFSA), in 2016, with powers including the provision of technical guidance on public procurement procedures and training in public procurement matters¹, is a legal effort to improve public procurement capacity, but has still not had the desired effects.

Second, the low capacity of staff and public procurement managers is due to lack of specific training in matters of their area of work. In the opinion of some UGEA managers interviewed for this paper, many UGEA staff have basic difficulties in interpreting the public procurement law, but are appointed to their posts because they are trusted by the managers.

This situation causes the management of public procurement to show high levels of amateurism, because there is a constant rotation of employees assigned to UGEAs, which is reinforced by the absence, within the civil service, in Mozambique, of a career for procurement specialists.

¹ Cf. Decree No. 5/2016, of March 8

10.2 Independence

The second component of assessing public procurement capacity is independence, in this case, the UGEA's independence. It is not independent by law and consequently in practice. The Public Procurement law grants to the Competent Authority, in addition to the above mentioned appointment of UGEA staff, the power to indicate the specific public interest to be pursued in a contract, the definition of the object of the contract, the establishment of price estimates for the building work, goods or services to be contracted, including the definition of the contracting method to be adopted¹.

The Competent Authority, with the exception of the Permanent Secretary², is an appointed political figure, and politically trusted by the executive to whom he/she owes obedience. That is how, in practice, the holders of political power exert enormous influence on public procurement, favouring companies in which they have shareholdings or companies owned by individuals related to them, as seen during President Armando Guebuza's governance, in which companies owned by members of his family regularly won State tenders and were often awarded contracts directly. Star Times, a Focus 21 owned company, was awarded the digital migration contract, first without a tender and later through a highly contested tender³; Whasintelec, owned by Intelec Holding, was awarded the contract for the exclusive production of vehicle registration number plates, in a very suspicious public tender⁴. In the first term of President Filipe Nyusi, the company owned by his daughter, Cláudia Nyusi, was in the news for supplying school desks to the Government led by her father⁵.

Therefore, in terms of the ability to assess resources and its independence, the public procurement sector in Mozambique is clearly unable to carry out its mission properly.

The lack of independence is also notable in various cases of conflicts of interest in public procurement. One of the most striking cases, which is currently on trial, is that of Linhas Aéreas de Moçambique (LAM), where the former Chairperson of the Board of Directors, António Pinto, and the former Financial Manager, Hélder Fumo, through a public procurement scheme, hired a company in which they had interests, "Executive Moçambique", to provide services to LAM.

10.3 Transparency

The successive legal reforms of the Public Procurement Regulation, as well as the approval and entry into force of the Freedom of Information Law (Law 34/2014 of 31 December) and its respective regulations (Decree 35/2015, of 31 December), allowed for more transparency in Public Procurement, at least in terms of access to information.

Many public procurement processes started to be made through a public tender, with the basic information, namely the launching of the tender and the respective award, published in a newspaper deemed to be of widest circulation and on the UFSA website. The public is allowed to attend the opening of technical and financial proposals submitted by bidders. Interested citizens also have the right to consult tender documents in full, up to 60 days after termination of the process.

1 Cf. Article 12 of Decree n. 5/2016, of March 8

2 In recent years there has been a politicization of the figure of Permanent Secretary, with the manipulation of public tenders for these positions, and political trust becoming the most important criterion.

3 CIP: A Chinese business for the Guebuza family, 2011, available at https://cipmoz.org/wp-content/uploads/2018/07/98_CIP_Newsletter11.pdf

4 CIP: HOW ARE THE PPPS USED TO BENEFIT THE ELITES AND HARM THE STATE, 2015, available at <https://cipmoz.org/2017/05/10/como-as-ppp-sao-usadas-para-beneficiar-as-elites-e-prejudicar-o-estado/>

5 <https://observador.pt/2018/09/18/presidente-mocambicano-criticado-por-fornecer-carteiras-escolares-fabricadas-pela-empresa-da-filha/>

These clear formal advances of transparency in public procurement procedures are, however, blocked by the difficulties created by the contracting bodies. As an example, although the law allows access to consult public procurement processes, the Ministry of Health refused access to information about suppliers of medicines and hospital equipment¹ to the Centre for Public Integrity.

On the other hand, while the contracting entities allow public access when opening technical and financial proposals, the key moment for taking the decision, which is the evaluation of technical and financial bids, happens far from public scrutiny.

The Minimum Price criterion used for taking the decision on awarding contracts makes transparency in the process of choosing the successful bidder even less. This is because, while in the Minimum Price Criterion, the award is given to the bidder with the lowest price for services of the same quality, the evaluation on which this is based is dubious.

