



REFORM OF DISCRIMINATORY SEXUAL OFFENCES LAWS IN THE COMMONWEALTH AND OTHER JURISDICTIONS

Case Study of Mozambique



THE HUMAN DIGNITY TRUST

The Human Dignity Trust is an organisation of international lawyers supporting local partners to uphold international and constitutional human rights law in countries where private, consensual sexual conduct between adults of the same-sex is criminalised. Over 70 jurisdictions globally criminalise consensual same-sex intimacy, putting lesbian, gay, bisexual and transgender (‘LGBT’) people beyond the protection of the law and fostering a climate of fear, stigma, discrimination and violence.

The Trust provides technical legal assistance upon request to local human rights defenders, lawyers and governments seeking to eradicate these discriminatory laws.

With generous funding from Global Affairs Canada, the Human Dignity Trust has developed a series of case studies on the ways in which Commonwealth governments around the world have achieved reform of these laws and other sexual offences laws that discriminate against women, children, LGBT people and other groups. They have initiated the establishment of a Commonwealth Group of Experts on legislative reform comprised of legal, political, academic and other experts with experience in reform of discriminatory sexual offences laws.

The research for this series of case studies has been possible thanks to the insight and assistance of members of the Commonwealth Group of Experts and many others in the relevant countries who helped initiate, steer, inform and implement sexual offences law reform to bring sexual offences laws into compliance with international and domestic human rights standards.

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INTRODUCTION


INTRODUCTION

Discriminatory sexual offence laws continue to impact the lives of many Commonwealth citizens, particularly affecting women, children, and LGBT people. These laws are at odds with international and regional human rights norms and domestic constitutional law. They undermine human rights and perpetuate violence, hate crimes and discrimination, and threaten the health and prosperity of entire societies.

Discriminatory laws are apparent in the sexual offences provisions of many Commonwealth criminal codes, as well as in the absence of protective legislation. For example, many Commonwealth countries have different ages of consent for sexual relations and marriage for males and females. Rape provisions are often gender-specific and do not cover all forms of rape including rape with objects. Marital rape remains lawful in half of all Commonwealth countries. Laws protecting against sexual harassment and child sexual grooming are uneven across the Commonwealth. In two-thirds of Commonwealth member states, consensual same-sex sexual intimacy in private between adults is criminalised. Many countries have laws that are used to discriminate against transgender people including cross-dressing, impersonation and vagrancy laws. Very few Commonwealth countries have legislation to recognise, prevent and punish hate crimes, including those committed on the basis of sexual orientation or gender identity.

Several countries have, however, made real progress in reforming their laws through either the wholesale updating of criminal codes, allowing multiple issues to be tackled together, or through targeted reforms. Some of the most recent examples are as follows:

- **Palau** in 2012 and 2014, with the assistance of model laws, respectively modernised its sexual offences laws and completed the wholesale updating of its penal code;
- **Belize** in 2014 enacted major reforms to its colonial-era sexual offences laws, including making rape laws gender neutral, and it achieved decriminalisation of consensual same-sex sexual acts in 2016 through the courts;
- **Northern Cyprus** in 2014 repealed a law that criminalised consensual same-sex sexual conduct, prompted by litigation before the European Court of Human Rights, as part of a package of reforms to the sexual offences chapter of its colonial-era criminal code;
- **Mozambique** in 2015 completed a wholesale updating of its penal code, including the modernisation of its sexual offences laws, drawing on the Portuguese penal code for inspiration;
- **Seychelles** in 2016 repealed a law criminalising consensual same-sex sexual intimacy between adults; and
- **Nauru** in 2016, with international assistance, completed a wholesale updating of its criminal code, including the modernisation of its sexual offences laws.



Law reform can play a key role in advancing human rights in relation to sexual and physical integrity and health, and is an important part of a comprehensive strategy to reduce crimes, particularly sexual crimes, as well as address the persecutory and discriminatory dimensions of laws that exist on many statute books, ensuring a criminal justice regime that meets international human rights obligations and is fit for the 21st century.

The above examples demonstrate that different countries have taken diverse approaches to reforming sexual offences laws. The Human Dignity Trust has compiled a series of case studies to document the ways and means that each of these countries has achieved reform.

By showcasing these examples, it is hoped that other countries can be inspired and assisted to undertake similar reforms.



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The Republic of Mozambique is a recent example of a country that has enacted wholesale reform of its criminal code, including its sexual offences provisions, thereby creating greater protection from violence and discrimination for women, children and LGBT people, among others. The significant amendments to the sexual offence laws in Mozambique were realised in 2015 and were brought about through the reform of the Portuguese Penal Code of 1886 ('1886 Penal Code'), which had been the basis of Mozambique's criminal laws since the colonial era. This report examines how the reform was successfully achieved, with a particular focus on the modernisation of Mozambique's sexual offences laws.

Background

Mozambique is a member of the Commonwealth, but it was not a British colony or a part of the British Empire. Mozambique was a Portuguese colony, with the Portuguese presence in the region tracing back to the 15th century, when the Portuguese started establishing commercial posts in the region. Mozambique gained independence from Portugal in 1975, and became a part of the Commonwealth in November 1995, with the agreement of all other members of the Commonwealth; thus, becoming the first member not to have once been associated with the British Empire.²

History of Sexual Offences Laws

After its independence in 1975, Mozambique inherited and continued to apply the 1886 Penal Code and its colonial-era sexual offence provisions.

The provisions that criminalised rape, sexual abuse of children and other forms of sexual violence were gender-specific (thereby providing inadequate protection for male victims), lacked statutory definition, and established different sanctions for perpetrators of offences against a variety of distinct victims. The 1886 Penal Code also notably contained marital rape exceptions, including providing immunity for rape offenders who married their victims.

Originally, the 1886 Penal Code did not criminalise private consensual same-sex sexual acts. However, in 1954, amendments were made to the code as applied to Portugal's colonies in Africa. Articles 70 and 71 of the 1886 Penal Code were revised to establish that certain "*security measures*" would apply to those that committed "*acts against nature.*" Whilst the expression "acts against nature" was not defined in the 1886 Penal Code, it was interpreted as criminalising consensual same-sex sexual acts.³

These sexual offences provisions remained virtually untouched until the reform process commenced in 2011.

² Mozambique: History (available at: <http://thecommonwealth.org/our-member-countries/mozambique/history>).

³ Free & Equal – United Nations for LGBT Equality, *Fact sheet: criminalization* (available at: [https://www.unfe.org/system/unfe-43-UN_Fact_Sheets_-_FINAL_-_Criminalization_\(1\).pdf](https://www.unfe.org/system/unfe-43-UN_Fact_Sheets_-_FINAL_-_Criminalization_(1).pdf)).

Enforcement and Impact of the Law

Sexual offences are endemic in Mozambique and it is estimated that rape cases account for half of all recorded violence in the country.⁴ The criminal justice system has systematically failed to counteract these offences and to protect victims, whilst enforcement of sexual offence laws has been further hampered by low rates of reporting combined with cultural, societal and educational barriers. The apathetic response from the police and other state authorities has further discouraged victims from taking action. In many cases, families negotiate indemnifications directly with the offenders to avoid publicity and embarrassment. Furthermore, the narrow scope of the prior sexual offence laws established by the 1886 Penal Code excluded certain forms of sexual violence, which were not specifically punishable and remained unaddressed.

As to the offence of “*acts against nature*,” since Mozambique’s independence, there had been no recorded prosecutions or security measures applied for such practices or against the LGBT community. Nevertheless, the law fostered and legitimised stigma, marginalisation and discrimination of LGBT people, who were often forced to assume dual identities by maintaining a heterosexual pretence in their professional lives and towards their families and social circles, while seeking safe spaces where they can be themselves amongst other LGBT people.

Drivers of Reform

The significant reform of the 1886 Penal Code was influenced and driven by a variety of factors, some more significant than others. Mozambique’s political and legal context certainly created an environment conducive and receptive to reform. Having emerged from almost 20 years of civil war, the establishment of the rule of law and the democratisation of Mozambique paved the way for largescale legal and policy reform. It was in this context, together with the overwhelming recognition of the need for the modernisation of the criminal law, that the reform of the 1886 Penal Code took place.

Against that backdrop, what appears to have specifically driven the reform of Mozambique’s sexual offences laws and provisions were the efforts and strategies of domestic civil society (women’s right organisations, LGBT activists and organisations, general human rights organisations and their supporters). By combining their efforts in a coalition, these organisations advocated as a multi-pronged, multi-issue movement, and effectively pressed for key reforms to the 1886 Penal Code. Political will, although at times hesitant, was apparent and a necessary element to achieving the reform. Equally, the importance of supportive MPs (albeit tacitly) willing to champion change was also evident. The international human rights context and international community were further contributory factors in the reform, influencing change and providing support to the process.

⁴ Fédération Internationale des Ligues des Droits de l’Homme (FIDH), *International fact-finding mission: women’s rights in Mozambique*, May 2007, p. 16 (available at: <https://www.fidh.org/IMG/pdf/mozambique474angconjointfemme.pdf>).

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The Reform Process

Following an earlier unsuccessful attempt at reform in 2006, the revised penal code was eventually enacted on 18 December 2014 ('Revised Penal Code'), after a drafting and consultation process that began in 2011. Whereas all of those involved in the process, including the government, parliament and civil society, were in agreement from the outset as to the need for comprehensive reform, the sheer scale of the review process combined with the controversy that surrounded certain changes (like those to the sexual offence laws and abortion) and the absence of a fully inclusive and detailed consultation process led to a complex and, at times, discordant process. As a result, serious concerns remained surrounding the retention of certain sexual offences provisions and the extent of reform (i.e., not going far enough).

Key Changes to Sexual Offences Laws

The Revised Penal Code did not result in a sexual offences framework that was fully in accordance with the expectations of civil society nor did it represent, to a satisfactory extent, contemporary good practice and standards. Some of the critical deficiencies include the lack of a statutory definition of consent, the retention of certain pre-existing outdated provisions and the lack of clarity with respect to certain offences. Moreover, the absence of a simultaneous reform of the Mozambican criminal procedure code (Decree No. 16 489 of 15 February 1929, the 'Criminal Procedure Code') left inconsistencies between the substantive and procedural law.

Despite this, strides were made, and some important changes achieved. In general, the reforms resulted in greater gender neutrality, the adoption of a broader definition of rape, the establishment of new and more appropriate contextual factors and punishments for rape and sexual violence against children, and the decriminalisation of consensual same-sex sexual acts between adults.

Post-Reform Environment

The Revised Penal Code is certainly a major development for Mozambique and has brought numerous positive developments to Mozambican society, providing enhanced protection for women (by criminalising marital rape), children (by establishing more severe sanctions for child sexual abuse and protections against child pornography) and LGBT people (by decriminalising consensual same-sex sexual acts). It also promoted greater openness within and visibility of the LGBT community, as well as general awareness of sexual violence issues and of women's human rights.

Nevertheless, progress in other respects remains limited. We have found no evidence or publicly available information to suggest that the government and/or parliament developed and rolled out a comprehensive implementation programme, including such areas as training of the criminal justice sector, public education and awareness-raising. In fact, a considerable part of the population appear to be unaware that the 1886 Penal Code has been reformed.⁵

⁵ Interview with Katia Amado, Ivone Zilhão (Programme Director and Sexual and Reproductive Health Doctor at Pathfinder) and Maira Domingos (Coordinator for Sexual and Reproductive Health and Rights at Fórum Mulher), 2 May 2019.

Another area that represents a major challenge for Mozambique is monitoring and evaluating the implementation of legislation. There is no evidence that there is a systematic collection and retention of records of cases of sexual assault or other sexual offences,⁶ and there is no reliable data either on the reporting or prosecution of these crimes. Considering that the collection of reliable data and statistics on sexual offences is essential for adequate monitoring and enforcement, there are effectively no means to assess whether the Revised Penal Code is being applied as intended by lawmakers.

The reform process also failed to review the Criminal Procedure Code alongside the 1886 Penal Code. This created incompatibility between the substantive and procedural law, as the current procedural rules are inadequate to ensure the proper enforcement of the new law.

The on-going shortcomings in the Revised Penal Code and the need for review of the Criminal Procedure Code resulted in a further review of the Revised Penal Code, which commenced almost instantaneously as the Revised Penal Code entered into force in 2015. This new process of review demonstrates that more progress could have been made from the outset, as maintained by domestic civil society throughout the reform process. The present review proposes some important changes to the sexual offences provisions, such as amendments to laws relating to rape, child pornography, early marriage and domestic violence. Whilst the outcome of this further review is unknown, as the process is still ongoing, it is hoped that Mozambique can emerge from the process with a strengthened sexual offences framework that better equips the country to tackle the plight of sexual violence and abuse.

Lessons Learned

Valuable lessons can be drawn from the reform of the 1886 Penal Code. In general, the Mozambique experience illustrates how reform is possible even on contentious issues when political will, diverse champions and a mix of domestic and international support are present. A number of specific lessons were also evident:

- **Civil Society** - The strategy adopted by different civil society organisations in working together in a coalition successfully expanded the scope of the reform beyond the proposals presented by the Mozambique government and parliament. By taking the spotlight away from individual aspects and proposals through a multi-pronged, multi-issue approach, civil society was able to succeed in addressing certain aspects of sexual offences that might have otherwise faced opposition when tackled in silo. Drawing international support, in the form of international non-governmental organisations, also brought important and influential attention and pressure from the international sphere.
- **International Community** - International influence and active participation of Mozambique within the international treaty body framework provided valuable

⁶ See, for example, WLSA, *Relatório Anual de 2017*, (available at <http://www.wlsa.org.mz/wp-content/uploads/2019/04/RelatorioAnual2017.pdf>); WLSA, *Relatório Anual de 2016* (available at: http://www.wlsa.org.mz/wp-content/uploads/2017/03/RelatorioAnual2016_2.pdf).

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inputs and support to both the Mozambique government and its civil society organisations in their efforts to reform the 1886 Penal Code, including through actively recommending and advocating for reform of specific portions of Mozambique's sexual offences laws.

- **Timing and Limitations in the Legislative Process** - Notwithstanding the advances achieved by the reform, the need to rush the approval of the Revised Penal Code due to limitations presented by the Mozambican legislative process resulted in the new law having certain deficiencies that needed to be addressed immediately after its enactment. This, in turn, resulted in the current process of reform of the Revised Penal Code.
- **Inclusive Reform** - The failure to review the Criminal Procedure Code simultaneously with the 1886 Penal Code rendered the mechanisms available to enforce certain provisions within the Revised Penal Code inadequate. This may have hindered the implementation of the Revised Penal Code. Mozambique is currently addressing such procedural law reform in conjunction with the current review of the Revised Penal Code.
- **Implementation Programmes** - The lack of a comprehensive implementation plan following the reform of the 1886 Penal Code has limited the reach and impact of the Revised Penal Code.

COUNTRY OVERVIEW

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Location and Population

Located in the African continent, Mozambique covers 786,380 square kilometres of land and 13,000 square kilometres of water, making it the 35th largest nation in the world. Mozambique became an independent state in 1975, after gaining its sovereignty from Portugal. The population of Mozambique is 27,909,798 as of 2017.⁷

The country is divided into eleven provinces: Niassa, Cabo Delgado, Nampula, Tete, Zambézia, Manica, Sofala, Gaza, Inhambane, Maputo and Maputo City.⁸ Ninety nine point sixty six per cent of the population is of African origin, mainly of Makhuwa, Tsonga, Lomwe and Sena ethnicities.⁹

Mozambique's official language is Portuguese (spoken by 16.6 per cent of the population), although the majority of the population (26.1 per cent) speaks Emakhuwa. Other African languages are used by large portions of the total population.¹⁰ The illiteracy rate in Mozambique is 39 per cent - 27.2 per cent amongst men and 49.4 per cent amongst women.¹¹

Legal System

The Mozambican legal system is based on Portuguese civil law and customary law. The justice system is bifurcated into a civil-criminal system under the aegis of the ministry of justice and a military justice system under joint supervision of the ministries of defence and justice. The Supreme Court is the highest court and hears appeals from both systems. The judiciary is mainly composed of provincial and district courts, but there are also special courts that deal with administrative, customs, fiscal, maritime, and labour matters. Local customary courts are part of the civil/criminal system, and handle estate, divorce, and other social and family issues.¹² In predominantly muslim rural villages, Islamic law (Sharia) is applied.¹³

⁷ Instituto Nacional de Estatística. *Censo 2017: IV Recenseamento Geral da População e Habitação* (available at: <http://www.ine.gov.mz/>).

⁸ Portal do Governo de Moçambique. *Informação Geral* (available at: <http://www.portaldogoverno.gov.mz/por/Mocambique/Informacao-Geral>).

⁹ The CIA World Factbook – Mozambique (available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/mz.html#Econ>).

¹⁰ *The CIA World Factbook – Mozambique, Ibid.*

¹¹ *Censo 2017: IV Recenseamento Geral da População e Habitação, Ibid. n. 7.*

¹² Index Mundi Mozambique (available at: https://www.indexmundi.com/mozambique/legal_system.html).

¹³ *The CIA World Factbook – Mozambique, Ibid. n. 9.*

Political System

Mozambique was a Portuguese colony for almost five centuries, and only in 1975, after a 10-year war (1964-1974), did Portugal recognise Mozambique's independence. The Front for the Liberation of Mozambique ('FRELIMO') has been the ruling political party since independence and its former leader, Samora Machel, led the country from 1975 to 1986. Immediately after independence, the single-party regime was challenged by the Mozambican National Resistance ('RENAMO') and the country was engulfed in a violent civil war that lasted until 1992. In 1994, the country held its first democratic elections which saw Dr. Joaquim Chissano (one of the founding members of FRELIMO) elected as President with 53 per cent of the popular vote.¹⁴

RENAMO's residual armed forces have intermittently clashed with the government forces since 2012, but a December 2016 cease-fire agreement has facilitated efforts to build peace in Mozambique.

On 15 October 2014, with a voter turnout of less than 50 per cent, the presidential and parliamentary elections were again won by FRELIMO, with Filipe Nyusi being elected the President of Mozambique. New elections are to be held in October 2019.¹⁵

Mozambique's legislature consists of a parliament (*Assembleia da República*) of 250 members, with each member representing the entire country and the district that elected her or him.¹⁶ Members of parliament have a five-year tenure, and elections for parliament are held every five years,¹⁷ along with presidential elections. The current President of parliament is Hon. Veronica Macamo,¹⁸ and FRELIMO is the party that holds the majority of the seats.¹⁹

¹⁴ The New York Times, *Mozambique Leader Wins Multi Party Vote*, 20 November 1994 (available at: <https://www.nytimes.com/1994/11/20/world/mozambique-leader-wins-multiparty-vote.html>).

¹⁵ Mozambique: Constitution and politics (available at: <http://thecommonwealth.org/our-member-countries/mozambique/constitution-politics>); *The CIA World Factbook – Mozambique*, *ibid.* n. 9.

¹⁶ Constitution of Mozambique, Articles 168 and 170.

¹⁷ Constitution of Mozambique, *ibid.* Articles 171 and 185.

¹⁸ Assembleia da Republica Website, Profile of the President of Parliament (available at: <http://www.parlamento.mz/index.php/presidente>).

¹⁹ Mozambique: Constitution and politics, *ibid.* n. 15; *The CIA World Factbook – Mozambique*, *ibid.* n. 9.

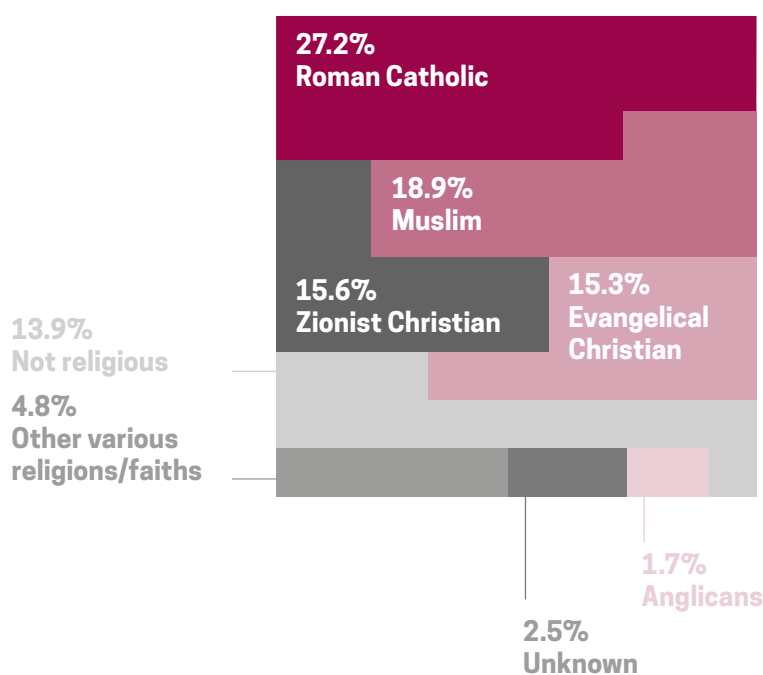
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Economy

Mozambique is one the poorest nations in the world. It had a gross domestic product ('GDP') per capita of USD 426.222 in 2017,²⁰ and is the sixth poorest country out of the 48 countries in sub-Saharan Africa and the sixth poorest country in the world.²¹ The economy is largely based on agriculture, and subsistence agriculture employs the vast majority of the population. Between 2010 and 2015, the service sector represented the largest share of GDP (approximately 53 per cent), followed by agriculture (approximately 30 per cent), with industry and manufacturing making up the remainder.²²

Religion

Main Religious Denominations in Mozambique



Source: Instituto Nacional de Estatística. Censo 2017: IV Recenseamento Geral da População e Habitação, p.25. (available at <http://www.ine.gov.mz/>).

Mozambique is a secular state. The faith community in Mozambique is made up of a wide spectrum of religious identities. Catholicism is the dominant faith, covering 27 per cent of the population.

Urban areas and the southern region of the country are mostly inhabited by Christians, whereas the predominant religion in coastal areas is Islam. Traditional African religions are particularly prevalent in rural areas.²³

²⁰ Worldbank (available at: https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=MZ&most_recent_value_desc=true).

²¹ Worldbank, *Ibid*.

²² Mozambique Country Report (available at: https://www2.deloitte.com/content/dam/Deloitte/za/Documents/africa/ZA_Mozambique%20country_report_25012017.pdf).

²³ ACN, Relatório da Liberdade Religiosa, accessible at <https://www.acn.org.br/relatorio-liberdade-religiosa/mocambique/>.

Given its multi-religious nature, the majority of the Mozambican population cultivates traditional values and religious practices which are particularly connected to Christian and Islamic faiths. Nonetheless, given the multi-religious make-up of the country, religious rituals and beliefs are practiced in mixed and parallel forms.²⁴

Media

The media landscape in Mozambique is dominated by state-controlled outlets. Independent media is underfunded and is generally found only in major cities, with the government employing pressure to restrict advertising in independent outlets.²⁵ The only domestic TV channel with nationwide reach is the state-owned Televisão de Moçambique. The private channel Soico TV, Portuguese state television's African service (RTP Africa), and Brazilian-owned TV Miramar also have large audiences. Radio is an important source of information in the country, and there are several private and local radio stations in operation. The State-owned radio station Rádio Moçambique has the largest audience in the country.²⁶

Newspapers and print media have smaller audiences than radio and TV, mainly because they are printed solely in Portuguese, which, despite being the country's sole official language, is only spoken by a small part of the population.²⁷ Other languages spoken in Mozambique, according to the countries' 2017 census, are Emakhuwa, Xichangana, Elomwue, Cinyanja, Cisena, Echuwabo, Cindau, Xitswa and Mudo.²⁸

High cost of newspapers, poor distribution networks and a 41 per cent illiteracy rate also contribute to low readership. The most read daily newspaper in the country, A Notícia, is state-owned. The largest private newspaper is O País.²⁹

Internet access is unrestricted, but usage is low. About six per cent of the population had access to the internet in 2017,³⁰ and most usage is confined to major cities.³¹

²⁴ Rainer Grajek, "Religion in Mosambik", in "Handbuch der Religionen der Welt", Markus Porsche-Ludwig and Jürgen Bellers (eds), Bautz 2012, (available at: <http://www.rainergrajek.de/religion-in-mosambik/>).

²⁵ Freedom House: Mozambique, *Freedom of Press Report 2015*, p. 4 (available at: <https://freedomhouse.org/report/freedom-press/2015/mozambique>).

²⁶ *Freedom of Press Report 2015*, *Ibid.*

²⁷ *Freedom of Press Report 2015*, *Ibid.* n. 25.

²⁸ *Censo 2017: IV Recenseamento Geral da População e Habitação*, *Ibid.* n. 7.

²⁹ *Freedom of Press Report 2015*, *Ibid.* n. 25.

³⁰ National Institute for Statistics, *Results Presentation for the 2017 Census of Mozambique*, 29 April 2019, p. 68.

³¹ *Freedom of Press Report 2015*, *Ibid.* n. 25.

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The Legal Framework for Human Rights

The Constitution

The 1990 constitution introduced the rule of law and paved the way for a democratic multiparty system. Mozambique promulgated its current constitution in 2004 ('Constitution'), which was amended in 2007.

