CENTRO DE INTEGRIDADE PÚBLICA
MOÇAMBIQUE

# anti CORRUPTION LEGISLATION IN MOZAMBIQUE

*Contribution to an improvement in the anti-corruption legal framework*

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## ABREVIATONS AND ACRONYMS

| | |
|---|---|
| AR | Assembly of the Republic |
| AU | African Union |
| CRM | Constitution of the Republic of Mozambique |
| CC | Constitutional Council |
| CIP | Centre for Public Integrity |
| CP | Penal Code |
| CPP | Penal Procedural Code |
| GCCC | Central Office for the Fight against Corruption |
| PGR | Attorney-General's Office |
| SADC | Southern African Development Community |
| TA | Administrative Tribunal |
| UN | United Nations |
| UTRESP | Public Sector Reform Technical Unit |

## SUMMARY

The present report is an analysis of anti-corruption legislation in Mozambique, dealing with its preventive aspects, the identification of opportunities for acts of corruption created by some legal diplomas and the limitations of the penal component. The report also drawn a comparison between national legislation and the international legal instruments on corruption ratified by Mozambique.

Under the preventive component, the report analyses the problem of conflicts of interest, an area where regulation is still poor, which opens a window for acts of corruption and the abuse of public functions. For example, under Mozambican legislation, there is no hindrance to a former member of the government undertaking activities linked to his former role for a certain period of time after he has left the government. Nor is there anything to prevent a former member of the government from taking a leadership position in an institution that undertakes activities related with his former job and which has specifically benefited from public incentives (e.g. fiscal incentives, treasury loans, etc).

As for the declaration of assets, the inspection system in merely formal. There is no possibility of an incisive inspection of these declarations, given the limited powers of the Constitutional Council which do not allow this body to make a specific inspection of the declarations. Furthermore, access to the declarations of assets is restricted to half a dozen members of the government, and the declarations are not published. There are no codes of conduct in the public administration, and no institutionalized systems for managing ethics.

In Mozambique there are no concrete mechanisms for protecting whistle-blowers and witnesses, just as there is no legislation guaranteeing access to information in the possession of the state. As for the penal component, the legislation does not criminalize practices such as the trafficking in influence, illicit enrichment or corruption in the private sector.

After a short explanatory introduction about the objectives of the Centre for Public Integrity in publishing this report, we have structured it around the following lines: presentation of the legal notion of corruption; discussion about the weakness of the legislation in its preventive component; identification of the opportunities for acts of corruption created by some legal diplomas; and discussion of the limitations of the penal framework of the legislation.

# 1. INTRODUCTION

The control of corruption through penal measures in Mozambique is a central aspect of governance which has gained greater relevance as from the first half of the present decade, a time when the volume of appeals for the government to put into practice policies and actions to increase transparency in managing public property and to reduce the levels of corruption became louder. This occurred following the murders of the journalist Carlos Cardoso in 2000 and of the economist Siba Siba Macuacua in 2001, which happened against a backdrop of corruption, trafficking in influence and bank frauds.

The control of corruption assumes the existence of laws and regulations which allow the judicial authorities to act effectively. However, the establishment of a wide-ranging legal framework that would make viable an effective penal reaction against acts of corruption has never been dealt with in an integrated and careful manner, such that the institutions of justice would be endowed with the necessary instruments to act.

Unlike Mozambique, in the global context, states individually or collectively (through multilateral bodies such as the United Nations or the African Union) have been arming themselves with legal instruments with the objective to prevent and punish corruption and connected crimes. But in Mozambique, the legal anti-corruption engineering is still weak.

In the turn towards democracy in the mid 1990s, attempts were made to make viable the change in the form of state organization and the character of governance, by passing some laws that sought to promote transparency and good governance. For example, in 1990 a law was passed introducing new Norms of Conduct, Rights and Duties for high ranking state leaders[1]. And in 1998 a further law, with the same scope, was passed for the holders of government offices[2]. The two laws contained some fundamental rules for guaranteeing transparency in a democratic society: the declarations, and the obligation to update them every year.

Despite these attempts, the legal anti-corruption framework was always flimsy until the country's parliament, the Assembly of the Republic, passed an Anti-Corruption Law (Law no 6/2004, of 17 June), which gave two definitions of corruption: passive corruption, which is when a state official or agent requests a material or non-material benefit in order to commit or omit an act, contrary or not to the duty of his position; and active corruption, which is when someone offers a material or non-material benefit to a state official or agent to commit an act contrary to the duties of his position.

With regard to the forms of corruption in this definition, they cover requesting and offering bribes. As we can note, this definition does not cover, for example, such matters as the diversion of funds, trafficking in influence, illicit enrichment and the laundering of the proceeds from corruption. In any case, this law strengthened the existing legal framework, namely the Penal Code, which already envisaged crimes of corruption in articles 318 (passive corruption) and 321 (active corruption) and also included, even before Law no 6/2004, a series of articles which could fit into the concept of corruption in the Public Administration.

Law 6/2004 was passed in a context of pressure from the donors to speed up anti-corruption legal reform. But the political class (in the Assembly of the Republic) passed an Anti-Corruption Law which limited the legal definition, leaving out practices such as the diversion of funds and others, which the international conventions ratified by Mozambique regard as acts of corruption.

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1 Law 4/90, of 26 September and its respective regulations, Decree no. 55/2000, of 27 December. This means that a law passed in 1990 only began effectively to be applied 10 years later.

2 Law 7/98, of 15 June, and its respective regulations, Decree no, 48/2000, of 5 December.

Furthermore, the law did not grant the Central Office for the Fight against Corruption (GCCC) specific powers to accuse cases of corruption. It should be mentioned that the national legal framework is complemented by international conventions the state has ratified, namely the African Union Convention (2006), the United Nations Convention (2007) and the Anti-Corruption Protocol of the Southern African Development Community (SADC), but these have not been given the due treatment through their incorporation into domestic legislation.

The objective of this report is to help draw the attention of the government, the Assembly of the Republic, the judiciary and society at large, to the weakness of the legal framework for corruption in Mozambique, which may undermine the efforts to introduce a culture of good governance into the country.

The report attempts to analyse the anti-corruption legal framework, identifying the precarious aspects that exist and the opportunities for corruption that flow from them, starting from the assumption that a good regulatory framework is fundamental to lever reform policies in this area (such as the Anti-Corruption Strategy, approved by the government in 2006).

Good legislation is necessary to regulate socio-political relations within the state, significantly shaping the way in which the political class and public officials manage public property. In countries with flimsy anti-corruption legislation, there are great opportunities for the executive, judicial and legislative powers to manipulate the budget (allocation of resources) for rent seeking. Good anti-corruption legislation is, in itself, a central element in a National Integrity System (NIS).[3]

We therefore think it urgent to revise the legislation in the aspects identified in this report. We are, however, aware that the existence of a wide-ranging legal framework is not the only life raft for controlling corruption, but a fundamental component in a cocktail of measures that have been tried in other contexts to react against the phenomenon, given its multifaceted nature; an integrated and multidisciplinary approach that is not yet being implemented in Mozambique.[4]

Three procedures were used in drawing up the document:

i) bibliographical research,

ii) interviews with a specialist panel,

iii) informal interviews with a broad range of key informants. We have opted not to reveal the names of the interviewees (the list can be supplied by CIP in the event of an express request), but they include Supreme Court and Constitutional Council judges, lawyers, deputies of the Assembly of the Republic, public prosecutors, and academics, among others.

3 An integrity system is a political and administrative provision which encourages integrity. A National Integrity System (NIS) includes both governmental and non-governmental institutions, laws and practices that can minimize the risks of corruption and poor management. The concept of an NIS has been developed and promoted by Transparency International as a working tool, through which corruption can be analysed in a given context, as well as the effectiveness of national anti-corruption efforts.

4 Legislative methods (the adoption of rules for political funding, and to control the wealth and interest of elites), procedural methods (the introduction of payment by debit/credit card in departments attending to the public that are prone to corruption); structural measures (the introduction of regulation and rules of market competition); and institutional measures (the creation of an independent and specialist agency with the specific task of researching criminal action against corruption) (Sousa, 2005).

## 2. THE LEGAL DEFINITION OF CORRUPTION IN MOZAMBIQUE

It is not the purpose of the current work to discuss the different concepts of corruption that have been used in various areas of knowledge, such as anthropology, political science, economics and sociology. This approach could be the subject of a separate work. Bearing in mind that the present study seeks to identify the weaknesses of the anti-corruption legislation, it makes sense to present the legal notion (or penal definition) of corruption made by the Mozambican legislator, without forgetting that the concept of corruption, outside of the strictly legal spectrum, is broader and covers realities that are not necessarily caught by the legal definition.[5]

Law no. 6/2004, in articles 7 and 9, defines corruption in two ways: first passive corruption, which is when a state official or agent requests a material or non-material benefit in order to commit or omit an act, contrary or not to the duty of his position; and active corruption, which is when someone offers a material or non-material benefit to a state official or agent to commit an act contrary to the duties of his position.

The only forms of corruption covered in this definition are soliciting and offering bribes. As we see, this definition does not cover, for example, such matters as the diversion of funds, trafficking in influence, illicit enrichment and laundering the proceeds of corruption.

Article 7, paragraph 1, of Law no. 6/2004, on passive corruption for an illicit act, states: "The bodies envisaged in Article 2, who either directly or by an intermediary, with their consent or ratification, solicit or receive money or the promise of money or any material advantage that is not due to them, in order to practice or not to practice an act which implies violating the duties of their office, shall be punished with imprisonment of between two and eight years, and a fine of up to a year".

