Part I

State, Law and the Administration of Justice

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The Heterogeneous State and Legal Plurality

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Introduction

The end of the twentieth century witnessed a global call for the rule of law and the reform of the judicial systems in many countries of the world. Multilateral financial agencies and international aid non-governmental organizations (NGOs) made such changes one of their priorities for their efforts in the developing world.[1] The global nature of this process and the intensity with which it was implemented, both in financial and political terms, reflected the rise of a new development model: the neo-liberal development model. This model looks to a greater reliance on markets and the private sector and requires a new legal and judicial framework: only when the rule of law is widely accepted and effectively enforced are certainty and predictability guaranteed, transaction costs lowered, property rights clarified and protected, contractual obligations enforced and regulations applied. In most countries across the developing world profound legal and judicial reforms were implemented. They focused exclusively on the official legal and judicial system, conceived of as a unified system, and left out of consideration the multiplicity of unofficial legal orderings and dispute resolution mechanisms that had long coexisted with the official system, many dating back to the early colonial period. The neglect of non-state legal structures, combined with the intense, globally induced call for reform and the changes in the role of the state, ended up widening the gap between the law-in-books and the law-in-action.

The focus of this chapter is the recent history and current nature of this gap in Mozambique. In present-day Mozambique – as in other African countries – the disjunction between the officially established unity of the legal system and the socio-

logical plurality and fragmentation of legal practice is probably more visible than in any other region of the developing world. In the analysis that follows, I will show that this disjunction has a multiple impact on state action and legitimacy, on the operation of the official legal system, on the relationships between political and administrative control, on the mechanisms of conflict resolution operating in society, on the legal and institutional frameworks of economic life and on the social and cultural perceptions of politics and legality.

For several centuries a Portuguese colony, Mozambique became independent in 1975. The revolutionary socialist development path adopted in the first decade after independence was abandoned in 1984 in the face of a deep economic crisis and under the pressure of multilateral financial institutions. It was replaced by a democratic capitalist development path, later on enshrined in the Constitution of 1990. At the end of the 1970s a vicious civil war broke out, initially masterminded and fueled by the Rhodesian and South African secret services. It ended twelve years later with the Peace Agreement of 1992, having left the countryside pulled apart and half a million dead. In 1987 the first structural adjustment agreement was signed.[2] Considered one of the poorest peripheral countries, Mozambique was initially subjected to particularly harsh measures of restructuring, given its status as a 'strong adjuster'. It is today viewed as a 'success story', having experienced in the last decade some economic recovery and having carried out the democratic transition with mixed results but without much turbulence.

As mentioned earlier on in the preface, the empirical research analyzed in this chapter results from an on-going project on the judicial system in Mozambique. The empirical data more directly relevant for the analysis undertaken here comprise extensive research focused on community courts and traditional authorities.[3] In-depth studies were conducted in 5 community courts – Mafalala and Xipamanine (Maputo city), Liberdade (Inhambane province), Munhava Central (Sofala province) and Maimio (Cabo Delgado province) – and 6 chiefdoms: the *regulados* Luis and Mafambisse (both in the Sofala province), Cumbapo (Zambézia province), Zintambila (Tete province), Cumbana and Nhampossa (both in the Inhambane province). The data collection included direct observation of court sessions and dispute resolution settlements, archival data whenever available, and semi-structured interviews.

In section 1, I deal very briefly with the recent transformations on the nature and role of the state in Africa and its impact on legal pluralism. In section 2, I analyze the social and political conditions that account for the heterogeneity of state action and legal pluralism in Mozambique. In section 3, I focus on the community courts, conceived as legal hybrids, and in section 4, on traditional authorities, conceived as alternative legal and political modernities.

1. The Heterogeneous State and Legal Plurality

The Emergence of the Heterogeneous State

The globalizing pressure Africa is experiencing today is perhaps more intense and selective than ever before. Since the fifteenth century Africa has been subjected to various forms of globalization originating in the West, including colonialism, slavery, imperialism, neo-colonialism or structural adjustment. The intensity of the most recent form of globalization lies in the fact that it is almost totally impossible to be resisted locally. It appears as an unconditional and ineluctable imperative.[4]

The impact of neo-liberal globalization in Africa is most visible in the changing structures and practices of the state. The states that emerged from the processes of independence became in one way or another developmentalist states. Although huge differences existed between them – above all the difference between those which adopted the capitalist and those which adopted the socialist path towards development –, the new states presented themselves as the driving forces of development. They were seen as the centers of strategic economic decision-making and as holding total primacy over civil society, a concept little used during that period. This model of the state operated through great bureaucratic apparatuses, many of which had been inherited from the colonial state. Moreover, this 'overdimensioning' or 'overdevelopment' of the state in relation to society constituted one of the most resistant forms of continuity with the colonial regime (Bayart, 1993; Young, 1994).

Between the mid-1970s and early 1980s, this model of the state entered into a crisis. It was during this transition period, in 1975, that the African countries freed from Portuguese colonialism – Mozambique, Angola, Guinea-Bissau, Cape Verde Islands and São Tomé and Príncipe Islands – emerged, and all of them, without exception, adopted the socialist path to development.[5] With the final collapse of the Soviet Union already imminent, the Washington Consensus, adopted by the core countries under the aegis of the United States in the mid 1980s, sealed the fate of nationalist and socialist models of development based on the primacy of the state. From then on, the state, which under the previous model of development had been the solution to the problems of society, became the great problem of society. Inherently predatory and inefficient, it had to be reduced to a minimum, since reducing its size was the only way of reducing its negative impact on the development of society-based problem solving mechanisms. In many African countries, the production of the weak state, combined with the socially devastating consequences of structural adjustment, led some states to the brink of total implosion. As always, external factors have combined with internal ones to create civil wars, inter-ethnic wars, the rise of corruption and, consequently, the privatization of the state and the collapse of its fragile administrative structures, above all in the areas of education and health care policies and basic infrastructures. By the mid 1990s, the World Bank itself recognized that the new model of development presupposed a state strong and efficient enough to ensure an effective regulation of the economy and the stability of the expectations

of economic agents and social actors in general. As latecomers, the new states that emerged from Portuguese colonialism in the mid-1970s, after decades of liberation struggles, suffered even more drastically the consequences of the new global impositions which affected in profound ways the most basic tasks of state building. In section 2, I will illustrate this with the case of Mozambique.

As a consequence of the global imperatives just mentioned, the African nation-state has lost centrality and dominance by force of the emergence of powerful supra-state political processes. However, in an apparently paradoxical way, these same processes have led to the emergence of infra-state actors (sometimes very powerful actors) equally determined, albeit for very different reasons, to question the centrality of the nation-state. A case in point is the re-emergence of traditional authorities as social and political actors, a phenomenon which, as I will show below, occurred in Mozambique. These combined pressures have led to a double decentering of the state, at an infra- and at a supra-state level. This does not mean that the state has ceased to be a key political factor. However, the ways in which it is being contested and reformed transform it into an increasingly complex social field in which state and non-state, local and transnational relations interact, merge and confront each other in dynamic and even volatile combinations, making the nature of legal plurality ever more complex. The centrality of the state resides now, to a great extent, in the way in which the state organizes its own loss of centrality. In other words, the withdrawal of the regulatory state – what has been called the deregulation of economic and social life – can only be achieved by state action, most of which must be accomplished through legislation .

The ways in which this state transformation is occurring are contributing to an increase in the functional heterogeneity of state action. Under often contradictory pressures, the different sectors of state action are assuming such different logics of development and rhythms, causing disconnections and incongruities, that sometimes it is no longer possible to identify a coherent pattern of state action, that is, a pattern common to all state sectors or fields of state action. This is related to the increasing duality between the intensely transnationalized sectors of social life and the non-transnationalized or only marginally transnationalized ones. The heterogeneity of state action is itself reflected in the total breakdown of the already shaky unity of state law, with the consequent emergence of different politics and styles of state legality, each of which operates with relative autonomy. In extreme cases such autonomy may lead to the formation of multiple micro-states existing inside the same state.[6] This new political formation I call the heterogeneous state (Santos, 1995: 274-281). It is characterized by the uncontrolled coexistence of starkly different political cultures and regulatory logics in different sectors (*e.g.*, in economic policies and family or religion policies) or levels (local, regional and national) of state action. Among the most significant factors accounting for the heterogeneous state are a disjunction between the political and administrative control over the territory and its people, the lack of integration among different political and legal cultures governing state action

and the official legal system, and political and institutional upheavals caused by multiple ruptures occurring in rapid succession. All these factors will be illustrated in section 2 with the case of Mozambique.