Articles 3 and 11 establish, respectively, that Mozambique is a democratic state

“governed by the rule of law, based on pluralism of expression and democratic political organisation and on the respect for, and guarantee of, fundamental human rights and freedoms” and based on “the defence and promotion of human rights and the equality of citizens before the law.”

Title III guarantees a variety of fundamental rights, duties and freedoms, including political, social and economic rights, which are aligned with the principles of various international human rights treaties to which Mozambique is a party.



Constitution of Mozambique

“Article 43: The constitutional rights related to fundamental rights shall be interpreted and integrated harmoniously with the Universal Declaration of Human Rights and the African Charter of Human and Peoples’ Rights.”

The Constitution contains several provisions relating to equality and non-discrimination.

Article 36 enshrines the principle of equality and non-discrimination, guaranteeing that:

“[m]en and women shall be equal before the law in all spheres of political, economic, social and cultural life.”

The provision prohibits discrimination on the basis of “colour, race, sex, ethnic origin, place of birth, religion, level of education, social position, the marital status of their parents, their profession or their political preference.”

Article 37 protects disability rights, setting forth that people with disabilities shall enjoy the same fundamental rights provided for in the Constitution as other Mozambican citizens.

More generally, Article 44 provides that:

“all individuals shall have the duty to respect and consider their fellow beings without any form of discrimination whatsoever, and to maintain relations with them aimed at promoting, safeguarding and strengthening respect, mutual tolerance and solidarity,”

and Article 47 “guarantees children the right to protection and care and freedom of expression according to their age and maturity.”

National Human Rights Commission

In 2009, Mozambique adopted Law 33/2009, which established the National Human Rights Commission (“NHRC”), whose mandate is to promote and protect human rights in Mozambique.

The NHRC's main functions are to promote education on human rights amongst the population, develop and execute actions to promote such rights, propose action plans to other governmental entities, and cooperate with the judiciary branch and with civil society organisations in the promotion of human rights. The NHRC also receives complaints from citizens related to human rights violations and assists claimants in pursuing claims.³²

The NHRC became operational in September 2012, but the absence of functioning and solid structures have constrained the NHRC from fulfilling its mandate.³³

Ombudsman

Article 256 of the Constitution created the Office of the Ombudsman. The Office has been operational since 2012. The Ombudsman is charged with “*guaranteeing the rights of citizens and upholding legality and justice*” in public administration³⁴ and sets forth its recommendations in its annual report to parliament.

The Ombudsman's functions also include:

- Hearing cases brought by individuals with respect to unlawful actions by the government and to provide non-binding recommendations with respect to such cases;
- Ascertaining deficiencies in the law or suggesting the implementation of new legislation to parliament;
- Issuing reports on legal issues when required by parliament;
- Petitioning for declarations of unconstitutionality of laws to the Mozambican Constitutional Court; and
- Promoting public awareness regarding rights, duties and fundamental freedoms of the citizens of Mozambique.³⁵

Hon. Isaque Chande has been the Ombudsman since June 2018. Resource and capacity issues have, however, hampered the ability of the Ombudsman to adequately process complaints.³⁶

³² Bylaws of the National Human Rights Commission of Mozambique, Articles 3 and 4. July 2014.

³³ United Nations Human Rights Council, *National Report* (24th session, 18-29 January 2016, A/HRC/24/MOZ/1).

³⁴ Constitution of Mozambique, *Ibid.* n. 16, Article 256.

³⁵ Law n. 7/2006, Articles 1, 15 and 16.

³⁶ *National Report* (24th session, 18-29 January 2016), *Ibid.* n.33.

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International Commitments

Mozambique is a monist system, meaning that international law does not need to be transposed into national law. The act of ratifying an international treaty immediately incorporates that international law into national law. Article 18 of the Constitution sets out that:

“1. International treaties and agreements, validly approved and ratified, are in force in the Mozambique legal system after their official publication and are internationally binding on the State of Mozambique; 2. The standards of international law have the same value within the domestic legal system as infra-constitutional regulations issued by the Assembly of the Republic and of the government, dependent on their respective form of approval.”

The transposition of international treaties into the Mozambican legal regime is dependent upon their signing and ratification. First, the President of the Republic is required to sign a treaty, which must then be ratified by parliament.³⁷

Mozambique has signed and ratified several international and regional human rights treaties, one notable exception being the International Covenant on Economic, Social and Cultural Rights.

Relevant International Human Rights Commitments of Mozambique

TREATY	RATIFICATION
▪ International Convention on the Elimination of All Forms of Racial Discrimination)	18 April 1983
▪ African Charter on Human and Peoples’ Rights	22 February 1989
▪ International Covenant on Civil and Political Rights	21 July 1993
▪ Convention on the Rights of the Child	26 April 1994

³⁷ Francisco Pereira Coutinho, *O Direito Internacional na Ordem Jurídica Moçambicana*, pp. 1-3.

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- Convention on the Elimination of All Forms of Discrimination against Women

21 April **1997**

- African Charter on the Rights and Welfare of the Child

22 December **1998**

- Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment

14 September **1999**

- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

12 September **2005**



SEXUAL OFFENCES LAWS UNDER REFORM

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Colonial History

Portuguese presence in Mozambique dates back to the late 15th century, when Portuguese merchants established trading posts in the region. During the 17th and 18th centuries, Portugal adopted a system called *prazos*, under which large pieces of territory were leased to private lessees who would then colonise it. In 1885, Portugal intensified its direct presence in the region, out of concern for losing its territories to rival European powers. In 1891, Portugal entered into treaties with the United Kingdom and Germany that defined the borders of present-day Mozambique.³⁸

During Mozambique's colonial period, the country was subject to Portuguese law, which was applied throughout Portuguese territory, including its colonies.³⁹

In 1975, when Mozambique gained independence, it inherited the 1886 Penal Code. From 1975 to 2014, the 1886 Penal Code was supplemented by specific statutes,⁴⁰ and amended on a piecemeal basis.⁴¹ With respect to the sexual offences provisions in the 1886 Penal Code, two amendments were made: Law no. 10/87 introduced an offence for robbery concurrent with rape,⁴² and Law No. 2/2002 amended certain prostitution and solicitation related offences.⁴³ Yet, the 1886 Penal Code largely reflected its colonial origins until it was fully reformed in 2014.⁴⁴

Sexual Offences Prior to Reform

Consensual Same-Sex Sexual Acts

Until 1821, sodomy was criminalised in Portugal and its colonies by force of canonical law, which punished the so-called “*nefast sin*.”⁴⁵ In 1821, Portuguese criminal law was reformed, and such reform excluded sodomy from the list of punishable offences. However, in 1912, the Portuguese parliament criminalised private consensual

³⁸ Gustavo Gomes da Costa Santos, Matthew Waites, *Comparative Colonialisms for queer analysis: comparing British and Portuguese colonial legacies for same-sex sexualities and gender diversity in Africa – setting a transnational research agenda*, June 2019, pp.6-7.

³⁹ Gustavo Gomes da Costa Santos, *Reflexões sobre o Legado Colonial Português na Regulação das práticas sexuais entre pessoas do mesmo sexo em Moçambique: notas de uma pesquisa em curso*, 42º Encontro Nacional da ANPOCS, pp. 7-8.

⁴⁰ For example, a statute related to crimes against public health was enacted in 1982, and a statute regulating military crimes was enacted in 1987 - Elísio de Sousa, *Manual de Direito Criminal Moçambicano* (2nd ed. 2016), p. 34.

⁴¹ By Law No. 10/87 on 19 September 1987 and Law No. 2/2002 on 5 February 2002 - *Manual de Direito Criminal Moçambicano*, *Ibid*.

⁴² Law No. 10/87, from 19 September 1987, Article 434.

⁴³ Law No. 2/2002, from 5 February 2002.

⁴⁴ Commission of Constitutional, Human Rights and Legality Matters (Comissão dos Assuntos Constitucionais, Direitos Humanos e Legalidade), *Do Projecto de Revisão do Código Penal*, p. 5.

⁴⁵ *Comparative Colonialisms for queer analysis: comparing British and Portuguese colonial legacies for same-sex sexualities and gender diversity in Africa – setting a transnational research agenda*, *Ibid*. n. 38, p.8.

same-sex sexual acts as the “*practice of acts against nature*”⁴⁶ alongside mendicancy and vagrancy.

Although there is no case law available clearly illustrating what specific practices would constitute “*acts against nature*,” homosexuality was seen as a social issue similar to mendicancy (*i.e.*, begging). According to scholars, the idea of treating homosexuality as akin to mendicancy came from the perceived problem in Portuguese society in the early 20th century where there was significant male prostitution and idleness present in the streets of large Portuguese cities.⁴⁷ In that sense, both crimes had the objective of repressing conduct related to populations that either inhabited or worked on the streets.⁴⁸

Excerpts from debates within the Portuguese parliament from 1912 also show that those who practiced “acts against nature” were compared to “vagrants” by Portuguese legislators, who considered that “... *regenerating this individual, making him fit for life, enabling him to compete with his effort for the proper functioning of the social organism, is to attack crime in one of its most remarkable origins.*”⁴⁹

Furthermore, during the Salazar period, an authoritarian regime which ruled Portugal from 1932 until 1974,⁵⁰ homosexuality was viewed as subversive to the new Portuguese state and against male values, with homosexuals being seen as a danger to society.⁵¹

Such criminalisation was adopted in Portugal’s colonies in Africa in 1954 when amendments were made to Articles 70 and 71 of the 1886 Penal Code, establishing that certain “security measures” would apply to those that committed “acts against nature” and other offences.⁵² These measures allowed the state to detain people for up to 24 years without a formal accusation or formal trial and to suspend a person’s political rights.⁵³

⁴⁶ Law of 20 July 1912, Article 3, paragraph 1.

⁴⁷ *Comparative Colonialisms for queer analysis: comparing British and Portuguese colonial legacies for same-sex sexualities and gender diversity in Africa – setting a transnational research agenda*, *Ibid.* n. 38, p. 10.

⁴⁸ *Comparative Colonialisms for queer analysis: comparing British and Portuguese colonial legacies for same-sex sexualities and gender diversity in Africa – setting a transnational research agenda*, *Ibid.* n. 38, p. 8.

⁴⁹ *Comparative Colonialisms for queer analysis: comparing British and Portuguese colonial legacies for same-sex sexualities and gender diversity in Africa – setting a transnational research agenda*, *Ibid.* n. 38, p. 10.

⁵⁰ Encyclopedia Britannica, *The Salazar Regime* (available at: <https://www.britannica.com/place/Portugal/The-First-Republic-1910-26#ref1634>).

⁵¹ Filipe Cesar Maciel Vendrame, *A Homofobia Institucionalizada em Portugal e no Brasil*, June 2015, p. 15.

⁵² *Reflexões sobre o Legado Colonial Português na Regulação das práticas sexuais entre pessoas do mesmo sexo em Moçambique: notas de uma pesquisa em curso*, *Ibid.* n. 39, p. 9.

⁵³ *Reflexões sobre o Legado Colonial Português na Regulação das práticas sexuais entre pessoas do mesmo sexo em Moçambique: notas de uma pesquisa em curso*, *Ibid.* n. 39, p. 9.

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Article 70: The following are security measures:

- 1. – Imprisonment in an asylum for criminals;*
- 2. – Imprisonment in a labour camp or agricultural settlement;*
- 3. – Probation;*
- 4. – Good conduct bond;*
- 5. – Prohibition from professional activity;*
- [...]*

Article 71: Security measures are applicable to: [...]

- 4. – Those who habitually practice acts against the order of nature; [...]*

Paragraph 1. – [...] The individuals indicated in paragraphs 3, 4, 5, 6, and 8 will be sentenced, on first offence, to a good conduct bond or a probation and, on second offence, to probation with a doubled good conduct bond, or imprisonment.

Before these amendments, Portuguese academics viewed homosexuality as an urban, “civilised” and European issue, and thus there was no interest in criminalising such behaviour in the colonies.⁵⁴ Portugal ultimately decriminalised consensual same-sex intimacy in 1982, seven years after Mozambique gained its independence from the former colonial power.

The meaning of the expression “acts against the order of nature” in Article 71 was not defined in the 1886 Penal Code, but was interpreted as criminalising consensual same-sex sexual acts.⁵⁵

The lack of certainty as to the interpretation and breadth of the provision even resulted in the Mozambican government, during its 2011 United Nations Universal Periodic Review (‘UPR’), denying that consensual same-sex sexual acts were ever criminalised in the country.⁵⁶

Convictions for practicing acts “against the order of nature” were punished with one or more “security measures.” For a first time offender, the applicable security measures included probation or the payment of a security deposit (a good conduct bond, or *caução de boa conduta*, kept by the State in case of repeated infringement of the law). For a second time offender, both probation and the security deposit (for double the amount paid by a first time offender) would be applied. Second time offenders could also be imprisoned in an insane asylum, workhouse or agricultural colony.⁵⁷ There is no record of these sanctions being applied in post-independence Mozambique, nor are there any known cases of prosecutions.⁵⁸

⁵⁴ Reflexões sobre o Legado Colonial Português na Regulação das práticas sexuais entre pessoas do mesmo sexo em Moçambique: notas de uma pesquisa em curso, *Ibid.* n. 39, pp. 9-10.

⁵⁵ Fact sheet: criminalization, *Ibid.* n. 3.

⁵⁶ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Mozambique*, 28 March 2011, para. 85 (available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/123/79/PDF/G1112379.pdf?OpenElement>).

⁵⁷ 1886 Penal Code, Articles 70 and 71, available at 1.a. of the Annex, with an English translation available at 4.a. of the Annex.

⁵⁸ Sapó Notícias, *Minorias sexuais moçambicanas consideram novo Código Penal “meramente simbólico”*, 2 July 2015 (available at: <https://noticias.sapo.mz/actualidade/artigos/minorias-sexuais-mocambicanas-consideram-novo-codigo-penal-meramente-simbolico>).

Rape

The 1886 Penal Code criminalised rape (“*violação sexual*”) in Article 393. The offence was limited to forced vaginal intercourse. It excluded married females where the perpetrator was her husband and all male victims, as well as other forms of sexual violence. It also provided immunity for rape offenders who went on to marry their victims, provided the victims were virgins.

Article 393: Anyone who has illegal coitus with any woman, against her will, by means of physical violence, aggressive intimidation, or any fraud that does not constitute seduction, or depriving a woman of use of her reason, or of her senses, commits the crime of rape, and will be sentenced to long-term imprisonment of two to eight years.

According to the provision, “*illegal coitus*” meant vaginal intercourse against a woman’s will, through physical violence, intense intimidation or any fraud, except if the fraud was considered “*seduction*.”⁵⁹ “*Seduction*” was undefined, but it suggested that some degree of fraudulent behaviour was acceptable, and that misleading a victim with the intent of having intercourse without fully informed consent may have, in some circumstances, not been considered rape.

The definition of rape excluded other forms of sexual misconduct such as forced oral or anal sex and rape using objects, which were punished as indecent assaults, provided the crime was accompanied with violence.⁶⁰

The forced intercourse of a married woman by her husband was considered outside the statutory definition of rape, since only “*illegal coitus*” fell under the definition of rape and intercourse between married individuals was regarded as legal in all situations. Marital rape was therefore not considered a crime.⁶¹

In an attempt to address this issue in the mid-2000s, women’s rights groups sought to include the crime of marital rape in a new Law on Domestic Violence against Women, Law No. 29/2009, which came into force on 29 September 2009 (‘Domestic Violence Law’).⁶² This was unsuccessful. Instead, the Mozambican parliament included an intermediate crime of forced relations (“*cópula não consentida*”), which applied to married women as part of the Domestic Violence Law, but more lenient sanctions were associated with this crime than those applied to cases of rape under the 1886 Penal Code.⁶³ This particular law is discussed in further detail below.

⁵⁹ 1886 Penal Code, *Ibid.* n. 57, Article 393.

⁶⁰ Centro de Estudos Judiciários, *Justiça criminal em Moçambique: notas essenciais*, July 2017, p. 255.

⁶¹ Irene Afonso, *O crime de violação na legislação em Moçambique. Análise legal do disposto no actual Código Penal*, February 2002 (available at: <http://www.wlsa.org.mz/artigo/o-crime-de-violacao-na-legislacao-em-mocambique-analise-legal-do-disposto-no-actual-codigo-penal/>).

⁶² *International fact-finding mission: women’s rights in Mozambique*, *Ibid.* n. 4.

⁶³ Law No. 29/2009, of 29 September 2009, Article 17, available at: http://www.wlsa.org.mz/wp-content/uploads/2014/11/Lei_VD_2009.pdf.

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The previous definition of the crime of rape also excluded male victims (men and boys over 12 years of age).⁶⁴ The rape of male victims, if accompanied by violence, fell under Article 391 of the 1886 Penal Code, which criminalised indecent assault. In the absence of violence (*i.e.*, rape or other sexual assaults committed through intimidation or coercion), the rape or sexual assault of male victims was not criminalised under the sexual offences framework.⁶⁵

Rape was also sanctioned with relatively minimal sentences, with prison terms of only two to eight years. This was a much lesser penalty than those handed out in certain cases of aggravated burglary, for example.⁶⁶

Article 400 of the 1886 Penal Code provided immunity for offenders in the event that they married their female victim if she was a virgin. Such practice was not uncommon, especially in rural areas, where, in accordance with traditional customs, family honour took precedence over the needs of the victims, who were often coerced into marriage.⁶⁷ Different sanctions were also applied to cases involving female virgins, as further discussed below in the section *Child Sexual Offences*.

Indecent assault

The 1886 Penal Code criminalised sexual violence other than rape as an offence of indecent assault (“*atentado ao pudor*”) under Article 391.⁶⁸

Article 391: Any indecent assault on a person of either sex that is committed with violence, whether to satisfy carnal passion, or for any other reason, will be punished with prison.

Sole paragraph – If the person assaulted is under the age of 16 years, the penalty will be the same in all cases, provided that there is no evidence of violence.

The offence was gender-neutral and encompassed a variety of sexual violations other than rape,⁶⁹ having been interpreted to include “*every act practiced against the will of the victim that violates the victim’s sense of honesty*.”⁷⁰ Yet, the crime of indecent assault

⁶⁴ ActionAid, AMJ, AMMCJ, Fórum Mulher, LDH, Muleide, Rede de Defesa dos Direitos Sexuais e Reprodutivos, WLSA Mozambique, *Os direitos das mulheres e crianças no Anteprojecto do Código Penal: posicionamento da sociedade civil*, 2013.

⁶⁵ These acts may have been criminalised in accordance with other offences that prohibited violence against persons, such as assault.

⁶⁶ *Os direitos das mulheres e crianças no Anteprojecto do Código Penal: posicionamento da sociedade civil*, *Ibid.*, n. 64.

⁶⁷ Amnesty International, *Happening now: Mozambique debating rape-marriage legislation* (available at: <https://www.amnestyusa.org/happening-now-mozambique-debating-rape-marriage-legislation/>).

⁶⁸ A literal translation of this crime (“*atentado ao pudor*”) is an “*attack or assault against modesty*.” “*Indecent assault*” is the equivalent crime in most other jurisdictions.

⁶⁹ 1886 Penal Code, *Ibid.* n. 57, Article 391. This offence has not been reformed in the 2014 review and is currently foreseen in Article 221 of the Revised Penal Code.

⁷⁰ *Manual de Direito Criminal Moçambicano*, *Ibid.* n. 40, p. 348.

would only apply where the offender used violence, which effectively excluded an array of sexual crimes where they were committed, for instance, through intimidation or coercion. Importantly, the requirement of violence as part of the *actus reus* left a significant lacuna in the protection of victims of sexual assaults. If the assault fell short of rape and was not accompanied with violence, there was no specific sexual offence that such conduct could fall within.

Offences against modesty

The 1886 Penal Code criminalised offences against modesty (“*ultraje público ao pudor*”) under Article 390:

Article 390: Offences against modesty, committed by action, or publicity resulting from the place or other circumstances in which the crime was committed, and provided that there is no individual infringement of the integrity of any person, will be punished with prison of up to six months and a fine of up to one month.

Child Sexual Offences

The main deficiency of the 1886 Penal Code with respect to child sexual abuse was the lack of gender neutrality in the applicable provisions, which left male children unprotected by the 1886 Penal Code from the time they reached the age of 12, and certain other gaps that left both male and female children unprotected.

Article 392 of the 1886 Penal Code criminalised the abuse of female children between 12 and 18 years old.

Article 392: Anyone who, by means of seduction, rapes a virgin woman, over the age of twelve years and under the age of eighteen years, will be sentenced to long-term imprisonment of two to eight years.

Article 394 of the 1886 Penal Code criminalised the rape of children (male and female) under 12 years old.

Article 394: Anyone who rapes a minor under the age of twelve years, provided that there is no evidence of the circumstances set out in the preceding article [see below] will be sentenced to long-term imprisonment of eight to twelve years.

Article 393 criminalises rape and demands the use of physical violence, aggressive intimidation or fraud for the configuration of the crime.

According to this Article, seducing virgin girls amounted to rape, while seduction of non-virgin girls would, in effect, only be classified as indecent assault in accordance with Article 391, which did not require violence if the non-virgin girl was under 16 years old. Non-virgin girls between 16 and 18 years old did not have any special protection.

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Male children over 12 years old were left unprotected, as only females fell within the definition of rape under Article 393, and any act of sexual violence against them could only be classified as indecent assault.⁷¹

A number of domestic civil society organisations condemned these offences, noting that children of all ages, virgin or not, and regardless of gender, needed to be protected.⁷² Article 394 was specifically criticised for setting the age of 12 as a limit to the special protection afforded to male children, particularly since Mozambique had ratified the UN Convention on the Rights of the Child ('CRC'), which defines children as all individuals under 18 years old.⁷³

The special condition of Article 400 (*marriage immunity*), as noted above, also applied to the rape of a female child. Accordingly, where a female child victim was a virgin, the perpetrator could avoid prosecution by marrying her.

The rape of 12 to 18 year-old virgin girls through means other than seduction (violence, fraud, intense intimidation) was punishable as the general offence of rape foreseen in Article 393 ("*violação sexual*").

Non-violent acts of indecent assault were also criminalised if the victims were under 16 years old, irrespective of the consent of the victim.⁷⁴

The offence of "*corruption of minors*" (Article 406) criminalised "*habitual*" facilitation of "*debauchery*" of any person under 21 years old. The offence carried a penalty of imprisonment for three months to one year, in addition to a fine and suspension of political rights for three years.

Procurement of Children

The procurement of children for the purposes of prostitution was punishable in the same way as procuring adults for that same purpose: with the application of security measures mentioned in Articles 70 and 71.⁷⁵ Article 405 (amended by Law 8/2002), in turn, established a different crime, with specific sanctions for procuring descendants,

⁷¹ ActionAid Moçambique and MEPT (Movimento Educação para Todos), *Análise clínica do quadro legal e político para a promoção e protecção da rapariga contra todas as formas de violência em Moçambique*, 2012, pp. 31-32.

⁷² *Análise clínica do quadro legal e político para a promoção e protecção da rapariga contra todas as formas de violência em Moçambique*, *Ibid.*

⁷³ *Os direitos das mulheres e crianças no Anteprojecto do Código Penal: posicionamento da sociedade civil*, *Ibid.* n. 64.

⁷⁴ 1886 Penal Code, *Ibid.* n. 57 Article 391, sole paragraph.

⁷⁵ 1886 Penal Code, *Ibid.* n. 57, Articles 70 and 71: "Article 70: The following are security measures: 1. - Imprisonment in an asylum for criminals; 2. - Imprisonment in a labour camp or agricultural settlement; 3. - Probation; 4. - Good conduct bond; 5. - Prohibition from professional activity; [...]; Article 71: Security measures are applicable to: [...] 6. - Those who maintain or manage houses of prostitution or places habitually frequented by prostitutes, when they repeatedly breach regulatory and police prescriptions; 7. - Those who habitually encourage or provoke the depravation or corruption of minors, or dedicate themselves to encouraging prostitution, even if they have not been convicted of any facts of this kind [...]. Paragraph 1. - Imprisonment, under the terms of no. 2 and paragraph 2 of article 70, may only take place on first offence for the individuals indicated in paragraphs 1, 2, 7 and 9. The individuals indicated in paragraphs 3, 4, 5, 6, and 8 will be sentenced, on first offence, to a good conduct bond or a probation and, on second offence, to probation with a doubled good conduct bond, or imprisonment. [...]"

adopted children or stepchildren, punishable with imprisonment for one to two years and the loss of political rights for 12 years.⁷⁶

With penalties of only one to two years of imprisonment for procuring, the protections established in the 1886 Penal Code were considered insufficient to deter the procuring of children. The situation was partially remedied with the enactment of the Anti-Trafficking Law in July 2008 (Law No. 6/2008, the ‘Anti-Trafficking Law’), which established more severe sanctions for those who recruited, transported, fostered, delivered or received a person to engage in procuring (and also forced labour, slavery and servitude) with aggravated penalties for cases in which the victims were minors.⁷⁷

Sexual Harassment

Sexual harassment was not addressed by the 1886 Penal Code (and only became a criminal offence with the Revised Penal Code). From August 2007 sexual harassment was deemed a disciplinary infraction if practiced in the workplace, pursuant to Article 66(2) and (3) of the Labour Law 2007 (Law No. 23/2007). The Article established, in paragraph 3, the victim’s right to an indemnification equivalent to 20 times the minimum wage in force in the country, without prejudice to any other legal actions.