Article 9 of the same law has this to say about passive corruption for a legitimate act: "The bodies envisaged in Article 2, who either directly or by an intermediary, with their consent or ratification, solicit or receive money or the promise of money or any material advantage that is not due to them, to practice acts that are not contrary to the duties of their office and which fall within their functions, shall be punished with up a year's imprisonment".
Article 9 also says the following about active corruption: "Anyone who gives or promises to the bodies envisaged in article 2, directly or through an intermediary, money or any other material

5 A relevant definition establishes corruption as a transaction between actors of the public and private sectors, in which collective goods are illegitimately converted into private gain (see Heidenheimer et. al, 1989, 6, cited by Andvig et. Al, 2000). This point is stressed by Rose-Ackerman who says that corruption exists in the interface between the public and private sectors (see Rose-Ackerman, 2000). The classic definition of Colin Nye is that corruption is "behaviour that deviates from the formal duties of a public role (elected or appointed) motivated by private gains (personal, family, etc) of wealth or status" (see Nye, 1967: 416, cited by Andvig et. al, 2000). Nye's concept of corruption is, as can be seen, centred on the public administration. Heywood argues that the fact that the concept is concentrated only on the public sphere, means that it only covers corruption that occurs within this sphere, or in the interface between the public and private spheres; which means that other practices that happen within the private sphere remain outside the definition, such as financial corruption (see Heywood, 1997, in Williams, 2000, pp. 417-35). Klitgaard (1998) is another of the authors who regards corruption as a form of misuse of a public post for private benefit or for unofficial purposes. He developed a formula through which corruption may be defined. The formula is: C = M+D-A, where C = Corruption, M = Monopoly, D = Discretionary power and A = Accountability.
For Klitgaard, whether it is a private or a public activity, regardless of whether it is non-profit making, ad whether it happens in Bamako or in Washington, corrupt practices occur when an organization or a person has a monopoly of power over certain goods or services, and has the discretion to decide who will receive them and in what amounts, but is not bound by any rule or practice of accountability – that is, this organisation or person has no obligation to give an account of himself. For Klitgaard, in a similar context, there is more space for corrupt practices, which can only be controlled if the monopoly is reduced, discretionary powers clarified, and transparency increased, alongside an increase in formal/legal disincentives (costs). Just like the classic concept of Nye, the concept proposed by Klitgaard is excessively legalistic, and does not accompany social values and behaviour.

or non-material benefit that is not due to them, with the purposes indicated in Article 8, shall be punished with the penalty envisaged in that article". The bodies mentioned in Article 2 of the Anti-Corruption Law are: leaders, officials or employees of the state or of the municipalities, of public companies, of private companies in which the state holds shares, or in companies that are running public services.

Article 8 of the law says that the same persons are punished with up to a year's imprisonment if, directly or through an intermediary, with their consent or ratification, they request or in any way receive money or the promise of money or any material or non-material benefit, that is not due to them, in order to practice acts that are contrary to their activity, although they fall within their powers. This is the shape of the legal definition of corruption contained in Law no. 6/2004, and the agents and facts that it seeks to cover.

# 3. THE PREVENTIVE COMPONENT

## 3.1 On the Declaration of Assets

The principle of declaring assets[6] is intended to make it possible to verify to what extent the assets of a holder of a public office vary between the moment he takes office and the moment he leaves it. That is, it is an instrument that exposes the variation in his assets while he is a public servant. The declarations seek to guarantee transparent management of public property, through verification and control of the evolution of the leaders' assets. Bearing in mind that the holders of public office manage the resources of the public treasury, it makes complete sense that they should be obliged to declare their assets and their income so that no doubts hang over the integrity and transparency of their management.

The declaration of assets in Mozambique is regulated in scattered legislation. Laws have followed each other over time with the same content, without explicitly repealing the previous legislation.

Law no. 4/90 (which lays down the Norms of Conduct, Rights and Duties of high ranking state leaders) mentions, in article 7, the obligatory declaration of assets by the holders of government office. This law also prohibits the involvement of high ranking state officials in paid activities within their areas of responsibility. It also makes it obligatory for these officials to declare their assets and sources of income.

Article 3 of this law makes it obligatory for the leaders "to declare their assets, liabilities, positions they hold or held in private and public companies, an indication of gross complementary income, for purposes of tax deduction, a declaration of the assets of their spouses, and an annual updating of their assets". Paragraph 5 of this article declares that "culpable failure to present the envisaged declarations, or their inexcusable inaccuracy, shall determine the application of sanctions, including the sanction of dismissal".

6 In some countries, such as the USA and Argentina, this declaration is referred to as a Declaration of Financial and Patrimonial Information.

### 3.1.1 Bodies covered by the declarations

Law no. 7/98, which establishes the Norms of Conduct for Holders of Government Office, indicates the bodies that are covered by it, and are consequently subject to the declaration of assets, but excludes the President of the Republic and the organs of legislative and judicial power.[7]

Law no. 4/90 goes a little further in relation to the bodies covered. It states that those subject to the declaration of assets are the President of the Assembly of the Republic, the Prime Minister, the members of the Standing Commission of the Assembly of the Republic, the Ministers, Deputy Ministers, State Inspectors, Provincial Governors, Secretaries of States, Ambassadors, Consuls-General, District Administrators and Heads of Administrative Posts. Also covered by the law are the Governor and Deputy Governor of the Bank of Mozambique, and the Vice-Chancellors of public universities and other public institutions of higher education.

The compulsory declaration of assets by the President of the Republic[8] was only fixed later, through the approval of Law no. 21/92, of 31 December (which sets the rights and duties of the incumbent President of the Republic). Article 7, paragraph 1 of this Law states the following: "The President of the Republic has the duty to deposit every year, with the Constitutional Council, a declaration indicating his assets and other income".

The Anti-Corruption Law tries to be still more inclusive with regard to leaders making the declaration of assets. Although it is not very specific in indicating some of the holders of public office subject to this duty, it widens the sphere to include those who exercise public functions with decision making powers in state institutions, municipalities, public companies, public institutes, and companies of mixed ownership.

Thus, the Anti-Corruption Law, in Article 4, paragraph 1, states that "taking office and exercising public duties with decision making powers in the state apparatus, in the municipal administration, in public companies and institutions, as well as taking office as state representatives in private companies in which the state holds shares, is conditional on the presentation of a declaration of assets of the person being sworn in, so that it may be deposited in the appropriate archive of the institution".

One of the problems in this formulation is that the levels of decision making the law mentions are not made explicit, thus leaving the door open to a variety of interpretation. A further question raised is: why did the legislator not also include the bodies of legislative and judicial power, namely parliamentary deputies, judges and attorneys?

As mentioned above, both Law no. 4/90 and Law no. 7/98 list exhaustively the bodies subject to the declaration of assets. However, in a literal interpretation of Article 4, paragraph 1. of the Anti-Corruption Law, the bodies of legislative and judicial power are excluded from this obligation. The definition of bodies with decision making power should have been more specific. For example, we are left without knowing whether the bodies of legislative power have decision making powers strictu sensu or not, and if they are included within the scope of the declaration of assets mentioned in the law. The same is true of the judicial bodies.

Most of our interviewees believe that Article 4 of Law no. 6/2004 cannot be used to include judges and attorneys. Which means that we are faced with a gap, since those who occupy prominent

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7 Cf Article 1 of Law 7/98

8 In Mozambique, the need to cover the President of the Republic by a law on conflicts of interest is of great importance, if we bear in mind that the current president has strong business interests in the national economy. On this matter, see Marcelo Mosse, Corrupcao em Mocambique: Alguns Elementos para Debate, Maputo.

positions in the courts, the public prosecutor's office and the police are not obliged to declare their assets.

A further gap in the legislation on the declaration of assets is that it says nothing about the parliamentary deputies. Furthermore, the Statute of Deputies itself makes no mention of any rules to declare assets. It seems that there was never any concern on the part of the legislators and of the government to cover this group of politicians. Analysing the minutes of the commission of the Assembly of the Republic charged with drawing up Law 6/2004 (Commission on Legal Affairs and Legality), one notes that it never discussed the possibility of bringing the deputies within this series of rules.

In the parliaments of other countries there are norms that require the deputies[9] to declare their income and property and rules on transparency and on conflicts of interest apply to all classes of politicians and agents of the state[10].

### 3.1.2 Extension of the declaration to other persons

The Anti-Corruption Law (6/2004) and its respective regulations tried to deepen the sense of the declaration of assets in Mozambique but did not bring any significant changes. This law states that specific rules may extend the declaration of assets to spouse or partner, children or other persons who are economically dependent on the person making the declaration. Probably the legislator was absent minded in putting this reference into the Anti-Corruption Law, because the previous law, no.7/98, in Article 3, paragraph 2, already stated that this obligation extends to the spouse, when the marriage regime is that of common property, to children who are minors or legally incapable, and other legal dependents to whom the office-holder is guardian.

But, because, as mentioned above, Law no. 7/98 restricts the bodies that are subject to it, the question may be raised, for the case of the bodies of legislative and judicial power, as to whether the extension envisaged in Law no. 6/2004, about the persons obliged to declare their assets, applies to them.

This is a question that should be solved by the legislator because it may cause doubts faced with omissions in the Law, or lack of clarity. However, the reference made by the Anti-Corruption Law is not at all damaging, because, as the Latin saying puts it, "quod abundant non nocet", that is, abundant caution does no harm.

### 3.1.3 Place of deposit of the declarations and their inspection

Although it was passed in 1990, the legislation on declaration of assets was only regulated 8 years later, through Law 7/98, which states in Article 7, paragraph 2, that the assets records must be deposited in a specific place, namely at the Constitutional Council (CC), which also has the power to inspect them[11].

Law 7/98 tried to advance in regulating these matters, but the advances were few as regards the

9 Rodrigues, Ricardo Jose Pereira (2001). A questao e Transparencia Fiscal nos Codigos de Conduta Parlamentar: Um Estudo comparado da Africa do Sul, Portugal e Reino Unido

10 Argentina and Brazil are examples of countries where the law expressly states that the bodies of executive, legislative and judicial power, including the President of the Republic, are subject to a declaration of assets. The legislation in South Africa, Portugal, the USA and the United Kingdom makes it obligatory to present declarations of assets to the Ethics Commissions.

11 Article 6, paragraph 3, of Law 6/2006 of 2 August states that the CC is empowered to receive and inspect the declarations of assets. Article 3, paragraph 1, of Law no. 4/90 and Article 7, paragraph 1, of Law 21/92, point in the same direction.

duties and obligations of the office holders covered. It established a regime of sanctions in the event of a leader violating the norms, and clarified that competence in the matter is within the jurisdiction of the CC. It drew a penal framework on corruption, on the violation of budgetary legality, and on the abuse of information, but it did not give specific powers to the CC so that this body could undertake effective inspection of the declarations.