Old and New Forms of Legal Pluralism

Legal pluralism in contemporary African societies is more complex today than ever before and in large part this is due to the processes of state transformation mentioned above. Until recently the analysis of legal plurality was centered on the identification of local, intra-state legal orders, which co-existed in different forms alongside the official, national law. Today, alongside local and national legal orders, supranational legal orders are emerging, which interfere in multiple ways with the former. Nowadays sub-national legal plurality acts in conjuction with supra-national legal plurality.[7]

From a sociological perspective, the articulation among different scales of law becomes,[8] therefore, increasingly complex. We can identify three scales – the local, the national and the global. Each one has its own legal norms and rationale, with the result that relations between them are very often tense and conflicting. These tensions and conflicts tend to increase as the articulations between the different legal orders and the different scales of law multiply and deepen. Whereas in colonial society it was easy to identify the legal orders and their spheres of action and thus regulate relationships between them – European colonial law on the one hand, and the customary law of the native peoples on the other[9] –, in present-day African societies the plurality of legal orders is much more extensive and the interactions between them much denser. Paradoxically, if, on the one hand, this denser relationship makes conflict and tension between the different legal orders more likely, it also shows that the different legal orders are more open and susceptible to mutual influences. The boundaries between the different legal orders become more porous and each one loses its 'pure', 'autonomous' identity and can only be defined in relation to the legal constellation of which it is a part. Out of this porosity and interpenetration evolve what I call legal hybrids, that is, legal entities or phenomena that mix different and often contradictory legal orders or cultures, giving rise to new forms of legal meaning and action. In section 3, I will illustrate the concept of legal hybrid with the case of community courts in Mozambique.

Situations involving legal hybridization as a new kind of legal pluralism challenge conventional dichotomies to the extent that legal practices frequently combine the opposite poles of the dichotomies and contain an infinite number of intermediate situations. Even so, on an analytical level, the dichotomies are a good starting point, as long as it is clear from the outset that they will not provide the point of arrival. The conventional dichotomies most relevant to analyze legal plurality in Mozambique are the following: official/unofficial, formal/informal, traditional/modern, monocultural/multicultural.

The official/unofficial variable results from the political-administrative definition of what is recognized as law or the administration of justice, and what is not. In the modern state, the unofficial is everything that is not recognized as state-originated. It may be prohibited or tolerated; most of the time, however, it is ignored. The formal/informal variable relates to the structural aspects of the legal orders in operation. A form of law is considered formal when it is dominated by written exchanges and norms and standardized procedures, and, in turn, is considered informal when it is dominated by orality and common language argumentation. The traditional/modern variable relates to the origins and historical duration of law and justice. A form of law is said to be traditional when it is believed to have existed since time immemorial, when it is impossible to identify with any accuracy the moment or the agents of its creation. Conversely, a law is said to be modern when it is believed to have existed for a shorter period of time than the traditional and whose creation can be identified as to time and/or author.[10] The monocultural/multicultural variable relates to the cultural universes in which the different laws and systems of justice occur.[11] There is monocultural legal plurality whenever different laws and justices belong to the same culture and, conversely, there is multicultural legal plurality whenever the diversity of laws and justice correlates with important cultural differences (Santos, 1995: 506–19; 1997; 2002c). Taking this set of variables or dimensions as starting points, I will analyze in the following sections some of the most important features of legal plurality in Mozambique.

2. A Palimpsest of Political and Legal Cultures[12]

During the thirty years of its existence as an independent state, political-legal cultures as diverse as the colonial culture, the socialist culture, the democratic culture and the traditional or community cultures have superimposed themselves on Mozambique. The uneven embeddedness of these highly diverse political-legal cultures derives in great part from the political instability caused by multiple ruptures succeeding each other at a fast pace. In fact, over the past thirty years, Mozambican society has experienced a series of radical political transformations, many of them traumatic, which have followed one another at dizzying speed. The following are the most significant: the end of colonialism, which was violent up until its last period (starting with the national liberation struggle from the early 1960s until 1975); a revolutionary rupture which aimed to build a nation from the Rovuma to the Maputo,[13] a socialist society and the formation of a 'new Man' (1975–1984); the aggression of colonial Rhodesia and apartheid South Africa, in retaliation for the solidarity offered by Mozambique to the struggle for freedom in the region (from the late 1970s until the 1980s); the civil war (from the end of the 1970s until 1992); the collapse of the revolutionary economic model and its abrupt replacement, under external pressure, by the neo-liberal capitalist model, which included both structural adjustment and the transition to democracy (1985-1994); and finally the construction of democracy (from 1994 to the present).[14] All these transformations occurred as ruptures, as processes which, in-

stead of capitalizing on the positive features of previous transformations, aimed to sweep away all traces of them and make a new beginning, unable or unwilling to accommodate the immediate past. In reality, however, ruptures coexisted with continuities, blending explicit and self-proclaimed ruptures with unspoken continuities and so giving rise to very complex legal and institutional constellations and hybridizations.

Some of these constellations and hybridizations are the result of political decisions; others have proliferated in a more or less unacknowledged fashion, far removed from political proclamations. In these constellations, the most complex combinations occur between the cultures of greater historical duration (the traditional cultures and the colonial culture) and the cultures of a lesser historical duration (the socialist, revolutionary culture and the democratic, capitalist culture). The colonial political-legal culture, despite having been most thoroughly rejected – as exemplified by the notion of the '*escangalhamento do Estado'* (breaking up of the colonial state) during the revolutionary period – has prevailed up to the present day, not only in its most obvious forms, such as the colonial legislation still in force or the organization of the administration, but above all in terms of habits and mentalities, styles of behavior, representations of the other, etc. (Bragança and Depelchin, 1986; Monteiro, 1999). It was within this culture that most of the senior civil servants who still ensure administrative routines today were trained.

Another legal-political culture that was rejected, although not quite so unconditionally, was the set of traditional or community cultures. Viewed as products of ignorance and as producing obscurantism and reactionary ideas, these cultures were seen as remnants and instruments of colonial culture. This attitude of rejection, which totally prevailed during the early post-independence years, came to coexist with another, more moderate attitude that favored a highly political and selective use of traditional cultures. For example, the creation of the popular courts, after the independence, sought selectively to co-opt traditional cultures, in order to make them serve the revolutionary culture (Sachs and Honwana Welch, 1990).[15] In this early period, the constellation of political-legal cultures was dominated by the eurocentric revolutionary socialist culture (henceforth socialist culture). This culture, though based on the European revolutionary experience at the beginning of the twentieth century, encompassed also other non-European experiences: Latin American (Cuba), Asian (China and North Korea) and African (African socialism, with a much less Marxist-Leninist outlook than the former and, in general, with a much less explicit set of doctrines, as exemplified in the case of neighboring Tanzania). Apparently the only legitimate culture, revolutionary culture coexisted, in fact, alongside with colonial culture and traditional cultures.

From the mid-1980s onwards, it was the turn of the revolutionary cultural component to retreat and give way to the primacy of eurocentric democratic capitalist culture (henceforth democratic culture). In contrast to the former, which was adopted as an autonomous option and mobilized predominantly internal energies, democratic

culture was adopted under strong external pressure, which, nevertheless, in no way excluded its genuine adoption by certain national political elites. Just as in the period when the revolutionary political-legal culture prevailed, democratic culture brought with it profound political changes, including peace, subjection to global capitalism and the transition to democracy. Like socialist culture, democratic culture sought to be the only legitimate cultural reference. However, it had to exist alongside an altogether more complex cultural constellation, including not only the colonial and the traditional, the cultures of longer duration, but also the revolutionary culture of the previous period. The latter had transformed itself into an important institutional reality which, despite having been formally revoked, continued to operate on a sociological level. Thus, for example, the community courts, created during this second period (1992) to replace the popular courts of the previous period, ended up by ensuring the continuity of the popular courts, although under very precarious circumstances, as I will show in the following section. Using the same facilities and staffed by the same judges who, in the previous period, had been popular judges, the community courts transformed themselves into a highly complex hybrid institution. In these courts, revolutionary, traditional and community political-legal cultures combined. Eventually, the only absent culture was the one which supposedly had become the official legal and political culture: democratic culture. In other sectors of public administration and legislation, different political-legal constellations were created. The revolutionary component, which was officially replaced by the democratic component, underwent, in fact, different metamorphoses and combined with the other cultural strains.