10.5 Accountability

In normal public procurement procedures, accountability is done for two entities, one from the public sector and the other from the judiciary, namely UFSA and the Administrative Tribunal.

The Contracting Entity submits information about the tender to UFSA, with details such as the name of the successful bidder, the contract amount and the term of execution;

The procurement process is submitted to the Administrative Tribunal for inspection purposes. The contracts that may be subject to prior inspection must be executed after the ruling of the Administrative Tribunal, but in cases where the Court takes 53 days without responding, the Law allows the Contracting Authority to execute the contract, invoking the principle of tacit consent. Given the Tribunal's inability to dispatch the thousands of contracts submitted to obtain authorisation, it appears that many contracts are executed before obtaining that authorisation.

For contracts that do not require a go-ahead from the Administrative Tribunal, the contracting entity must submit them within 30 days after their conclusion, for mere note by the Administrative Tribunal. Contract addenda must also be sent to the Administrative Tribunal for inspection purposes.

However, notwithstanding these legal provisions, many contracts are executed without supervision, or the inspection simply fails to detect irregularities in time to prevent the execution of contracts with the potential to harm the State.

The entrepreneurs interviewed report frequent cases of alleged extortion by public officials assigned to the Administrative Tribunal to facilitate the process of authorisation. The companies, desperate to comply with the contract term, as the jobs have already been awarded and the contracts have already been entered into with the competent entities, adhere to the corrupt schemes to obtain the Tribunal's authorisation.

10.6 Integrity

The integrity of public procurement procedures is the weakest element in the entire Public Procurement process and it resides in the Competent Authority's excessive discretionary powers. As we have mentioned, it is the manager of the contracting entity that appoints UGEA managers and staff, based on subjective criteria. The public procurement regulation establishes that "in the exercise of its powers, the Competent Authority must observe the principles of independence and impartiality". However, in practice, given the hierarchical nature of the Public Administration and the excessive partisanship of public institutions, the Competent Authority - which, as we have seen, can be the permanent

¹ CIP: The Ministry of Health's millionaire business networks, 2017, available at <https://cipmoz.org/2017/11/29/as-redes-de-negocios-milionarios-do-ministerio-da-saude/>

secretary at central, provincial, or district levels, National Directors, Provincial Directors, Directors of the District Service, or a director of a public institute - can never be independent. The Competent Authority is subordinate to his/her top manager and, in practice, to the ruling party. Many officials found in acts of corruption claimed, in court, that they had embezzled state funds at the request of the ruling party, Frelimo¹².

There are many situations which constitute formal impediments for the Contracting Authority to be able to represent the Contracting Entity. These are the cases in which the contracting authority has an interest in the procurement process, either itself or as a representative or business manager of another person, a spouse, or other relative, or when the person with whom you live in a housing partnership, has an interest, or owns shares in a company with an interest in the procurement process or when related people hold shares in that company³.

However, despite the legal provision for these situations, which constitute a conflict of interest, their practical control is almost zero. It depends on the voluntary action of the contracting authority to declare a situation of conflict of interest in a public procurement process in which they are involved. And, in a context of weak supervision, it is very easy, and it has been recurrent, to award public works and services to people who are in conflicts of interest under the terms of the law⁴.

10.7 Fight against corruption

In terms of anti-corruption initiatives in Public Procurement, very little has been seen. There are no public campaigns in the media or in other public spaces to promote initiatives to prevent and combat corruption in public procurement.

Inter-institutional cooperation to address corruption issues in public procurement has also not been visible in practice, despite the Public Procurement Regulation establishing some cooperation mechanisms between UFSA and the internal and external control bodies, namely the General Inspectorate of Finance and the Administrative Tribunal.

However, it is in reducing the risks of corruption that the great failure of the National Integrity System in public procurement resides. Major corruption cases made public are mostly related to the public procurement process. The cases of the hidden debts, which originated in the procurement of goods and services for the protection of the Exclusive Economic Zone, can be mentioned; the Linhas Aéreas de Moçambique scandal, involving the Brazilian company Embraer paying bribes for LAM to buy its aircraft; the Nacala Airport case, involving the payment of bribes for the construction of this public infrastructure; and the case of former Labour Minister Helena Taipo/INSS, related to the contracting of building jobs by the National Social Security Institute (INSS) to private companies⁵.

The examples listed above of cases of corruption in public procurement show how problematic and urgent the existence of public awareness initiatives is, in order to increase the levels of denunciation.