In addition, the Organic Law on the Constitutional Council (Law no. 6/2006) was lacking in this regard, and did not grant the CC powers to investigate the legitimacy of the origins of the goods and income added to the assets of public office holders. The Organic Law on the CC is also silent when it comes to obliging those subject to the declaration of assets to present an annual declaration of income[12] to the CC.

The questions that may be raised is: what is the advantage, in practical and functional terms, of depositing the declarations with the CC., a body whose central purposes are to analyse whether legislative and normative acts of state bodies are constitutional, and to decide upon electoral disputes[13], that is, it does not have effective powers to monitor the assets of those covered by the obligatory declaration of assets.

This question takes on greater relevance, if we consider that the accumulation of assets by the holders of public office may result from illicit or administratively improper acts, practiced during the exercise of public duties, for example in the execution of the state budget, through undertaking expenditure without respecting budgetary rules, diverting money from the public treasury and making undue payments[14], misapplication of funds, over-invoicing, the violation of public procurement rules[15] in order to charge undue commissions and bonuses, and signing contracts without submitting them to inspection by the Administrative Tribunal (TA), etc.

Bearing in mind that the declarations are linked to the evolution of the assets of the public office holder, and taking into account that these assets may increase thanks to violation of budgetary norms by the office holder, it makes sense that the declarations should be deposited with an institution which, because of its attributes, has direct access to information on state budgetary execution, such as the TA[16].

In a framework such as that proposed, if the holder of a public office, his/her spouse and children present declarations of assets manifestly higher than in previous periods, and if they are suspected of financial offences linked to acts of corruption detected by the TA in exercising its duties of external inspection, the TA would be able to act speedily in investigating the suspicions, since it would have direct access to the assets declarations made by the suspects. In the current Mozambican context, where communication between sectors within the justice system on matters linked to corruption is very defective, depositing the declarations in a body such as the TA would open the door to effective inspection.

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12 The annual declaration on income is delivered to the area tax offices, within the deadlines laid down in the income tax codes, to calculate the amount of tax owed to the state by the taxpayer and ensure that it is paid.

13 Cf the powers of the CC in Article 6 of Law 6/2006

14 This behaviour constitutes typical financial offences under Article 12 of Law 16/97

15 On the public procurement rules, see Decree 54/2005, of 13 December 2005

16 This occurs, for example, in Brazil, where the declarations are deposited in the Union Accounts Tribunal (TCU), under Article 1, paragraph 2, of Law 8730 of 10 November 1993, concerning the obligation of public officials to declare their assets and income.

Another solution would be to strengthen the powers of the CC on the matter, notably so that this body could undertake concrete inspection, determining, for example, whether the goods added to the assets of the public office holder, his/her spouse and children are in line with the income earned in the year in question. In the event that the goods added are out of proportion – that is, manifestly greater than the annual income declared, and without proof that they were obtained licitly – this may raise suspicion that an administratively improper act has been committed, possibly linked to corruption. This would be one way of strengthening mechanisms of transparency in Mozambique.

In the current legal framework, we believe that depositing the declarations of assets at the CC is no more than a formal and protocol act, and gives no added value to preventive measures for fighting corruption. The CC merely collects the declarations and deposits them but undertakes no in-depth inspection of their content, merely verifying whether the persons in question are complying with the law in terms of the deposit. In cases where the CC detects that declarations have not been deposited, it warns the office holders concerned to comply with the law.

Depositing the declarations at the CC is thus merely symbolic. The CC does not even have the prerogative of exchanging information with other institutions, such as the Tax Authority (AT), about the incomes earned by public office holders. The scenario described points to the need for the declarations of assets to be deposited in a different institution but such a change must come from the legislator, that is from the Assembly of the Republic (AR) or from the Government.

Among the institutions that could be considered as holders of the declarations of assets are the TA[17] and the Central Office for the Fight against Corruption (GCCC)[18]. The former for the reasons mentioned above. The latter because it has specific powers to investigate crimes of corruption. Thus both would be better able to inspect and control the declarations in a more effective way, all the more so because Mozambique does not yet possess specific public ethics management programmes, which would imply the existence of institutions with the task of inspecting, monitoring and controlling the norms on ethics in the public administration.[19]

### 3.1.4 Confidentiality and access to the declarations

A further problematic question in the Mozambican legislation is that the declarations of assets deposited at the CC are not public, and are governed by strict rules of confidentiality. Article 7, paragraph 5, of Law no.7/98 states that the declarations of assets are covered by the sub judice norms, and divulging them unduly is punishable by law.

This article also states that a limited number of figures have access to the declarations, namely: the President of the Republic, the President of the Assembly of the Republic, the Prime Minister, and the Attorney-General. In short, they are not public, which means that any mass media or civil society organizations who wish to make an independent investigation of corruption allegations involving public office holders have no access to these records, thus limiting the exercise of inspection.
The law also lists several duties, but does not say what their content is (for example, it speaks of the

17 In Brazil the declarations of assets made by the holders of public office are deposited in the TCU (Union Accounts Tribunal)

18 In Portugal, the holders of high level political posts must, within 60 days of taking office, deposit in the Attorney-General's Office, a declaration that they are not affected by any incompatibilities or impediments, which contain all the elements needed to verify compliance with the provisions of the law. See the Portuguese Law on the Incompatibilities and Impediments of Holders of Public Office (Law 64/93 of 26 August).

19 In the USA, the declarations on financial information are deposited with the OGE (Office of Government Ethics). In Argentina, the declarations are deposited in the OA (Anti-Corruption Office), which also has the powers to investigate corruption offences.

duties of loyalty, and neutrality, but does not explain what these terms mean) and does not state how the declarations of assets should be inspected.

Publication of the declarations of assets is a requirement of transparency in modern democracies. This principle allows citizens to defend themselves from particular acts of corruption that take place, for example, in their municipalities. In the case of Mozambique, and in the event of regulation of the Law on Class Action[20], citizens would be better able to propose actions, for instance, to annul acts damaging to state assets which are practiced by public office holders abusing their functions.

We thus believe that the declarations should be published in order to confer greater transparency to the management of public property, and to open further doors to inspecting actions by members of the executive.

But the idea of publishing the declarations of assets does not enjoy unanimous support. One of the Supreme Court judges interviewed for this report was sceptical about unrestricted publication of the declarations. This judge believed that uncontrolled publication of the content of the declarations could amount to invasion of the privacy of the holders of public office. He argued that a culture of privacy with regard to the assets of public office holders is needed, otherwise their private lives would be on display.

Other interviewees said there is still a trend in Mozambique to divulge the intimate and private lives of public office holders, mostly by persons of bad faith, who make undue use of information obtained illicitly for illicit purposes, which could lead to the loss of the sense of State. But we should also bear in mind that, in our recent history, corruption, trafficking in influence[21], rent seeking[22], whether with State resources (see the BCM and Austral Bank cases), or with donor resources, have sustained a phase of enrichment by political and leading elites.

This explains the resistance, which still exists, on the part of public office holders to accepting that the content of the declarations should be made public. This resistance takes an excessively severe shape, as was seen in early 2005, when the government of Armando Guebuza took office and the current Finance Minister, Manuel Chang, took the initiative to divulge publicly his list of assets.

In March 2005, a newspaper (***Embondeiro***) asked the minister to declare his assets, and he did not hesitate. He gave the paper a copy of the declaration he had sent to the CC. Prior to Chang, the current Minister of Public Works and Housing, Felício Zacarias, had published, in September 2004, through the paper ***Savana***, the list of his assets. At the time, Zacarias was still governor of Sofala province.

After Chang's initiative, there was some disquiet among political figures, some of whom argued that public opinion might be scandalized if it saw the wealth of some ministers[23].
The reaction of some members of what was then the new Guebuza government was mixed. Labour

20 Article 81 of the CRM, but the specific legislation has not yet been produced.

21 Trafficking in influence occurs when a professional requests benefits, by using his influence to provide unjust advantages in the interest of a person close to him.

22 Rent seeking is often viewed as corruption. In truth, the two are overlapping concepts. While corruption involves the use of public power to obtain private benefits, rent seeking derives from the economic concept of rent, that is, excessive gains without significant costs, and is the same as what many people think are monopoly profits. Rent seeking, the effort to acquire rent, is not necessarily banned by law, or even considered immoral in society. It also does not have perverse effects on the economy in terms of development, in the event that productive investment occurs, but it is largely unproductive and often economically inefficient.

23 Tourism Minister Fernando Sumbana, interviewed by the Mozambique News Agency (AIM) "Should Ministers Declare their Property to the Public?", 10/03/2005

Minister Helena Taípo said that only those with something to hide would feel uncomfortable about publishing their assets. She, who had also delivered her declaration of assets to the CC, said she would not be worried if her assets were made public knowledge. But other ministers were not at all satisfied. Cadmiel Muthemba, the Minister of Fisheries, said that he saw no advantage in publishing the declarations of assets. "If they want to investigate my life, let them investigate, but I am never going to publish my list of assets", he said. Another Minister who did not agree with publishing the declaration of assets was António Munguambe, who was then Minister of Transport and Communications. He said that his property was a question of his private life and had nothing to do with the public.

## 3. 2 Conflicts of interest

There is no specific law in Mozambique that regulates conflicts of interest[24]. The legislation contains, in scattered form, aspects linked to this matter, which ban high ranking state officials from paid activities within their areas of responsibility.

### 3.2.1 Regulation of conflicts of interest for members of the executive

Law no. 4/90 mentions, in passing, situations of conflicts of interest for members of the executive, namely: the exercise of paid activity without prior authorization; being a director or manager of any company, except by a State decision or delegation; undertaking for somebody else professional activities related to his sphere of decision-making, even if unpaid. If the office holder is a shareholder, director or owner of any company, the management of the property and of the company positions must be entrusted to others.

For its part, Law no. 7/98, determines, in article 4, that the holders of government positions named in this law may not undertake paid activities, administration and management of business, or activities, even if unpaid, that are related to the decision making sphere of the position they hold. Also Decree no. 30/2001, of 15 October (which approves the Operational Norms of Public Administration Services) regulates impediments and suspicions, under which the holder of a public office is limited from intervening in decisions where he, or people close to him by virtue of ties of kinship or affinity, have a direct or indirect interest.

Also in the case of the Statute of Public Manager, approved by Decree no. 28/2005, of 23 August, this is regulated in Article 8, paragraph 1, which states: "Public Managers have the duty to abstain from taking part in the discussions, from voting and from, in any way, deciding upon or influencing decisions about matters which affect him or in which he, his spouse, dependents or other relatives, or any person or entity, public or private, with which he has a professional tie, or of which he is a creditor or debtor, have an interest". Paragraph 4 of this article also bars public managers from exercising any other professional activities, whether paid or not.

As for fiscal legislation, Article 17 of Decree no. 19/2005, of 22 June (Regulation of Tax Inspection Procedures) mentions a series of impediments to which tax inspection staff are subject, whenever the inspection involves people with whom they have relations of matrimony, kinship or affinity, and whenever the staff member has an interest with the body under inspection; in the event of violating this ban, the offending staff are subject to disciplinary proceedings.

Despite the norms mentioned above, regulation of conflicts of interest for members of the government

24 A conflict of interests occurs when an individual with a formal responsibility to serve the public participates in an activity which endangers his professional judgement, objectivity and independence. Generally, this activity (such as a private business activity) primarily serves personal interests and may potentially influence the objectives of the duties of the individual officials.

is limited: it has no effects after leaving the government. This allows a member of the government to use his period in public office to seek employment or firm up business deals that take effect after he has left office. Indeed, the law does not prevent a minister, after leaving ministerial office, to take a job in a project that he himself set up. Or to become a shareholder or an executive in a company that he himself licensed or privatized. This permissiveness can have a substantial impact on ministerial motivation, since it provides a strong incentive to intervene in situations that might generate a job opportunity for him after he has left the government.

We find many shadowy areas where conflicts of interests are not properly regulated and which could form a window of opportunity for crimes of corruption or connected crimes, for the reasons indicated below:

- We find no norm that prevents a holder of public office from exercising activity linked to his previous duties for a certain period of time after leaving his earlier job (a quarantine or period of restraint)25, as happens in other countries;
- There is also no ban on former holders of public office using information to which they had access because of their positions;
- Likewise, we find no norms that prevent the holder of a public office from accepting the post of director or advisor or establishing a professional tie with a physical or legal person active in the area that falls under the powers of the post he used to occupy;
- We find no norms that prevent the former holder of public office from signing with government bodies contracts for services, consultancies or similar activities linked (however indirectly) with the body where he used to hold a position;
- We find no norms that prevent the former holder of public office from intervening, directly or indirectly, in favour of a private interest with the body or entity in which he used to hold a position or job;
- We do not find in the legislation that any specific body has been given the power to inspect and control situations where conflicts of interest arise26;
- We do not find in the legislation anything that prevents a company, a percentage of which is owned by a public office holder, from entering into contracts with the state, notably through tenders for the supply of goods or services. Likewise we find no norm that prevents companies where the wife or other relatives of the public office holder own shares from signing contracts with the state27. The regulations on public procurement, approved by Decree no. 54/2005, of 13 December, make no specific mention of this aspect;

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25 For example, the Portuguese Law on Incompatibilities and Impediments of Holders of Public Office (Law 64/93 of 26 August) establishes, in Article 5, that: the holders of sovereign offices and of political posts may not exercise, for a period of three years, counted from the date they leave office, positions in private companies or pursue activities in the sector that they had directly overseen which had been, during their term of office, privatized or had benefited from financial incentives or from systems of fiscal incentives and benefits of a contractual nature.

26 In Brazil, the draft law on conflicts of interest, of 2006, presented by the Comptroller General, states that it is the task of the Public Ethics Commission, set up by the Federal Government, and of the Comptroller General to inspect the occurrence of situations of conflicts of interest, and to authorize the holder of a public office to exercise an activity even where there is no conflict of interest.

27 In Portugal, Article 8 of the Law on Incompatibilities and Impediments of Public Office Holders (Law 64/93 of 26 August) reads as follows: "companies where the holder of a sovereign office or of a political position, or of a high ranking public office owns more than 10% of the capital are banned from taking part in tenders to supply goods or services, in commercial or industrial activities, in contracts with the state and other public collective persons. Subject to the same regime are:

a) Companies where the same percentage is owned by his/her spouse, not separated, his close relatives, as well as any person cohabiting with him/her under the conditions of Article 2020 of the Civil Code;

b) Companies where the office holder owns directly or indirectly, alone or together with the relatives mentioned in the previous line, not less than 10%" .

We do not find any norms that ban the holders of government office from taking part in decisions that involve hiring companies in which they have owned a stake, or where they have been members of the company bodies[28]. With the exception of the situations envisaged in Article 4 of Law no. 7/98 and in Decree no. 30/2001, on impediments and suspicions, we do not find any norms that deal, with proper acuity, with situations that ought to be regarded as constituting a conflict of interest, either during or after the holding of public office.

### 3.2.2 Regulation of conflicts of interest for members of parliament

As for the bodies of legislative power, the legislator was completely silent on possible conflicts between the office of a parliamentary deputy and the interest of the individuals elected as deputies. The Statute of Deputies (Law no. 3/2004) makes no mention of any impediments of deputies or any conflicts of interest.

In Mozambique there are no rules on conflicts of interest that may warn against any opportunism on the part of deputies to the AR. The parliamentary deputies may, at one and the same time, own shares in companies and vote for laws that may benefit them. That is, the legislation does not regulate conflicts of interest of parliamentarians with regard to private business: the deputies can serve interests without restrictions; there are no impediments or conditions on them occupying positions of trust in private companies, including as members of the Board of Directors. A deputy can be the chairperson or member of a parliamentary commission that is studying and drafting a law that may have effects on a company in which he is an official; this will be even more serious if the deputy in question represents a company which, even if it is Mozambican, is dominated by foreign capital.

Furthermore, the law has no mechanism to prevent deputies from lobbying to delay or prevent the approval of a law, or to ensure that a law is drafted in such a way as not to damage the interests of his company. If the company in which the deputy is an official is dominated by foreign capital, he may be serving foreign interests.

Regulating these matters is of the utmost importance, if we consider that it is the AR which passes the laws. If there are no markers that strictly define how deputies may act, we may have situations in which the deputies of the AR pass laws specifically to benefit their personal or business interests, thus subverting the purpose for which they were elected, which is to defend the interests of Mozambicans. Nowhere in national legislation do we find norms that prevent deputies from:

- Being members of a body of a collective public entity, and thus of a leading body of companies where the capital is mostly or entirely public, or companies to which public services have been leased;
- Being members of bodies of public companies, companies formed by public capital or mostly owned by the state, and of public institutes;
- Holding government-appointed posts without authorisation of the Assembly of the Republic;
- Signing contracts with the State and other public collective persons, in the exercise of commercial or industrial activities, directly or indirectly, by a spouse from whom he/she is not legally separated, or by an entity in which he/she holds more than a certain percentage (e.g. 10%) of the capital. This extends to participation in tenders to supply goods or services, building work or tenders for concessions, opened by the state and other public collective

28 On this aspect, see Article 9-A of the Portuguese Law on Incompatibilities and Impediments of Holders of Public Office.

persons, and, also, by companies where the capital is mostly or wholly publicly owned, or by companies running public services;

Taking part in contracts in the drawing up of which bodies or services placed under his direct influence took part.

To verify, control and inspect conflicts of interest affecting parliamentarians, some countries have set up Parliamentary Ethics Commissions, which apply sanctions against deputies who violate legislation on the matter. The penalties range from losing their parliamentary seats to the obligation to reimburse the sums received by the deputy since the start of the situation of impediment[29].

In Mozambique, the Statute of Deputies does not oblige the deputies to make any prior declaration of the existence of private interests[30] when a law is under debate that might potentially benefit him directly, or people close to him, in the following situations:

- Where the deputies, their spouses, the persons they are cohabiting with, or their relatives hold rights in or are parties to businesses the existence, validity or effects of which may change as a direct result of the law or resolution of the Assembly of the Republic
- Where the deputies, their spouses, the persons they are cohabiting with, or their relatives are members of company bodies, agents, employees or permanent collaborators in companies or collective bodies the legal situation of which may be modified directly by the law or resolution to be passed by the Assembly of the Republic.

It is thus urgent to reflect upon the need to introduce impediments to situations where there are potential conflicts of interest that might exist during the deputy's term of office, so that he may represent the interests of the people with integrity and transparency.

## 3.3 Codes of conduct and the management of public ethics

If public officials are badly paid in comparison with other sectors of activity, they become more prone to accepting bribes, in contrast with better paid officials or those who receive a competitive salary. This leads to a climate in which corruption is tolerated, and which the former find it difficult to combat.

In such a context, those officials who manage to build houses with large sums of money derived from corruption are viewed by the others as successful people; there may also be some sympathy towards those who increase their salaries through the bribes they receive, or through the use of public resources, such as vehicles, for private purposes.

Public officials represent the state in its interface with the private sector and with civil society. In the central aspect of their position for the correct operations of the state, it is expected that public officials can carry forward actions and take decisions that affect the lives of citizens. It is expected that they will not abuse the powers and resources put at their disposal, and avoid conflicts between their private interests and their public duties.

Codes of Conduct are important to guide the behaviour of officials in cases where decisions are taken on complicated ethical matters, and provide the basis for the understanding that the users of

29 See Article 21, paragraph 8, of the Portuguese Statute of Deputies.

30 On this, see Article 27 of the Portuguese Statute of Deputies.

Public Services have about the basic standards of behaviour they can expect from the staff of the public sector.

The establishment of written, formal Codes of Conduct – binding in terms of the responsibility, probity, legality and equality of the activity of public officials – is very frequent in modern public administration. Codes of Conduct may establish, in broad terms, values and principles that define the professional role of the public officials – such as impartiality, integrity, clarity and responsibility – or may merely lay stress on the practical application of these principles.

The codes may be applied to the public sector as a whole, or designed to reflect the ethical challenges in a specific sector and, in this case, can contain the procedures and sanctions to be used in cases of deviant behaviour. Regardless of their statute, style and scope, Codes of Conduct for the Public Administration can play an important role in the Anti-Corruption Strategy.

Codes of Conduct are essentially preventive and have an enormous potential for avoiding corruption and misconduct in the administration before it happens. Good Codes of Conduct do not only identify clearly standards of behaviour in the public administration, including the consequences that apply in cases of deviating from them, but they also lay down a framework for removing or regulating conflicts of interest, thus reducing the number of opportunities for the illicit enrichment of public officials at the cost of the state. At the same time, Codes of Conduct provided incisive declarations of intent, aimed within and outside of the Public Administration, stating that unethical behaviour will not be tolerated.

Although there is scattered legislation on the norms that should guide the behaviour and conduct of public officials, in Mozambique there is no specific Code of Conduct for state functionaries. The General Statute of State Functionaries and the Ethical Norms for Public Officials, approved by Resolution no. 10/97, of 20 July, of the now defunct National Public Service Council, mentions aspects linked to general conduct which should guide the behaviour of state functionaries. But there is no Code of Conduct proper for the Public Service.

Some bodies in the public administration have, however, tried to lay down codes of conduct. A noteworthy example is the Mozambican Customs Service which, as part of its reform and modernisation, in 2005 introduced a Code of Conduct. This was the first instrument of its kind in a public sector institution in Mozambique.

A further attempt was made by the National Teachers' Organisation (ONP), with the support of the Centre for Public Integrity. In late 2006, the ONP finalised its Code of Conduct after participatory debates held throughout the country. In 2008, Maputo City Municipal Council (CMCM) also divulged a draft Code of Conduct for staff to cover their behaviour towards the users of municipal services. A further significant experience is that of the Sofala Commercial and Industrial Association (ACIS), which also has a code of good practices for their members. These are the only experiences known of in Mozambique.

Apart from Codes of Conduct proper, some countries that are more advanced in the reform of the Public Administration, in order to ensure a greater degree of integrity and ethics in their administrative activity, have set up what they called models of public ethics management, which deal with ethical conduct in the Public Service, by coordinating and administering programmes of governmental ethics in the Public Administration.

Among the existing institutions in Mozambique, we find none with the specific vocation to manage public ethics programmes, in order to prevent corrupt practices. The fundamental task of such institutions would be to regulate, coordinate and supervise public ethics programmes, which would

involve drawing up Codes of Conduct, and inspecting compliance with them. This fact shows a weakness in Mozambican legislation in the component of preventing acts of corruption.

It is imperative that the government should adopt urgently a Code of Conduct for public officials, which defines matters concerned with integrity, transparency, accountability, conflict of interests, financial management and government purchases, and access to governmental information, among other matters. In addition to a general Code of Conduct, codes of conduct at sector level should also be adopted, notably a code of conduct for staff in the judicial apparatus, one for health staff, one for teachers, and so on.

## 3. 4 Publicity of the Government's acts

In Mozambique the culture of secrecy is still practiced. Everything is secret. Increasingly one notes that the texts of legal documents approving acts and contracts are not published in the official gazette, the ***Boletim da República***. Why not? The failure to publish government acts has nothing to do with state defence and security, the only reason internationally accepted as justifying non-publication.

Thus, for the sake of transparency in the acts of the Public Administration and of the struggle against corruption, we believe that publication should be obligatory for at least all acts and contracts imbued with a certain discretionary power of the public administration or which represent public expenditure, not connected to day-to-day management, or which result in revenue above a certain amount (to be fixed regularly) not entering the state's coffers.

The great majority of countries publish, in their official paper (in our case the ***Boletim da República***), acts and contracts of a certain relevance signed by the Public Administration. This includes even tender announcements and, obviously, the hiring that results from the tenders. Recently, many countries have adopted mechanisms through which they publicise on the Internet, all matters linked to public procurement.

For example, in Mexico, all procurement activities are made available through a website accessible to everybody, In Colombia, the State Contracting Information System (SICE) is also accessible to the public. Similar systems apply in Chile and in South Korea. The high degree of transparency through access in real time to decisions about procurement reduces the opportunities for manipulation and may strengthen the willingness of public officials and of the bidders to commit themselves to hiring processes that are free of corruption.

In promoting transparent and open governance, it makes every sense for the governed to have access to information on the way the Executive is handling the destinies of the country (Government in the Sunshine)[31]. This opening can be a way for the Government to demonstrate transparency and prevent the spread of suspicions about it, which would greatly contribute to increasing its credibility among citizens, thus constituting a concrete act demonstrating political will in the fight against corruption.

Obviously it is necessary to take into account aspects concerned with state security and the private life of citizens when releasing information. But these factors should not be a hindrance to publishing relevant information. The publication of relevant information on government activity can be regarded as one of the ways of expressing the government's accountability to its citizens.

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31 In 1976, the American Congress passed the Government in the Sunshine Act. With a few exceptions, mainly in the area of national security and personal privacy, the law requires that government meetings be open to the public. Public agencies must announce future meetings and their respective agenda in advance, and must also divulge the results of the meetings in records open to the public. Furthermore, the law defines in detail what constitutes a "meeting", to prevent government authorities from taking decisions at meetings they allege are not official.

In Mozambique, the ***Boletim da República*** only publishes the resolutions that approve financing contracts, but not the terms and conditions of the contracts themselves. Access to this type of information is of the greatest importance, particularly in cases where the state benefits from debt relief, so that one can determine exactly the impact of this relief on the financing contracts mentioned earlier.

The opinions of the TA on the General State Accounts are a major source of information on how the funds of the public treasury are managed. However, the state does not provide, with due rigour, for publication of the content of this document so that citizens may have access to the information contained in the opinions of the Tribunal, which reports various kinds of irregularities committed during implementation of the budget.

It should, however, be mentioned that the recent legislation on public procurement, approved by Decree no. 54/2005, establishes (in Article 82, paragraph 2) that it is compulsory for decisions on the results of tenders to be made public. This, and the possibility of allowing consultation to the entire administrative procedures around procurement after the bids have been assessed, has altered the framework of secrecy that still persists in much state business.

Because of this legal demand, currently some Mozambican state bodies publish in the press announcements of tenders and the respective awards. Furthermore, apart from publishing announcements about public tenders in the country's man newspapers, the government has opened an Internet portal (www.concursospublicos.gov.mz), where new tenders are announced. This is a significant advance towards greater transparency in state business in Mozambique.

But it should be mentioned that the contracts the Government signs with foreign investors, contracts awarding services of large commercial value, and concessions for undertakings in the mining area (gas, oil, mining) are still not published, which shows that a vast amount of state business is still known only to half a dozen people. A flagrant example is the contract with Sasol for exploiting the Pande and Temane natural gas, the contents of which have never been divulged.

## 3.5 Protection of witnesses and whistle blowers

The importance of evidence from witnesses in criminal law in general, and in dealing with the phenomenon of organised crime in particular, including corruption, cannot be doubted. Alongside this importance arises the need for states to protect witnesses and whistle blowers since organised crime is by its very nature highly sophisticated, with tentacles in all or almost all sectors, Links are known between organised crime groups and certain governments. But it is also known that common citizens suffer losses when they take the initiative to denounce cases of corruption in Mozambique, even cases of petty corruption.

The application of the anti-corruption law and strategies is largely dependent on the good will of individuals to provide information or give evidence. Whistle-blowers are people who inform the public or the authorities about corrupt transactions they have witnessed or covered up. These individuals generally ask for protection, since they fear reprisals from those they expose. The protection of whistle-blowers thus refers to the measures (administrative and legislative) taken to protect informants from physical, social and economic retaliation.

Internationally, there have been several ways of protecting whistle blowers and witnesses. One of them is the so-called statement for purposes of future memory. Such statements are collected prior to the trial with the purpose, among others, of preserving the person who gave evidence and incorporating him/her into an administrative security programme.

However several criticisms have been made about whether this sort of evidence is admissible, particularly since it calls into questions certain dogmatic principles of law, and which preside over trials: namely, the principle of oral testimony, mediation and cross-examination.

Another method is the protection of the image of the witness, which currently concerns not only protecting his/her identity, but also avoiding any visual confrontation with the suspects or accused. Using modern technology it is today possible to remove the witness from the court room in order to protect him/her, without any time lapse in the examination and cross-examination, and preserving principles such as oral testimony and concentration of the trial. We are referring here to the resort to the broad range of possibilities of video-conferencing, used successfully in other countries.

Other executive witness protection measures involve special security programmes, which range from police protection to changes in identity, altering the physiognomy or appearance of the person concerned, placing the witness and his/her family, with state support, in new places, and ensuring their conditions of subsistence, and even granting a subsistence allowance.

To make witness protection viable, some countries, such as South Africa, have created specific legislation, policies and institutions. South Africa passed a law, the Witness and Protection Act, 112 of 1998, under which the Office for Witness Protection has been set up.

In Portugal, there is also a specific witness protection law, including a special security programme, which envisages protection, not only for the witness, but also for his/her spouse and relatives. This law also set up a Commission of Special Security Programmes, depending directly on the Minister of Justice, who is charged with establishing the special security programmes and ensuring that they are effective.

### 3.5.1 Protection of witnesses and whistle blowers in the light of international conventions

International anti-corruption conventions and protocols in general point to the need for the signatory states to adopt concrete mechanisms to protect whistle blowers and witnesses. Thus the SADC Protocol against Corruption, approved by the government through Resolution no 33/2004, of 9 July, when referring to preventive measures, in Article 4, line e), states that the signatory countries should put into practice "systems to protect individuals who, in good faith, denounce acts of corruption".

The African Union convention, ratified by the AR through Law no. 30/2006, of 2 August, in article 6, on legislative and other measures, states that the signatory countries should "adopt legislative and other measures to protect whistle blowers and witnesses in cases concerned with corruption and similar offences, including protecting their identities; adopting measures to ensure that citizens provide information about cases of corruption without fear of reprisals".

Finally, the United Nations Convention against Corruption states, in Article 33, on the protection of whistle blowers, that "each member state should establish in its legal system appropriate measures to protect against any unjustified treatment all citizens who, in good faith, report cases of corruption to the relevant authorities".

We can also mention the United Nations Convention against Transnational Organised Crime which, in article 24, recommends the state-parties to adopt measures to ensure effective protection against likely acts of intimidation or reprisal aimed against witnesses who testify in cases of corruption, among other forms of organized crime covered by the Convention. The same article recommends that protection be given through the following measures: provision of a new home to the protected witness and, if necessary, preventing or restricting the publication of information about the identity and whereabouts of the witnesses.

### 3.5.2 The protection of whistle blowers and witnesses in Mozambican legislation

Contrary to what is laid down in the international conventions, Mozambique still does not have concrete measures to protect whistle blowers and witnesses. The protection of witnesses is not enshrined in Mozambican legislation. Even if we refer to Article 214 and the following articles in the Penal Code, which refer to witness evidence, there is nothing about protection. But in delicate matters, such as those we are discussing, people must feel safe before they take the risk of making denunciations and giving evidence.

Worse still, the local authorities do not hesitate to break national law and the international principles that the state has signed up to. In May 2007, CIP reported an episode involving a Mozambican citizen named João Gune, the driver of a "chapa" (privately-owned minibus used for passenger transport). He was detained in Matola for 5 days because he had the courage to denounce extortion by two agents of the Matola Municipal Police

His detention by the Mozambique Republic Police (PRM) was a flagrant violation of the law; it also sent out a signal discouraging the denunciation of corruption in Mozambique. Instead of protecting the whistle blower, as required by Law 6/2004 (the Anti-Corruption Law) and the international conventions (the SADC Protocol and the African Union and United Nations Conventions, all validly ratified by Mozambique), the state detained him.

The case of Gune reopened the debate on the need for Mozambique to establish legal and practical mechanisms to protect whistle blowers and witnesses of acts of corruption. It was serious that the two policemen denounced were immediately set free (they were freed because the driver had also been freed) and they returned to the streets where they continued to work. No disciplinary or criminal proceedings were taken against them. And the government never tires of saying it has zero tolerance in the fight against corruption.

On this matter, it is also worth recalling the National Research into Governance and Corruption (UTRESP, 2005). This research gave clues as to why people do not denounce acts of corruption. The reason stated most often was fear of reprisals: 61.3% (public officials), 49.9% (companies) and 46.8% (households). Mozambique has a Central Office for the Fight against Corruption (GCCC) which has not yet done much to make itself known among the public at large; the GCCC is only known among the urban elites of this country.

The UTRESP research had already given indications about this. Those surveyed in the study said they did not denounce corruption because the investigation procedure were complex, that in some cases nothing could be proved, that they didn't know the procedures for how to denounce corrupt officials, etc. This lack of knowledge of the existence of the GCCC by public opinion is a symptom that the Office has not anchored its work in civil society; this closed attitude perpetuates citizens' distrust towards the state institutions that deal with these matters.

That was why João Gune (like many citizens) instead of going to the GCCC, went to a television station. The lack of anchorage of the GCCC's work in civil society has to do with its format, and with the fact that the Mozambican government still underestimates the centrality of the citizens in the fight against corruption.

With regard to protecting whistle blowers and witnesses, the Anti-Corruption Law deals with the question very superficially, and does not mention the need to protect witnesses. Article 13 of Law no. 6/2004 states: "No complainant or whistle blower may be subjected to disciplinary proceedings or prejudiced in his professional career or be persecuted in any form because of the complaint against or denunciation of the crimes envisaged in the present law". Article 13 of the law also states that no

complainant or whistle blower may be persecuted because he/she complained against or denounced crimes of corruption; it adds that anyone harassing a whistle blower shall be punished with up to six months imprisonment.

As can be seen, the law tries to establish the principle of protecting whistle blowers, but the great problems is that it does not guarantee any protection because the legislation does not say specifically how this protection will be given. This gap is particularly serious when it is intended that more citizens should inform the authorities about the cases of corruption of which they are aware. The same applies to witnesses who also enjoy no protection under the present legislation.

Furthermore, the nature of the protection of whistle blowers included in Law 6/2004 rests "prima facie" on guaranteeing the whistle blower's job. If he is a state functionary he cannot be subjected to any disciplinary measure or be deliberately prejudiced in his professional career because he has made a denunciation. Secondly, the law seeks to protect those who, while not being state functionaries or agents themselves, make denunciations against state functionaries or agents.

Despite its good intentions, the law makes no allusion to the measures required for the state to provide effective protection to whistle blowers. This means that the law does not touch, as it should have done, upon questions linked to the fundamental rights of citizens which are constitutionally guaranteed, namely the protection of life and physical integrity (Article 40, paragraph 1, of the Mozambican constitution). It is a mild way of dealing with an extremely important matter. It does not encourage citizens to denounce acts of corruption, and motivate those who are in a position to denounce and testify, but who are intimidated from doing so because it may put their life and physical integrity in danger.

If the Mozambican government intends to continue advocating zero tolerance in the fight against corruption, it is urgent that it take legal and institutional measures to allow citizens to denounce acts of corruption that they become aware of. In a scenario where state institutions (General Inspectorate of Finance, TA and GCCC) do not exchange information about the corrupt practices they detect (Article 21 of the Anti-Corruption Law says that when public and private audits find signs of corruption they should communicate these signs to the GCCC, but this is not happening), the state should support denunciations in good faith.

## 4. OPPORTUNITIES FOR CORRUPTION IN SOME LEGAL DIPLOMAS

Previous chapters stressed some of the weaknesses in the preventive component of anti-corruption legislation, and identified areas of the Mozambican legislation that need to be revised. The current section looks at the other side of the same coin: the opportunities for corruption offered by some of our legal diplomas.

These opportunities are created in several ways and in laws that are not especially dedicated to the fight against corruption; laws that are intended to regulate various aspects of our life, particularly state financial activity, or economic activity in general. However these laws often create opportunities for corruption, because of their ambiguity, contradictory provisions, incongruences, and gaps, and because of excessive discretionary power in the judicial sphere granted to some state bodies.
We shall refer to three major groups of cases:

- The first group concerns laws that impose compliance with certain rules or contain prohibitions, but also contain legal provisions which authorize non-compliance with those rules or open exceptions to the prohibitions.

- The second group, very close to the first, concerns laws which grant broad discretionary powers to a body or agent of the Public Administration.
- The third group concerns laws which contain contradictory or ambiguous legal provisions. Sometimes these contradictory, or at least non-harmonised, legal provisions coexist in the same law. On other occasions they are in different laws, but related with the same theme.

Our objective is to draw attention to these situations, and so we shall not engage in lengthy theoretical disquisitions about the matter. But we think it important to give some examples of each of the groups mentioned above, since these are not merely theoretical issues, but very real defects in some of our laws.

With regard to the first group, that of laws which allow non-compliance with certain important rules that can avoid corruption, the best example is without doubt that contained in Law no. 13/97, of 10 July (which establishes the Legal Regime for Prior Inspection of Public Expenditure by the TA), because of its importance for transparency in the use of public money. That is, these are laws which, on the one hand contain obligatory norms, norms which have special importance for preventing corrupt practices in the broadest sense of the term, but which, on the other hand, contain provisions which sometimes, without much precision, allow non compliance with these supposedly compulsory norms.

Below we present some illustrative examples:

**Example 1**

Law no. 13/97 envisages, in Article 3, that a series of acts, contracts and other legal instruments that generate public expenditure, practiced or signed in State institutions and bodies are subject to prior inspection by the TA, that is, before the expense is made the proposal should be submitted to the TA for approval. It is important to note the wording of Article 3, paragraph 1, which states: "Obligatorily subject to prior inspection are....".

However, Article 4, line f) and Article 9 open exceptions, allowing that, whenever the work involved is urgent, certain acts and contracts can take effect on the date they are signed, even without being submitted to prior inspection. Article 9, paragraph 1, line d) goes still further granting this possibility to "contracts of any nature arising from an act of God or force majeure". As if this were not enough, Article 9, paragraph 3, continues along the same line of banning with one hand and allowing with the other. Paragraph 3 of this article states:

"Processes where urgency has been declared should be sent to the Administrative Tribunal in the thirty days following the authorization dispatch, under pain of cessation of the respective effects, except for powerful motives that the Tribunal shall assess". That is, although it is compulsory for the expenditure to be submitted to prior inspection, a period of thirty days is still given for the matter to be presented to the TA and also the possibility of violation of this compulsory norm, and lack of compliance with the deadline is not subject to any sanction. In other words, on the one hand there is an obligation, but immediately the exception is allowed, without clearly fixing the criteria that guide this exception, since "urgency", "act of God" and "force majeure" are imprecise and very abstract terms.

It should also be added that those who violate the norms of this law will only be held financially responsible, if the assets and financial interests of the state are damaged, according to article 13 of the same law. Perhaps because of this, article 3 of this law is the provision most often violated in executing the state budget. In executing the 2005 budget alone, the Administrative Tribunal found that Article 3 of Law 13/97 was violated more than 15 times. Thus it is not worth banning or imposing certain conduct if, when an infraction occurs, nothing happens to the offender.

In the case of Law no. 13/97, for example, since the TA began analysing the General State Accounts, violation of the rule that imposes prior inspection has been noted without any offender being punished for this. Clearly non-compliance with article 3 of Law no. 13/97 is not in itself indicative of corruption, nor are we saying or even insinuating that any of the cases of violations of this article indicated by the TA were cases of corruption. What we wish to show through this example is the open door for corruption that the exception envisaged by the law has created, even though it is important to envisage exceptions. What is essential is that the exceptional regime, in its essence and scale, does not imply derogation from the general rule, otherwise the exception becomes the rule.

**Example 2**

A further example comes from Law no. 10/99, of 12 July, the Law on Forestry and Wild Life. Article 10 of this law states that there are zones of protection intended for the conservation of biodiversity, of fragile ecosystems or of animal or plant species. Article 11, paragraph 2, of this law lists the activities banned from these areas, unless for scientific reasons or management needs.

But Article 10, paragraph 8, of the same law says: "For reasons of public necessity, use or interest, the Council of Ministers may exceptionally authorize certain activities in the zones of protection mentioned in the present law". This is a further exception to the ban. It does not even mention which activities may be authorized. It seems that all of them may be, and this is at the discretion of the public power. Public "necessity", "use" or "interest" are not defined, limited or specified. No criteria are given, nor is an explanation required. This could be one more door open to the practice of administratively improper acts.

Clearly there may and will have to be exceptions. But the question posed is knowing whether all the exceptions that exist in our laws are necessary, as well as if and when they are, and whether, when and how these exceptions may occur should be limited and better specified. Furthermore, it would also be important that the respective body, agent or functionary of the Public Administration be obliged to give a full and public explanation and justification for the non-compliance with certain norms.

The second group that we wish to note concerns laws that grant broad discretionary powers to a body or agent of the Public Administration.

**Examples:**

The Law on Forestry and Wild Life mentioned above: the wide-ranging power given to the Council of Ministers to allow banned activities in zones of protection. A further example comes from the Fiscal Benefits Code. This determines the various fiscal benefits for investment. In general, the benefits are fixed without leaving much room for manoeuvre by the Public Administration. However, in the case of large scale projects, the Council of Ministers is authorized to grant exceptional incentives.

The third group we wish to mention concerns laws that contain incongruent, contradictory or ambiguous legal provisions. We have already mentioned the Law on Forestry and Wild Life in connection with laws that contain exceptions to bans or to obligations. The same articles are examples of contradictions and ambiguities in our law that may create opportunities for corruption. Indeed, in that specific case, there is no certainty whether the exceptional permission granted by Article 10, paragraph 8, of authorizing activities in zones of protection even covers zones of total protection, such as those mentioned in Article 11 (national parks) and the activities that are expressly prohibited in that article.

As another example from this group of laws that contain contradictions and/or ambiguities, we can refer to the ownership of urban properties. The Land Law, its regulations, and the recently approved urban land regulations, all state that foreigners resident for less than five years in Mozambique cannot hold land tenure rights, except under foreign investment projects.

But no law prohibits non-resident foreigners or foreigners resident for less than five years from owning buildings, just as no law bans them from owning any other goods. It seems that non-resident foreigners can own apartments in apartment blocks, since in these cases none of the owners of the apartments individually holds tenure rights over the land on which the building sits. But they cannot be owners of stand-alone dwellings, since when these are transmitted the land tenure rights are also transmitted, which is banned for foreigners.

On the other hand, Decree-Law no. 5/76, of 5 February (on the nationalization of rented housing) determined, in Article 3, paragraph 1, that "ownership of buildings belonging to foreigners who are not domiciled in the People's Republic of Mozambique reverts to the State of Mozambique".

Thus, it seems that:

Non-resident foreigners or those resident for less than five years can only own apartments, but not stand-alone dwellings; But, under Decree-Law no. 5/76, as soon as this foreigner is absent from Mozambique for more than 90 days, without authorization, this apartment reverts to the state.

## 5. SOME LIMITATIONS IN THE PENAL FRAMEWORK ON CORRUPTION IN MOZAMBIQUE

### 5.1 The crime of deviation of funds

The criminalization of corruption in Mozambique did not begin with Law 6/2004, but was envisaged under the Penal Code. The relatively recent approval of the Anti-Corruption Law merely strengthened an existing penal framework which had been completely ignored. The crime of corruption was already envisaged in article 318 and 321 of the Penal Code in force in Mozambique, covering passive and active corruption respectively (Cruz and Rodrigues, 2001).

The Code also has a series of articles which could be included, with greater or lesser difficulty in the concept of corruption in the Public Administration, namely article 322 which refers to accepting offers or promises by a public employee, article 314 which deals with misappropriation of funds, article 315 which penalizes the arbitrary imposition of contributions, article 316 which punishes the illegal receiving of emoluments, article 317 which punishes the acceptance of private interest by a public employee, article 313 which deals with fraud, article 218 on falsification practiced by a public employee in the performance of his duties (Cruz and Rodrigues, 2001).

It is article 313 of the Penal Code that covers the crime of diversion of funds, punishing it in situations where a public employee (that is, a public official), using this capacity, has under his protection money, securities or mobile goods belonging to the state or to private individuals, and instead of this steals them or uses them for his own benefit or that of someone else and does not use these goods for the purpose for which they were legally intended. The penalties for theft mentioned in article 437 of the code apply to this behaviour.

Law no. 1/79, of 11 January (Law on the Diversion of State Funds) punishes fraud in particular, considering it as the crime of diverting state property and increasing the penalties for those who, without respecting the legal commands on the destination of state goods and money, use them for

their own benefit or that of others (Article 1, paragraph 1). Apart from the punishment for the person committing this crime, the law also dictates the confiscation of his property to cover the losses caused to the state (Article 1, paragraph 2).

One of the main problems arising from the approval of the Anti-Corruption Law was that the legislator made no effort to include the crimes envisaged in the Penal Code in the new law. Thus problems of interpretation have arisen about the scope of the concept of corruption in Law 6/2004. This is why the description of diversion of funds as a crime of corruption has been controversial among Mozambican academics and jurists. Although the Penal Code criminalizes deviation of funds (fraud), extortion, the illegal receiving of emoluments, the acceptance of private interests by public employees among other crimes linked with acts of corruption these are not regarded as crimes of corruption. This fact, particularly the idea that the diversion of funds is not corruption, has led to sharp debates.

One current of opinion holds that diversion of funds does fall within the crime of corruption, and that therefore the GCCC has the legal power to investigate and prepare cases concerning this legal type of crime.

Another current holds that diversion of funds does not fit the definition of the crime of corruption and thus the GCCC does not have the power to investigate and prepare. The debate is still at an early stage, but this is an opportunity to expand it. The great question around this aspect is that the legal definition of corruption does not coincide with the sociological definition which is much more wide-ranging and covers a range of behaviour such as diversion of funds, nepotism, favouritism, trafficking in influence, etc.

In strictly legal terms, the notion of what should be understood as corruption is presented in the Law. As mentioned at the start of this present study, Law no. 6/2004, in articles 7 and 9, gives the notion of what is regarded as passive and active corruption. The forms of corruption covered by this definition are only soliciting and offering bribes. It excludes the diversion of funds, trafficking in influence, illicit enrichment, money-laundering or the laundering of the proceeds of corruption.

The penal legislator himself does not always use the term corruption rigorously, as an exchange of favours being solicited and offered (a transaction between actors in the public and private sectors). The legislator uses the term corruption to typify practices that do not strictly fit into the context of state administrative activity. This is the case with the crime of corruption of minors and procuring, envisaged in articles 405 and 406 of the Penal Code, bearing in mind the alterations introduced by Law no. 8/2002, of 5 February, where the term corruption is used in a broad sense to express the idea of abuse of trust.

Without forgetting that in Criminal Law, the rule of typifying, meaning that a fact can only be included in a legal type of crime if all its constitutive elements are met, it seems opportune to pose the following question: if the legislator himself uses the word corruption to identify practices that are formally different, but which objectively cover behaviour that deviates from ethical and moral standards, why should we not consider diversion of funds as a practice that deviates from acceptable standards and include it in the concept of corruption?

A further major problem with the Mozambican legislation is that it is completely out of line with the International Conventions. In this mismatch, the question of diversion of funds is of particular relevance, since, unlike the Mozambican legislation, the international conventions consider this practice as a crime of corruption.

In fact, the SADC Protocol against Corruption, ratified by the Council of Ministers through Resolution no. 33/2004, and the African Union Convention against Corruption, ratified by the AR through Resolution no. 30/2006, consider diversion of funds as an act of corruption. The United Nations Convention against Corruption takes the same line – in article 17 it envisages diversion of funds as an act of corruption.

In this context, it is urgent that the Mozambican government explain what it means when it promotes the ratification of international protocols and conventions, since under Article 18, paragraph 2 of the CRM, international legal instruments have the legal value of normative acts of the AR and of the government. It is necessary to clarify to what extent the International Conventions which define as acts of corruption the diversion of funds, trafficking in influence, illicit enrichment, the laundering of the proceeds of corruption, and obstruction of justice are applicable to concrete cases.

Clarification is required, even though we know that the international conventions do not present penal sentences to punish the cases of corruption they typify. In any case, the limited scope of crimes of corruption, reducing them to active and passive corruption, leaves out practices that in international law are regarded as corruption, namely the diversion of funds, trafficking in influence, abuse of duties etc. As Professor Luís de Sousa says, the "operational definition of corruption should not be limited to one or two types of crimes defined in the penal code. (...) Corruption, as a social phenomenon, is always more dynamic than its criminalisation"[32].

## 5.2 The crime of trafficking in influence or exploitation of prestige

Trafficking in influence is envisaged, in passing, in Article 2, line d), of Law 4/90, which states that high ranking state leaders "should not use the influence or power conferred by their position to obtain personal advantages, to provide or achieve undue favours and benefits to third parties". This is the sole reference to the matter in Mozambican legislation.

Trafficking in influence is referred to in an unclear manner in Article 452, paragraph 2, of the Penal Code, and is punished with imprisonment. But, even taking into account that the Anti-Corruption Law was designed to strengthen the regulatory framework for offences of corruption, it did not touch upon trafficking in influence and, although the international conventions regard this behaviour as an act of corruption, in Mozambique it is still not considered to be a criminal practice.

## 5.3 The crime of illicit enrichment

Illicit enrichment concerns situations where someone possesses property and values out of proportion to his/her income and cannot prove where they came from. The international conventions to which Mozambique is a party recommend that states take legislative measures to punish illicit enrichment as an act of corruption. But in Mozambique, illicit enrichment is not yet considered a crime of corruption. In any case, it should be mentioned that the idea of criminalizing illicit enrichment has been controversial for two reasons:

- It is seen as contradicting the constitutional principle of the presumption of innocence. It is alleged that to consider someone who shows external signs of wealth without any explanation, as having committed the crime of illicit enrichment, may be a violation of the principle of the presumption of innocence[33].
- The crime may imply a reversal of the onus of proof, since under Criminal Procedural Law it

32 Sousa, Luis (2005): As Agencias Anti-Corrupcao como Peças Centrais de um Sistema Nacional de Integridade, Lisbon.

33 "Suspects enjoy the presumption of innocence until a definitive court decision", Article 59, paragraph 2, of the CRM.

> is up to the state, through the Public Prosecutor's Office, to prove that the suspect is guilty, and it is not up to the suspect to prove that he is innocent. To analyse this question we must bear in mind that, because these are people who hold government posts, and because of their duties, namely the management of funds that result from taxes paid by citizens, the principles at stake must be pondered.