Incest

Incest was not specifically addressed in the 1886 Penal Code, but it constituted a “special aggravating factor” for certain sexual offences, as set forth in Article 398(1):

In the crimes dealt with in this section, the penalties will be replaced with those immediately higher, if the criminal:

1. – Is an antecedent or sibling of the assaulted person [...]

The maximum penalties for rape that had incest as a “special aggravating factor” were therefore increased (eight to 12 years of imprisonment instead of the two to eight years under Article 393).⁷⁸ The definition of incest was particularly narrow, omitting the full array of familial relationships and others in positions of trust.

Domestic Violence

Domestic violence was not specifically addressed by the 1886 Penal Code. Specific protection was only implemented by the Domestic Violence Law in 2009. The definition of domestic violence includes physical, sexual, emotional, psychological and financial abuse, as well as social isolation and damage to property. The statute established sanctions for different types of violence against women within family and domestic relationships. It punishes physical violence (establishing different sanctions for simple and severe violence, in Articles 13 and 14), psychological harm (which

⁷⁶ 1886 Penal Code, *ibid.* n. 57, Article 405.

⁷⁷ Law No. 6/2008, Articles 5 and 10.

⁷⁸ 1886 Penal Code, *ibid.* n. 57, Article 55.

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encompasses threats and defamation, in Article 15) and moral harm (sanctioning public offences to the honour and character of the woman, in Article 16).

The Domestic Violence Law, to a limited extent, addressed the lacuna that existed under the 1886 Penal Code whereby marital rape was not considered rape. It created an intermediate crime of forced relations (“*cópula não consentida*,” Article 17), pursuant to which forcing sexual relations with a spouse, girlfriend or a woman with whom the offender had a long-term romantic relationship was deemed a crime, sanctioned with six months to two years of imprisonment (a penalty that is inferior to the one for rape). The domestic violence provisions were not gender-neutral, with only women being capable of being the victim.

Abortion

Abortion is not considered a sexual offence. However, we have addressed the criminalisation of abortion here and in this report in light of the importance that the abortion rights movement had in relation to the reform of the 1886 Penal Code. The 1886 Penal Code criminalised abortion in all circumstances.⁷⁹ Despite such criminalisation, starting in 1985, the Ministry of Health established a series of policies that allowed abortions of up to 12 weeks to be performed in the interest of protecting women’s health.⁸⁰ Abortion remained a crime despite these health policies⁸¹ and very few women had access to safe abortions.

According to the national census, in 2015, Mozambique had a maternal mortality rate of 489 deaths per 100,000 live births, one of the highest rates in the world.⁸² Although there is a lack of evidence to demonstrate the impact unsafe abortion had on these numbers, the 2011 Mozambique Demographic Health Survey showed that abortions were among the main causes of maternal deaths.⁸³ A 2008 study revealed that unsafe abortions represented 11-18 per cent of all hospital based maternal deaths.⁸⁴ In 2004, admissions for post-abortion care accounted for 55 per cent of all gynaecological complications in Mozambique.⁸⁵

⁷⁹ 1886 Penal Code, *Ibid.* n. 57, Article 358; RDP África, *Promulgado Código Penal moçambicano que legaliza aborto*, December 2014 (available at: http://www.rtp.pt/rdpafrika/noticias-afrika/promulgado-codigo-penal-mocambicano-que-legaliza-aborto_3641). See also ANGOP, *Mozambique: Presidente promulga nuevo Código Penal que legaliza el aborto* (available at: https://www.angop.ao/angola/es_es/noticias/afrika/2014/11/51/Mozambique-Presidente-promulga-nuevo-Codigo-Penal-que-legaliza-aborto,7f991b9c-10d8-45a3-9c27-1b20eefcdb83.html).

⁸⁰ Momade Bay Ustá et al., *Who is Excluded When Abortion Access is Restricted to Twelve Weeks? Evidence from Maputo, Mozambique*, Reproductive Health Matters 2008; Fernanda Machungo, *O aborto inseguro em Maputo*, May 2004 (available at: <http://www.wlsa.org.mz/artigo/o-aborto-inseguro-em-maputo/>).

⁸¹ *Manual de Direito Criminal Moçambicano*, *Ibid.* n. 40, p. 34.

⁸² The World Bank, *Maternal mortality ratio* (available at: <https://data.worldbank.org/indicator/SH.STA.MMRT>).

⁸³ *Needs assessment on safe abortion advocacy for the Association of Obstetricians and Gynaecologists of Mozambique*, April 2008, pp. 9-10 (available at: https://www.figo.org/sites/default/files/uploads/Mozambique%20Country%20Report_Final_0.pdf).

⁸⁴ *Needs assessment on safe abortion advocacy for the Association of Obstetricians and Gynaecologists of Mozambique*, *Ibid.*

⁸⁵ *Needs assessment on safe abortion advocacy for the Association of Obstetricians and Gynaecologists of Mozambique*, *Ibid.* n.83.

Low access to contraceptives (data shows that only 12 per cent of the female population uses some form of contraception), violence against women and lack of social support for pregnant women were identified as some of the factors that led women to resort to unsafe abortions.⁸⁶

Women's rights organisations in Mozambique dedicated a significant amount of their efforts to abortion rights advocacy. These organisations raised the issue both as a public health problem and as a human rights issue.⁸⁷

Enforcement and Impact

Rape and sexual assault

Sexual crimes, such as rape, indecent assault and the sexual abuse of children, are endemic in Mozambican society. Although comprehensive research is sparse, available data reveals that sexual offences are commonplace and a significant part of the population reports to have been sexually assaulted at least once in their lifetime. The criminal justice system has systematically failed to counteract these offences and to protect victims, and the enforcement of sexual offences has been hampered by low rates of reporting and by cultural, societal and educational barriers.

The 2011 Mozambique Demographic Health Survey reported that 12.3 per cent of all women and 7.4 per cent of all men between the ages of 15 and 49 declared they were forced to have sexual relations against their will at some point during their lives, and 6.9 per cent of women and 4.7 per cent of all men declared being a victim of the same crime in the 12 months that preceded the report.⁸⁸ In addition, the survey showed that seven per cent of the women and 1.9 per cent of the men were victims of sexual violence before the age of 22.⁸⁹

Since the statistics described above are part of an official government survey, in which information was voluntarily collected among a representative sample of the population, actual numbers might be higher, especially considering the existing social stigma towards victims of sexual offences in Mozambican society.

It is also estimated that rape cases account for half of all recorded violence in Mozambique.⁹⁰ Since statistics about the actual reported cases or the enforcement of the applicable laws on sexual offences in general are not publicly available in Mozambique, it is hard to fully assess the impact of the 1886 Penal Code. The

⁸⁶ *Needs assessment on safe abortion advocacy for the Association of Obstetricians and Gynaecologists of Mozambique*, *Ibid.* n.83.

⁸⁷ WLSA Moçambique, *Pela descriminalização do aborto*, 28 September 2013 (available at: <http://www.wlsa.org.mz/pela-descriminalizacao-do-aborto/>).

⁸⁸ Instituto Nacional de Estatística and Ministério da Saúde de Moçambique, *3º Inquérito Demográfico e de Saúde (IDS)*, August 2012, pp. 250-251 (available at: <https://dhsprogram.com/pubs/pdf/FR266/FR266.pdf>).

⁸⁹ *3º Inquérito Demográfico e de Saúde (IDS)*, *Ibid.* p. 253.

⁹⁰ *International fact-finding mission: women's rights in Mozambique*, *Ibid.* n. 4.

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apathetic response from police and state authorities has been highlighted as a barrier to the reporting of sexual crimes and subsequent enforcement of sexual offences laws. As a result, families frequently negotiate an indemnification directly with offenders to avoid publicity and embarrassment.⁹¹

Further, given the narrow scope of sexual offences set forth in the 1886 Penal Code, several offences were not in fact punishable within the sexual offences framework prior to the Revised Penal Code and the Domestic Violence Law.

Cultural, societal and educational barriers have also hampered the reporting of sexual offences in Mozambique. The significant issue of early and child marriage, together with a lack of access to education, are seen as two major factors impacting the ability and capacity of women (and girls in particular) to report cases of sexual violence and abuse.

About 863,000 children were not in school in Mozambique in 2012, and 56 per cent of those were girls.⁹² According to ActionAid, parents prioritise the education of male children, and a combination of premature marriage and pregnancy, domestic labour and the risk of encountering violence on the way to school contributes to keeping girls outside the educational system.⁹³ In 2010, the Ministry of Education received 1,000 reports of premature pregnancies as the result of rape in Mozambican schools.⁹⁴ Teachers were identified among the perpetrators of these crimes, and Mozambique has faced serious issues regarding sexual harassment, sexual assault and rape in schools. In the same year, however, only three educators were dismissed for committing sexual offences.⁹⁵

Mozambique has one of the highest rates of child marriages in the world. In 2003, approximately 18 per cent of women between 20 and 24 years old were married before they had turned 15. In general, 60 per cent of uneducated Mozambican women marry before they turn 18.⁹⁶ In this environment, the reporting of sexual offences is challenging, and the possibility of avoiding prosecution for rape by marrying the

⁹¹ WLSA Moçambique, *O (deficiente) enquadramento legal do crime de violação*, 28 February 2014, (available at: <http://www.wlsa.org.mz/o-deficiente-enquadramento-legal-do-crime-de-violacao/>). The Other Foundation, *Canaries in the coal mines: an analysis of spaces for LGBTI activism in Mozambique*, 2017, p. 5 (available at: http://theotherfoundation.org/wp-content/uploads/2017/06/Canaries_Mozambique_epub_Draft2_CB2.pdf).

⁹² *Análise clínica do quadro legal e político para a promoção e protecção da rapariga contra todas as formas de violência em Moçambique*, *Ibid.* n. 71.

⁹³ *Análise clínica do quadro legal e político para a promoção e protecção da rapariga contra todas as formas de violência em Moçambique*, *Ibid.* n. 71.

⁹⁴ República de Moçambique, *Relatório do governo da República de Moçambique nos termos do artigo 62 da Carta Africana dos Direitos do Homem e dos Povos (relatório consolidado 1999-2010)*, para. 246, August 2012 (available at: http://www.achpr.org/files/sessions/55th/state-reports/1-1999-2010/relatorio_inicial_e_cumulativo_1999_2010_pr.pdf).

⁹⁵ The government saw the small number of dismissals as a sign of reduction in the number of crimes. *Relatório do governo da República de Moçambique nos termos do artigo 62 da Carta Africana dos Direitos do Homem e dos Povos (relatório consolidado 1999-2010)*, *Ibid.*, para. 245-246.

⁹⁶ *Análise clínica do quadro legal e político para a promoção e protecção da rapariga contra todas as formas de violência em Moçambique*, *Ibid.* n. 71, p. 36.

victim would likely create an unsurmountable obstacle, particularly where parents agree to the marriage.

“Acts Against Nature”

Since Mozambique’s independence in 1975, there had been no recorded prosecutions or cases under Article 71 of the 1886 Penal Code, “Acts Against Nature.”⁹⁷ Yet, despite this provision being seemingly unenforced, the law fostered and legitimised stigma, marginalisation and discrimination against LGBT people.⁹⁸



Elísio de Sousa, 2019

“Homosexuality was not a crime in itself (...). Yet, if someone was a homosexual, the criminal courts would treat that person like someone dangerous (...). The State would have to provide means to control this person, not as a criminal, but as a danger to society.”

There were no known or registered cases of attacks or physical violence against LGBT people,⁹⁹ but LGBT people suffered discrimination at home, within their families, in the workplace and in public spaces.¹⁰⁰ For example, even though the Employment Act of 2007 prohibits discrimination in the workplace on the grounds of sexual orientation (among other grounds), some LGBT people will still not disclose their sexual orientation in the workplace because they fear losing their jobs, being passed over for promotions or other advancements or being victimised.¹⁰¹



S. Saiete, 2011 Study (Construção e Gestão da Identidade Homossexual das Lésbicas em Moçambique. Monografia (Licenciatura em Sociologia) - Faculdade de Letras e Ciências Sociais - Departamento de Sociologia, Universidade Eduardo Mondlane. Maputo).

“Straight towards society, and gay before other homosexuals.”

As a result of this environment, LGBT people frequently assume a dual identity, by maintaining a heterosexual pretence in their professional lives and towards their families and social circles, while seeking safe spaces where they can be themselves amongst other LGBT people.

⁹⁷ Sapo Notícias, *Minorias sexuais moçambicanas consideram novo Código Penal “meramente simbólico,”* 2 July 2015 (available at: <https://noticias.sapo.mz/actualidade/artigos/minorias-sexuais-mocambicanas-consideram-novo-codigo-penal-meramente-simbolico>). Article 71 of the 1886 Penal Code stated that “Security measures are applicable to: [...] 4. – Those who habitually practice acts against the order of nature; [...]”.

⁹⁸ Interview with Maria Arthur (Spokeswoman of WLSA Mozambique), 3 May 2019; Interview with Danilo da Silva (Director at LAMBDA), 11 February 2019; *Canaries in the coal mines: an analysis of spaces for LGBTI activism in Mozambique*, *Ibid.* n. 91.

⁹⁹ *Mozambique Civil Society Report on the Implementation of the ICCPR (replies to the list of issues CCPR/C/MOZ/Q/1)*, October 2013, para. 33.

¹⁰⁰ Deutsche Welle, *Homossexuais moçambicanos querem fim da discriminação*, 15 November 2011 (available at: <https://www.dw.com/pt-002/homossexuais-mo%C3%A7ambicanos-querem-fim-da-discrimina%C3%A7%C3%A3o/a-15533545>).

¹⁰¹ City Press, *Open but Closed*, 4 April 2018 (available at: <https://city-press.news24.com/News/open-but-closed-20180304>).

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The previous laws would also be used to extort money from those in LGBT relationships,¹⁰² and the simple fact that this provision existed created uncertainty and apprehension in the lives of LGBT people.¹⁰³ A general lack of understanding of and education about sexual orientation and gender identities has been identified as playing an important role in the discrimination and stigma that the LGBT community faced and resulted in an environment where engaging on such issues was seen as taboo.¹⁰⁴

Early Attempts at Reform

In 2006, there was an attempt at reforming the 1886 Penal Code and the Criminal Procedure Code. A review was undertaken by the *Unidade Técnica de Reforma Legal* ('UTREL', the Technical Unit for Legal Reform) and public consultations were held on a draft of the revised penal code. Ensuing elections hampered progress and the process was effectively suspended before the 2009 general elections.

UTREL was created in 2002 by the *Comissão Interministerial de Reforma Legal* (the Inter Ministry Commission for Legal Reform), which was responsible for reforming legislation. UTREL drafted and promulgated, among other statutes, the 2004 Family Law, the 2005 Civil Procedure Code and the 2005 Commercial Code.¹⁰⁵

In the early 2000s, UTREL was tasked with reviewing the 1886 Penal Code and the Criminal Procedure Code. In July 2006, it presented a draft of a revised penal code to the public for consultation and debate. At that time, UTREL had already submitted two versions of the draft review of the Criminal Procedure Code to the Mozambican government, but neither had been presented to the public for consultation.¹⁰⁶

A draft of the revised penal code ('UTREL Draft') was made available on UTREL's website, and public consultations were held on 13 July 2006.¹⁰⁷ The UTREL Draft had several shortcomings, which included its failure to criminalise marital rape and to decriminalise abortion under any circumstances.¹⁰⁸ It also maintained the possibility of a rape offender avoiding prosecution by marrying the victim and established limited sanctions for the crime of sexual harassment.¹⁰⁹ According to domestic civil society organisations that participated in the public consultations, UTREL was not receptive

¹⁰² Interview with Danilo da Silva (Director at LAMBDA), *Ibid.* n. 98.

¹⁰³ Interview with Maria Arthur (Spokeswoman of WLSA Mozambique), *Ibid.* n. 98.

¹⁰⁴ *Canaries in the coal mines: an analysis of spaces for LGBTI activism in Mozambique*, *Ibid.* n. 91.

¹⁰⁵ Open Society Foundation, *Moçambique: o Sector Justiça e o Estado de Direito*, 2006, pp. 21-22 (available at: https://sarpn.org/documents/d0002240/Mozambique_Justica_Sept2006.pdf).

¹⁰⁶ *Moçambique: o Sector Justiça e o Estado de Direito*, *Ibid.*

¹⁰⁷ WLSA Mozambique, *Reforma legal: a revisão do Código Penal*, August 2006 (In: *Outras Vozes*, No. 16, available at: <http://www.wlsa.org.mz/wp-content/uploads/2014/11/OV16.pdf>).

¹⁰⁸ *Reforma legal: a revisão do Código Penal*, *Ibid.*

¹⁰⁹ *Reforma legal: a revisão do Código Penal*, *Ibid.* n. 107; Assembleia da República, *Projecto de Revisão do Código Penal*, 2012, p. 5 (available at: <http://www.acismoz.com/wp-content/uploads/2017/06/CODIGO%20Penal.pdf>).

to comments provided by participants, which were predominantly aimed at addressing the above mentioned shortcomings.¹¹⁰

An intervening general election, resulting in a new government taking office, meant that the review process of the 1886 Penal Code stalled. According to observers, it is customary practice of the Mozambican parliament not to vote or consider bills discussed in the prior legislature once a new legislature is tenured. Accordingly, a new legislature typically proposes a new bill for the same issue (to the extent that the new legislature has the political will to do so), as opposed to pursuing the approval of a bill that was being discussed by the prior legislature.¹¹¹ With the new legislature in place, the UTREL Draft reform process was abandoned. Discussions regarding the reform of the 1886 Penal Code only resurfaced in 2010, when the efforts that ultimately culminated in the approval of the Revised Penal Code began.¹¹²

110 *Reforma legal: a revisão do Código Penal*, *Ibid.* n. 107.

111 Interview with Maria Arthur (Spokeswoman of WLSA Mozambique), *Ibid.* n. 98; Interview with Julania Langa (Senior Policy Advisor at IPAS), 19 March 2019; Interview with Katia Amado, Ivone Zilhão (Programme Director and Sexual and Reproductive Health Doctor at Pathfinder) and Maira Domingos (Coordinator for Sexual and Reproductive Health and Rights at Fórum Mulher), *Ibid.* n. 5.

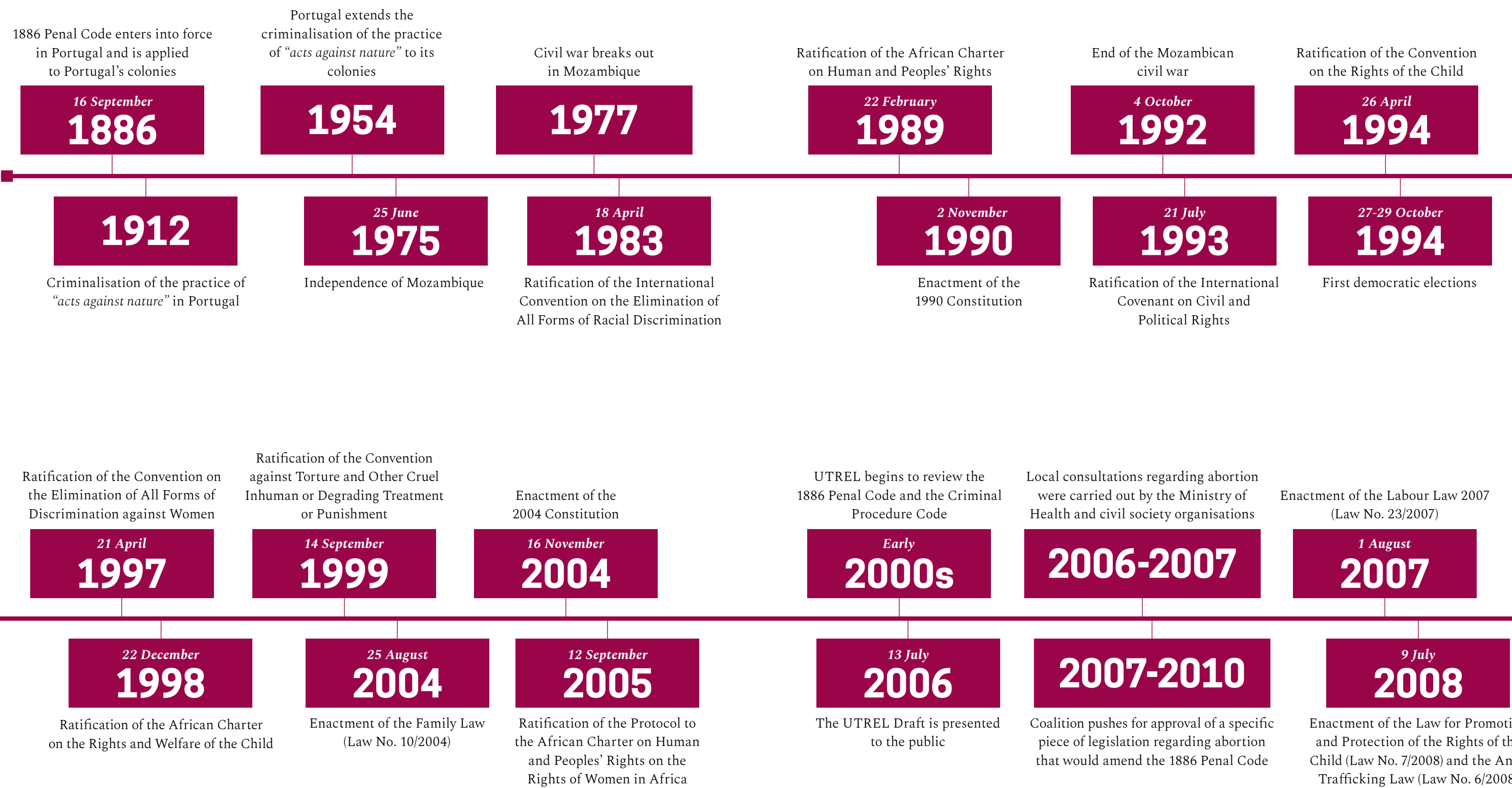
112 Interview with Katia Amado, Ivone Zilhão (Programme Director and Sexual and Reproductive Health Doctor at Pathfinder) and Maira Domingos (Coordinator for Sexual and Reproductive Health and Rights at Fórum Mulher), *Ibid.* n. 5.



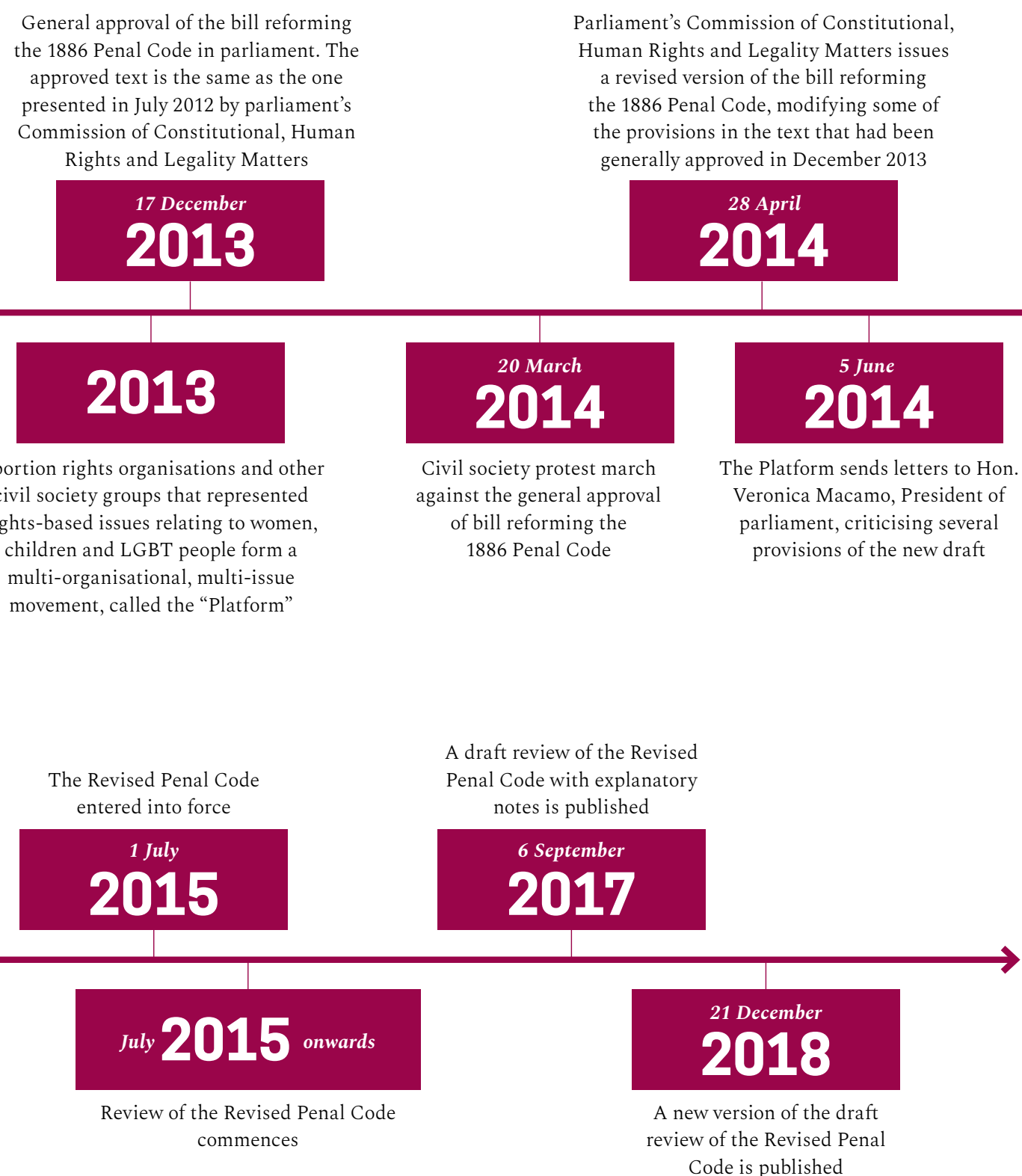
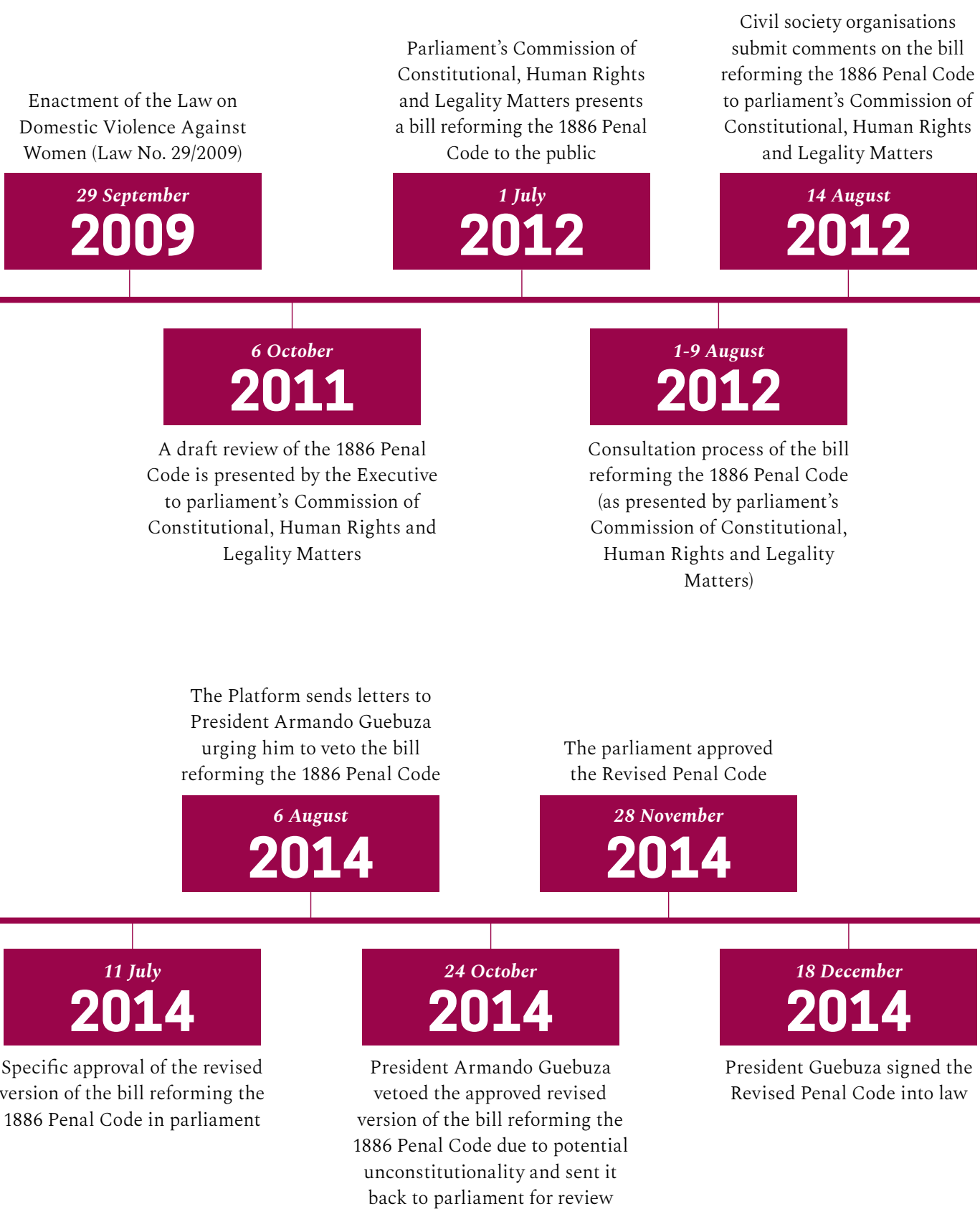
CHRONOLOGY OF LEGISLATIVE REFORM

CHRONOLOGY OF LEGISLATIVE REFORM

The following provides a timeline of key events and activities relating to the sexual offences reform in Mozambique



CHRONOLOGY OF LEGISLATIVE REFORM





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The enactment of the Revised Penal Code on 31 December 2014 (which came into effect in July 2015) saw Mozambique undertake a wholesale reform of its criminal laws, including its sexual offences provisions. The reform was influenced and driven by a variety of factors, some more significant than others. Mozambique's political and legal context certainly created an environment conducive and receptive to reform. Having emerged from almost 20 years of civil war, the establishment of the rule of law and the democratisation of Mozambique paved the way for large scale legal and policy reform. It was in this context, together with the overwhelming recognition that the criminal law needed to be modernised, that the reform of the 1886 Penal Code took place. However, what drove the reform of Mozambique's sexual offences laws and provisions were the efforts and strategy of domestic civil society (women's right organisations, LGBT activists and groups, general human rights organisations and their supporters). Through combining their efforts in an alliance, these organisations advocated as a multi-pronged, multi-issue movement, and effectively pressed for key reforms to the 1886 Penal Code. Political will, although at times hesitant, was apparent and a necessary element to achieving the reform. Equally, the importance of supportive parliamentarians (albeit tacitly) willing to champion change was also evident. The international human rights context and international community were further contributory factors in the reform, influencing change and providing support to the process.

Historical Context

After its independence in 1975, Mozambique went through a violent civil war that lasted almost 20 years. During this period, no serious law reform project was possible, and many of the Portuguese laws from the colonial period subsisted. It was only in 1990 that a new constitution was enacted, which introduced the rule of law and paved the way for a democratic multiparty system. In 1994, the country held its first democratic elections and a new democratically drafted Constitution followed in 2004. This new context not only provided the opportunity, but the obligation on Mozambique to review and reform its domestic legal landscape. As Mozambican society entered a new era, its colonial legal inheritance, including the 1886 Penal Code, no longer addressed the needs of society nor did it comply with its domestic human rights framework.

The 1990 constitution was at the root of creating the necessary reform context. Having been drafted at the time of peace negotiations, the Constitution's core aims were to secure peace and to set the legal basis for democratic elections that would be held in the future.¹¹³ In 1992, the General Peace Agreement was signed and elections were held two years later.¹¹⁴

¹¹³ *Moçambique: o Sector Justiça e o Estado de Direito*, *Ibid.* n. 105, p. 4.

¹¹⁴ *Moçambique: o Sector Justiça e o Estado de Direito*, 2006, *Ibid.* n. 105, pp. 4-5.



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"In 1990 a new constitution was promulgated. It opened the country to a new political and economic order with the introduction of multiparty system and market economy,

which represented the establishment of pluralistic democracy and a qualitative leap in matters of promotion and protection of human rights."

With peace seemingly secured, discussions focused on a new democratically drafted constitution. It was not until 2004, however, that the new Constitution was agreed and promulgated.¹¹⁵ The new Constitution contained an array of fundamental rights and freedoms including the principle of equality (Article 35), the principle of gender equality (Article 36), the right to life and physical integrity (Article 40), the fundamental rights of the child (Article 47), freedom of expression and information (Article 48), freedom of association and right to protest (Articles 51 and 52), freedom of consciousness and religion (Article 54), and the fundamental rights to education, health and balanced natural environment (Articles 88, 89 and 90). With a new Constitution in place, changes were needed in order to ensure that the domestic legal framework was consistent with its provisions.

As a result, a process of review and reform of Mozambique's domestic legislation was initiated in the mid-2000s, which resulted in the adoption of several pieces of legislation, such as the 2004 Family Law, the 2005 Civil Procedure Code, the 2005 Commercial Code, and the 2007 Labour Law, among others.¹¹⁶ The review of the 1886 Penal Code was one of a number of statutes that was tackled as part of this process. The below provides a brief overview of some of the related legal and policy changes implemented over the years.

On 9 July 2008, parliament passed the Law for Promotion and Protection of the Rights of the Child, Law No. 7/2008 ('Child Protection Law'), which established the fundamental rights of children and the need for their special protection. The legislation was also an attempt to fully domesticate the CRC and the African Charter on the Rights and Welfare of the Child.¹¹⁷

On the same day, parliament passed the Anti-Trafficking Law. This criminal statute established sanctions for crimes related to the recruitment or facilitation of the procuring of a person for the purposes of prostitution, forced labour, slavery or

¹¹⁵ *Moçambique: o Sector Justiça e o Estado de Direito*, Ibid. n. 105, p. 5.

¹¹⁶ *Moçambique: o Sector Justiça e o Estado de Direito*, Ibid. n. 105, pp. 21-22.

¹¹⁷ Law No. 7/2008, Article 1.

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servitude (such as kidnapping, transporting or adopting a person to achieve such ends).¹¹⁸ The enactment of the Anti-Trafficking Law was in line with the text of the new Constitution, which protects the individual rights and freedoms of Mozambican citizens. It also complied with many of the international obligations assumed by Mozambique under treaties such as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, ratified by Mozambique in September 2006.¹¹⁹

On 29 September 2009, the Domestic Violence Law was passed, criminalising domestic violence committed by spouses, partners (including common law unions), as well as other family members.¹²⁰ The enactment reflected recommendations made by the United Nations Committee on the Elimination of Discrimination against Women ('CEDAW Committee'), which expressly recommended, in its 2007 report, that Mozambique adopt a law against domestic violence.¹²¹

The new Constitution also demonstrated the clear obsolescence and impropriety of the 1886 Penal Code, and, as stated in the preamble to the Revised Penal Code, its “mismatch [...] with the political, social, cultural and economic reality of the country.”¹²² This “mismatch” led to “a need to reform the Penal Code to ensure the enjoyment of rights and freedoms to citizens and [also to ensure] its conformity with today’s conceptions of criminal dogmatism.”¹²³



2011 UPR National Report for Mozambique

“The current Constitution establishes that Mozambique is a democratic state based on the ‘pluralism of expression, democratic rights, respect and guarantee of fundamental human rights and freedoms’.”

As explained in the preceding chapter, the initial review of the 1886 Penal Code was started in 2006. Although this process stalled, the timeline above demonstrates that the review and reform of the 1886 Penal Code was part and parcel of a trajectory of legislative reform spurred on by the new political and legal context.

118 Law No. 6/2008, Articles 2 and 10.

119 United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, November 2000 (available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=en).

120 Law No. 29/2009, *Ibid.* n. 63, Article 5.

121 United Nations Committee on the Elimination of Discrimination against Women, *Concluding comments of the Committee on the Elimination of Discrimination against Women: Mozambique*, 11 June 2007, paras. 19 and 25 (available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/MOZ/CO/2&Lang=En).

122 Revised Penal Code, Preamble.

123 Revised Penal Code, *Ibid.* Preamble.

Civil Society Influence

The importance of the advocacy and influence of domestic civil society groups cannot be overstated; it was pivotal to the reform of the 1886 Penal Code.

Civil society influenced the reform process in two important ways:

1. Highlighting the inadequacies in the 1886 Penal Code - the long struggle for the decriminalisation of abortion, which began years before 2014, demonstrated the inadequacies of the 1886 Penal Code and the need for wholesale reform; and
2. Developing an intersectional movement that resulted in an inclusive and broad reform effort - the initial campaign for reproductive rights developed into a powerful multi-pronged, multi-organisational, multi-issue movement, which not only strengthened the movement itself but enabled the alliance to apply maximum pressure on the political establishment and bring about wide-ranging legal change.

The Abortion Struggle

The campaign for decriminalisation of abortion in Mozambique pre-dates the discussions regarding the reform of the 1886 Penal Code. For over a decade, civil society organisations and the Ministry of Health of Mozambique were already pushing for reforms, specifically targeted at the decriminalisation of abortion, when discussions about a larger overhaul of the entire 1886 Penal Code started. Through their tireless commitment and campaign for the decriminalisation of abortion and provision of safe facilities, domestic civil society drew attention to yet another failing in the existing criminal law framework, making the case for comprehensive reform even stronger. Moreover, the relevant players that were advocating for abortion rights seized the opportunity to push for the decriminalisation of abortion as part of the discussions concerning the reform of the 1886 Penal Code, which proved a successful strategy.



"[The story of our advocacy for abortion rights] is a very, very old one. A lot of NGOs made a lot of pressure on the government, saying that a lot of girls and a lot of women were dying from abortion, so we needed to do something about it."

Katia Amado,
Programme Director
at Pathfinder, 2019

In the 10 years preceding the efforts to reform the 1886 Penal Code, the Ministry of Health, the Mozambican Association of Obstetricians and Gynaecologists, domestic civil society organisations and international non-governmental organisations advocated for the adoption of legislation to permit abortion in a wider range of cases beyond pregnancies that posed risk to the health or life of the woman.¹²⁴ About 12 women's rights organisations were already organised in a coalition ('Coalition') focused on abortion and reproductive rights in the decade preceding the reform of the 1886 Penal Code.¹²⁵

In 2006 and 2007, the Ministry of Health and civil society organisations carried out local consultations on the topic in many small Mozambican villages, raising

¹²⁴ IPAS, *Legal reform in Mozambique widens access to abortion care*, 23 December 2014 (available at: <https://www.ipas.org/news/2014/December/legal-reform-in-mozambique-widens-access-to-safe-abortion-care>).

¹²⁵ Interview with Katia Amado, Ivone Zilhão (Programme Director and Sexual and Reproductive Health Doctor at Pathfinder) and Maira Domingos (Coordinator for Sexual and Reproductive Health and Rights at Fórum Mulher), *Ibid.* n.5.

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awareness of unsafe abortions and attempting to discuss decriminalisation with the population.¹²⁶ Abortion was treated by the ministry as an urgent public health issue, given its impact on the large maternal mortality rate in Mozambique.¹²⁷ Some members of parliament also attended these workshops, which proved to be a real driver in educating society as a whole.¹²⁸

When the UTREL Draft was first published on government internet pages in 2006, during the first attempt to update the entire 1886 Penal Code, civil society organisations were already engaged. At around that time, the Coalition had been pushing for a specific piece of legislation that would amend the 1886 Penal Code ('Standalone Bill'), which would result in the decriminalisation of abortions in certain situations, such as where the pregnancy resulted from rape or incest, in addition to cases where the pregnancy posed risks to the woman's life and health,¹²⁹ and to establish a public policy on provision of abortions. The Standalone Bill had been drafted and sent to parliament, but before it was put to a vote, the 2009 elections took place and a new legislature took office.¹³⁰ This derailed the progress of the approval process.¹³¹

Before the Standalone Bill could regain momentum, the government assigned a broad review of the 1886 Penal Code to the Commission of Constitutional, Human Rights and Legality Matters (*Comissão dos Assuntos Constitucionais, Direitos Humanos e Legalidade*), also known as the "First Commission", in December 2010.¹³² The Coalition capitalised on this opportunity to push for legal reform of the abortion law as part of the 1886 Penal Code review.¹³³ This proved successful. Addressing the issue of abortion as part of a broad reform effort meant that rather than the one issue being highlighted and targeted, as was the case under the Standalone Bill, the decriminalisation of abortion became just one of many aspects of the 1886 Penal Code reform.

126 Interview with Katia Amado, Ivone Zilhão (Programme Director and Sexual and Reproductive Health Doctor at Pathfinder) and Maira Domingos (Coordinator for Sexual and Reproductive Health and Rights at Fórum Mulher), *Ibid.* n.5.

127 Interview with Katia Amado, Ivone Zilhão (Programme Director and Sexual and Reproductive Health Doctor at Pathfinder) and Maira Domingos (Coordinator for Sexual and Reproductive Health and Rights at Fórum Mulher), *Ibid.* n.5.

128 Interview with Hon. Antonio Niquice (member of the Mozambican parliament), 2 May 2019.

129 Interview with Katia Amado, Ivone Zilhão (Programme Director and Sexual and Reproductive Health Doctor at Pathfinder) and Maira Domingos (Coordinator for Sexual and Reproductive Health and Rights at Fórum Mulher), *Ibid.* n.5.

130 Interview with Julania Langa (Senior Policy Advisor at IPAS), *Ibid.* n. 111.

131 Interview with Katia Amado, Ivone Zilhão (Programme Director and Sexual and Reproductive Health Doctor at Pathfinder) and Maira Domingos (Coordinator for Sexual and Reproductive Health and Rights at Fórum Mulher), *Ibid.* n.5.

132 Pursuant to Article 85 of the Internal Rules of the Mozambican Parliament, dated 12 August 2013, the First Commission's main areas of competence are, *inter alia*, (i) assessing the constitutionality of bills of law and treaties, (ii) ensuring the exercise of individual rights and liberties enshrined in the Mozambican Constitution, (iii) ensuring compliance with the law, (iv) addressing the equality of all citizens before the law, access to justice, due process and other constitutional safeguards (available at: <http://www.parlamento.mz/images/PDF/Legislacao/Regimento%20da%20Assembleia%20da%20Republica.pdf>).

133 Interview with Katia Amado, Ivone Zilhão (Programme Director and Sexual and Reproductive Health Doctor at Pathfinder) and Maira Domingos (Coordinator for Sexual and Reproductive Health and Rights at Fórum Mulher), *Ibid.* n. 5.

Development of an intersectional movement

The intersectional movement formed and advanced by a broad alliance of domestic civil society groups was central to the reforms that were ultimately made to Mozambique's sexual offences laws as part of the 1886 Penal Code reform. The roots of such movement date back to the first attempt to reform the 1886 Penal Code in 2006, when civil society organisations sent comments to the UTREL Draft in light of the inadequacy of the bill for contemporary Mozambique.

By 2013, the relentless campaign that had been forged by the abortion rights Coalition united with other civil society groups and organisations that represented a broad spectrum of rights-based issues, from children and women to the environment and the rights of LGBT people, to form a multi-organisational, multi-issue movement, called the "Platform."¹³⁴ When the review of the 1886 Penal Code gathered speed, the Platform and other civil society organisations were fully engaged and actively reviewed and submitted comments on the drafts to parliament.¹³⁵

The Platform was formed by the following civil society organisations:¹³⁶ ActionAid Mozambique,¹³⁷ Mozambican Association of Judges ('AMJ'),¹³⁸ Mozambican



¹³⁴ Interview with Katia Amado, Ivone Zilhão (Programme Director and Sexual and Reproductive Health Doctor at Pathfinder) and Maira Domingos (Coordinator for Sexual and Reproductive Health and Rights at Fórum Mulher), *Ibid.* n. 5.

¹³⁵ Genderlinks, *Mozambique: When Party Politics Beats Sisterhood*, 26 August 2014 (available at: <https://genderlinks.org.za/programme-web-menu/mozambique-when-party-politics-beats-sisterhood-2014-04-03/>).

¹³⁶ Plataforma pelos Direitos Humanos no Código Penal, *Historial e ponto de situação sobre a campanha pelos direitos humanos no Código Penal*, 10 September 2014, available at 3.c. of the Annex.

¹³⁷ The local chapter of ActionAid, "a global justice federation working to achieve social justice, gender equality and poverty eradication." ActionAid Mozambique, *Quem nós somos* (available at: <https://mozambique.actionaid.org/pt-pt>).

¹³⁸ The national association of Mozambican judges. Associação Moçambicana de Juizes, *Apresentação* (available at: <http://www.amj.org.mz/institucional/apresentacao/>).

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Association of Women in Legal Careers ('AMMCJ'),¹³⁹ CECAGE – Centre for Coordination of Gender Issues of the Eduardo Mondlane University,¹⁴⁰ Centro Terra Viva,¹⁴¹ Community Radio Forum ('FORCOM'),¹⁴² Civil Society Forum for the Rights of the Child, ('ROSC'),¹⁴³ Fórum Mulher,¹⁴⁴ Third Age Forum,¹⁴⁵ LAMBDA - Mozambique Association for Sexual Minority Rights ('LAMBDA'),¹⁴⁶ Mozambican League of Human Rights ('LDH'),¹⁴⁷ Women and Law in Southern Africa Research and Education Trust ('WLSA'),¹⁴⁸ Associação Mulher, Lei e Desenvolvimento ('MULEIDE'),¹⁴⁹ Pathfinder International,¹⁵⁰ Rede CAME,¹⁵¹ Network for the Defence of Sexual and Reproductive Rights¹⁵² and the Network of Men for Change ('HOPEN').¹⁵³ Alongside the Platform, the Mozambican Association of Obstetricians and Gynaecologists, the international organisation IPAS, Amnesty International and other women-focused legal, health and civil society organisations were also part of the broad civil society movement that advocated for reform of the 1886 Penal Code.

139 AMMCJ is an association of women that work in the legal profession, notably "judges, prosecutors, notaries, lawyers, legal interns, legal technicians and law students." AMMCJ's Facebook page is available at: https://www.facebook.com/pg/Ammcj-Ammcj-1683358058572550/about/?ref=page_internal.

140 CEGAGE was created by the university's council to investigate, train and provide services to the university and community in all gender-related issues. Universidade Eduardo Mondlane, Centro de Coordenação dos Assuntos do Género (available at: <https://www.uem.mz/index.php/investigacao/centros-investigacao/centro-de-coordenacao-dos-assuntos-do-genero>).

141 Centro Terra Viva is a centre for environmental studies and advocacy dedicated to informing the population, preserving the environment and monitoring the application of environmental law. Centro Terra Viva, *História* (available at: <http://www.ctv.org.mz/qshistoria.php>).

142 FORCOM is an organisation that represents the community radios of Mozambique (available at: <http://www.forcom.org.mz>).

143 ROSC is an organisation that unites many children's rights civil society associations. ROSC, *Breve historial* (available <http://www.rosc.org.mz/index.php/o-rosc>).

144 Fórum Mulher is a women's rights organisation which unites 35 women's rights organisations across Mozambique. Fórum Mulher, *Quem somos* (available at: <http://forummulher.org.mz/quem-somos/>).

145 Third Age Forum (Fórum da Terceira Idade) is an organisation for the rights of the elderly which unites many Mozambican senior citizens' rights organisations. Age Africa, *Resource library* (available at: <http://ageafrica.net/resource-library/forum-de-terceira-idade-fti-mozambique/>).

146 LAMBDA is the main association working for the recognition of LGBT people's human rights in Mozambique. LAMBDA, *Quem somos* (available at: <https://lambda.org.mz/>).

147 LDH is an association working for the defence of human rights that is centred in Maputo and has branches in all provinces of Mozambique. Namati, *Liga Moçambicana de Direitos Humanos* (available at: <https://namati.org/network/organisation/liga-mocambicana-dos-direitos-humanos/>).

148 WLSA is the Mozambique chapter of an association that researches and advocates for women's rights in seven southern African countries (Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe). WLSA, *Apresentação da WLSA Moçambique* (available at: <http://www.wlsa.org.mz/visao-e-missao-da-wlsa/>).

149 MULEIDE is a women's rights organisation. MULEIDE (available at: <http://www.muleide.org.mz/index.php/a-muleide>).

150 Pathfinder International, an organisation that "champions sexual and reproductive health and rights worldwide." Pathfinder International, *Who we are* (available at: <https://www.pathfinder.org/about-us/who-we-are/>).

151 Rede CAME is a children's rights organisation that unites more than 30 civil society and religious organisations that advocates for children's rights. Rede CAME, *Plano estratégico 2016-2020* (available at: <http://www.redecame.org.mz/wp-content/uploads/2018/03/Rede-CAME-Plano-Estrat%C3%A9gico-2016-2020-Draft-19-abril-REV-1.pdf>).

152 Network for the Defence of Sexual and Reproductive Rights is a network of women's rights organisations coordinated by Ivone Zilhão (Pathfinder International) and Maria Arthur (WLSA).

153 HOPEN is an association that unites 25 NGOs and activists focused on incentivizing men to question discriminatory actions and approaches related to masculinity. Facebook page available at: <https://www.facebook.com/rede.hopen>.

Coming together as a physical alliance of some 20+ groups as well as coalescing on a multi-issue platform was influential for a number of reasons:

- There was obvious strength in numbers. By combining together, they created a powerful and visible movement that could apply maximum pressure on the political establishment to bring about legal change. The Platform was a force to be reckoned with and could not be ignored.
- Creating a broad alliance not only enabled the Platform to advocate on a multi-issue basis but by doing so they made the case all the stronger and more probable for comprehensive reform of Mozambique's sexual offences laws. Equally, broadening the reform effort provided better inclusion of more controversial issues, such as the decriminalisation of abortion and private consensual same-sex sexual acts between adults. Rather than each organisation or group targeting and highlighting one issue to be addressed, those issues became just one of many aspects of Mozambique's 1886 Penal Code that required reform. Advocating in this way made the changes far more possible and also palatable for those more resistant to some of the proposed reforms.

Such an intersectional movement and approach was crucial in realising the legal change that was achieved.

The Platform acted on different fronts and adopted a variety of strategies and initiatives. The following provides some examples of their multi-faceted approach:



"The pressure did not come from the top (...). It was really interesting to see the pressure from civil society having that influence."

Maira Domingos,
Coordinator for Sexual
and Reproductive Health
and Rights at Forum
Mulher, 2019

- Participation in legal technical debates in universities,
- Issuing briefing notes, comments and submissions to parliament, the First Commission and to the Cabinet of Parliamentary Women,
- Publishing infographics and short notes to inform the general population of the need for reform in different news outlets such as "A Verdade", "Savana" and "Canal de Moçambique",¹⁵⁴ and
- In March 2014, the Platform organised a protest march on parliament, where they delivered a declaration to the President of parliament, Hon. Veronica Macamo, explaining their objections to certain provisions of the draft bill under discussion.¹⁵⁵

From 2012, when the revision gathered speed, women's rights groups pored over drafts described as being as thick as two telephone books.¹⁵⁶ Despite the limited public consultation process described below, civil society organisations remained active through the entire reform process to make sure that the old provisions that violated human rights were eliminated.

¹⁵⁴ *Historial e ponto de situação sobre a campanha pelos direitos humanos no Código Penal*, *Ibid.* n. 136.

¹⁵⁵ *Historial e ponto de situação sobre a campanha pelos direitos humanos no Código Penal*, *Ibid.* n. 136.

¹⁵⁶ *When Party Politics Beats Sisterhood*, *Ibid.* n. 135.



marriage if this is in the family's interest. The girls, after the horror of rape, will also be forced to marry their aggressors. How will their lives be? This is the worst nightmare for rape victims."



of Mozambique and international legal instruments and regional accords ratified by the State establish the principle of non-discrimination.”

principle of equality between women and men, guaranteed by the Constitution. No protection for male victims: By not recognizing forced anal or oral intercourse or the use of objects as rape, [the State] is not protecting male individuals who are victims of sexual violence."

A lei, que deveria proteger as vítimas de violação sexual, favorece o violador. Autoriza que o violador se case com a vítima, tenha a sua pena suspensa se for condenado.

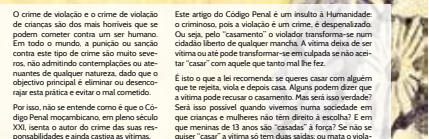
A aprovação na especialidade só se fará na próxima sessão do Parlamento, em Março de 2014. Ainda há tempo para alterar as normas que discriminam e que violam os direitos humanos.

Texto: WLSA Moçambique
Ilustrações: Zacarias Chemane

sexual de
ma, pôe-
eventiva.
iver con-
a, a pena
er havido

A quem beneficia esta norma?

Eliminar totalmente este artigo do Código Penal



O que diz o Código Penal aprovado pelo Parlamento?

Texto VCS, Moquebique

Devemos negar as normas sociais prejudiciais de controle sobre a sexualidade humana, incluindo aquelas relacionadas com a contracepção sexual e identidade de gênero. Muitas das normas sociais e regras educacionais atuais servem para subestimar

A proibição da aplicação de métodos de vasectomia contra hormônios controla uma violação das liberdades humanas e dos princípios democráticos. As pessoas não devem ser discriminadas em função de sua orientação sexual. Equiparar os homossexuais a criminosos ou outros grupos de má conduta é tanto uma forma discriminatória e ignorar também a luta por seus direitos e liberdades.

Pressure was particularly visible and strong when parliament presented drafts of the penal code bill that were clearly out of step with civil society's expectations and Mozambique's own human rights framework. In July 2012, for example, strong opposition was shown against provisions contained in a revised draft bill that purported to retain the laws allowing a rape offender who married the victim to avoid prosecution.¹⁵⁷ Similar pressure was put on the legislature in 2014 when a revised draft bill was presented that again failed to address issues such as the marital rape exceptions. On that occasion, civil society organised the aforementioned protest march in Maputo, ensured that its criticisms were published in the press and engaged with members of parliament to ensure that the final draft bill was amended.



These efforts, the tireless campaign and advocacy, directly impacted the final draft of the Revised Penal Code, since many of the amendments that the Platform sought were ultimately incorporated. This was illustrated when, a little over a month after the march on parliament occurred, the First Commission issued a revised draft of the Revised Penal Code which no longer included the provision that permitted perpetrators of rape to avoid prosecution by marrying their victims.



The involvement of international organisations, such as Amnesty International and Equality Now,¹⁵⁸ was also an important element of the Platform's strategy. Drawing on this support brought international attention to the reform process, which positively benefitted the advocacy and campaigns of domestic civil society by adding external

¹⁵⁷ Assembleia da República, Projecto de Revisão do Código Penal), 1 July 2012, Article 413 and Chapter IV (entitled "crimes against honesty").

¹⁵⁸ Deutsche Welle, *Manifestação marca rejeição à proposta de novo Código Penal em Moçambique*, 20 March 2014 (available at: <https://www.dw.com/pt-002/manifesta%C3%A7%C3%A3o-marca-rejei%C3%A7%C3%A3o-%C3%A0-proposta-de-novo-c%C3%B3digo-penal-em-mo%C3%A7ambique/a-17511390>).

DRIVERS OF REFORM

pressure on Mozambique's authorities. For example, Amnesty International supported the campaign to remove from the provision that allowed perpetrators of rape to avoid prosecution by marrying their victims.¹⁵⁹ With the support of and international attention generated by Amnesty International and other international NGOs, the Platform and other allied domestic civil society organisations were able to successfully influence changes that were adopted in the Revised Penal Code.

As noted above, the approach taken by the Platform was to advocate for change in a wholesale way, addressing multiple issues at the same time. This approach was only possible due to the plurality and diversity of the civil society organisations and international NGOs involved, that were specialised not only in one particular area – as the Coalition, which was essentially a group of reproductive rights organisations – but on a variety of issues. The civil society organisations that constituted the Platform advocated for issues such as women's rights, children's rights, the rights of LGBT people, rights of the elderly and reproductive rights.

This approach proved to be very effective. By not focusing on any particular issue, they managed to avoid extensive controversy and succeeded in achieving changes to the 1886 Penal Code that may not have been accomplished had they received individual attention. Through collective action, these organisations not only drove the reform effort but achieved changes to the sexual offences laws that would not have been realised without their tireless work.

Political Will and Champions

Political will, although at times hesitant, was a necessary element to achieve the reform of the 1886 Penal Code, which could not have been successful without the support of key parliamentarians.

As explained above in the 'Historical Context' section, a process of modernising Mozambique's colonial-era legislation began in the mid-2000s with the new Constitution. However, the reform of the 1886 Penal Code was not prioritised and, whilst a first attempt was made in 2006, it was ultimately unsuccessful due to a lack of political appetite for reform.

In 2010, it was the government who took the initiative to reform and modernise the 1886 Penal Code. Further, at that time, the need for reform of the criminal law was recognised in parliament and generally acknowledged.¹⁶⁰

Although the changes to the sexual offences' provisions were limited in the draft bill that was first presented to parliament on 6 October 2011 ('First Draft Bill'), and the

¹⁵⁹ Sarah Hager (Amnesty International), *How you can fight for women & girls forced to marry their rapists in Mozambique*, 7 March 2014 (available at: <https://blog.amnestyusa.org/africa/how-you-can-fight-for-women-girls-forced-to-marry-their-rapists-in-mozambique/>); Interview with Katia Amado, Ivone Zilhão (Programme Director and Sexual and Reproductive Health Doctor at Pathfinder) and Maira Domingos (Coordinator for Sexual and Reproductive Health and Rights at Fórum Mulher), *Ibid.* n. 5.

¹⁶⁰ Gender Links, *Legislation changes lives: Mozambique Penal Code*, 1 March 2019 (available at: <https://www.youtube.com/watch?v=wa8Ax8nSnCw>).



"I believe that the criminalisation of people based on their sexual orientation goes against all international and regional human rights treaties. The New Penal Code introduces changes adjusted to the actual political, economic and social reality in Mozambique. Through such changes in the new Penal Code, Mozambique makes a strong statement and reinforces the fight against the discrimination based on sexual orientation and gender identity. It serves to send the message that it is the duty of all nations to secure and provide human and equal rights to all of its people."

Hon. Antonio Niquice,
2015

advances and changes achieved were in part a product of the action of civil society organisations, the importance of the support of certain members of parliament in achieving change (whilst tacit in many respects),¹⁶¹ cannot be underestimated. These supporters, such as Hon. Antonio Niquice and the President of parliament, Hon. Veronica Macamo, played an important role in supporting and pressing the demands of domestic civil society, which culminated in modifications being implemented in the legislation that was subsequently approved by parliament.

Hon. Niquice, a member of Parliamentarians for Global Action, positioned himself on the issue of the criminalisation of people based on their sexual orientation, making public statements in support of the reform.¹⁶²

Hon. Macamo, the first female President of parliament since Mozambique gained independence,¹⁶³ was particularly instrumental in supporting the demands presented by the Platform.¹⁶⁴ Several members of the Platform that were involved in the reform process confirmed that she played a vital role, even if not always public, in getting important changes through parliament.¹⁶⁵ For example, Hon. Macamo opened an informal channel of communication with civil society organisations, providing them with information about the review process,¹⁶⁶ and, after the demonstration held in March 2014, again met with civil society organisations to listen to their submissions and assure them that the controversial provisions then contained in the penal code bill would be revised.¹⁶⁷

It was the government's will and initiative, starting in 2010, and the influence and commitment of political champions that made the reform a reality in 2014.

¹⁶¹ Partisan politics in Mozambique seem to have placed members of parliament favourable to the agenda proposed by civil society organisations in a position in which publicly defending such agenda was politically challenging. This situation would on certain occasions put civil society organisations at odds with such members of parliament. See *When Party Politics Beats Sisterhood*, *Ibid.* n. 135.

¹⁶² Parliamentarians for Global Action, PGA Member, Hon. Antonio Niquice, MP, *Plays Direct Role in the Drafting and Adoption of the New Penal Code of Mozambique Decriminalizing Homosexuality*, 9 July 2015 (available at: <https://www.pgaction.org/news/pgs-member-honorable-antonio-niquice.html>).

¹⁶³ ONU News, *Em Moçambique, Ban pede impulso para alcance dos ODMs*, 20 May 2013 (available at: <https://news.un.org/pt/story/2013/05/1438401-em-mocambique-ban-pede-impulso-para-alcance-dos-odms>).

¹⁶⁴ Deutsche Welle, *Manifestação marca rejeição à proposta de novo Código Penal em Moçambique*, 20 March 2014 (available at: <https://www.dw.com/pt-002/manifesta%C3%A7%C3%A3o-marca-rejei%C3%A7%C3%A3o-%C3%A0-proposta-de-novo-c%C3%B3digo-penal-em-mo%C3%A7ambique/a-17511390>).

¹⁶⁵ Interview with Katia Amado, Ivone Zilhão (Programme Director and Sexual and Reproductive Health Doctor at Pathfinder) and Maira Domingos (Coordinator for Sexual and Reproductive Health and Rights at Fórum Mulher), *Ibid.* n. 5.

¹⁶⁶ Interview with Katia Amado, Ivone Zilhão (Programme Director and Sexual and Reproductive Health Doctor at Pathfinder) and Maira Domingos (Coordinator for Sexual and Reproductive Health and Rights at Fórum Mulher), *Ibid.* n. 5.

¹⁶⁷ *Historical e Ponto de Situação sobre a Campanha pelos Direitos Humanos no Código Penal*, *Ibid.* n. 136.

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International Influence

The international and regional human rights obligations of Mozambique, as well as the role and support played by the international community, were important supplementary influences on the push for the review and reform of the sexual offence provisions in the 1886 Penal Code.

As described in the ‘Country Overview’ section, between 1983 and 2005, Mozambique ratified a series of relevant international and regional human rights treaties, a number of which focused on the rights of women and children. These international and regional conventions and the bodies overseeing their implementation were influential in the legal changes adopted in Mozambique for two key reasons: (i) the ratification of conventions created impetus for review and reform in light of the status of international law in Mozambique’s legal system, and Mozambique has publicly expressed the importance of fulfilling commitments and engaging at the international level, and (ii) the treaty bodies and related review processes (such as the UPR and CEDAW Committee reviews) urged Mozambique to address deficiencies in its criminal law system. These elements are addressed in more detail in the subsections below.



2011 UPR National Report for Mozambique

“Mozambique has a long tradition on the ratification of basic human rights instruments and it constitutes a priority of its

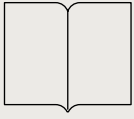
foreign policy. The country is also a full member of the majority of regional and international human rights legal instruments.”

International Human Rights Context

The Constitution established, in Article 18, that international treaties, after ratification, are directly applicable in Mozambique. Having ratified a swathe of international and regional conventions, this created an impetus and pressing need to ensure that Mozambique’s domestic legal framework was in conformity with those conventions. Mozambique’s criminal legislation was but one aspect of the legal framework that needed to be reviewed in order to be brought into compliance with international standards.

The country is an active member of the United Nations human rights system, and has received visits from UN Special Rapporteurs whenever requested. Mozambique has a good and cooperative relationship with the UN Office of the High Commissioner for Human Rights, from which the country has benefited from technical assistance.¹⁶⁸ Moreover, the Mozambican government has publicly affirmed the importance of fulfilling international and regional commitments and the country’s participation within the international community.

¹⁶⁸ United Nations Human Rights Council, National Report (10th session, 24 January – 4 February 2011) https://www.upr-info.org/sites/default/files/document/mozambique/session_10_-_january_2011/ahrcwg-610moz1e.pdf.



2011 UPR National Report for Mozambique

“The implementation of the universal principles of human rights in the domestic, regional and global levels is an imperative for the Mozambican government. In this context, the key priorities are summarized in this report and there is

maintained the commitment to lead efforts for accession and ratification of some key instruments that the country has not acceded, and to submit regular reports to the bodies of United Nations Treaty.”

“Mozambique reaffirms its commitment to ensure a full realization of all human rights and principles enshrined in

the light of its Constitutional Charter and other legal devices that do not contradict it.”

It is no surprise therefore that international and regional institutions have played an influential role in Mozambique’s legislative changes.

International and Regional Treaty Bodies and Institutions

The deficiencies of the 1886 Penal Code and its dissonance with Mozambique’s international obligations and constitutional norms were noted by several treaty bodies.

For example, as part of the CEDAW Committee’s review of Mozambique, whilst recognising positively the gender equality provisions found in the Constitution, the 2004 Family Law, the 1997 Land Law and the 2005 Commercial Code, the CEDAW Committee noted that “*discriminatory provisions still exist[ed] in several areas of Mozambican law, including in the Penal Code*” and recommended a comprehensive review. The CEDAW Committee also observed that Mozambique had yet to take action to address violence against women, particularly in relation to sexual offences.¹⁶⁹



United Nations Committee on the Elimination of Discrimination against Women, 2007

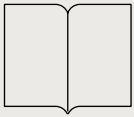
“The Committee calls upon the State party to pursue and accelerate without delay, in accordance with article 2 of the Convention, a comprehensive revision of its legislation in all areas and to work effectively with parliament to ensure that all discriminatory provisions are amended or repealed in order to achieve full compliance with the provisions of the Convention [...]

The Committee calls upon the State party to adopt the draft law against domestic violence as soon as possible, and to ensure that violence against women and girls, including domestic violence, marital rape, sexual harassment, and all forms of sexual abuse, constitutes a criminal offence; that perpetrators are prosecuted, punished and rehabilitated; and that women and girls who are victims of violence have access to immediate means of redress and protection.”

¹⁶⁹ Concluding comments of the Committee on the Elimination of Discrimination against Women: Mozambique, *Ibid.* n. 121, paras. 4, 12, 13, 25.

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The United Nations Committee on the Rights of the Child, in its 2009 Concluding Observations, welcomed the adoption of the Child Protection Law, the Family Law and the Anti-Trafficking Law, but urged Mozambique to review its legislation concerning abortion.¹⁷⁰



United Nations Committee on the Rights of the Child, 2009

“The Committee urges the State party to take all the necessary measures to reduce teenage pregnancies and, to this end, improve knowledge and the availability of family planning services, further develop education programmes on adolescent reproductive health, and raise awareness

about and access to safe contraception methods. The Committee also urges the State party to review its legislation concerning abortion, with a view notably to guaranteeing the best interests of pregnant teenagers. [...]”

In its 2012 report to the African Commission of Human and Peoples’ Rights, Mozambique stated that it had cooperated with international and regional human rights organisations, and reinforced its status as a full member of the United Nations, the African Union and the Commonwealth.¹⁷¹

In addition, Mozambique has actively participated in the Universal Periodic Review process (‘UPR’). The UPR is a state-driven peer-review process, under the auspices of the UN Human Rights Council, under which the human rights situation of UN members is reviewed every five years. The result of each review is reflected in the final report of each working group, which lists the recommendations that the state under review is called upon to implement before the next review cycle.¹⁷²

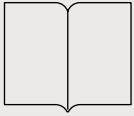
During Mozambique’s first UPR in 2011, many states called for enhanced protection of women and children against sexual violence, such as Australia, Brazil and East Timor, and a number of states recommended the decriminalisation of private, consensual, same-sex intimacy and/or combating discrimination against LGBT people, such as Canada, Slovenia, the Netherlands, France and Spain.¹⁷³

170 United Nations Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Mozambique*, paras. 3 and 6, 4 November 2009 (available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fMOZ%2fCO%2f2&Lang=en).

171 *Relatório do governo da República de Moçambique nos termos do artigo 62 da Carta Africana dos Direitos do Homem e dos Povos* (relatório consolidado 1999-2010), *ibid.* n. 94, para. 41.

172 United Nations Human Rights Council, *Universal periodic review* (available at: <https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx>).

173 *Report of the Working Group on the Universal Periodic Review: Mozambique*, 28 March 2011, *ibid.* n. 56, para. 5.



Recommendations during Mozambique's 2011 UPR

"Effectively implement the Law on Domestic Violence against Women, and enforce the policy of "zero tolerance" of sexual abuse in schools to provide better protection for women and girls" **East Timor**, 2011 UPR

"Adopt and implement policies for combatting discrimination and violence against women, especially domestic and sexual violence" **Brazil**, 2011 UPR

"Repeal the laws criminalising sexual relations between consenting adults of the same sex and guarantee fully the right of association, including for NGOs working on the question of sexual orientation" **France**, 2011 UPR

"Repeal criminal sanctions against sexual activity between consenting adults" **Netherlands**, 2011 UPR

"Amend articles 70 and 71 of the Penal Code with a view to not criminalizing sexual relations between consenting adults of the same sex; ensure the right to association of lesbian, gay, bisexual and transgender people (LGBTs) and facilitate the registration and activities of NGOs specialized in issues of sexual orientation and gender identity" **Spain**, 2011 UPR

"Ensure the right to freedom of association and enable the registration of NGOs working on issues of sexual orientation and gender identity" **Netherlands**, 2011 UPR

Mozambique accepted most of the recommendations and adopted the outcome of the UPR and the 2011 UPR report of the Mozambique working group.¹⁷⁴ Included in the accepted recommendations were several proposals relating to implementing the rights of women and children. In particular, Mozambique accepted recommendations urging it to reform its legal framework to ensure that violence against women and girls constitute criminal offences, that sexual harassment is properly addressed, and that implementation programmes relating to such matters are established.¹⁷⁵

Mozambique, however, stated that "[r]egarding questions on the issue of sexual orientation, its Constitution makes no reference to sexual orientation. The country is confronted with profoundly entrenched cultural and religious habits and such issues are recent and have only begun to be faced now. It was added that homosexuality is not criminalised, as there is no such definition in the Criminal Code, so that no one can be sanctioned for homosexuality. It was added, regarding freedom of association, that there was no restriction in this regard."¹⁷⁶ Mozambique thus simply ignored that security measures were still applicable in cases of "practice of acts against nature" per the 1886 Penal Code.

It is worth noting that the Netherlands, France and Spain urged Mozambique to guarantee the right of association of organisations working on matters related to sexual orientation. These comments were a reaction to the fact that LAMBDA, an LGBT advocacy organisation, was denied registration as an association by Mozambican authorities. This issue is further discussed below in the Section 'Recognition of the LGBT Community'.

¹⁷⁴ United Nations Human Rights Council, *Report of the Human Rights Council on its seventeenth session*, 24 May 2012, pp. 77 (available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/136/30/PDF/G1213630.pdf?OpenElement>).

¹⁷⁵ *Report of the Working Group on the Universal Periodic Review: Mozambique*, 28 March 2011, *Ibid.* n. 56, pp.15 – 20.

¹⁷⁶ *Report of the Working Group on the Universal Periodic Review: Mozambique*, 28 March 2011, *Ibid.* n. 56, para. 85.

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By the time Mozambique's second UPR cycle took place in 2016, it announced that of the 161 recommendations it had accepted from the 2011 cycle (out of 169), it had implemented 90 per cent of them. Some of the recommendations were implemented as part of the reform of the 1886 Penal Code, such as the repeal of Articles 70 and 71, which criminalised consensual same-sex intimacy between adults, the reform of provisions related to child sexual abuse, the criminalisation of sexual harassment and the decriminalisation of abortion under certain circumstances. This vividly demonstrates Mozambique's commitment to meeting its international obligations and that the reform of the 1886 Penal Code was, at least in part, driven by the desire to achieve compliance.

Other Factors

Lack of Significant and Sustained Opposition from Mainstream Faith Groups

Those involved with the reform process have explained that an additional factor enabling the reforms to take place was the absence of organised and vociferous religious opposition.

A number of Mozambican religious groups expressed opposition to the decriminalisation of abortion, but made no statements regarding the reform of wider sexual offences nor the decriminalisation of private consensual same-sex sexual acts.

The Roman Catholic Church, for example, publicly stated its position against the decriminalisation of abortion during the public consultation process held in 2012.¹⁷⁷



Mozambican Episcopal Conference, 2012

"Regarding the decriminalisation and legalization of abortion, the Bishops note that provoked abortion is an attack against the preciousness of life, and emphasize that the Catholic Church considers the decriminalisation and legalization of abortion an ethical aberration, aimed at promoting the

practice of disrespect for the life of others. For this reason, in no way should the law allow the existence of norms that are adverse to the common good and the integrity of the human being, [...] the human being must be respected and treated as a person from its conception."

Representatives of other religious groups, such as the Methodist church, the Universal Church of the Kingdom of God, and the Jehovah's Witnesses also spoke out against the decriminalisation of abortion.¹⁷⁸

These religious groups, however, did not agitate the population. Some stakeholders that were close to the process observed that the Catholic Church was discreetly lobbying in the background against the decriminalisation of abortion. That said,

¹⁷⁷ Conferência Episcopal de Moçambique, *Salvaguardar a vida humana* (carta pastoral), 14 September 2012 (available at: <https://cliturgica.org/portal/artigo.php?id=1718>).

¹⁷⁸ Verdade, *Religiosos contra liberalização do aborto em Moçambique*, 2 August 2011 (available at: <http://www.verdade.co.mz/nacional/21267-religiosos-contra-liberalizacao-do-aborto-em-mocambique>).



"The first and pressing factor for change in our Penal Code was the occurrence of a significant rise in the number of abductions of children of businesspeople (...). It shook the government because everybody was saying that they were creating an environment for this to happen."

Carlos Manjate,
Executive Director
of Rede CAME
(Organization against
Sexual Abuse of Minors)

there is no public information or evidence to suggest that these attempts to influence parliament in the process of reform became overt and proactive. The passive resistance from religious groups was not sufficient to obstruct or prevent the process¹⁷⁹ and the absence of active religious pressure was helpful in encouraging the reforms.

Impetus from Other Calls for Criminal Law Reform

Another minor driver of the reform of the 1886 Penal Code, unrelated to sexual offences, seems to have been an increase in the occurrence of kidnappings in Mozambique in the mid-to-late 2000s. Some cases were high profile involving the kidnapping of the children of executives of large companies. The increase of such incidents was attributed to the lack of specific legislation addressing the issue, the lenient sanctions established by the 1886 Penal Code and unsuccessful police investigations.¹⁸⁰

This was yet another reason why the 1886 Penal Code needed to be reviewed in order to respond appropriately to the needs of Mozambican society.

179 Interview with Katia Amado, Ivone Zilhão (Programme Director and Sexual and Reproductive Health Doctor at Pathfinder) and Maira Domingos (Coordinator for Sexual and Reproductive Health and Rights at Fórum Mulher), *Ibid.* n. 5.

180 Verdade, *Sequestros: penas pesadas só com a aprovação da proposta de revisão do Código Penal*, 17 October 2013 (available at: <http://www.verdade.co.mz/destaques/democracia/40965-sequestros-penas-pesadas-so-com-a-aprovacao-da-proposta-de-revisao-do-codigo-penal>).



WALISONGO SANGAJA WIRAJA KAPRITA
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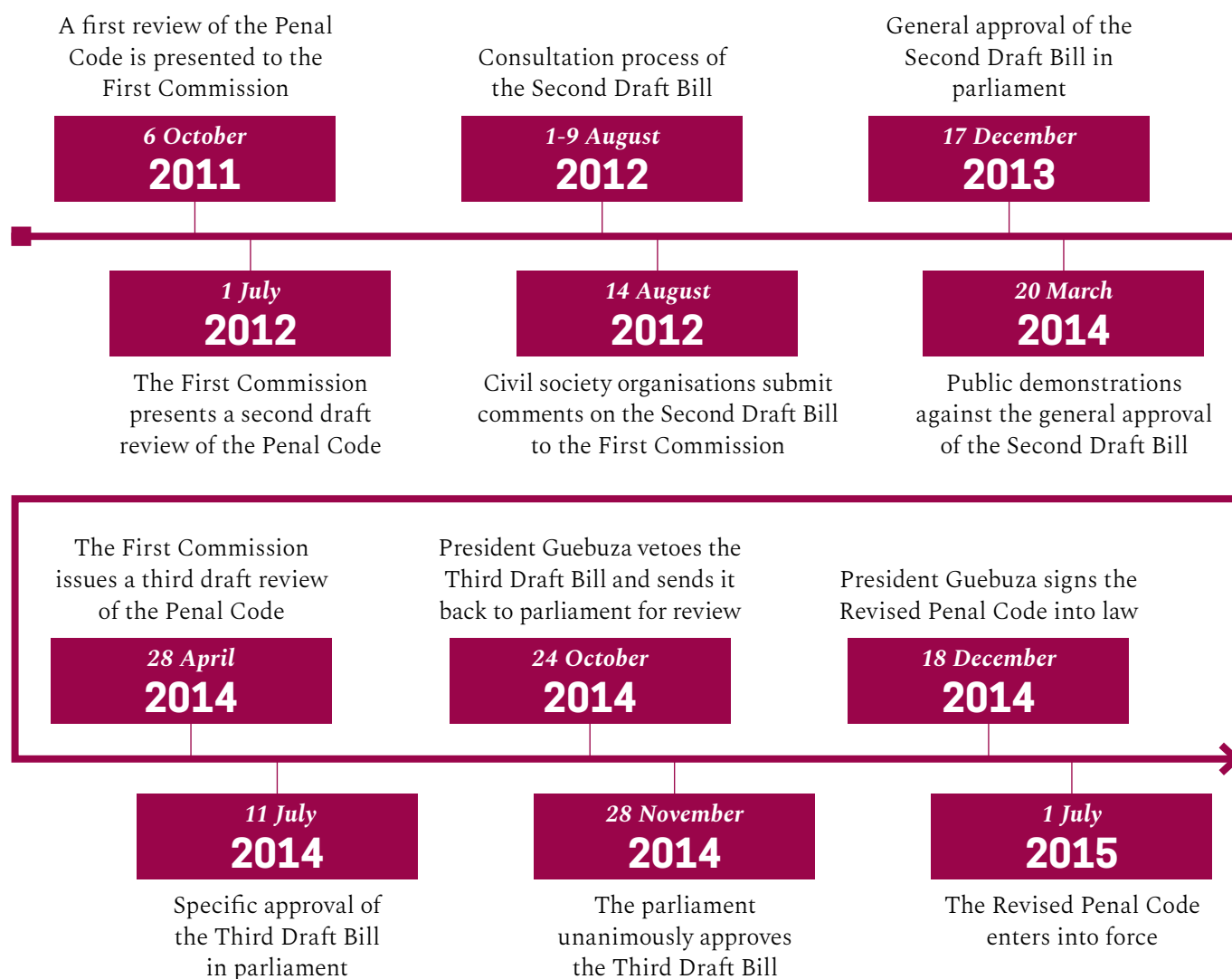
CONSULTATION, DRAFTING AND PASSAGE OF REFORM

CONSULTATION, DRAFTING AND PASSAGE OF REFORM

Following an earlier unsuccessful attempt at reform in 2006, the Revised Penal Code was enacted on 18 December 2014 after a drafting and consultation process that began in 2011. Whilst all of those involved in the process, including the government, parliament, civil society organisations and international NGOs, were in agreement from the outset as to the need for comprehensive reform, the sheer scale of the review process combined with the controversy that surrounded certain changes (like those to the sexual offence laws and abortion) and the absence of a fully inclusive and detailed consultation, led to a complex and, at times, discordant process.

Passage of Reform

Timeline from proposal to enactment



First Draft Bill

After the first failed attempt to review the 1886 Penal Code in 2006,¹⁸¹ discussions regarding a wholesale reform of the statute resumed in 2010. On 28 December 2010, parliament issued Resolution No. 46/2010 which assigned the entire review of the 1886 Penal Code to the First Commission of parliament.¹⁸²

The “First Commission” is the Commission of Constitutional, Human Rights and Legality Matters (*Comissão dos Assuntos Constitucionais, Direitos Humanos e Legalidade*) of parliament whose main areas of competence are assessing the constitutionality of bills of law and ensuring the exercise of individual rights and liberties enshrined in the Constitution.¹⁸³ At the time, the First Commission was composed of 18 members of parliament,¹⁸⁴ all of whom were members of the 7th legislature of Mozambique (2009-2014).¹⁸⁵

The government presented the First Draft Bill to the First Commission on 6 October 2011. The drafting process was opaque and it is not clear who drafted the First Draft Bill. The government did not previously discuss the First Draft Bill with civil society organisations or with any legal associations (such as the Mozambican Bar or the Association of Mozambican Judges).¹⁸⁶

The First Commission requested institutions and civil society organisations to contribute initial suggestions and comments, some of which were integrated. Contributions came from the Supreme Court, the Federal Prosecutor’s Office, the National Election Commission, the Mozambique Bar, the universities Eduardo Mondlane, ACIPOL and Unizambeze, and civil society organisations for the defence of sexual and reproductive rights.¹⁸⁷

181 *Historial e ponto de situação sobre a campanha pelos direitos humanos no Código Penal*, *Ibid.* n. 136.

182 In this legislature (7th legislature, 2009-2014), the First Commission had the following members: Teodoro Andrade Waty (president), Manuel Fernandes Pereira (rapporteur), Ernesto Cassimuca Lipapa, Ana Rita Geremias Sithole, Virgília Bernarda Neto Alexandre dos Santos Matabele, António José Amélia, Abel Ernesto Safrão, Edmundo Galiza Matos Júnior, Manuel Vasconcelos Estrela Manuel Maria, Luciano Augusto, Daniel João Matavele, Danilo Amarcy Ragú, José Carlos Rodrigues Palaço, Bartolomeu Afonso Baptista Muibo, Eduardo Augusto Elias, Feliz Avelino Sílvia and Hilário Uaite. Assembleia da República, *Projecto de Revisão do Código Penal*, 2012, p. 6.

183 See Article 85 of the Internal Rules of the Mozambican Parliament, dated 12 August 2013 (available at: <http://www.parlamento.mz/images/PDF/Legislacao/Regimento%20da%20Assembleia%20da%20Republica.pdf>).

184 Namely, Teodoro Andrade Waty (president), Manuel Fernandes Pereira (rapporteur), Ernesto Cassimuca Lipapa, Ana Rita Geremias Sithole, Virgília Bernarda Neto Alexandre dos Santos Matabele, António José Amélia, Abel Ernesto Safrão, Edmundo Galiza Matos Júnior, Manuel Vasconcelos Estrela Manuel Maria, Luciano Augusto, Daniel João Matavele, Danilo Amarcy Ragú, José Carlos Rodrigues Palaço, Bartolomeu Afonso Baptista Muibo, Eduardo Augusto Elias, Feliz Avelino Sílvia and Hilário Uaite.

185 Parliament of the Republic, Commission of Constitutional, Human Rights and Legality Matters. *Draft of Revised Penal Code (Assembleia da República, Comissão dos Assuntos Constitucionais, Direitos Humanos e de Legalidade, Projecto de Revisão do Código Penal)*, 2012, p. 6, available at: <http://www.acismoz.com/wp-content/uploads/2017/06/CODIGO%20Penal.pdf>, with a translation available at 4.d. of the Annex.

186 *Historial e ponto de situação sobre a campanha pelos direitos humanos no Código Penal*, *Ibid.* n. 136.

187 *Draft of Revised Penal Code*, *Ibid.* n. 185, p. 5; *Projecto de Revisão do Código Penal*, Comissão dos Assuntos Constitucionais, Direitos Humanos e de Legalidade.

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The First Draft Bill was met with opposition from civil society organisations, since it maintained a number of discriminatory provisions that had been part of the 1886 Penal Code, such as the ability of a rape offender to avoid prosecution by marrying their victim, the non-criminalisation of marital rape, and the criminalisation of the practice of “acts against nature.” An opinion expressing the concerns of civil society organisations was sent to parliament.¹⁸⁸

The First Draft Bill remained with the First Commission for over eight months due to the time needed to analyse the project given its scope and complexity.¹⁸⁹

Second Draft Bill

A new draft was issued on 1 July 2012 (‘Second Draft Bill’). No substantial changes had been made to the sexual offences provisions despite the concerns raised by civil society.

A formal consultation process was rolled out by the First Commission, which was a considerable and worthy undertaking. However, the process that was ultimately conducted appears limited and, according to observers, insufficient. Despite the importance and complexity involved with a process aimed at reforming the entire 1886 Penal Code, the formal consultation process undertaken by the First Commission seems to have been restricted to one meeting in the capital of every province, limited to a few hours each, within a period of nine days (between 1-9 August 2012).¹⁹⁰ Following the consultation meetings, the participants were given the opportunity to submit written comments on the Second Draft Bill.

The general sense and view of many of those who attended the consultation meetings was that the process was more a formality than a genuine attempt to comprehensively examine and deliberate the Second Draft Bill and garner support and suggestions.¹⁹¹

The limited time dedicated to each consultation meeting and the few consultations held inhibited the opportunity for meaningful analysis and debate. In addition, several human rights organisations were not invited to participate.¹⁹² It appears that, other than those meetings organised within the nine days in August 2012, there was no follow-up process or opportunity afforded to the public or civil society organisations to review and discuss further drafts.



“[The consultations] that took place in the city of Maputo, on 3 August 2012, excluded some civil society organisations, which were not invited [to participate]. [...] There was great dissatisfaction because questions were not allowed.”

AMMCJ, AMJ, CECAGE, Centro Terra Viva, Fórum da Terceira Idade, Fórum Mulher, MULEIDE and WLSA, 2012

¹⁸⁸ *Historial e ponto de situação sobre a campanha pelos direitos humanos no Código Penal*, *Ibid.* n. 136.

¹⁸⁹ *Verdade, Sequestros: penas pesadas só com a aprovação da proposta de revisão do Código Penal*, 17 October 2013 (available at: <http://www.verdade.co.mz/destaques/democracia/40965-sequestros-penas-pesadas-so-com-a-aprovacao-da-proposta-de-revisao-do-codigo-penal>).

¹⁹⁰ WLSA, *Nota sobre a revisão do Código Penal*, (available at: <http://www.wlsa.org.mz/nota-sobre-a-revisao-do-codigo-penal/>).

¹⁹¹ *Nota sobre a revisão do Código Penal*, *Ibid.*

¹⁹² *Nota sobre a revisão do Código Penal*, *Ibid.* n. 190.

As described more fully in the ‘Drivers for Reform’ section, despite the shortcomings of the consultation process, civil society organisations actively engaged and advocated their positions.¹⁹³

The consultation process was also met with scepticism by the Mozambican population. The Public Integrity Centre, a civil society organisation focused on transparency, anti-corruption and political integrity, expressed concerns regarding the delays in the approval of the reforms and the repetition of previous phases of the process. In particular, it first noted that, during the first attempt at reform, UTREL had already prepared several drafts, which seemed to have been ignored.¹⁹⁴ Considering that many months had passed between the issuing of the First and Second Draft Bills, and that only once the latter had been prepared was a formal consultation process carried out, doubts were raised as to whether this process was indeed a genuine attempt to generate public discussion.¹⁹⁵

The absence of a largescale and comprehensive public consultation process may have contributed to a lack of general understanding amongst the public about the Revised Penal Code changes and the necessity for further reform.

The General Approval, Protest and Campaigns

Under Mozambican law, a bill needs to be approved on an initial vote, called “*general approval*”, in which the fundamental principles and general structural organisation of the project is analysed and voted upon. The detailed discussion of specific provisions takes place at a second stage of approval, the “*specific approval*.”¹⁹⁶

The process of approving the Second Draft Bill in the general approval stage formally began on 16 December 2013 when Dr. Teodoro Waty, the President of the First Commission, presented the Second Draft Bill to parliament. Although there was no specific discussion about sexual offences, Dr. Waty focused part of his presentation on abortion, emphasising the idea that life is protected from the moment of conception and reiterating that the draft legislation still criminalised abortion.¹⁹⁷ This is despite the fact that the Second Draft Bill already contained provisions allowing for abortion during the first 12 weeks of pregnancy and in several other circumstances after that, as was later adopted in the final version of the Revised Penal Code.¹⁹⁸

193 Interview with representatives of the Mozambican Association of Women in Legal Careers – AMMCJ, 3 May 2019.

194 Deutsche Welle, *Consulta pública do Parlamento não agrada sociedade civil*, 7 August 2012 (available at: <https://www.dw.com/pt-002/consulta-p%C3%BAblica-do-parlamento-mo%C3%A7ambicano-n%C3%A3o-agrada-sociedade-civil/a-16149333>).

195 Verdade, *Sequestros: penas pesadas só com a aprovação da proposta de revisão do Código Penal*, 17 October 2013 (available at: <http://www.verdade.co.mz/destaques/democracia/40965-sequestros-penas-pesadas-so-com-a-aprovacao-da-proposta-de-revisao-do-codigo-penal>).

196 Law No. 6/2001, as modified by Law No. 6/2005, Article 93.

197 Assembleia da República, *Acta da 15a Sessão Plenária*, 16 December 2013, pp. 76-78, available at 2.a. of the Annex.

198 *Acta da 15a Sessão Plenária*, *Ibid.*

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Dr. Waty's presentation followed the general position of the Mozambican government at the time, which allowed exceptions to the crime of abortion but continued to characterise it as a crime.¹⁹⁹ Assuming an extreme position with regards to abortion – whether completely criminalising or decriminalising it – was seen as risky.²⁰⁰ The government's intermediate position and Dr. Waty's attempt to minimise the modifications in the Penal Code reflect the controversial nature of the topic in Mozambican society.



Teodoro Waty, President of the First Commission, 2013

"Arguments favourable to the criminalisation of abortion weigh heavy on the Legislator, since the law's protection to human life arises in the moment the new being is created, [as] the egg is fertilized [...] The Project determines the maintenance of the protection of the human being in formation, establishing abortion as a crime [...]"

The Project decriminalises the abortion performed by a doctor or other health professional authorized to perform it, in a health care facility and with the pregnant woman's consent."

The Second Draft Bill was then approved by parliament at the general approval vote on 17 December 2013.²⁰¹

The general approval process of the Second Draft Bill does not seem to have generated much controversy within parliament but triggered a significant and very effective reaction from domestic civil society. The backlash from civil society was the result of the evident shortcomings present in the Second Draft Bill, which had not incorporated all of the suggestions made by civil society and others, and still included, amongst other flaws, the possibility that a perpetrator of rape could avoid prosecution by marrying their victim and a very limited definition of rape. The Second Draft Bill had removed Articles 70 and 71, which had provided for the application of security measures for the "practice of acts against nature", and thus no longer criminalised consensual same-sex sexual acts.



Platform for Human Rights in the Penal Code, 2014

"(...) We highlight the fact (...) that the rhetoric of culture and tradition has been used to continue to perpetrate human rights violations, especially with respect to the rights of women,

girls and children. Culture has several positive aspects to be preserved, but it also include beliefs and practices that violate (...) human rights."

¹⁹⁹ *Manual de Direito Criminal Moçambicano*, Ibid. n. 40.

²⁰⁰ *Manual de Direito Criminal Moçambicano*, Ibid. n. 40.

²⁰¹ Online Noticias, *Na generalidade: aprovado Código Penal* (available at: <http://www.jornalnoticias.co.mz/index.php/politica/8631-na-generalidade-aprovado-codigo-penal.html>) (last visited on 7 January 2019).

The Revised Draft and the Specific Approval

The concerted efforts led by the Platform resulted in the First Commission revising the Second Draft Bill and issuing a new draft ('Third Draft Bill') that addressed a number, but not all of the, concerns raised. The Third Draft Bill, even though still criticised by civil society organisations, was the draft that was ultimately approved by parliament under the specific approval process.

The Third Draft Bill was issued by the First Commission on 28 April 2014, shortly after the protest march organised by civil society organisations in Maputo on 20 March 2014. The march had a direct impact on the Third Draft Bill, since after meeting with civil society organisations and listening to their concerns, we understand from observers that Hon. Macamo worked within parliament behind the scenes to make sure that changes were reflected in the Third Draft Bill.²⁰²

In addition to addressing some of the specific concerns around the sexual offences provisions, the Third Draft Bill also incorporated and mirrored some substantive provisions from the Domestic Violence Law but also extending these to male victims.²⁰³ This generated a strong reaction from women's rights groups that saw this move as an attempt to weaken the victories achieved with the enactment of the Domestic Violence Law and dismantle the protections afforded to female victims of domestic violence.²⁰⁴ According to the Platform, this was a setback given that it impacted the unity of the Domestic Violence Law and considered men as also being potential victims.²⁰⁵ The inclusion of such provisions also created real uncertainty in their enforcement, since the Third Draft Bill did not expressly revoke or supersede the Domestic Violence Law. The Platform argued that these changes were "*against the principle of legal stability.*"²⁰⁶

Furthermore, the Third Draft Bill, whilst considered as an advance in relation to the initial drafts, still did not appropriately address a number of aspects:²⁰⁷

- Not mentioning sexual orientation as a ground for a discrimination offence,
- The provisions regarding domestic violence overlapped and potentially undermined the application the Domestic Violence Law,
- Failing to regulate rape in accordance with the seriousness of the physical and emotional damage it causes to victims (e.g., aggravation of penalties), and
- Inadequacies in the definition of the crime of rape of a child, since it only covered children under 12 years old.

²⁰² *Historial e Ponto de Situação sobre a Campanha pelos Direitos Humanos no Código Penal*, *Ibid.* n. 136.

²⁰³ WLSA, *Nota sobre a versão do Código Penal de 28 de Abril e da Adenda de 30 de Abril de 2014*, 11 May 2014 (available at: <http://www.wlsa.org.mz/nota-sobre-a-versao-do-codigo-penal-de-28-de-abril-e-da-adenda-de-30-de-abril-de-2014/>).

²⁰⁴ *Nota sobre a versão do Código Penal de 28 de Abril e da Adenda de 30 de Abril de 2014*, *Ibid.*

²⁰⁵ *Nota sobre a versão do Código Penal de 28 de Abril e da Adenda de 30 de Abril de 2014*, *Ibid.* n. 203.

²⁰⁶ *Nota sobre a versão do Código Penal de 28 de Abril e da Adenda de 30 de Abril de 2014*, *Ibid.* n. 203.

²⁰⁷ *Plataforma de Luta Pelos Direitos Humanos no Código Penal, Carta à Presidente da Assembleia da República*, 5 June 2014, available at 3.a. of the Annex.

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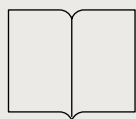
Despite the continued opposition from civil society, the Third Draft Bill was approved under the specific approval process on 11 July 2014.²⁰⁸ The impending general election in October 2014²⁰⁹ and the end of parliament session, added urgency to the approval of the Third Draft Bill and may have been a factor in the rushed passage of the legislation.

After its parliamentary approval, the Third Draft Bill was sent to President Armando Guebuza for signature.

The Presidential Veto

The Third Draft Bill was vetoed by the President on the grounds that it still presented significant human rights and legality concerns. The Platform had continued with its efforts to prevent the Third Draft Bill from being enacted and had turned its attention to the President.

After the specific approval of the Third Draft Bill in parliament, the Platform sent a letter to President Guebuza setting out the shortcomings of the Third Draft Bill and urging him to veto it due to the unconstitutionality of some provisions.²¹⁰



Platform for Human Rights in the Penal Code, 2014

"The protection of sexual dignity presupposes the existence of a solid legal and criminal system in order to protect the victims and punish the perpetrators of sexual offences. It is necessary to overcome the ideology based on paradigms

of male superiority or moralist conceptions, and we acknowledge that the legislator of the new Penal Code has tried to do so. However, many aspects that put the legal and social dimension of sexual dignity [...] at risk persist [...]."

Upon receipt of the Platform's manifesto, President Guebuza requested opinions from the Attorney General and the Ministry of Justice on the potential limitations of the Third Draft Bill, specifically requesting them to consider the observations of civil society organisations and Amnesty International (mentioned because of its intense campaigning against the provisions that violated human rights).²¹¹

On 17 October 2014, the Attorney General's office sent an opinion to President Guebuza examining all provisions that could be unconstitutional in the Third Draft Bill. Regarding sexual offences, the opinion described all potential shortcomings of the draft. Some examples are below.

²⁰⁸ Law No. 6/2001, as modified by Law No. 6/2005, Article 94.

²⁰⁹ Election Guide, *Republic of Mozambique* (available at: <http://www.electionguide.org/elections/id/2327/>).

²¹⁰ Plataforma de Luta Pelos Direitos Humanos no Código Penal, *Carta ao Presidente da República de Moçambique*, 6 August 2014, available at 3.b. of the Annex.

²¹¹ Procuradoria Geral da República, *Parecer No. 16/CT/PGR/2014*, 17 October 2014, p. 2, available at 2.f. of the Annex.

- Establishing different crimes and sanctions for sexual offences against children under 12 and 16 years old, despite all human rights treaties on the matter defining children as people under 18 years of age. Despite noting this, the Attorney General did not conclude that these provisions were unconstitutional, indicating that they were within the breadth of the legislators' discretion and that other countries had adopted similar crimes in their legal systems and legislation,²¹² stating that it represented “a choice of the legislator that fits the majoritarian position adopted worldwide”,²¹³
- Failing to refer to sexual orientation in the crime of discrimination, which could be deemed unconstitutional. The Attorney General stopped short of recommending an amendment to the provision to include specific reference to sexual orientation-based discrimination.²¹⁴ He explained that “[the failure to include said provision] may amount to unconstitutionality by omission due to article 18 of the Constitution (International Law), [but] said [category of] unconstitutionality does not exist in the Mozambican constitutional/legal system, thus it cannot be recognized by the Constitutional Council.”²¹⁵ This position highlights the fact that international commitments were taken into account during the reform process.



“In attention to the reports from the Attorney General and the Ministry of Justice and the comments from civil society organisations and from Amnesty International (...), I understand that, even though there is no unconstitutionality, the bill in hand has raised [constitutionality] concerns (...)”

President Guebuza – Veto Message,
October 2014

The Vice-Minister of Justice, Alberto Nkutumula, also sent an opinion to the President on 7 October 2014, stating that many provisions that “*promote and protect the rights of ‘sexual minorities’[...]*” have been approved elsewhere, including by the African Commission on Human and Peoples’ Rights (which approved a resolution condemning all acts of violence and persecution based on sexual orientation in 2014),²¹⁶ and acknowledged that the failure to include sexual orientation as one of the bases of the crime of discrimination was potentially unconstitutional.²¹⁷ However, the Vice-Minister did not state that the provisions on sexual orientation were unconstitutional.²¹⁸ It is unclear what drove such a conclusion.

President Guebuza vetoed the Third Draft Bill on 24 October 2014.

²¹² Parecer No. 16/CT/PGR/2014, *Ibid.*

²¹³ Parecer No. 16/CT/PGR/2014, *Ibid.* n. 212.

²¹⁴ Parecer No. 16/CT/PGR/2014, *Ibid.* n. 212.

²¹⁵ Parecer No. 16/CT/PGR/2014, *Ibid.* n. 212.

²¹⁶ African Commission on Human and Peoples’ Rights, 275 Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, adopted at the 55th Ordinary Session in April and May 2014 (available at: <https://www.achpr.org/sessions/resolutions?id=322>).

²¹⁷ Ministério da Justiça, Parecer relativo à Lei de Revisão do Código Penal, 7 October 2014, available at 2.d. of the Annex.

²¹⁸ Parecer relativo à Lei de Revisão do Código Penal, *Ibid.*

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The main concerns presented by President Guebuza in his veto message were the following:²¹⁹

- “Potential violation of the equality principle under Article 35 of the Constitution of the Republic”²²⁰ by Articles 223 (which demands that a victim of rape denounce the crime to the authorities for the perpetrator to be prosecuted) and 243 (crime of discrimination, which does not include the criminalisation of discrimination based on sexual orientation);
- “Potential violation of children’s rights under Article 47 of the Constitution of the Republic”²²¹ by Articles 219 (which enhances the penalties for rape of minors under 12 years old) and 220 (crime of sexual acts with minors, which only considers children up to 16-years old as “minors”);
- “Potential violation of the right to life under Article 40 of the Constitution of the Republic”²²² by the language of Articles 218 (crime of rape) and 222 (aggravating circumstances);
- “Potential violation of the gender equality principle under Article 36 of the Constitution of the Republic”²²³ by the incorporation of concepts from the Domestic Violence Law.

The President’s direct reference to the concerns expressed by local civil society organisations and Amnesty International illustrates that the pressure exerted by those groups was an important factor during the reform process. The opinions expressed by the Ministry of Justice and of the Attorney General also suggest that a potential violation of international commitments may have influenced the President’s decision to veto the Third Draft Bill, especially since the Attorney General’s opinion did not point out any unconstitutionality, but did mention the possibility of the Third Draft Bill representing violations to international commitments assumed by Mozambique.

²¹⁹ List only includes matters related to sexual offences and related topics. We did not have access to the underlying documents that make the case for the unconstitutionality of the provisions, only to the memorandum prepared by the Commission rebuking such arguments and the veto message, which does not develop the arguments for unconstitutionality; Comissão de Assuntos Constitucionais, Direitos Humanos e Legalidade, Parecer n. 33/14, de 24 de novembro de 2014, relativo ao Reexame da Lei de Revisão do Código Penal, 24 November 2014, available at 2.b. of the Annex.

²²⁰ Presidente Armando Guebuza, *Mensagem de veto*, 24 October 2014, available at 2.e. of the Annex.

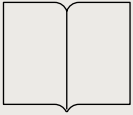
²²¹ *Mensagem de veto*, *Ibid.*

²²² *Mensagem de veto*, *Ibid.* n. 220.

²²³ *Mensagem de veto*, *Ibid.* n. 220.

Enactment and Entry into Force

The First Commission rejected all constitutionality-related arguments raised by President Guebuza in a memorandum addressed to the President of the parliament on 24 November 2014.²²⁴



First Commission of the Mozambican Parliament, 2014

“(...) the alleged unconstitutionality of the provisions of the penal code bill is unsubstantiated, from this Commission’s perspective, since the majority of the solutions proposed [by

the penal code bill] are the development and materialisation of constitutional rights.”

The Presidential veto was subsequently overruled by a super-majority vote in parliament on 28 November 2014, and President Guebuza signed the Third Draft Bill into law on 18 December 2014.²²⁵ The Revised Penal Code entered into force on 1 July 2015.

²²⁴ Parecer n. 33/14, de 24 de novembro de 2014, relativo ao Reexame da Lei de Revisão do Código Penal, *Ibid.* n. 219.

²²⁵ RTP, *Parlamento moçambicano contraria veto presidencial* (available at: https://www.rtp.pt/noticias/mundo/parlamento-mocambicano-contraria-veto-presidencial-e-aprova-novo-codigo-penal_n785825).



KEY CHANGES TO THE SEXUAL OFFENCES LAWS

KEY CHANGES TO SEXUAL OFFENCES LAWS

As set out above, whilst the Revised Penal Code made major advances, it did not result in a sexual offences framework that was fully in accordance with civil society's expectations nor did it fully represent contemporary good practice. Some of the critical deficiencies include the lack of a statutory definition of consent, the inclusion of domestic violence provisions that overlapped with the standalone Domestic Violence Law, the retention of some outdated provisions, such as the requirement that a victim of rape denounce the crime to the authorities for the perpetrator to be prosecuted, and the requirement that violence is present for an act to be considered "indecent assault", and a lack of clarity on what constituted certain sexual offences. However, important changes were achieved. The reforms resulted in greater gender neutrality, the adoption of a broader definition of rape, the establishment of new and more appropriate contextual factors and punishments for rape and sexual violence against children, and the decriminalisation of adult consensual same-sex intimacy. Some of these key changes are outlined below. These fall within the new chapter of the Revised Penal Code dedicated to sexual offences now entitled "*Crimes against sexual freedom*," instead of the previous outmoded title of "*Crimes against honesty*."

Practice of "Acts Against Nature"

The Revised Penal Code decriminalised private, consensual sexual conduct between adults of the same sex by removing the provisions contained in Articles 70 and 71 of the 1886 Penal Code.

Rape

The Revised Penal Code criminalises rape in Article 218, including marital rape.

The offence of "*rape*" is gender-neutral and now includes both non-consensual vaginal and anal penetration, but it does not cover other forms of penetration, such as oral sex or the use of digits or objects, which are covered under the offence of "*indecent assault*." Limiting the offence in this way does not ensure comprehensive and non-discriminatory protection for victims of sexual violence and to a large extent does not accurately capture the realities of sexual violence in the lives of women, men or children.

Rape carries a penalty of imprisonment of two to eight years, as it did in the 1886 Penal Code, unless "*special aggravating factors*" are present. In the presence of a "*special aggravating factor*", the penalty of imprisonment increases from eight to 12 years.²²⁶ The minimum penalty of two years is low when compared to other

²²⁶ Revised Penal Code, *Ibid.* n. 122, Articles 218, 222 and 61 of the Revised Penal Code.

countries,²²⁷ but otherwise the penalties appear to be generally in line with contemporary standards.²²⁸

Certain “*special aggravating factors*” are applicable to all sexual offences in the Revised Penal Code, which include the following circumstances:

- (i) the perpetrator is:
 - a) an ancestor, adoptive parent or sibling of the victim,
 - b) in a position of power and authority in relation to the victim, including a guardian, teacher, religious authority or civil servant, or
 - c) a domestic servant of the victim or his or her family,
- or (ii) the offence results in the victim contracting a sexually transmitted disease.

All of these aggravating factors were already present in the 1886 Penal Code and carry the same consequence of increasing the penalty applied.

The Revised Penal Code established new “*special aggravating factors*”:

- i. if the perpetrator uses or threatens to use a firearm or other weapon to commit the offence;
- ii. if the perpetrator is a member of the police, armed forces, private security or a paramilitary organisation;
- iii. if the offence results in pregnancy; or
- iv. if the offender transmitted HIV/AIDS to the victim.²²⁹

However, the crime of rape still requires that a victim denounce the crime to the authorities for the perpetrator to be prosecuted,²³⁰ which means that a victim has to bring a complaint to the authorities and pursue a prosecution, as opposed to only reporting the crime to the police. President Guebuza had signalled that this provision

²²⁷ Minimum penalties for rape in Kenya is of ten years, the United Kingdom is of eight years, in France is of 15 years, in the Netherlands of 12 years, and in Brazil is of six years. See the Kenya Sexual Offences Act (available at: www.kenyalaw.org), CPS, *Rape and Sexual Offences - Chapter 19: Sentencing* (available at: <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-19-sentencing>), the Brazilian Penal Code (available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/del2848compilado.htm), Service Public, *Viol commis sur une personne majeure* (available at: <https://www.service-public.fr/particuliers/vosdroits/F1526>), the Dutch Criminal Code (available at: http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafrecht_ENG_PV.pdf).

²²⁸ Human Dignity Trust, *Good Practice in Human Rights Compliant Sexual Offences Law in the Commonwealth*. 2019.

²²⁹ Revised Penal Code, *Ibid.* n. 122, Article 222. Article 222 sets forth “*special aggravating factors*.” While each of the aggravating factors may be found in relation to any sexual offence, these specifically mention rape and, accordingly, are not applicable to other sexual offences in the Penal Code.

²³⁰ Revised Penal Code, *Ibid.* n. 122, Article 223.

KEY CHANGES TO SEXUAL OFFENCES LAWS

was a potential violation of equality under the Constitution.²³¹ The First Commission defended this provision by stating that it protected the interest and the honour of the victim, as well as the honour of the family,²³² and it did not mention or address the great number of sexual offences that remain unreported in Mozambique.

Indecent Assault

The Revised Penal Code did not alter the provision of the 1886 Penal Code that criminalised non-penetrative and non-vaginal penetrative assault under the offence of “*indecent assault*.”²³³ “Indecent assault” is again defined as an act of “*violence*” against the victim so that the perpetrator satisfies his or her “*carnal passions*” or for “*another reason*.” The Revised Penal Code does not define “*indecent*” or “*modesty*,” and the offence remains gender neutral.

The offence carries a penalty range of two to eight years imprisonment in cases in which the victim is over 16 years old.

The crime of indecent assault only applies where the offender uses violence, which effectively excludes an array of sexual crimes committed, for instance, through intimidation coercion, intoxication or other cases where there is a lack of consent. Importantly, the requirement of violence as part of the *actus reus* continues to leave significant lacuna in the law protecting victims of sexual assaults. If an assault falls short of rape and is not accompanied by violence, there is no specific sexual offence that covers the conduct. This is a major shortcoming of the Revised Penal Code that should have been reformed.

Offences against Modesty

The Revised Penal Code retained and did not alter the 1886 Penal Code provision that criminalised “*public offences against modesty*.”²³⁴ The offence covers acts such as exhibitionism, indecent exposure or masturbation in a public place. The offence remains gender-neutral and carries a penalty of imprisonment of up to six months or a fine. The Revised Penal Code does not define “*modesty*.”

Portugal and Brazil, two civil law Portuguese speaking countries that share with Mozambique historical ties with Portuguese institutions, have similar provisions in their penal codes, with the penalties in such countries being higher than those in Mozambique. Portugal punishes the offence with a penalty of imprisonment of up

²³¹ *Mensagem de veto*, *Ibid.* n. 220.

²³² *Parecer n. 33/14, de 24 de novembro de 2014, relativo ao Reexame da Lei de Revisão do Código Penal*, *Ibid.* n. 219.

²³³ Revised Penal Code, *Ibid.* n. 122, Article 221. A literal translation of this crime (“*atentado ao pudor*”) is an “*attack or assault against modesty*.” “*Indecent assault*” is the equivalent crime in most other jurisdictions. *Parecer n. 33/14, de 24 de novembro de 2014, relativo ao Reexame da Lei de Revisão do Código Penal*, *Ibid.* n. 219.

²³⁴ Revised Penal Code, *Ibid.* n. 122, Article 225.

to six months or a fine,²³⁵ and Brazil punishes the offence with a penalty of imprisonment of between three months and one year or a fine.²³⁶

Child Sexual Offences

With respect to sexual offences involving children, the Revised Penal Code imposes a new enhanced penalty of 20 to 24 years of imprisonment for “*rape of minors under 12 years old*.”²³⁷ The previous penalty was eight to 12 years.

The rape of a minor between the ages of 12 and 17 years old, as in the 1886 Penal Code, absent any aggravating factors carries the standard penalty of imprisonment (between two to eight years).

For cases of indecent assault in which the victim is under 16 years old, the Revised Penal Code maintained the statutory offence of “indecent assault,” identical to the 1886 Penal Code. This offence does not require the perpetrator to use violence and the offence carries a penalty of two to eight years of imprisonment.²³⁸

The differing levels of protection for children based on age was strongly criticised by civil society groups and is out of step with international conventions, such as the CRC.²³⁹ President Guebuza had also expressed that there was a potential violation of child rights under the Constitution.²⁴⁰ The First Commission defended the provisions on the basis that:

- Regarding Article 219, medical science recognised differences between children of different ages and many countries adopted similar provisions; and
- Establishing a more severe sanction for the rape of children under 16 was not a violation of the Constitution.²⁴¹

Ultimately, the Revised Penal Code failed to address these distinctions, ensuring that there was a comprehensive framework that protected all children in all respects.

Non-penetrative sex acts with minors under 16 years old are criminalised in Article 220 of the Revised Penal Code, which addresses any acts of a sexual nature involving minors. The offence of “*sexual acts with minors*,” a new crime in the Revised Penal Code, carries a penalty of imprisonment of two to eight years.

²³⁵ Portuguese Penal Code, Article 170 (available at: http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?artigo_id=109A0170&nid=109&tabela=leis&pagina=1&ficha=1&so_miolo=&nversao=#artigo).

²³⁶ Brazilian Penal Code, Article 233 (http://www.planalto.gov.br/ccivil_03/decreto-lei/del2848compilado.htm).

²³⁷ Revised Penal Code, *Ibid.* n. 122, Article 219.

²³⁸ Revised Penal Code, *Ibid.* n. 122, Article 221, paragraph 2.

²³⁹ Article 1 of the CRC.

²⁴⁰ *Mensagem de veto*, *Ibid.* n. 220.

²⁴¹ *Parecer n. 33/14, de 24 de novembro de 2014, relativo ao Reexame da Lei de Revisão do Código Penal*, *Ibid.* n. 219.

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The new offence of “*use of minors in pornography*” in the Revised Penal Code criminalises the act of using children in pornography across a variety of media, including photographs, films and recordings. This offence also criminalises the possession, acquisition, distribution, import, export or exhibition of pornographic materials containing children. The offence carries a penalty of imprisonment of two to eight years.²⁴²

All “special aggravating factors” can be applied to sexual offences perpetrated against minors.

The offence of “*corruption of minors*” criminalises “*habitual*” facilitation of “*debauchery*” of any child under 18 years old, while the 1886 Penal Code sanctioned corruption of people under 21 years old in this offence. The offence carries a penalty of imprisonment for three months to one year, in addition to a fine, as it did in the 1886 Penal Code. However, the penalty of suspension of political rights was eliminated in the new code.²⁴³

The procurement of minors is sanctioned in the same way as the procurement of adults. Article 227 of the Revised Penal Code criminalises “*prostitution-related crime*.” Prostitution-related crimes include the promotion and facilitation of prostitution for profit. The offence of “*prostitution-related crimes*” is gender neutral and carries a penalty of imprisonment of one to two years, unless the offence is committed under specific enumerated circumstances. In such cases, the offence carries a penalty of imprisonment for two to eight years. The Revised Penal Code has enhanced penalties when the offence is carried out by means of violence, threat or fraud, if the victim has a psychological incapacity or is otherwise “*especially vulnerable*,” if the perpetrator is an authority figure, such as a teacher, family member or guardian, or if the victim is otherwise dependent on the perpetrator economically.

Article 227 of the Revised Penal Code also provides that teachers who facilitate the prostitution of a minor will be suspended from the profession for a period of eight years, in addition to receiving the enhanced penalty of imprisonment for two to eight years.

Sexual Harassment

Article 224 of the Revised Penal Code criminalises various forms of sexual harassment, with different penalties applicable in different circumstances. In cases where the perpetrator promises a benefit of any kind, the penalty is a fine of up to 10 times the minimum monthly wage set by the Mozambique government. In cases where the perpetrator abuses a position of authority, including through the use of threats or coercion, the penalty is a fine of up to 20 times the minimum monthly wage. In cases where the perpetrator abuses a position of authority in the workplace, the penalty is a fine of 40 times the minimum monthly wage.

²⁴² Revised Penal Code, *Ibid.* n. 122, Article 226.

²⁴³ Revised Penal Code, *Ibid.* n. 122, Article 228.

Incest

Incest is not specifically addressed in the Revised Penal Code and, as in the 1886 Penal Code, is constructed through the inclusion of a “*special aggravating factor*” in Article 222, which remains unchanged. The failure to criminalise incest through a standalone provision is another shortcoming of the Revised Penal Code.

The Revised Penal Code also permits abortion in cases of pregnancy resulting from a sexual relationship between family members, including grandparents, parents (including adoptive parents) and siblings.²⁴⁴

Domestic Violence

The Revised Penal Code includes the following offences in its chapter on domestic violence:

- “*severe physical violence*” includes any violence that seriously affects the victim’s senses, speech or ability to work or procreate (penalty of imprisonment that varies according to the time the victim takes to recover, varying from eight to 24 months, as defined in Article 171, plus a fine), causes a life-threatening disease or injury (penalty of imprisonment for two to eight years) or causes irreparable harm to the body (penalty imprisonment for two to eight years);²⁴⁵
- “*psychological harm*” includes threats or defamation (penalty of imprisonment for eight months to one year, plus a fine, or imprisonment for one to two years, plus a fine, if the threat was made using a dangerous instrument);²⁴⁶
- “*moral harm*” includes defamation in any publication (penalty of imprisonment for six months to one year, plus a fine);²⁴⁷
- “*harm to assets*” includes the damage or loss of objects, animals or other assets (penalty of 50 to 100 hours of community service);²⁴⁸ and
- “*social isolation*” includes preventing the victim from moving freely or forcing him or her to remain in one location (penalty of imprisonment for a minimum of one year, plus a fine).²⁴⁹

The Revised Penal Code provides that abuse of a spouse or unmarried partner is punishable by imprisonment for one to two years. In cases where another crime is perpetrated alongside the abuse, the penalties are enhanced.²⁵⁰

244 Revised Penal Code, *Ibid.* n. 122, Article 168, paragraph 1 (f).

245 Revised Penal Code, *Ibid.* n. 122, Article 246.

246 Revised Penal Code, *Ibid.* n. 122, Article 247.

247 Revised Penal Code, *Ibid.* n. 122, Article 248.

248 Revised Penal Code, *Ibid.* n. 122, Article 250.

249 Revised Penal Code, *Ibid.* n. 122, Article 251.

250 Revised Penal Code, *Ibid.* n. 122, Article 246.

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Article 254 of the Revised Penal Code provides for enhanced penalties to be applied if “*special aggravating circumstances*” are present. These “*special aggravating circumstances*” include crimes committed against pregnant or disabled victims, offences that occur in a public place or in the presence of children, cases where the perpetrator has a history of violent behaviour or if the victim is unable to ask for and receive help.

The Revised Penal Code reproduced most of the articles of the Domestic Violence Law using the same wording. In some cases, it established harsher sanctions, such as for the crime of moral harm. The Revised Penal Code, however, did not include the specific procedural rules and specific remedies established by the Domestic Violence Law, which many suggest hampers the protection of victims.

Most importantly, the offences in the Revised Penal Code are gender-neutral, while the Domestic Violence Law protects women only. The gender-specific aspect of the law had been seen as a major victory for women’s rights organisations in Mozambique. The codification of the substantive Domestic Violence Law in the Revised Penal Code was considered by much of domestic civil society as a setback.²⁵¹ The First Commission responded to these criticisms by stating that the Revised Penal Code promoted gender equality by establishing that men are also victims of domestic violence.²⁵²

Further, the existence of different legislation governing these crimes has created confusion in their application. As the most recent statute, the Revised Penal Code should ordinarily take precedence. On the other hand, the Domestic Violence Law is a specific statute and so should trump the overlapping provisions of the Revised Penal Code. In this context, there is some anecdotal evidence that judges are hesitant to apply the Domestic Violence Law, and this reluctance means that the specific procedural rules and remedies which are available to protect women are not being applied since they were not incorporated into the Revised Penal Code.²⁵³ Proper streamlining of these different provisions is necessary, in order to ensure equal protection of male and female victims, enable procedural rules to be applied in all cases, and foster proper data collection to ensure that the disproportionate impact of domestic violence on women is recorded and recognised, including to influence other measures to reduce and eliminate such violence.

²⁵¹ Carta à Presidente da Assembleia da República, *Ibid.* n. 208.

²⁵² Parecer n. 33/14, de 24 de novembro de 2014, relativo ao Reexame da Lei de Revisão do Código Penal, *Ibid.* n. 219.

²⁵³ Interview with Maria Arthur (Spokeswoman of WLSA Mozambique), *Ibid.* n. 98.

Abortion

The Revised Penal Code partially decriminalised abortion, permitting it in the following circumstances:

- Within the first 12 weeks of pregnancy, requiring only the consent of the woman,
- Within the first 16 weeks of pregnancy, in cases of rape or incest,²⁵⁴
- Within the first 24 weeks of pregnancy, in cases of severe foetal malformation,
- Without limitation of time, in case (i) of risk of death or irreversible damage to the physical or mental health of the woman, (ii) of an unviable foetus, or (iii) the abortion is recommended due to chronic or degenerative diseases.

Criminal Procedure

A vital aspect of the 1886 Penal Code reform that was not considered or included as part of the process that may have consequentially hindered its impact, was the fact that the Criminal Procedure Code was not part of the review process. This omission has generated inconsistencies in the criminal legal framework. For example, the Revised Penal Code established some alternative sanctions that were not foreseen in the Criminal Procedure Code and, as a result, could not be implemented. This issue was identified by the First Commission at the time the Revised Penal Code was approved:²⁵⁵



First Commission of the Mozambican Parliament, 2014

"It has been said that this Code cannot be adopted without a [Criminal Procedure] Code. Perhaps it will not be true that an important part, the most innovative [part], the alternative sanctions to prison will never be applied before

the approval of a new [Criminal] Procedure [Code]? [...] [We] will be missing another decisive [step] to the reform of the Mozambican penal regime."

²⁵⁴ Revised Penal Code, *Ibid.* n. 122, Article 168.

²⁵⁵ Parecer n. 33/14, de 24 de novembro de 2014, relativo ao Reexame da Lei de Revisão do Código Penal, *Ibid.* n. 219, p. 337.

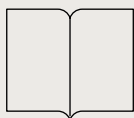


THE POST-REFORM ENVIRONMENT

THE POST-REFORM ENVIRONMENT

New Review of Revised Penal Code

The Revised Penal Code was a five-year endeavour culminating in its enactment in 2015. Yet, even before that process commenced in 2010, the 1886 Penal Code had been part of the law reform agenda since the mid-2000s. Despite this long journey, a review of the Revised Penal Code was almost instantaneously commenced by parliament as soon as it entered into force. According to official sources, the review was required to further develop the criminal law to ensure greater compliance with the Constitution and international human rights conventions.



The Review Bill, 2017²⁵⁶

"[A] revision inspired by the need to deepen and apply the fundamental principles embodied in the Constitution of the Republic and in other international and national instruments."

A number of observers have suggested that, in the end, the Revised Penal Code was approved in a rush, without in-depth analysis and debate. In part, the new review may have also been prompted by the criticisms levelled by domestic civil society and the President with respect to the shortcomings in the Revised Penal Code.²⁵⁷ In fact, some of the concerns raised by the Platform to President Guebuza, which led to the presidential veto, were arguably not adequately addressed by parliament. These same concerns do feature in the public drafts of the recent bill to review the Revised Penal Code.

In addition, the fact that the Criminal Procedure Code was not reformed together with the Revised Penal Code has also played a role in the need for a new review due to inconsistencies between the substantive and procedural law. This was a major flaw of the previous reform and it was imperative that Mozambique undertake a full and complete review of its criminal laws, including the Revised Penal Code, the Criminal Procedure Code and the sentencing law. The new review encompasses all parts of the substantive and procedural criminal law framework.

Draft revision bills have been published. The most recent draft is from December 2018 ('Review Bill').²⁵⁸ The Review Bill proposes some important reforms concerning sexual offences. Amendments to provisions related to abortion, rape, child pornography, early

²⁵⁶ Draft of Revised Penal Code, dated 6 September 2017, pp. 47-48, available at: <http://www.oam.org.mz/wp-content/uploads/2017/07/CODIGO-PENAL-Anteprojecto-1-de-Junho-de-2017.pdf>.

²⁵⁷ Draft of Revised Penal Code, dated 6 September 2017, *ibid.* p. 46. The explanatory notes state that the Supreme Court, Administrative Court, Mozambican Bar Association, National Association of Jurists, Human Rights League, Eduardo Mondlane Law School and other NGOs proposed changes to the Revised Penal Code, and that the review aims at making the Penal Code more precise, simplifying its language and standardising drafting among its provisions.

²⁵⁸ Draft of Review Bill, dated 21 December, 2018, available at 2.c. of the Annex. This version does not have explanatory notes.

marriage and domestic violence form part of the review. We have set out below the most relevant proposed changes.

Rape

The Review Bill further amends the definition of rape to include oral sex and the insertion of objects or body parts, both of which were important gaps in the Revised Penal Code.²⁵⁹

Child Pornography

The Review Bill expands and clarifies the conduct related to child pornography. For example, it includes a new article addressing the distribution, import, export and exhibition of child pornography without profits or intent to generate profits,²⁶⁰ as well as the acquisition, conservation or holding of such materials, including if solely for personal use.²⁶¹ The Review Bill aims to address any loopholes that the Revised Penal Code may have in this regard, by ensuring that any conduct related to either generating or distributing child pornography will be criminalised.

Child Marriage

The Review Bill criminalises child marriage in its Article 249, punishing adults who marry children under 18 years old (or 16 years old, provided the parents agree to the marriage). Any adult who is the legal guardian of the child also commits an offence which is punishable with the same sanctions.

Domestic Violence

The Review Bill removes provisions related to domestic violence offences, leaving these to be dealt with by the Domestic Violence Law only. This would allow for the Domestic Violence Law to become the main statute with respect to these issues, as defended by civil society organisations. Although this is a change advocated by domestic civil society groups, such a change will leave a lacuna in the equal legal protection of male victims of domestic violence that will need to be addressed.