From this fusion of ruptures and continuities a highly heterogeneous state action and a very complex matrix of legal pluralism have emerged which today dominate the legal and judicial system and, more generally, public administration. But a full account of these features of legal and political life in Mozambique requires that another, more recent, factor is brought under consideration: the heavy pressures of the globalization to which Mozambique has been subjected in the process of 'structural adjustment'. I am referring more specifically to the impact of global factors on local and national conditions, under circumstances in which the latter cannot consistently incorporate or adapt, and much less subvert, external pressures. Such pressures are both very intense and very selective, and by imposing their own specific regulatory logic, they result in profound changes in some institutions and legal frameworks. At the same time, other institutions and legal frameworks are left untouched and are therefore subject to their own logics.

This results in enormous fragmentation and segmentation, which affect the entire legal and administrative system. On the one hand, there are the transnationalized sectors, operating according to regulatory logics imposed by the multilateral financial agencies and the core countries. On the other hand, there are the nationalized or local sectors, operating according to hybrid and endogenous logics, which, being irrelevant for the transnational designs, are left to the national and local elites to exert their own

political and personal differences on them. For example, today the law of the financial and economic sector is highly transnationalized and grounded on a single way of thinking promoted by global imperatives that leave little or no scope for internal political decision-making; on the other extreme, family law, for instance, is of little importance to the transnational powers and is therefore left in the hands of the national elites, who can lead intense political and cultural debates about it. The question of whether there is any underlying compatibility between the strikingly contrasting regulatory logics in these two legal domains is never addressed. The heterogeneity of regulatory logics lies precisely in these disjunctions, which, because they are unquestioned, go on being reproduced.[16]

The global pressures that have created legal and institutional plurality are of two basic types: pressures from the international financial agencies and so-called 'donor countries,' which fall very specifically into the economic area, and pressures originating from the same agents, but principally from the foreign or transnational NGOs, which fall within what we may term social policy in the broadest sense. Both these pressures are very strong, so much so that it is legitimate to ask whether we are not confronted with a situation of shared sovereignty between the Mozambican state and the foreign agents. In the field of economics, the segmentation created by structural adjustments between the transnationalized sector of the economy and the so-called informal sector, is immense. It is a matter of two legal and institutional worlds whose actions are very often unfathomable. It is up to the state to keep them apart by managing this heterogeneity. On a strictly legal level, the heterogeneity of regulatory logics and the duality of legal and institutional worlds reproduce themselves in still another form. The two main sub-cultures of eurocentric political-legal culture – continental civil law and Anglo-Saxon common law – are currently engaged in what we could call a 'global legal culture war'.[17] Breaking apart from the post-World War II settlement, common law legal culture, especially in its U.S. law version, has come to play, through globalization, an increasingly important role. This promotion of common law – which at times can be very intense – is carried out in countries with distinctive legal cultures, and operational logics and methods very different from those which prevail in Anglo-Saxon legal culture. Therefore, discrepancies are created within national legal systems, which add up to the already high levels of state heterogeneity and legal pluralism. The official modern legal culture of Mozambique, which is inspired by continental European legal culture, has begun to experience the influence of Anglo-Saxon legal culture from two sides: through the policies of structural adjustment and, due to the proximity of and the close economic ties between the two countries, through South Africa, whose legal culture is Roman-Dutch and Anglo-Saxon in origin. The latter influence is detected both in contract law and in the legislative process.

In the 'social area', the segmentations and shared sovereignties are even more complex. The complexity lies in the fact that the different NGOs and, in many cases, the different core states behind them, have different concepts of what social inter-

vention should be in such different domains as the fight against poverty, basic infrastructures, education, health care, protection of the family economy and the environment, etc. In other words, in the social sphere, global pressure is not only strong but also very differentiated. Its strength still lies in the fact that the pressure, far from being conceived of as an imposition, is conceived of as international solidarity with a legitimate right to establish the terms of its implementation. As these terms vary from NGO to NGO and from donor country to donor country, and as NGOs and countries have concentrated their interventions in different regions or provinces of the country, the heterogeneity of social policies assumes a territorial nature. The ensuing fragmentation and segmentation emerges not only as the result of complex negotiations, between foreign and international NGOs and donor countries, on the one hand, and the national state and provincial and district governments on the other, but also as the result of the unequal relationships between the foreign and international NGOs and the national NGOs, which, in the vast majority of cases, are financially dependent on the former and therefore subject to their conditions.

The ensuing institutional and administrative fragmentation of the state thus results, in many cases, from anarchic superimpositions that generate exclusion and complaints from all those involved. Thus, the district government complains if an international NGO decides to operate directly and autonomously in the community, responding to needs as they see them and their satisfaction. The provincial government (the administrative level above the district) complains at the decision of an NGO to support a municipality directly, without channeling this support through it. One or more national NGOs complain if an international NGO coordinates its aid with the provincial government and does not include the national NGOs working in the area. Provincial and district governments complain if international NGOs have decided to support particular areas or communities 'without plausible reasons'. Lastly, international NGOs complain that the terms of their intervention are not defined by the national government, which means that they are seen as 'parallel governments' when in fact they 'just want to be partners'. These reciprocal exclusions fuel the abovementioned disjunction between political and administrative control and transform the latter into an appendage of the former. This transformation, which may occur in other contexts, is here particularly intense and its specificity lies in the fact that it often involves the three scales (local, national and global) of both law and politics.

In order to put an end to the most extreme forms of segmentation and fragmentation in state action, the Government sought, through Decree no. 55/98 of October 13, 1998, to establish some measure of control over NGO actions. Article 6 no. 4 establishes that "it is the obligation of the central organ responsible for the NGO activity to indicate the province in which it will undertake its activities, bearing in mind the need to apply the principle of equity to the development of the country", and Article 2 no. 3 stipulates that "in the course of their activities, foreign NGOs are forbidden to undertake or promote any actions of a political nature". This Decree

has not yet been put to a test and it is not difficult to imagine the problems its implementation will entail.

In a situation involving great segmentation of state, legal, judicial and institutional practices, official deregulation is always less far-reaching than it is declared to be and re-regulation much less homogeneous than it intends to be. Under these circumstances, the legal and institutional unity of the state is precarious and the state often appears to be a set of micro-states, at varying removes from each other, some local and others national or transnational, and all of them bearers of composite and distinct operational logics. This is the condition that characterizes both the heterogeneous state and legal pluralism under conditions of globalization. The characterization of legal pluralism will be presented in detail in the following sections.

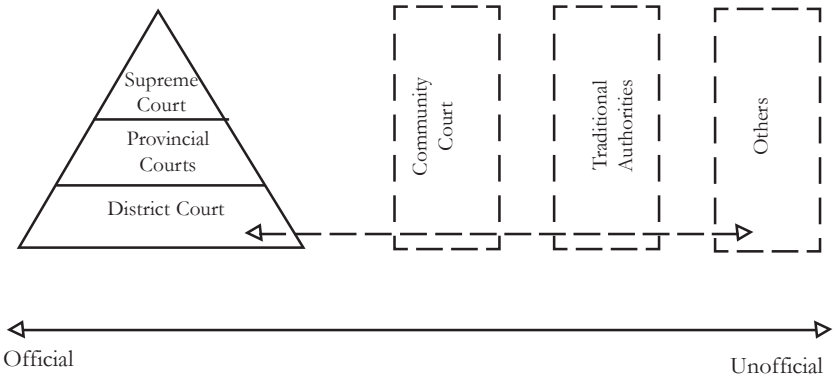
I conclude the analysis of the conditions accounting for the Mozambican state heterogeneity and legal plurality by focusing on the disjunction of political and administrative control, that is, on the state's incapacity for guaranteeing either the separation or the equal territorial penetration of political and administrative control, thus tending to politicize administrative control and exercise the latter selectively. This is one of the most persistent legacies of the colonial state in Africa and it has grown in the last two decades due to neoliberal globalization, especially in the countries that gained independence most recently, as is the case of the Portuguese-speaking African countries. Nowadays the overdimensioning of political control in relation to administrative control is evident in Mozambique. In administrative terms, the state is still confronting the problems of modern state building, among which is, the problem of state penetration, that is, of its effective political and bureaucratic presence in the whole territory. This situation encourages the politicization of the administration, as can be illustrated with the difficulties in transforming election results into the sharing of power. It is feared that sharing power will involve a loss of administrative control, which is always imagined to be in the service of political control.

The disjunction of political and administrative results control also in the fact that, in its everyday practices, public administration has no means of guaranteeing its own efficiency. Therefore it resorts to whatever institutions are locally available, whether they are structures from an earlier period, colonial or revolutionary[18] – which, in spite of having been legally eliminated or superceded, continue to survive as both political and administrative entities – or whether they are the traditional authorities (Geffray, 1990; Dinerman, 1999; Chichava, 1999). These heterogeneous resources – which create a situation of bureaucratic *bricolage* – translate themselves in to heterogeneous acts of administration caused by the coexistence of the formal and the informal, the official and the unofficial, the modern and the traditional, the revolutionary and the post-revolutionary. In the following section some of these complex coexistences will be illustrated.

3. Entangled Legal Pluralities: Community Courts as Legal Hybrids[19]

In this and in the following section I will analyze some of the patterns of legal pluralism in Mozambique. As already indicated, Mozambican society is a vast and vastly differentiated social field of legal pluralism. Figure 1.1 gives a synthetic view of legal pluralism in Mozambique. In constructing it I privileged the official/unofficial dichotomy.

Figure 1.1: Legal Plurality in Mozambique



The pyramid on the left hand side represents the official legal system. There are 11 provincial courts and 93 district courts functioning in the country.[20] The district courts are the lower courts and are those with more intense interactions with the non-official legal orders. In the latter I distinguish three instances of conflict resolution which, as the figure shows, are differently located within the official/non-official continuum. The first instance are the community courts, which I conceive of here as a legal hybrid combining official and unofficial components; the second instance are the traditional authorities and the third one is a vast set of associations in which the religious associations, particularly the Muslim ones, stand out. In this section I will concentrate on the community courts.

There are no reliable data on the number of community courts and much less on the number of cases they handle. The number of judges varies from court to court, although a minimum of three judges is required to hear the cases. In the courts analyzed, only about 18% of the judges were women. The judges, whether men or women, tend to be over 40 years of age. Even when they are replaced, recruitment does not, as a rule, alter the age group. However, particularly when the replacements are women, they do tend to be younger. In terms of occupation, the majority may be considered rural workers (most of them women), followed by those who are retired, craftsmen or factory workers. By and large they handle cases relating to family matters,

followed by theft, injuries and physical aggression. There are also cases relating to debt, land issues, housing issues and witchcraft accusations.

There are significant differences among the courts in the ways they operate, whether in terms of procedural or of substantive norms. In a few courts there is a selective adoption of the styles, formulas and language of official justice, with all the proceedings being registered in writing. In most cases, however, informality and orality prevail. Even in more formalized proceedings, the use of judicial formulae is combined with the use of common language, directly linked to the oral nature of the surrounding culture. In any event, the formality does not influence the decision. It seems, above all, to have the aim of creating an institutional distance in relation to the parties and of legitimizing the power of the court. All the hearings take place in a context dominated by rhetoric, that is, by common language argumentation. National languages predominate (there are more than 20 national languages in Mozambique) and the court usually speaks in the same language as the parties, with no need for interpreters.[21]

In Mozambique, community courts are the legal hybrid institution *par excellence,* particularly in what concerns the official/unofficial dichotomy. They are recognized by law – they were created by Law no. 4/92, of May 6, 1992 – but their operation is not regulated by law nor are they part of the official legal system (for instance, there is no appeal to the official courts from the decisions of the community courts).[22] The decision to remove them from the judicial system was justified with the new conception of the rule of law introduced along with structural adjustment. The decision was in tune with the political atmosphere of the time, interested in eradicating from the state any remnants of the popular power institutions of the previous, revolutionary period. The community courts were thus left in an institutional limbo. Because they decide cases "with impartiality, good sense and equity" (Article 2, no. 2, of Law no. 4/92) but not according to law, they are not considered part of the judicial system. They should however become organs of justice "*for the purposes of reconciliation or the settling of minor disputes*" (Article 63 of Law no. 10/92) as a type of community justice for which there are words of praise in the law, "*bearing in mind the ethnic and cultural diversity of Mozambican society*" (Preamble to the Law no. 4/92). The Preamble also states that the community courts will "enable citizens to resolve minor differences within the community, contribute towards harmonizing the diverse practices of justice as well as enriching rules, uses and customs and lead towards a creative synthesis of Mozambican law". Being neither entirely official nor entirely unofficial, community courts are a legal hybrid, both inside and outside official law and justice.

Left in this limbo, community courts have taken on the legacy of the popular courts, which have, in the meantime, been formally abolished. The Law that created the community courts determined that the judges of the local and neighborhood courts (that is, the popular courts of the previous, revolutionary period) would continue to exercise their functions until the first elections for judges of the community courts were held. As there were no elections, the judges at the time kept their positions. Death, illness, war and migrations caused the number of judges to be reduced

over the years. Moreover, some judges left their posts, due to the loss of the social prestige attached to the position and the feeling of being 'abandoned' by the government. In the absence of any regulatory law to define rules of recruitment, these replacements were made from within the same socio-political environment as that of the previous judges. The new judges were selected by neighborhood structures or by the direct intervention of the ruling party, Frelimo.[23] For this reason, almost all the judges interviewed said they belonged to the Frelimo and many of them also participated in party organizations. This hybridization between political and judicial functions is also at the root of the problems confronting the community courts. Continuity with the popular courts in terms of both personnel and premises has favored the adherence to the Frelimo Party. This fact has led to the political polarization of community justice, in the terms of which community courts are considered instruments of Frelimo and the traditional authorities instruments of Renamo, the main opposition party.[24] This polarization reached some extremes when, for example, a group of judges, who are supporters of Renamo, decided to create a parallel community court in Mocímboa da Praia (in the northern province of Cabo Delgado).

The hybrid character of the community courts does not limit itself to the legal/political or official/unofficial variables. It can be traced in each of the dichotomies that define the terms of legal plurality and also in the constellation of legal cultures (revolutionary, traditional and liberal democratic legal cultures) present in the ways they operate. The extreme variety gives rise to a landscape of chaotic spontaneity. Lacking, in general, institutional support, being in competition with other mechanisms of dispute resolution – ranging from the police and the local political cadres informally performing judicial functions to the traditional authorities and church organizations –, community courts rely on themselves and their skills for improvising, innovating and, in the end, reproducing themselves. Some remain very active, others are moribund; some beat the competition offered by other institutions involved in dispute resolution, while others are rarely resorted to by the members of the community.

The palimpsest nature of the political and legal cultures in contemporary Mozambique mentioned in section 2 is most vividly illustrated in the legal reasoning and procedural style of dispute resolution in the community courts. Some function predominantly within an official, formal atmosphere, whilst others assume an unofficial, informal character. Some operate within a revolutionary logic, placing political loyalty above everything else, while others have fully accepted the new times and the pragmatism demanded by communities mainly interested in peaceful survival. Some seek to affirm their autonomy in relation to the local administrative authorities – which are themselves a political-administrative hybrid –, the religious authorities and the traditional authorities, while others are totally subordinate to the administrative authorities and assume a multicultural character, resorting to the traditional authorities in many cases, such as when dealing with witchcraft or family problems.[25] However, no matter which type of legal reasoning or procedural style predominates, it

operates in complex articulations with other types or styles. In this way, and varying according to the courts, the cases, the nature of the dispute or the status of the parties, different 'layers' of formalism and informalism, of revolutionary rhetoric and pragmatic rhetoric, of practices of autonomy and practices of networking are differently combined but always inextricably intertwined.

Finally, though most courts have no working relationship with the district courts, some do. In the revolutionary period, the district courts, then called popular district courts, were the bridges between the law courts and the base popular courts, establishing both complementary and competitive relationships with the latter. This type of articulation continues today, however sporadically and informally. For example, the district courts make use of the community courts and the traditional authorities in order to ensure that court summonses are complied with. In the district of Mueda (Cabo Delgado province), as well as in Angoche (Nampula province), the district court and the community courts in the district capital maintain a stable relationship, which has progressed from the discussion of jurisdiction of the community courts to the joint definition of the sanctions to be applied in various cases and on the rapid handling of cases which are referred to the district court by the community courts. In addition, a form of 'division of legal labor' has developed, in the terms of which family matters, for instance, are referred by the district courts to the institutions of community justice. According to one district court judge interviewed, these types of conflicts "are not for a judge to hear, but should be resolved within the family or in the neighborhood". In this context, the police often takes on the function of distributing the litigation among the different institutions, according to the agreed upon informal rules of jurisdiction.

Through this chaotic web of actions and omissions, of communication and non-communication among different institutions, practices and cultures, the community courts do contribute to 'a creative synthesis of Mozambican law', except that they do so under very precarious circumstances and indeed outside the law. The legal limbo has played against the community courts. A void has been created which has been filled by other mechanisms of social regulation, with the traditional authorities emerging as the most important of all.

4. Multicultural and Multi-ethnic Justices: The Case of the Traditional Authorities[26]

Throughout this chapter I have been emphasizing the multiple and culturally diverse instances of dispute resolution and community justice in Mozambican society, both in rural and urban environments. Besides community courts, traditional authorities and social, cultural, religious and regional associations function as instances of conflict resolution. The most important of the latter associations are the churches and, within them, the Islamic organizations, which have grown in influence in recent years. Because it does not recognize any strong distinction between the religious and the nonreligious, Islamic faith tends to regulate social life as a whole. In the central and

northern regions of the country, where the Islamic presence is historically more powerful, religious law has become an important component of legal plurality, particularly in family matters. This is a field of intense hybridization between the religious law and traditional law. All this vibrant legal life occurs outside the official legal field, mobilizing legal and political cultures that have very little to do with that underlying the official legal system. Legal polycentrism merges here with multiculturalism and, thus, with multicultural legal plurality. But of all the instances of multicultural legal plurality, the traditional authorities are by far the most important, not only because of their role in dispute resolution but also because of the political contention around them.[27]

In order to understand the political context in which the traditional authorities operate in Mozambique it is imperative to locate it in the broader, African context. Traditional authorities nowadays are the object of debate throughout the African continent. There are many themes to the discussion and the following may be highlighted: the traditional authorities as local power and administration; the regulation of access to land; women and traditional power; witchcraft; traditional medicine; the compatibility between traditional law and official law and, in particular, the Constitution. From the perspective of neo-liberal globalization, the traditional authorities are the paradigmatic example of what cannot be globalized in Africa. From this perspective, what cannot be globalized is of no interest to neo-liberal globalization, and, as such, can be easily stigmatized as an African specificity, an obstacle to the opening up of African societies to the virtues of the market economy and liberal democracy. Yet what becomes the object of stigmatization may be reappropriated by the subaltern social groups as something positive and specific, as a source of resistance against an excluding global (Western) modernity. It is exactly this reappropriation and resignification that has begun to take place in the area of traditional power. Today, the recovery of the traditional in Africa, far from being a non-modern alternative to Western modernity, is the expression of a claim to an alternative modernity. Because it is occurring throughout Africa and indeed throughout the global South, it is a form of globalization that presents itself as resistance to globalization.

One of the most visible modernities of the traditional lies in the way in which modern state elites seek out the 'non-modern', traditional legitimacy to reinforce their own power. However, this process also occurs in reverse, whenever the bearers of traditional power seek to promote their children or families to a political career in the service of the state, to consolidate and reinforce the traditional power they possess [and see as…] threatened by state competition. This double-edged power struggle can result in conflicts that are difficult to resolve. The ethical code of modern power is based on a distinction between public and private and on the primacy of common interests over sectorial interests. In contrast, the ethical code of ethnic power is based on community interests and relates to a community made up both of living people and their ancestors, in which modern distinctions make little sense. Thus, from the perspective of the modern political ethical code, a particular political or administrative action may be considered as corruption, favoritism, nepotism, patronage or

privatization of the state; but when evaluated from the point of view of the traditional ethical code it may be considered the fulfillment of family obligations and the exercise of community or ethnic loyalties. The popular saying 'the goat eats wherever it is tethered' illustrates this ambiguity or duality.

The question of how to articulate this dual legitimacy feeds one of the most intractable debates in Africa today.[28] According to one argument, the two powers and the two legitimacies must be kept separate, even if they are conferred upon the same person. In other words, state political actions or actions within the public arena of modern civil society must be based exclusively on modern ethical codes, whilst community actions and rituals must be based exclusively on traditional ethical codes. According to another argument, this separation, even if correct – which is debatable – is impossible to sustain, given that individuals cannot keep their multiple identities watertight and uncontaminated. It is better, therefore, to assume that contamination and hybridization between codes is a 'natural' condition.[29]

The rules for this dual-edged power game vary from country to country and according to the historical, cultural and political context. In countries that are officially democratic, these conflicts must be settled by electoral means and according to the rules imposed by the political system in force. Nevertheless, it does happen that, due to the factors already mentioned, electoral legitimacy cannot sustain itself, leading to frequent reliance on community, ethnic or traditional resources. Ethnic power can thus be manipulated, so that in certain situations it functions as a threat and in others as an opportunity. According to circumstances, the political elites wrangle amongst themselves, either for the modern political path, using ethnic power as a resource, or for the traditional political path, using electoral power as a resource. Herein lies a fertile field for the proliferation of political hybrids which are structurally similar to the legal hybrids identified in the previous section.

In the history of Africa this is not the first time that the traditional authorities have been politicized or politically manipulated. This was also the case during the colonial period, particularly from the end of the nineteenth century onwards. It is known that the traditional authorities were used by the colonial powers as a means of ensuring the above-mentioned disjunction between direct political control and indirect administrative control. And indeed the current situation in Mozambique shows a remarkable continuity with the colonial period. To limit myself to the twentieth century, the establishment of a dual, racialized civil society was formally recognized in *Estatuto do Indigenato* (The Statute of Indigenous populations) adopted in 1929.[30] The *Estatuto* established a distinction between the 'colonial citizens', subjected to the Portuguese laws and entitled to all citizenship rights effective in the 'metropolis', and the *indígenas* (natives), subjected to colonial legislation and, in their daily lives, to their customary, native laws. Between the two groups there was a third small group, the *assimilados,* made up of blacks, *mulatos*, Asians, or mixed, who had some formal education, were not subjected to forced labor, were entitled to some citizenship rights (a kind of second-class citizenship) and held a special identification card that differed

from the one imposed on the immense mass of African population, the *indígenas,* a card that the colonial authorities conceived of as a means of controlling the movements of forced labor (Centro de Estudos Africanos, 1998). The *indigenas* were subjected to the traditional authorities, who in turn were gradually integrated in the colonial administration charged with solving disputes, managing the access to land, guaranteeing the flows of forced labor and the payment of taxes (mainly the hut tax). As several authors have pointed out (Mamdani, 1996a; Gentili, 1999; O'Laughlin, 2000), the *Indigenato* regime was the political system that subordinated the immense majority of Mozambicans to local authorities entrusted with governing, in collaboration with the lowest echelon of colonial administration, the 'native' communities described as tribes and assumed to have a common ancestry, language and culture. The colonial use of traditional law and structures of power was thus an integral part of the process of colonial domination (Young, 1994; Penvenne, 1995; O'Laughlin, 2000), obsessed with the reproduction of the super-exploitation of African labor.

In the 1940s the integration of traditional authorities in the colonial administration was deepened. The colony was divided into *concelhos* (municipalities) in urban areas, governed by colonial and metropolitan legislation, and into *circunscrições* (localities) in rural areas. The *circunscrições* were led by a colonial administrator and divided into *regedorias*, headed by *régulos* (chieftains),[31] the embodiment of traditional authorities. Provincial Decree No. 5,639, of July 29, 1944, attributed to *régulos* and their assistants – the '*cabos de terra*' – the status of *auxiliares da administração* (administrative assistants). Gradually, these 'traditional' titles lost some of their content and the *régulos* and *cabos de terra* came to be viewed as an effective part of the colonial state,[32] remunerated for their participation in the collection of hut taxes, recruitment of the labor force, and the agricultural production in the area under their control.[33] Within the areas of their jurisdiction, the *régulos* and *cabos de terra* also controlled the distribution of land and settled conflicts according to customary norms (Geffray, 1990; Alexander, 1994; Dinerman, 1999). To exercise their power, the *régulos* and *cabos de terra* had their own police force. This system of indirect rule illustrates the disjunction between political and administrative control referred to above. It continued after the *Indigenato* system was abolished in the early 1960s. From then on, all Africans were considered Portuguese citizens and racial discrimination became a sociological rather than a legal feature of colonial society. The rule of traditional authorities was indeed integrated more than before in the colonial administration.

After the independence, Frelimo took a hostile position vis-à-vis the traditional authorities conceived of in the broad sense of the word, including *régulos*, healers (*curandeiros*), religious leaders, etc. Seen as obscurantist remnants of colonialism and as fomenting regional and ethnic differences, there was no place for them in the construction of a supra-ethnic state, a national culture and a model of development aimed at liberating Mozambique, in a few generations, from the shackles of underdevelopment. The first Constitution of Mozambique, approved in 1975, declared in its Article 4 the "elimination of colonial and traditional structures of oppression and

exploitation and the accompanying mentality". *Régulos* were then replaced by the new political structures at the local level, the base-level party cells, called *grupos dinamizadores*.[34] In tandem with the base popular courts, they took over the functions heretofore entrusted to the traditional authorities.

The legal abolition of traditional authorities proved to be a complex political and social problem for the government in the following years. To begin with, there were no resources to deploy the new political-administrative structures throughout the whole country, and where they were deployed they were not automatically accepted by the populations. As a result, the traditional authorities continued to rule under different forms and conditions. Both the popular courts and the *grupos dinamizadores* resorted to them in search of guidance and legitimacy. In the process, some *régulos* became judges of the popular courts, deciding the cases on the basis of traditional law and justifying their decisions in terms of revolutionary legality. Another source of problems for the government came with the rise of Renamo. Renamo, which was initially credibly seen as a product of South African secret services, gradually took roots in some regions of the country feeding on the frustrations of the populations with some misguided state policies and with the immense gaps between promises and delivery. Ostracized by Frelimo, the traditional authorities saw in Renamo an alternative for recuperating their power and prestige. A bloody civil war throughout the 1980s further undermined the administrative and welfare capacities of the state and deepened the political polarization around the traditional authorities. Such polarization, combined with the state's docile compliance with neo-liberal impositions from the mid-1980s onwards, fuelled the process by which the traditional became a way of claiming an alternative modernity.

Since 1992 the government has been trying to address the issue of the politicization of base-level governance: community courts, seen as heirs of the popular courts and close to Frelimo, on the one hand, and traditional authorities, seen as a legitimate source of power and close to Renamo.[35] The government response has been two-fold. On one hand, until recently, as I showed in the previous section, the government has seen no urgency in reforming the community courts. The reform is now under way and it is an open question whether the new law of the community courts will be truly bipartisan and therefore likely to survive any changes in government in the future. On the other hand, the government has been trying to neutralize the hostility of traditional authorities, co-opting them by granting them some kind of subordinate recognition and participation in local administration in the rural areas.

The strategy of co-optation relies on the disjunction between administrative and political control. Decree no. 15/2000, of June 20, 2000, the Law of Community Authorities, illustrates the intention of the state to benefit from the administrative abilities of the traditional authorities and simultaneously to neutralize any centrifugal energy they might harness in terms of the political control of populations. As the preamble to the Decree states, community authorities are recognized within the realms – and therefore the limits – "of the process of administrative decentralization, bettering

the social organization of local communities and improving the terms of their participation in public administration". Article 2, in turn, establishes that "in carrying out their administrative functions, local organs of the state will interact with the community authorities, by listening to opinions on the best way to mobilize and organize participation from the local authorities, in the design and implementation of economic, social and cultural plans and programs, designed to benefit local development". No political effect, particularly in terms of participatory democracy, is recognized in these processes of listening and interaction. Finally, Article 3 defines the limits of recognition which refer to the political Constitution and statutory law in general. The general limit is formulated in Article 3 no. 1, and no. 2 underlines the pragmatic and instrumental nature of the recognition of community authorities, since the criteria for participation are based exclusively on the "*needs for administrative service*".

This recognition pattern and the politics underlying it bear a clear continuity with the colonial past, which is also visible in some of the rights and privileges conferred upon the traditional authorities: the use of symbols of the Republic; participation in official ceremonies; the use of their own uniform or distinctive costume; the receiving of a subsidy as a result of helping the state in collecting taxes (Article 5). The main difference in relation to the colonial period lies in the fact that the state seeks to neutralize the traditional authorities not only through the strict separation between political and administrative functions but also through the integration of traditional authorities in a broader set of local government involving base-level administrative structures and even the political-administrative hybrids I mentioned above. The colonial state, on the contrary, emphasized the specificity of traditional authorities in order to justify the racialization of state and society. Specificity meant natural inferiority of traditional authorities vis-à-vis modern colonial rule, African culture vis-à-vis Western culture, indigenous peoples vis-à-vis colonial citizens.

In Mozambique and in Africa, in general, there are today two contrasting views concerning the specificity of traditional authorities: according to one of them, traditional authorities are one among several types of local authority and should be granted no privilege among various other types of authority existing in the same community; according to the other, traditional authorities are not on an equal footing with other local authorities, since they alone control the power of the spirits and the power of the ancestors, so decisive in the government of the community because of their access to rituals and the magical aspects of community life.[36] The already mentioned Decree no. 15/2000 of June 20, 2000, on local community authorities, adopts the first argument. According to Article 1, "under the terms of the present Decree, the community authorities are understood to be the traditional chiefs, the neighborhood or village secretaries and the other legitimate leaders recognized as such by their respective communities".

Underneath or parallel to this official politics of recognition and control there is an intense and chaotic web of interlacings among different legitimacies, local powers, legal cultures and legal practices. While in the revolutionary period the popular courts

and *grupos dinamizadores* sought the guidance and support of the traditional authorities and settled many disputes with resort to them, even though they had been officially abolished, today the official patterns of recognition of traditional authorities and the 'return to tradition' say very little about the traditional rule in action. Actually this varies according to the region, the prestige of the *régulo, xehé* or healer, the relative penetration of the state institutions, the kinship relationships among traditional authorities, state administrators and base-level party organizations, and, finally, the relative strength and influence of alternative community structures of conflict resolution, such as community courts, Muslim organizations, churches, NGOs, etc. A meshwork of regular or sporadic interactions and negotiations is in place, whose unfolding depends as much on the practice of the different institutions involved as it does on the initiative of citizens and social groups interested in turning to their advantage the existence of such competitive or complementary plurality.

Within this web of meshwork and plurality the 'return to the traditional' seems to have more and more appeal, particularly in rural areas where the vast majority of the population lives. A growing activism on the part of the traditional authorities has been identified and the involvement of political or administrative cadres in traditional ceremonies has been accepted. Respect and mutual tolerance have grown. Although in the early 1990s it appeared that most of the traditional authorities were intervening only in religious or spiritual ceremonies as a way to promote peace (Alexander, 1994; Honwana, 2002), the situation today points to a broader intervention which is particularly sought for whenever other local authorities are unable to resolve problems and conflicts.[37] In these forms of cooperation the abovementioned duality of traditional and modern legitimacies dominating law and politics in Africa surfaces very clearly, especially at the local level.[38]

This is the complex historical, social and political context in which traditional authorities operate today as entities of conflict resolution. Among all the dimensions of legal pluralism in Africa, traditional authorities and their law (traditional law, kinship systems, African customs and customary law are some of the terms currently used) have for a long time been the most significant. What distinguishes the legal pluralism they promote is the saliency of the modern/traditional variable and the monocultural/multicultural variable. What is common to the different conceptions of traditional authorities is the idea that these legal practices are distinct from the eurocentric symbolic and cultural universe that underlies official law and justice. Traditional law and justice, therefore, raise two very complex questions: the question of what is traditional and the question of what counts as multicultural. Both these questions are very widely debated issues today and this debate is not only an academic, but also a political one. What is at stake is, once again, the relationship between the political control and the administrative control of populations and their territories, and particularly the question of the legitimacy of the power needed to secure either form of control.

As dispute resolution mechanisms, traditional authorities are particularly important in issues of access to land, family, debt, bodily harm, damage to property, health/sickness, witchcraft and petty theft, indeed a very broad range of issues. In all these matters, traditional authorities are a key node in a network of institutions that may include the district or even the provincial courts, the police, as well as local political and administrative agencies. Sometimes they are the first venue sought for by the parties, sometimes they function as appeal institutions, and in still other occasions they provide advice, or evidence in cases being dealt with by other institutions.

One of the great strengths of the justice provided by the traditional authorities is its immediate, public, collective, face-to-face, and relatively transparent character.[39]

This analysis shows that the traditional authorities are carving out their judicial and political space in the new legal and political framework, both when effectively implemented and when left to the indeterminate play of competing local legal and political forces. They are doing so using a vast array of means available to them, some ancestral and others very recent, but all of them used in modern competitive or complementary interactions with all the other nodes of a mixed, inherently hybrid regulatory network. Out of this network new forms of democratic rule may be emerging which call for careful analysis. Under the new laws that regulate the process of recognition and legitimization of 'local leadership', *régulos* and other community leaders may be required to secure the basis of their legitimacy through a broad process of popular consultation. By opening some space for negotiation in the choice of *régulos*, *cabos de terra*, *madoda*, healers, etc, this process, although incipient, includes elements of participatory democracy.

Conclusion

In this chapter I have highlighted some hidden dimensions of the current global call for legal and judicial reform, namely the ways in which it seems to be operating, as if the developing countries were a legal and judicial *tabula rasa*. The rich social experience of diverse legal and judicial practices thereby ignored was the main focus of this chapter. More specifically, I focused on the Mozambican state and society and on the rich landscape of legal pluralism that characterizes them. I proposed the concept of heterogeneous state to highlight the breakdown of the modern equation between the unity of the state, on the one hand, and the unity of its legal and administrative operation, on the other. I explained the most salient features of the heterogeneous state and of legal pluralism in Mozambique in terms of three major factors: the impositions of neo-liberal globalization and their impact on the political and social processes; an African cultural heritage, which is the object of intense debates and has deep implications on law and politics; the nature and role of the state, bearing in mind that the latter emerged from colonialism in the last quarter of the twentieth century. I tried to highlight the complexity of legal and political processes in a country that has been independent for less than three decades; that has undergone, in such a short period, a turbulent succession of contrasting political regimes and cultures;

has suffered a bloody civil war for more than ten years, and since 1994 has been trying to consolidate a transition to a liberal democratic regime.

I expanded on the concepts of legal hybridization with the purpose of showing the porosity of the boundaries of the different legal orders and cultures at work and the deep cross-fertilizations or cross-contaminations among them. Among the many instances in which these conceptions could fruitfully unfold, I focused on community courts and traditional authorities. I reconstructed the multicultural legal plurality resulting from the interaction between modern law and traditional authorities as a multicultural legal plurality involving alternative modernities

The future of the conditions accounting for the heterogeneity of the state and legal pluralism is tied to the future of the Mozambican state and society as an encompassing process, and will tend to decrease in importance in any scenario in which the following developments will occur: democratic stability and sustained social and economic development that is capable of breaking the cycle of successive political-institutional ruptures; deepening democracy, so that political control and administrative control can develop with reciprocal autonomy; and an increase in the institutional and administrative ability and efficiency of the state, so that respect for the plurality of non-state local and foreign actors involved in social intervention does not result in the fragmentation and segmentation of the polity.

Notes

1 I analyze this phenomenon in great detail in Santos (2002c: 313-52). See also Tate and Valinder (1995).
2 Mozambique is part of the Bretton Wood Institutions since 1984. On this subject, see chapter 4.
3 See also chapter 3, as welle as10 through 13, all of them focusing on different aspects of legal pluralism and community justice.
4 It is true that global pressures are subject to local adaptations, but the latter, especially in peripheral countries, are less open to negotiation, or else are marginal or dictated by the philanthropic whim of international agencies or core countries in particularly extreme situations of social collapse. A good illustration of this is the HIPIC (Highly Indebted Poor Countries) initiative led by the World Bank and creditor countries to alleviate the foreign debt of the most impoverished countries.
5 Africa was the only continent not partitioned by the Treaty of Yalta at the end of the World War II and therefore the one where the Cold War became a permanent 'war of position', to use the Gramscian term. Portuguese colonialism survived for so long, despite its weakness as a colonial power, in part because it served the interests of the capitalist countries by functioning as a barricade against Soviet advances in Southern Africa. Still in the midst of the Cold War, the newly independent countries sided with the Soviet bloc, which was already showing visible signs of decline. The Soviet threat explained the war of destabilization waged by

apartheid South Africa against Angola and Mozambique. The war of destabilization gave way to civil war, which lasted in Mozambique until 1992 and in Angola until 2002.

6 Sometimes such micro-states are clustered around different ministries. For instance, the Ministries of Energy or of Mineral Resources and the Ministry of Environmental Coordination may operate under mutually incompatible political principles and regulatory logics.

7 On this subject, see Santos (2002c: 163-351), where the argument summarized in this section is developed at length. Legal pluralism is one of the core debates in the sociology and anthropology of law. See, amongst others, Nader (1969); Hooker (1975); Moore (1978, 1992); Galanter (1981); Macaulay (1983); Fitzpatrick (1983); Griffiths (1986); Merry (1988); Starr and Collier (1989); Chiba (1989); Benda-Beckmann (1988, 1991); Teubner (1992); Tamanaha (1993); Twining (1999); Melissaris (2004).

8 I use 'scales' in the sense that it is used on maps rather than in the common metaphor 'scales of justice'.

9 This does not mean that the two legal orders existed separately, in two different worlds. On the contrary, the separation was a product of the intense and unequal interactions between them. Chanock was one of the first to show that customary law, far from being a remnant, was created by the changes and conflicts brought about by colonialism (1998). The specificity of South Africa in this regard both in the pre-and post-apartheid period is cogently analyzed by Klug (2000).
On this subject, on Africa and specifically on Mozambique see, for example, Aguiar,(1891); Lopes (1909); Ennes (1946); Gonçalves Cota (1944, 1946); Mondlane (1969); Mondlane (1997); Sachs and Honwana Welch (1990); Ghai (1991); Hall and Young (1991); Gundersen (1992); Moiane (1994); Moore (1994); Ki-Zerbo (1996); O'Laughlin (2000); Bekker *et al*., (2002). On post-colonialism and legal plurality, see, for example, Darian-Smith and Fitzpatrick (1999); Randeria (2003); Abrahamsen (2003).

10 The complexity of this dichotomy has been widely debated in African post-colonial social sciences. See Copans (1990a); Ela (1994); Gable (1995); Mamdani (1996a); Werbner (1996); Chabal (1997); Fisiy and Goheen (1998); Mappa (1998); Mbembe (2000, 2001).