Under the promotion of a transparent Public Administration, and in order to raise increasingly the levels of trust among citizens in the bodies of the Public Administration, it is necessary that they should know the origins of the property added to the assets not only of their rulers, but also of state officials and of individuals without any ties or bond to the state.

Besides, this duty of holders of government office to prove that their property was obtained licitly can be framed within their general duty of accountability to the citizens. The privacy of a public servant is much more limited than the privacy of an ordinary citizen, since he must comply with a series of duties that do not burden other citizens. This kind of proposal is obviously inconvenient for many people and many interests, and so it is immediately classified as populist, demagogic and even anti-constitutional.

## 5.4 Corruption in the private sector

In the Mozambican legal order, for a crime of corruption to exist, a public servant must make a request for a material or non-material advantage. If a worker from a private company requests an advantage from a citizens, this behaviour is not treated as an act of corruption. That is, unlike international legislative practice and unlike the provisions in the relevant international conventions, corruption in the private sector is not yet criminalized in Mozambique.

Looking at the existing Mozambican legislation, there is an obvious legal vacuum with regard to criminalizing and punishing corruption in the private sector. Beginning with the Penal Code, we note that articles 318 to 323 (mainly articles 318 and 321 – on active and passive corruption, respectively) dealing with these matters simply refer to corruption, both active and passive, carried out by public officials or employees, from which one concludes that for our legal framework, such acts or types of behaviour only happen in the public sector and by agents that are an integral part of it.

Likewise, the special legislation (the Anti-Corruption Law) goes in the same direction. Its scope of application is the twin sister of the general law, and says straightaway in Article 2, paragraph 1: "This present law applies to the agents of the crimes mentioned in Article 1 who are leaders, officials or employees of the state or of the municipalities, of public companies, of private companies in which the state has a holding, or of companies that hold leases on public services".
Taking this approach into account, it is clear that, in the Mozambican case, acts of corruption in the private sector are not criminalized, which may also mean that in Mozambique the existence of this offence in the private sector is still not recognized. Looking at the quotation above, only people or bodies directly or indirectly linked to the public administration are suspects, and those in the private sector are excluded.

Furthermore, the international conventions ratified by Mozambique recommend that states should adopt mechanisms to criminalize corruption in the private sector[34]. The purpose of punishing this type of act, including it strictly into economic criminal law, is basically to eliminate unfair competition and avoid losses to good faith third parties.

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34 See Article 4, paragraph 2, of the SADC Protocol on Corruption; Article 11 of the African Union Convention on Corruption; Article 12 of the UN Convention on Corruption.

# 6. CONCLUSIONS

From the aspects identified in this report we find that, despite the existence of a regulatory framework in Mozambique on the prevention and penalties for crimes of corruption, there are still shadowy areas where lack of legal regulation may favour the occurrence of corrupt practices. Law no. 6/2004 was passed to respond, on the one hand, to the increase in crimes commonly known as "crimes of corruption" and, on the other, to society at large which believed that the existing legal means for fighting corruption were not sufficient.

For these reasons, Law no 6/2004 cover substantive law (for example, envisaging crimes of corruption), administrative law (for example, the creation of a specialized body to fight against corruption, the GCCC) and procedural law (for example, the provisions that regulate the form of penal procedural behaviour of the body set up by the Law).

The Regulations of the Law, approved by Decree no. 22/2005, follow the same line as the Law, but do not regulate various aspects which, because they are not included in the law, lack regulation (for example, with regard to the compulsory nature of the Declaration of Assets, and which are the posts which have "decision making" powers in the state apparatus?; First, who defines what are "decision making powers" and, what scope should be given to this "decision making" power"?).

After 4 years of the existence of the Law and its Regulations, and also because of the various problems and polemics that their contents have raised (for example, the fact that the GCCC does not have the power to charge suspects; the non-inclusion of certain types of crime which nowadays are treated as crimes of corruption, such as the crime of the diversion of funds), it would be important to assess to what extent they have been applied and implemented.

With regard to the preventive component, one notes that there are no effective mechanisms for making an incisive inspection of the declarations of assets of the holders of public office. The contents of these are shrouded in secrecy, which is not compatible with the transparency that should guide state administrative activity.

As for conflicts of interest, one notes that there is no legislation that prevents public office holders from exercising for some time activities linked with their former employment in the public sector (quarantine or period of restraint); we also find nothing in the legislation preventing a former holder of public office from holding a post in the administration or management of companies which undertake activities linked with his former job in the public sector, particularly where these companies have benefited from state incentives, which would prevent the government member during his term of office from lobbying to guarantee holdings in companies whose activities are connected to his former job.

Furthermore the Law says nothing at all about conflicts of interest with regard to the legislature, and there is, for example nothing to compel parliamentary deputies, during the discussion of a particular law, to declare whether they have interests in the matter under discussion and are therefore prevented from participating in the discussion; the law does not prevent deputies from holding management positions in public companies, companies running public services or companies in which the state owns shares.

The Law does not prevent deputies, after their term of office is over, to provide consultancy services to companies which have benefited from the laws that they passed, or in connected procedures. Furthermore there is no Ethics Commission to deal with matters to do with conflicts of interest, with a view to applying sanctions to offending deputies.

As for the penal framework, national legislation does not appropriately punish the crime of illicit enrichment (as explained above), in situations where someone displays external signs of wealth, and cannot prove that its origins are legitimate. It does not seem that scepticism towards this legal type of crime, concerning the fact that it is counter to the presumption of innocence and implies inverting the onus of proof, should be an obstacle to enshrining it in law, bearing in mind the higher judicial good (the public interest which it is intended to safeguard).

Furthermore, one notes the existence of Laws which, while not linked directly to the fight against corruption, allow exceptional regimes which essentially end up by allowing derogation from the general rule. This may be an open window for corrupt practices. There are also laws which grant a high degree of discretion to decision making bodies, without placing any limits on this. This may also favour or serve as a legal opening for the practice of acts out of line with the law, motivated by corrupt practices.

## 7. RECOMMENDATIONS

CIP thinks that a far-reaching revision of the Anti-Corruption law, and of its regulations, is very urgent, bearing in mind its insufficiencies and defects, which are public knowledge. This revision would also be a first step in revising anti-corruption legislation in general.

**What should be changed in the Anti-Corruption Law and its regulations:**

In principle, the following questions should be dealt with when revising Law 6/2004:

- The definition of the matters that should be dealt with in the Law against corruption, and the possible drafting of new legal diplomas for matters which should be taken out of the Anti-Corruption Law (for example, if the regulation of the GCCC should be placed in a separate Law; whether the anti-corruption contractual clause and the obligatory explanations for administrative acts should be included in Decree no. 54/2005, of 13 December (Procurement law) and in Decree no, 30/2001 (which approve functional norms for the public administration service which already deal with this obligatory act);
- The definition of the crimes to be dealt with by this law (for example, the type of fraud better known as the diversion of state funds is regarded as a crime of corruption all over the world and is envisaged as such in the International Conventions ratified by Mozambique); making the law compatible with other legal diplomas, particularly the Penal Code; and creating new legal types of crimes – for example, trafficking in influence
- The juridical nature, composition, and consequent powers and procedures of the GCCC;
- Standardisation of the matters handled by this Law, but which are already dealt with in other legal diploma, such as the Declarations of Assets, where they are deposited and how they are inspected;
- Regulating the protection of whistle-blowers and witnesses so that the State enforces administrative measures for this protection, and makes the relationship of the public to the GCCC viable.

**What the government and the AR should take into account as aspects where regulation is urgent so that in Mozambique we can have a comprehensive and up-to-date anti-corruption regulatory framework:**

- Revision of the legislation on conflicts of interest for members of the executive, introducing quarantines and impediments as regards public hiring;
- Introduction in the Statute of Deputies of impediments during the time the deputy is in parliament, and for a certain period afterwards;
- Need to pass a general Code of Conduct and sector codes for the public administration, and the establishment of a system to guarantee compliance with and monitoring of these norms (public ethics management system);
- Need to define clearly in the legislation the crime of illicit enrichment and indicate the practices linked to this;
- Introduction of the legal type of crime of trafficking in influence, corruption in the private sector and corruption of foreign public servants;
- Need to enshrine in a more substantial way protection of whistle blowers in the scope of the crimes envisaged in the anti-corruption law and in the general legislation which deals with this legal type of crime;
- Need to introduce material concerned with witness protection into the Anti-Corruption Law.

**As for the existence of a series of legal exceptions that derogate from the general rule, by providing discretionary power to decision making centres, which may be used to take illegal decisions under the cover of legality, we suggest the following:**

- That each Ministry reviews the legislation regulating its area of activity so as to identify the gaps, contradictions, ambiguity and discretionary power granted to the decision making body and the true need for altering certain authorizations or even prohibitions;
- That the drafting of laws should be more careful. with verification of all the legislation referring to the same matter, which has an influence on it, or which may be influenced by the new legal diploma, so as to try to avoid the incongruences, gaps and, in general, the legislative shortcomings that create opportunities for corruption.

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## ABOUT THIS REPORT

The control of corruption through penal measures in Mozambique is a central aspect of governance which has gained greater relevance as from the first half of the present decade, a time when the volume of appeals for the government to put into practice policies and actions to increase transparency in managing public property and to reduce the levels of corruption became louder.

The control of corruption assumes the existence of laws and regulations which allow the judicial authorities to act effectively.

The present report is an analysis of anti-corruption legislation in Mozambique, dealing with its preventive aspects, the identification of opportunities for acts of corruption created by some legal diplomas and the limitations of the penal component. The report also drawn a comparison between national legislation and the international legal instruments on corruption ratified by Mozambique.

## ABOUT CIP

The Center for Public Integrity of Mozambique (CIP) is a collective person in private law established in 2005 to promote integrity, transparency, ethics and good governance in the public and private spheres in Mozambique.

CIP is involved with different approaches that range from research to advocacy, from monitoring to public awareness aimed at improving good governance in Mozambique.

Apart from our work on anti-corruption legislation, we are involved in the following areas: local governance, electoral process, extractive industry, forest governance, etc.

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