Homicide Motivated by Gender, Sex, Sexual Orientation or Gender Identity

The Review Bill also addresses violence against women and LGBT people by defining all homicides motivated by the gender, sex, sexual orientation or gender identity of the victim as qualified homicide, as provided by Article 157 (which increases the sanction from 16- 10 years to 20-24 of imprisonment).²⁶²

259 Draft of Review Bill, *Ibid.* Article 197.

260 Draft of Review Bill, *Ibid.* n. 258, Article 208.

261 Draft of Review Bill, *Ibid.* n. 258, Article 208.

262 Draft of Review Bill, *Ibid.* n. 258, Article 157.

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Abortion

The Review Bill does not significantly alter the provisions related to abortion, but provides some clarity.²⁶³ There is, however, one setback in the revised provisions insofar as the Review Bill no longer decriminalises abortions performed after 12 weeks to prevent an irreversible harm to the woman's mental health, limiting the protection to a woman's physical health only.²⁶⁴

The Review Bill is expected to receive parliamentary approval by October 2019, before the general election which will be held in Mozambique on 15 October 2019.²⁶⁵ If the Review Bill does not pass before October, there are no guarantees that the next parliament will resume the initiative undertaken by the previous legislature.²⁶⁶ There is therefore again, a "race against the clock."²⁶⁷

Implementation

We have found no evidence or publicly available information to suggest that the government and/or parliament developed and rolled out a comprehensive implementation programme, including such areas as training of the criminal justice sector, education and awareness-raising. In fact, a considerable part of the population appear to be unaware that the 1886 Penal Code has been reformed.²⁶⁸ This significant gap has, to some extent, been filled by domestic civil society, which has undertaken awareness-raising and implementation projects to draw attention to the changes around sexual offences and the legalisation of abortion in particular.²⁶⁹ Nevertheless, this is no substitute for a state-led programme. We have been unable to ascertain why this is the case, but perhaps resource constraints and/or the new review of the Revised Penal Code may have hampered or deferred such implementation efforts. Importantly,

²⁶³ The Revised Penal Code has currently one provision that allows abortion within the first 12 weeks of pregnancy in case of risk of death or injury to the mother, and another one that simply allows abortion within the first 12 weeks. The proposed revised draft corrects such inconsistencies.

²⁶⁴ Draft of Review Bill, *Ibid.* n. 258, Article 166.

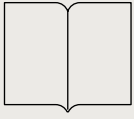
²⁶⁵ At the time of publishing this report, we have found no evidence that the Review Bill has been or will be imminently approved by parliament. In August 2019, publicly available sources indicate that some piecemeal but unrelated changes were made to the Revised Penal Code. These changes do not appear to have been part of the review process of the Revised Penal Code. See Club of Mozambique, *Revised Penal Code punishes violation of PES and State Budget rules with imprisonment – Mozambique*, 7 August 2019 (available at: <https://clubofmozambique.com/news/revised-penal-code-punishes-violation-of-pes-and-state-budget-rules-with-imprisonment-mozambique-138730/>); Moz News, *Mexer no celular do amigo ou família sem permissão passa a ser punido com pena de prisão em Moçambique*, 12 August 2019 (available at: <https://moznews.co.mz/2019/08/12/mexer-no-celular-do-amigo-ou-familia-sem-permissao-passa-a-ser-punido-com-prisao-em-mocambique/>).

²⁶⁶ Interview with Maria Arthur (Spokeswoman of WLSA Mozambique), *Ibid.* n. 98; Interview with Julania Langa (Senior Policy Advisor at IPAS), *Ibid.* n. 111; Interview with Katia Amado, Ivone Zilhão (Programme Director and Sexual and Reproductive Health Doctor at Pathfinder) and Maira Domingos (Coordinator for Sexual and Reproductive Health and Rights at Fórum Mulher), *Ibid.* n. 5; Interview with Hon. Antonio Niquice (member of the Mozambican parliament), *Ibid.* n. 128; Interview with Dr. Elísio de Sousa (lawyer and criminal law scholar), 3 May 2019; Interview with HDT, 3 May 2019.

²⁶⁷ Interview with Maria Arthur (Spokeswoman of WLSA Mozambique), *Ibid.* n. 98.

²⁶⁸ Interview with Katia Amado, Ivone Zilhão (Programme Director and Sexual and Reproductive Health Doctor at Pathfinder) and Maira Domingos (Coordinator for Sexual and Reproductive Health and Rights at Fórum Mulher), *Ibid.* n. 5.

²⁶⁹ Interview with Katia Amado, Ivone Zilhão (Programme Director and Sexual and Reproductive Health Doctor at Pathfinder) and Maira Domingos (Coordinator for Sexual and Reproductive Health and Rights at Fórum Mulher), *Ibid.* n. 5; Interview with Danilo Silva (Director at LAMBDA), *Ibid.* n. 98; *Canaries in the coal mines: an analysis of spaces for LGBTI activism in Mozambique*, *Ibid.* n. 91.



United Nations Human Rights Committee, 2013

“The State party should strengthen its efforts to prevent and combat gender-based violence in all its forms and manifestations, including by ensuring the effective implementation of the existing relevant legal and policy frameworks. It should conduct awareness-raising campaigns on the negative effects of domestic violence, inform women of their rights and existing mechanisms of

protection, and facilitate complaints from victims. The State party should further ensure that cases of domestic violence are thoroughly investigated, perpetrators are prosecuted and, if convicted, punished with appropriate sanctions, and that victims have access to effective remedies and means of protection, including an adequate number of shelters available in all parts of the country.”

there appears to be a general absence of effective legal and policy implementation in Mozambique. This issue was highlighted by the United Nations Human Rights Committee, in the context of the enforcement of the Domestic Violence Law.²⁷⁰

Another area that represents a major challenge for Mozambique is the monitoring and evaluation of the implementation of legislation. There is no evidence that there is a systematic collection and retention of records of the reporting or prosecution of sexual assaults or other sexual offences.²⁷¹ The collection of reliable data and statistics on sexual offences is essential for effective monitoring and enforcement. As a result, there is no ability to assess whether the Revised Penal Code is being applied as intended by lawmakers.

One example of the lack of reliable data collection is the data related to domestic violence complaints and criminal cases annually compiled by the Attorney General’s office. The numbers provided are not disaggregated by crime, and there are major fluctuations in the numbers from year to year, which suggests that the data collection and compilation processes may be incomplete and inaccurate.²⁷²

Positive Outcomes

Greater openness within and visibility of the LGBT community

The decriminalisation of consensual same-sex sexual acts has resulted in a greater openness for the LGBT community in Mozambique. Mozambicans have started discussing the topic more openly and some LGBT people have come out to society, ceasing to hide their sexual orientation and their relationships.²⁷³ The LGBT community is also now able to start discussing the implementation of their rights,²⁷⁴ and social acceptance is on the rise.

²⁷⁰ United Nations Human Rights Committee, 2013 Concluding Observations on the Initial Report of Mozambique, 19 November 2013, para. 10 (available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/MOZ/CO/1&Lang=En).

²⁷¹ See, for example, WLSA, *Relatório Anual de 2017*, *Ibid.* n. 6.

²⁷² Law No. 29/2009, *Ibid.* n. 63, Article 38.

²⁷³ Globalgayz, *Gay Mozambique*, June 2015 (available at: <https://www.globalgayz.com/gay-mozambique/>).

²⁷⁴ Interview with Danilo Silva (Director at LAMBDA), *Ibid.* n. 98.

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Despite Articles 70 and 71 of the 1886 Penal Code having never been enforced, the possibility of “special measures” was always a threat to the LGBT community in Mozambique. Decriminalisation removed this constant threat from the community, which has gone some way to facilitating LGBT acceptance by broader society.

Before the reform, same-sex intimacy was considered taboo and was never mentioned. More recently, there has been an increase in public discussion and acceptance,²⁷⁵ and there has been an increase in LGBT work and activism in the country.²⁷⁶

Although broader society still does not encourage LGBT people to embrace their sexual orientation and express it freely,²⁷⁷ there have been some signs of progress. In Maputo, although there are still no LGBT clubs or bars, the community’s members have a social circle, and some establishments host LGBT nights.²⁷⁸ Overall, the decriminalisation of consensual same-sex conduct did not provoke a backlash, as some had predicted, and there are still no reports of flagrant or systematic violence against LGBT people. In this regard, Mozambique is an inspiring example for other African countries.²⁷⁹

Greater Awareness of Sexual Violence and Women’s Rights

The reform generated greater awareness among the general population with respect to sexual violence and women’s and children’s rights.

Even though such topics are still a main concern for civil society organisations, even after the reform, the general awareness of the population of women’s rights and the rights of children has increased, especially regarding domestic violence.²⁸⁰ This increased awareness has yet to be turned into action, since there has been little progress in reporting, charging and prosecuting sexual offences.²⁸¹

The broader definition of the crime of rape, adopted in the Revised Penal Code, brought awareness to the criminal status of forced anal intercourse. This crime is perceived as becoming more frequent, particularly with the use of sexual violence and where it is perpetrated by multiple offenders. With the Revised Penal Code, these actions, alongside forced oral intercourse or abuse with the use of objects (should they come to fruition as a result of the on-going review), are now clearly understood as crimes.²⁸²

²⁷⁵ *Gay Mozambique*, *Ibid.* n. 273.

²⁷⁶ *Canaries in the coal mines: an analysis of spaces for LGBTI activism in Mozambique*, *Ibid.* n. 91.

²⁷⁷ United Nations Human Rights Council, *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity: visit to Mozambique*, 17 May 2019.

²⁷⁸ *Gay Mozambique*, *Ibid.* n. 273.

²⁷⁹ Deutsche Welle, *Comunidade LGBT em Moçambique é discriminada?*, 12 December 2018 (available at: <https://www.dw.com/pt-002/comunidade-lgbt-em-mo%C3%A7ambique-%C3%A9-discriminada/a-46703995>). *Gay Mozambique*, *Ibid.* n. 273.

²⁸⁰ Interview with representatives of the Mozambican Association of Women in Legal Careers – AMMCJ, *Ibid.* n. 193.

²⁸¹ WLSA, *Relatório Anual de 2017*, *Ibid.* n. 6.

²⁸² Interview with Maria Arthur (Spokeswoman of WLSA Mozambique), *Ibid.* n. 98.

Safe Abortion

The right to abortion has gained some visibility after partial decriminalisation, even in Mozambique's rural areas. Although this awareness is mostly a product of the work of civil society organisations, the reform has allowed open discussions of the issue and outreach to a large number of women.²⁸³

Civil society organisations, such as IPAS, worked with the Ministry of Health of Mozambique in the drafting and issuing of protocols regulating the provision of safe abortion procedures in the country.²⁸⁴ Such regulations were only issued in 2017, which delayed the implementation of safe abortion facilities.²⁸⁵ The Ministry of Health and civil society organisations have been cooperating in the promotion of awareness about and availability of safe abortions.²⁸⁶

Moreover, civil society organisations are the main actors pushing for making safe abortion procedures available in Mozambique, since the Ministry of Health has budget restrictions.²⁸⁷ IPAS, for example, trains abortion providers and supports health systems to ensure the availability of high quality abortion services, in addition to promoting information to women about the subject.²⁸⁸ Pathfinder engages in similar practices, fostering awareness and the provision of safe abortion proceedings in the country.²⁸⁹

283 Interview with Katia Amado, Ivone Zilhão (Programme Director and Sexual and Reproductive Health Doctor at Pathfinder) and Maira Domingos (Coordinator for Sexual and Reproductive Health and Rights at Fórum Mulher), *Ibid.* n. 5.

284 Interview with Julania Langa (Senior Policy Advisor at IPAS), *Ibid.* n. 111.

285 Interview with Julania Langa (Senior Policy Advisor at IPAS), *Ibid.* n. 111; WLSA, *Aprovadas Normas Clinicas sobre Aborto Seguro*, 9 November 2017. Available at: <http://www.wlsa.org.mz/aprovadas-normas-clinicas-sobre-aborto-seguro/>

286 *Mozambique Country Report*, *Ibid.* n. 83, p. 17.

287 Interview with Julania Langa (Senior Policy Advisor at IPAS), *Ibid.* n. 111.

288 IPAS, *Our work* (available at: <https://www.ipas.org/our-work>).

289 Pathfinder, *Safe abortion care* (available at: <https://www.pathfinder.org/focus-areas/safe-abortion-care/>).



AREAS FOR ONGOING WORK

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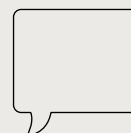
As described above, after the adoption of the Revised Penal Code, there appears to have been no specific plans or programmes put in place by the government or parliament to ensure effective implementation of the changes, such as training of the judiciary, the police or government officials, or the rolling out of a public education programme. Raising awareness in the general population, along with other public policies aimed at enforcing the Revised Penal Code (as discussed below), is an important task that Mozambique should undertake in order to accomplish the goal of meaningfully implementing the Revised Penal Code in a way that can foster real change to society. Awareness-raising could play a key role in increasing the number of victims reporting sexual offences, and in decreasing the amount of unsafe abortion procedures in the country. This should be addressed as a matter of priority.

The enforcement of the new provisions is also key for the Revised Penal Code to live up to its promise and not be merely a change on paper. This, however, appears to be highly dependent upon the result of the new review currently underway, which includes the reform of the Criminal Procedure Code.

Child Sexual Abuse

According to observers, there is still a pervasive lack of awareness among the population and among members of parliament with respect to what constitutes child abuse,²⁹⁰ and official statistics on the topic are not reliable.²⁹¹ Civil society organisations are seeking to rectify this, including as part of the review of the Revised Penal Code, their submissions on the shortcomings in relation to the protection of children.²⁹²

Another area of ongoing work is child sexual abuse in the school environment. The government of Mozambique implemented a “zero tolerance policy” for sexual harassment in schools, which required that schools establish a “Gender Office” to receive and investigate reports of sexual harassment. The “Gender Office” is required to protect the privacy of the victim and maintain strict confidentiality.²⁹³ Despite implementing a “zero tolerance policy,” sexual harassment in schools reportedly remains prevalent.²⁹⁴ In that regard, another shortcoming perceived by civil society organisations is that Article 224 of the Revised Penal Code does not explicitly include sexual harassment in the school environment.²⁹⁵



“In the past, everybody pushed for the government to understand that rape was an issue. The new trend now is children being sexually abused and people have a very vague idea of what child abuse is. That is why I understand we have a lot more work to do on this issue.”

Carlos Manjate,
Executive Director
at Rede CAME
(Organisation against
Sexual Abuse of Minors)

²⁹⁰ Interview with Carlos Manjate (Executive Director at Rede CAME), 3 May 2019.

²⁹¹ Interview with Carlos Manjate (Executive Director at Rede CAME), *ibid.*

²⁹² Interview with Carlos Manjate (Executive Director at Rede CAME), *ibid.* n. 290.

²⁹³ Super Técnica, *Contra o assédio sexual tolerância zero!* (available at: <http://www.supertecnica.co.mz/en/genero/assedio-sexual/>).

²⁹⁴ *Contra o assédio sexual tolerância zero!*, *ibid.*

²⁹⁵ Correspondence with Carlos Manjate (Executive Director at Rede CAME), 17 August, 2019.



"Most LGBTI people face stigma and discrimination inside the family. Family is the only support system an individual can get. Mozambique is different from the West, where there is a social security system; being cast out from the family means the person loses everything."

Danilo da Silva,
Executive Director
at LAMBDA, 2018

Domestic Violence

According to statements issued by civil society, six out of 10 women in Mozambique are victims of domestic violence, and domestic violence remains under-reported, despite the criminalisation of domestic violence in the Revised Penal Code and the Domestic Violence Law.²⁹⁶ Moreover, according to a 2016 report by the U.S. Department of State, a lack of economic and social alternatives also prevent women from leaving their abusers.²⁹⁷

The Mozambique Bar Association stated in 2017 that, despite the improvements brought by the Revised Penal Code with respect to the punishment of domestic violence, the Revised Penal Code has not contributed to the general prevention of domestic violence, as the penalties are too light.²⁹⁸

Recognition of LGBT People and Associations

Whilst overt acts of violence against LGBT people are rare in Mozambique,²⁹⁹ LGBT people do face discrimination, including in employment and in their social and personal lives, particularly in rural areas.³⁰⁰ Even though the Employment Law protects LGBT people from discrimination in the workplace, such discrimination remains a reality for many and it is not uncommon for LGBT people to hide their sexual identity in the workplace.³⁰¹ Public displays of affection between people of the same-sex are frowned upon and LGBT people face rejection and discrimination by their families on account of their sexual orientation.

Further, whilst the Constitution provides for access to health services for every citizen,³⁰² LGBT people remain cautious in approaching health facilities.³⁰³

²⁹⁶ US Department of State, 2016 Country Reports on Human Right Practices: Mozambique (available at: <https://www.state.gov/reports/2016-country-reports-on-human-rights-practices/mozambique/>); Club of Mozambique, Domestic violence: worrying levels in Mozambique (available at: <http://clubofmozambique.com/news/domestic-violence-worrying-levels-mozambique/>).

²⁹⁷ 2016 Country Reports on Human Right Practices: Mozambique, *Ibid.*

²⁹⁸ Correio da manhã, *Violência doméstica* (available at: <http://www.correiodamanhamoz.com/violencia-domestica/>).

²⁹⁹ Global Legal Monitor (Library of Congress), *Mozambique: New Penal Code Removes Colonial Era Dispositions Against Homosexuality* (available at: <http://www.loc.gov/law/foreign-news/article/mozambique-new-penal-code-removes-colonial-era-dispositions-against-homosexuality/>).

³⁰⁰ *Open but Closed*, *Ibid.* n. 101.

³⁰¹ *Canaries in the coal mines: an analysis of spaces for LGBTI activism in Mozambique*, *Ibid.* n. 91.

³⁰² Constitution of Mozambique, *Ibid.* n. 16, Articles 89 and 119.

³⁰³ *Canaries in the coal mines: an analysis of spaces for LGBTI activism in Mozambique*, *Ibid.* n. 91, p. 12.

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The Mozambican government has also refused to officially register LAMBDA as an association for over 10 years. The government's refusal is based on a clause in the Law on Associations, which prohibits the registration of organisations that pursue aims *"that are contrary to the moral, social, and economic order of the country and offend the rights of others or the public good."*³⁰⁴

The Constitutional Council ruled on 31 October 2017 that the clause in Mozambique's Law on Associations that prohibits the registration of organisations which pursue such aims is unconstitutional in light of Article 52 of the Constitution, which states that only *"armed organisations which are military or paramilitary and those which promote violence, racism, xenophobia, or which pursue aims contrary to the law"* can be barred from registration.³⁰⁵ Despite this decision, no progress has been made and, to date, LAMBDA has not been registered.

Anti-Discrimination Protection

Despite the removal of Articles 70 and 71 from the Revised Penal Code, there has been no further legislative progress to protect the rights of LGBT people. As part of Mozambique's 2016 UPR process, several states observed that neither the Revised Penal Code nor the Constitution outlaw discrimination on the basis of sexual orientation or gender identity. The states urged Mozambique to revise its laws to expressly prohibit discrimination on the basis of sexual orientation, gender identity and intersex status.³⁰⁶ Mozambique did not accept this recommendation, noting that *"no one is discriminated against in Mozambique on the basis of his/her sexual orientation, in light of s. 35 of the Constitution."*³⁰⁷

Another area identified by stakeholders as a potential next step for legislative reform is the introduction of legislation to more broadly address hate crime. This aspect is currently under consideration as part of the new review of the Revised Penal Code mentioned above.

³⁰⁴ Human Rights Campaign, *Mozambique's Recent Ruling Moves LGBTQ Organisation Closer to Legal Recognition*, 30 November 2017 (available at: <https://www.hrc.org/blog/mozambiques-recent-ruling-moves-lgbtq-organisation-closer-to-legal-recognition>).

³⁰⁵ *Mozambique's Recent Ruling Moves LGBTQ Organisation Closer to Legal Recognition*, *Ibid.*

³⁰⁶ United Nations Human Rights Council, "Report of the Working Group on the Universal Periodic Review" (32nd session, 12 April 2016, A/HRC/32/6).

³⁰⁷ United Nations Human Rights Council, "Addendum—Report of the Working Group on the Universal Periodic Review" (32nd session, 8 June 2016, A/HRC/32/6/Add.1).

LESSONS LEARNED

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Although further reform is needed to Mozambique's sexual offences laws, which the government and parliament recognise and have sought to address with the new review of the Revised Penal Code, it cannot be denied that the Revised Penal Code introduced important changes. Mozambique now has a legislative framework that has enhanced protections for children, women and the LGBT community, and has brought the country closer to complying with constitutional principles and international standards and commitments.

Valuable lessons from the reform of the 1886 Penal Code can be passed on to other states considering similar reforms. In general, the experience of Mozambique illustrates that reform is possible despite the existence of contentious and politically challenging issues, when political will, diverse champions and a mix of domestic and international support are present. The key lessons are outlined below.

An Intersectional and Multi-Pronged Strategy: the Importance of Different Civil Society Groups Working Together

The decision of the civil society organisations involved in the reform process to work intersectionally and collectively, as an alliance, gave them more power to ensure that their voices were heard. Solidarity between different organisations helped to exert pressure on the Mozambican authorities and, to some extent, mobilise society in relation to the human rights violations that needed to be addressed in the new Penal Code. Such concerted efforts brought visibility to the causes advocated by civil society, and directly resulted in a significantly improved text of the final Revised Penal Code.

The Advantages of Incorporating Changes into a Broader Reform

The decision by civil society organisations involved in the reform process to take advantage of the wholesale reform of the Penal Code to advocate for changes to the abortion law and sexual offences provisions made it easier for these reforms to be achieved. Having standalone legislation on issues like abortion and same-sex intimacy may have been a real challenge in the Mozambican social, cultural and political context. Capitalising on and utilising the wholesale reform of the Penal Code was vital in drawing the spotlight away from what could have been seen as more controversial changes, ultimately proved to be a successful approach.

The Trade-off between Timing and Quality of the Reform

Local observers have commented that the reform was rushed through³⁰⁸ due to the limitations of the Mozambican legislative process, which meant that the Revised Penal Code had to be approved before the end of the legislature's term. This meant that the law contained certain shortcomings that, immediately after its entry into force, were placed under a further review.

The failure to include a review and reform of the Criminal Procedure Code was a significant shortcoming as the current procedural rules do not ensure the proper enforcement of the new law, and resulted in a further review of the Revised Penal Code.

Mozambique seems to be addressing these issues through the review of the Revised Penal Code currently underway, which includes the reform of the Criminal Procedure Code.

Legal Change Needs to be Accompanied by Implementation

There was no implementation plan once the Revised Penal Code was enacted. This meant real change has been slow and less effective than hoped. Looking to the future, it is vital that the fundamental changes to the Revised Penal Code (and its further review) are accompanied with practical measures to ensure that the police, judiciary and the general population are fully aware of the changes in the law. Further training and education should be provided to the relevant sections of society and there should be continued commitment to raising general awareness in relation to sexual assaults and violence. Efficient implementation will also require appropriate data collection and analysis so that issues can be identified and appropriately addressed.

308 Interview with Maria Arthur (Spokeswoman of WLSA Mozambique), *Ibid.* n. 98; Interview with Dr. Elísio de Sousa (lawyer and criminal law scholar), *Ibid.* n. 265; Interview with HDT, *Ibid.* n. 266.



ANNEX

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1. Law and Legislation

- a. Extracts from the Portuguese Penal Code of 1886.
- b. Extracts from the Mozambique Penal Code, Law No. 35/2014.

2. Parliamentary Texts

- a. Assembleia da República, *Acta da 15a Sessão Plenária*, 16 December 2013.
- b. Comissão de Assuntos Constitucionais, Direitos Humanos e Legalidade, *Parecer n. 33/14, de 24 de novembro de 2014, relativo ao Reexame da Lei de Revisão do Código Penal*, 24 November 2014.
- c. Extracts from Draft of Review Bill, dated 21 December 2018.
- d. Ministério da Justiça, *Parecer relativo à Lei de Revisão do Código Penal*, 7 October 2014.
- e. Presidente Armando Guebuza, *Mensagem de veto*, 24 October 2014.
- f. Procuradoria Geral da República, *Parecer No. 16/CT/PGR/2014*, 17 October 2014

3. Civil Society Background/Campaigns

- a. Plataforma de Luta Pelos Direitos Humanos no Código Penal, *Carta à Presidente da Assembleia da República*, 5 June 2014.
- b. Plataforma de Luta Pelos Direitos Humanos no Código Penal, *Carta ao Presidente da República de Moçambique*, 6 August 2014.
- c. Plataforma pelos Direitos Humanos no Código Penal, *Historial e ponto de situação sobre a campanha pelos direitos humanos no Código Penal*, 10 September 2014.

4. Translations

- a. Extracts from the Portuguese Penal Code of 1886.
- b. Extracts from the Law on Domestic Violence Against Women, Law No. 29/2009.
- c. Extracts from the Mozambique Penal Code, Law No. 35/2014.
- d. Extracts from Commission of Constitutional, Human Rights and Legality Matters (Comissão dos Assuntos Constitucionais, Direitos Humanos e Legalidade), *Do Projecto de Revisão do Código Penal*, 2012.
- e. Extracts from Draft of Review Bill, dated 6 September 2017.