Some entrepreneurs interviewed for the purposes of this paper were unanimous in stating that they had never seen any type of public campaign condemning the current promiscuity in the State's procurement processes. They added that this lack also ends up restricting the number of public complaints from the private sector, when it feels harmed.

1 "Taipo revealed that the bribe money also benefited Nyusi", available at <https://news-diario.com/taipo-revelou-que-o-dinheiro-dos-subor-nos-tambem-beneficiou-nyusi/>

2 Cambaza volunteered to rehabilitate the FRELIMO school, available in <http://www.verdade.co.mz/nacional/7574-cambaza-voluntariou-se-a-re-abilitar-escola-da-frelimo>

3 Cf. Article 13 of Decree n. 5/2016, of 8 March

4 Sambo, Emildo (2018): "Public officials turn UGEA into a lair of corruption", available at <http://www.verdade.co.mz/destaques/democracia/65614-funcionarios-publicos-transformam-ugea-em-covil-de-corruptos->

5 <http://opais.sapo.mz/antiga-ministra-do-trabalho-indiciada-de-desviar-100-milhoes-de-meticais-do-inss>

10.8 Conclusion

The Public Procurement sector is a fertile field for the spread of corrupt practices, and four factors can be regarded as favouring this, namely (i), the large sums of money that governments spend on contracting public goods and services; (ii) the relatively high degree of discretion that public officials and politicians have in public procurement, when compared to other areas of public expenditure; (iii) the difficulty in detecting and investigating cases of corruption in this area, given its complexity and closure to public scrutiny; and (iv) the lack of political will to deal seriously with the problem, by introducing structural reforms that can improve the State's procurement.

In Mozambique, measures to prevent corruption in public procurement have been adopted over time, including: the review of the Public Procurement Law, the creation of regulatory institutions, the prior inspection by the Administrative Tribunal of public contracts above a certain amount and the involvement of the Attorney General's Office in the evaluation of contracts. Despite these recognizable efforts, cases of corruption continue. This situation may be related to the widespread perception, from political elites to lower-level civil servants and private sector agents, that public procurement is the main mechanism for manipulating the State for private benefit, withdrawing large sums of money from the public purse through the provision of services to the State. In fact, the manipulation and use of public procurement as a means of enriching elites and beyond, brings the Mozambican corrupt practices in force closer to those practiced in western countries.

Corruption in public procurement has major negative effects on the quality of public goods and services provided to the State, and on the increase in the price of contracted goods and services, diverting public funds that would otherwise be applied in other sectors.

Therefore, a transparent, efficient and corruption-free public procurement will allow the saving of public resources that can be reinvested in other sectors in the context of the economic and financial crisis in which the country finds itself.

11. General Conclusion

In general terms, with regard to the questions that must be answered to assess the effectiveness of a National Integrity System, there is still a long way to go to make it at least satisfactory in Mozambique. The issues addressed and the respective conclusions are evidence of this.

It should be noted that the major difficulty is related to the non-implementation of the existing legal framework and public policies in the various sectors. In other words, while there is an effort to improve the legal (and even institutional) framework and public policies, there are still serious gaps to be filled.

Therefore, it is important that when laws and public policy are passed and come into force, a process of monitoring their application/implementation/materialization is followed in order to give greater effectiveness to the changes that are intended to be introduced in the framework of transparency, integrity and control of corruption.

What is observed is that in most of the analyzed sectors, in formal terms, the necessary instruments exist for its correct functioning, but in practice these are not felt. A simple illustrative example is related to the Protection of Victims, Whistleblowers, Witnesses and Other Procedural Subjects Act, which is essential for increasing the number of reports of corruption cases. What happens is that this legal instrument has not been effectively implemented since it was approved in 2012. Another issue that should be highlighted is related to the Law of Public Probity that was also approved in 2012 but that in practical terms, many of the matters that are part of it are still being implemented at “half-gas”, especially in what concerns the process of declaration of assets/patrimony.

In other words, what is removed is that at the level of the Public Administration, the judiciary and the legislature, the “marriage” between formal issues (legal diplomas and sectoral public policies) does not find its concretization in practical terms. The main reason for this situation to happen on a recurring basis is that, in part, such instruments when approved are not accompanied or followed by an effective process of monitoring their effective implementation, specifically with regard to the creation of mechanisms for this purpose, often ending up falling into disuse and needing to be improved, even if they have never been applied and produced their effects.

It is therefore necessary to invest in the practical component, where the greatest weaknesses are observed, in order to guarantee greater efficiency in the promotion of transparency and integrity, aiming at the control of corruption.



CENTRO DE INTEGRIDADE PÚBLICA
Anticorrupção - Transparência - Integridade

Parceiros:

