

**AMNESTY
INTERNATIONAL'S
COMMENTS ON THE
DRAFT CONSTITUTION
OF MOZAMBIQUE**

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INTERNATIONAL**



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Amnesty International is a global movement of more than 3 million supporters, members and activists in more than 150 countries and territories who campaign to end grave abuses of human rights.

Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and public donations.

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1. INTRODUCTION

The Draft Constitution of the Republic of Mozambique (the Constitution) is currently being discussed and debated, and is expected to be finalized and adopted soon. This brief memorandum contains Amnesty International's concerns about selected provisions of the Draft Constitution which appear in their present form to be incompatible with international human rights obligations the country assumed including under the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights; and recommendations that Amnesty International hopes will be helpful to the Parliamentary ad hoc Commission on Constitutional Review. Amnesty International hopes that these comments will ultimately contribute to the enhancement of fundamental rights protection in Mozambique.

Amnesty International is an international non-governmental organization that works to protect all human rights. It works for the release of prisoners of conscience (people held anywhere for the non-violent exercise of their conscientiously-held beliefs or on account of their ethnic origin, sex, colour or language), advocates fair and prompt trials for all political prisoners and prisoners threatened with the death penalty; opposes torture and other cruel, inhuman or degrading punishment or treatment of prisoners, including the death penalty, "disappearances" and extrajudicial executions.

As part of its work, Amnesty International promotes the adoption of constitutions and other legal instruments which protect internationally recognized human rights and the ratification by governments of international and regional standards for the protection of human rights.

Amnesty International has prepared this memorandum in the spirit of contributing Amnesty International's experience to the strengthening of the constitutional provisions for basic civil and political rights as well as economic, social and cultural rights in Mozambique.

Internationally recognized human rights are embodied in treaties and other instruments, and some under customary international law. The principal foundations of international human rights law includes the Universal Declaration of Human Rights (UDHR) of 1948 and other international treaties which have developed from the provisions enshrined in the Universal Declaration, including, in particular, the International Covenant on Civil and Political Rights (ICCPR) of 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966, the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1976, the UN Convention on the Rights of the Child (CRC) of 1989 and regional instruments such as the African Charter on Human and Peoples' Rights (1981), the African Charter on the Rights and Welfare of the Child (1990),

and the Protocol to the African Charter on Human and Peoples' Rights on the Rights on Women in Africa (2003).

Although Mozambique is not yet a party to some of these instruments, Amnesty International bases its recommendations upon the relevant provisions contained in these and other instruments, which have increasingly been accepted by the international community as basic minimum standards for the protection of human rights.

Amnesty International is concerned that the Draft Constitution allows wide scope for subsidiary legislation or for executive government organs to restrict the rights and freedoms it guarantees to an extent inconsistent with internationally recognized human rights standards. Some of the guarantees contained in the Constitution fall far short of international human rights standards while others entrench limitations and exceptions which may give the state wide powers to restrict these rights. The concerns stated here will be demonstrated below.

Amnesty International urges that the Constitution not permit restrictions to be imposed on the rights provided therein that go beyond those permissible under international human rights standards. Amnesty International recommends that the Constitution ensures that no law or regulation and no action by the executive agencies of government may abolish or abridge the fundamental rights and freedoms contained in the Constitution. The supremacy clause contained in Article 2 of the Draft Constitution should be better framed to reflect that the Constitution is the supreme law of the land and that no legislation or executive order shall prevail over constitutional provisions or international human rights obligations and commitments.

Amnesty International recommends that Mozambique ratify or accede, without reservations and at the earliest opportunity, to the 1st Optional Protocol to the ICCPR allowing individual complaint mechanism; the ICESCR and its Optional Protocol allowing individual complaint mechanism; as well as make a declaration allowing direct access to the African Court on Human and Peoples' Rights pursuant to Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights Establishing an African Court on Human and Peoples' Rights.

2. HUMAN RIGHTS AND THE DRAFT CONSTITUTION

CIVIL AND POLITICAL RIGHTS

The Draft Constitution contains some fine statements guaranteeing not only civil and political rights but also economic, social and cultural rights. Amnesty International welcomes the fact that the revised constitution retains important provisions on civil and political rights as well as economic, social and cultural rights in particular the provisions of Article 40 on the right to life, and specifically

abolishing the death penalty; Article 82 on right of ownership of property; Article 84 on right to work; Article 85 on right to remuneration and safety at work; Article 86 on right to freedom of professional associations and unions; and Article 87 on right to strike and prohibition of lock outs. Others include: Article 88 on right to education; Article 89 on right to health; Article 90 on right to a balanced environment; Article 91 on right to housing and urbanization; Article 92 on rights of consumers; and Article 95 on right to assistance of the disabled and aged.

However, there are several fundamental human rights guarantees which Amnesty International considers should be strengthened or which are not found in the Draft Constitution. Further, the human rights guaranteed by the Constitution should be enjoyed by “everyone”, or “every person” or “every individual”; and not just “all citizens.” This formulation is a common problem throughout the Draft Constitution, including Article 35 on the principle of universality; Article 37 on the rights of disabled persons; Article 40 on right to life; Article 41 on the right to honour, good name, and privacy; Article 48 on freedom of expression and information; Article 51 on freedom of assembly and demonstration; Articles 52 and 53 on freedom of association; Article 54 on freedom of conscience, religion and worship; Article 59(3) which deals with the principle of legality; Article 69 on the right to contest acts that violate one’s rights and Article 70 on the right of recourse to court and should be consistently and fully adjusted to reflect the suggestion being made here.

THE RIGHT TO EQUALITY BEFORE THE LAW

Article 35 guarantees to “all citizens” equality before the law, and provides that “they shall enjoy the same rights....regardless of colour, race, sex....” Amnesty International recommends that “all citizens” be replaced with “every person” as states generally are not allowed under international human rights law to discriminate against “non-citizens” in the enjoyment of basic human rights. Consistent with international standards, the organisation suggests the inclusion of sexual orientation and “other status” at the end of the categories highlighted in Article 35. Along these lines, the organisation also suggests the inclusion of “and all other aspects of life” at the end of Article 36 and that Article 37 on the right of “disabled citizens” be changed to “disabled persons”.

INTERPRETATION OF FUNDAMENTAL RIGHTS

Amnesty International welcomes Article 43 which provides that “all constitutional principles in respect of fundamental rights shall be interpreted and integrated in harmony with the Universal Declaration of Human Rights and with the African Charter on Human and Peoples’ Rights”. However, in addition to the African Charter, Amnesty International suggests the inclusion of other treaties such as the International Covenant on Civil and Political Rights; Convention against Torture and

Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Right of the Child, and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, to which Mozambique is a state party.

Amnesty International suggests that, to ensure the greater protection of fundamental rights and freedoms, the Constitution should acknowledge international human rights law as a source of law in Mozambique. It should also provide, with regard to international and regional human rights treaties to which Mozambique is a state party or will be party that nothing in the Constitution or other law shall be interpreted to exclude any fundamental rights and freedoms contained in these treaties or limit them to a greater extent than is provided for in the treaties.

PROHIBITION OF TORTURE AND OTHER FORMS OF CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Torture and other cruel, inhuman or degrading treatment or punishment is universally condemned and there is an absolute prohibition against torture under international law. The Draft Constitution in Article 40 forbids the use of torture and Article 65 (3) prohibits the use of evidence obtained through torture. However, the Constitution must not only prohibit torture and cruel, inhuman or degrading treatment or punishment, but should, in addition, specifically incorporate the safeguards to prevent torture and other cruel, inhuman or degrading punishment or treatment included in international standards. Guarantees should be included in the Constitution that any complaint of torture or ill-treatment be promptly and impartially examined by independent civilian judicial authorities. The Constitution should also specify that perpetrators of torture will be brought to justice, and that victims will receive effective remedies.

Amnesty International further urges that Article 65(3) be redrafted to clearly and unambiguously prohibit the use during investigation or trial of evidence obtained by torture or ill-treatment except against a person accused of torture as evidence that the statement was made. Amnesty International recommends that the government of Mozambique ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment without reservation.

FREEDOM OF EXPRESSION AND INFORMATION

The Draft Constitution contains the right to freedom of expression and information, albeit in a limited manner. Article 48 of the Draft Constitution only guarantees this right to "all citizens". Similar problem is found in Article 51 on the right to freedom of assembly and demonstration, Article 52 on the right to freedom of association, and Article 54 on freedom of conscience, religion and worship. Amnesty International suggests redrafting these provisions to reflect "every person". Similarly, these provisions also contain extensive "ouster or escape clauses" (i.e.,

“within the terms of the law”, and “in accordance with the law”) that can permit the state, in its almost unbounded discretion, to restrict the enjoyment of these rights. The clauses also could seriously diminish the effectiveness of the Constitution in the areas as well, and would be contrary to the international obligations and commitments of Mozambique.

Amnesty International urges that every effort be made to ensure that all the provisions of the Constitution which enumerate the right to freedom of assembly, association, expression and conscience incorporate all the universally accepted international human rights norms and standards. International instruments stress that governments must guarantee the respect of the right of everyone to freedom of assembly and association (including the right to form and join political parties of one's choice) and freedom of conscience, opinion and expression, without any form of discrimination.

Amnesty International recommends that the Constitution specifically safeguard the right to freedom of assembly and association in accordance with Article 20 of the Universal Declaration of Human Rights, Articles 21 and 22 of the International Covenant on Civil and Political Rights, and the African Commission on Human and Peoples' Rights Declaration of Principles on Freedom of Expression in Africa, adopted at its 32 Ordinary Session October 2002, Banjul, The Gambia.

Amnesty International further recommends that the fundamental right to freedom of opinion and expression, as guaranteed by Article 19 of the UDHR and Article 19 of the International Covenant on Civil and Political Rights be explicitly included in the Constitution. Limitations on the exercise of these freedoms specified by law are permitted, under 19(3) of the ICCPR, only in so far as they are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Amnesty International also believes that the right to freedom of conscience, religion and worship, contained in Article 54 of the Draft Constitution, should explicitly include the right to freedom of thought which is guaranteed by Article 18 of the UDHR and Article 18 of the International Covenant on Civil and Political Rights.

SAFEGUARDS AGAINST ARBITRARY ARREST OR DETENTION

Although the Draft Constitution contains in Article 59 the “right to liberty and to security”, its scope are grossly limited as many of the safeguards and protection guaranteed in international standards are missing or not fully recognized and entrenched in the Constitution. Article 59 simply states that “everyone has the right to security and nobody shall be detained and put on trial except in accordance with the law....Accused persons shall enjoy a presumption of innocence until final court judgment has been passed. While other safeguards such as the right to defence and to legal assistance aid are contained in Article 62, the Draft Constitution omits other equally important safeguards.

Although the Draft Constitution states that detentions and trials can only be carried out in accordance with the law, it does not require the same for arrests. The Constitution should make it clear that arrest can only take place on grounds and procedures established by law. It should further make it clear that any laws authorising arrest must confirm to international standards including those relating to the principles of legality and equality before the law; that there shall be no mass arrests, and no arrest of relatives of a criminal suspect to put pressure on the suspect; that arrest may only be carried out by people authorised to do so; that any authority with the power of arrest or otherwise depriving people of their liberty may only exercise the powers granted to them under the law, and that the use of these powers must be subject to supervision by a judicial or other authority. We also suggest adding additional provisions on the rights of arrested person to medical assistance; not to incriminate oneself, including the right to silence; to complain and recourse for complaints about ill-treatment or conditions; and to trial within a reasonable time or to release pending trial.

The Constitution should be redrafted to reflect the following regional and international standards: Ouagadougou Declaration; Resolution on the Right to Recourse and Fair Trial 1992; Resolution on the Respect and the Strengthening of the Independence of the Judiciary 1996; Resolution on the Right to a Fair Trial 1999; General Principles and Guidelines on the Right to a Fair Trial 2003; Resolution on Independent Civilian Oversight 2006; UN Code of Conduct for Law Enforcement Officials 1979; UN Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1982; UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985; UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) 1985; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988; UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions 1989; the UN Basic Principles for the Treatment of Prisoners 1990.

Others include: Basic Principles on the Use of Force and Firearms by Law Enforcement Officials 1990; UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) 1990; UN Rules for the Protection of Juveniles Deprived of their Liberty 1990; United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules) 1990; UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health-Care 1991; UN Guidelines for Action on Children in the Criminal Justice System 1997; UN Principles on the Effective Investigation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2000 ; UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) 2011; UNHCR, 'Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the detention of Asylum Seekers and Alternatives to Detention' (2012), and UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems 2012.

2.2 ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The Constitution contains a number of provisions on economic, social and cultural rights many of which, although not all, are contained in the African Charter on Human and Peoples' Rights to which Mozambique is a state party and the International Covenant on Economic, Social and Cultural Rights (ICESCR) to which it is not. In order to ensure effective protection of a range of economic, social and cultural rights Amnesty International respectfully recommends that Mozambique ratifies the ICESCR and incorporates its provisions into domestic law. In this respect Amnesty International notes that currently the Constitution does not contain any provisions guaranteeing the rights to social security¹, water and sanitation despite their recognition at the international level including treaties ratified by Mozambique such as the CRC and CEDAW and therefore urges that these omissions are addressed.

With respect to particular rights that are guaranteed in the current Constitution the following provisions could be developed to bring them more into line with international human rights standards and Mozambique's own treaty obligations:

- Article 88 guaranteeing the right to education should encompass: the right to free and compulsory primary education for all (this should be an immediate priority even if it has to be progressively realized due to resource constraints); secondary education available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.²
- Article 89 guaranteeing the right to health should be reframed as the right of everyone to the enjoyment of the highest attainable standard of physical and mental health requiring equal access to a range of affordable health facilities, goods and services. This should include measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care, emergency obstetric services and access to information, as well as to resources

¹ The right to social security as defined under international law encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents (CESCR General Comment 19 (E/C.12/GC/19) 2008) para 2).

² See Article 13 ICESCR and Article 28 CRC.

necessary to act on that information.³

- Article 91 guaranteeing the right to housing and urbanisation should be reframed as the right to adequate housing which includes an explicit prohibition on forced evictions and guarantees security of tenure for all to ensure that everybody is protected against forced evictions, harassments and other threats. The right to adequate housing can be elaborated to encompass a number of aspects including availability of services, materials and infrastructure; habitability; affordability and accessibility.⁴

3. CONCLUSION

The issues and provisions cited above are illustrative and not exhaustive examples of ways in which the draft Constitution may be improved. They do not necessarily purport to constitute a comprehensive human rights analysis of the draft Constitution. Amnesty International hopes that these brief comments and suggestions will assist the Committee to develop and improve the Constitution further.

³ See Article 12 ICESCR and CESCR General Comment 14 (E/C.12/2000/4) 2000) paras 12 and 14

⁴ See Article 11 ICESCR and CESCR General Comments 4 (1991) and 7 (1997)

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