11 On the debate on multiculturalism and the law, see Khatibi (1983); Pannikar (1984, 1996); Lippman (1985); Sheth (1989); Le Roy (1992); Ndegwa (1997); Esteva and Prakash (1998); Tie (1999); Sheleff (1999); Khare (1999); Sanchéz (2001).

12 A palimpsest is a parchment or other writing-material written upon twice, the original writing having been erased or rubbed out to make place for the second or, more simply, a manuscript in which a later writing is written over an effaced earlier writing. In archaeology the concept of palimpsest is used to refer to situations in which the same archaeological layers comprise objects and residues from very different periods and times and very often not susceptible to exact dating. I use

the metaphor of the palimpsest to characterize the intricate ways in which very different political and legal cultures and very different historical durations are inextricably intertwined in contemporary Mozambique. Their impact on state functions and actions is rendered by the concept of the heterogeneous state illustrated below.

13 These two rivers mark the north and south borders of Mozambique and are used as a symbol of national unity.

14 For an evaluation of the last 30 years of political and economic history of Mozambique see chapters 2 and 4 in this volume. See also Chingono (1996); Minter (1998); Newitt (1995, 2002).

15 The popular courts were considered to be "like a weapon permanently aimed at the class enemy, the reactionaries and the traitors, saboteurs of the economy and unscrupulous exploiters, criminals and outlaws throughout the country". The popular courts were, therefore, the instrument which enabled the population to "resolve the problems and difficulties which emerge in the life of the community, the local area, the village or the neighborhood". The popular courts were considered a guarantee of the consolidation and unity of the Mozambican people, "the great forge in which the people create the new law which is increasingly routing the old law of colonial-capitalist and feudal society" (Cf. Preamble to Law no. 12/78).

16 This process of legal-institutional segmentation does not exclude the possibility of some legal or administrative sectors trying to bridge the two sets of existing regulatory logics. This is the case of the Land law approved in 1997. It remains an open question whether the building of this bridge, always a difficult task, will be solid enough to be sustained (Negrão, 2003).

17 I use the concept of global legal culture wars to highlight the extreme forms of competition among different legal systems, particularly in peripheral countries, which are often linked to structural adjustment programs. Instances of such extreme forms of competition can be read, among others, in Santos, 2002c: 208-215; Nader, 2002; Dezalay and Garth, 2002.

18 From the revolutionary period, all kinds of local political cadres, such as members of *grupos dinamizadores*, *chefes de quarteirão*, *secretários de bairro* can still be drawn upon. Both urban settings and large rural villages are divided into neighborhoods (*bairros*). Each neighborhood had a local *grupo dinamizador*, ruled by a secretary. Although the *grupos dinamizadores* have been formally abolished, the figure of *secretário de bairro* (neighborhood secretary) has been maintained; the large neighborhoods are subdivided into quarters, controlled by *chefes de quarteirão* (more on this below).

19 On the subject of community courts, see also chapter 10.

20 A broader analysis of the official judicial structure in Mozambique is presented in part 3 of this book. The figure for district courts includes also the city courts existing in the country. The data is for 2003.

21 For the official judges this is problematic, since the official legal language – Portuguese – is neither the mother tongue nor the language normally used by the majority of Mozambicans.
22 The law that created the community courts established that before the courts could operate a new law would be promulgated, defining their jurisdiction and their institutionalization. Such law has not been promulgated up until now (2005).
23 Frelimo (Mozambique Liberation Front) was the movement that conducted the struggle for national liberation. After Mozambique's independence, Frelimo underwent a process of political transformation and was established as a party in the late 1970s. After the introduction of a multi-party system, in the early 1990s, Frelimo won the three first presidential and legislative elections, thus being the party in power.
24 Renamo emerged as a movement of resistance against Frelimo, carrying out a civil war for more than a decade. After the 1992 Peace Agreement between Renamo and the Mozambican Government, Renamo transformed itself from a movement of resistance into a political party, becoming the major opposition party in the country.
25 The community courts also resort to the Mozambican Association of Traditional Doctors (Ametramo) in cases of witchcraft (see also Meneses *et al.*, 2003, as well as chapter 3).
26 On this subject, see also chapters 3, 11 and 13.
27 The role of traditional authorities in conflict resolution in Mozambique has been emphasized by several Mozambican researchers. See, for example, Cuahela (1996); Honwana (2002); Bonate (2003).
28 In a different way, the question of dual legitimacy is also present in Latin America today after the emergence of multicultural constitutionalism of the late 1980s and early 1990s (the constitutional recognition of the political and legal identity of the indigenous peoples).
29 This, however, raises serious questions, such as, for example, the issue of determining criminal liability in cases considered by official law to be active or passive corruption or abuse of power.
30 The Statute underwent several transformations throughout the colonial period. This subject is also briefly analyzed in chapter 2.
31 The *régulo* (chieftain) was institutionalized, in colonial times, as the lowest component of the administrative colonial system, working under the control of the local administrator. The *régulo*'s position is passed down from generation to generation, according to a hereditary system. Thus, where such a position still exists, its legitimacy derives from family lineages going back to pre-colonial times. The *régulo* embodies different functions of power: legislative, judicial, executive and administrative.
32 Despite this linkage with the colonial administration, several authors refer to the dual role of some *régulos,* who used their privileged position to promote programs

that improved the life conditions of their populations (Isaacman, 1990; Alexander, 1994). In other situations, they made a decision to confront the colonial system directly, or to flee to neighboring countries (Vail and White, 1980; Centro de Estudos Africanos, 1998).

33 An example of this is Article 2 of the Municipal Decree No, 13.128, of April 1950, which granted traditional authorities certain concessions for their interference in labor contracts.

34 The *grupos dinamizadores* were groups of eight to ten people, chosen by a show of hands during the public meetings of urban neighborhoods, workplaces, or local communities throughout the country. All of those accused of collaboration with the colonial regime were excluded on principle. Popular vigilante groups were also formed to assist the *grupos dinamizadores* and were supported by militias that reported to the Frelimo-appointed local administrators.

35 This formulation represents the general tendency. Of course, there are many traditional authorities publicly siding with Frelimo.

36 On the former view, see, among many others, Ghai, 1991; Nzouankeu, 1997; Mamdani, 1996b. On the latter see, also among many others, Ayittey, 1991; van Rouveroy, van Nieuwaal and van Dijk, 1999; Williams, 2004.

37 Depending on the situation, some traditional leaders directly offered their services to the state without conditions, in order to recuperate the role they had before it was disrupted by politics or by the war; others, concerned with the question of status and social recognition are still waiting for formal state recognition, of their authority (materially translated in goods and services such as housing and uniforms).

38 This climate of cooperation does not prevent traditional authorities from remembering past grievances and from voicing them when deemed appropriate. *Régulos* and their assistants were intimidated and humiliated by their former subjects who came to occupy party secretary positions within the Frelimo, or by higher level state and party authorities (Geffray, 1990; Meneses *et al.*, 2003).

39 A detailed analysis of dispute processing by the traditional authorities can be read in chapter 11.

2

Rupture and Continuity in Political and Legal Processes

João Carlos Trindade

Introduction

The nature and forms that the struggles for independence in former colonial territories assumed are factors which heavily influenced the political configuration of new states. In formulating their development strategies, these states, as a rule, adopted one of two attitudes: they either favored elements offering structural continuity with the former ruling nations or, conversely, imposed significant and deep ruptures with any links to the past.

In the case of Mozambique, the fact that the struggle for freedom had assumed the nature of a 'prolonged popular war' and that FRELIMO[1] had progressively incorporated into its ideas "the destruction of all vestiges of colonialism and imperialism, in order to eliminate the system of man exploiting his fellow man, and to build the political, material, ideological, cultural and social basis of a new society",[2] determined the predominance of elements of rupture, especially those relating to the nature of political power and its ideology, the integration of economic and military areas and the strategic options relating to foreign policy (Moita, 1985:504). In spite of this, both in the political and in the legal and judicial spheres, there were large areas where very little changed, or, where, if changes had taken place, they were only felt at a formal or *institutional* level. For example, we shall see later that the composition, organization and functioning of the courts and the other organs dedicated to the administration of justice were profoundly altered, but the essential nucleus of the standard system that these bodies were called upon to implement remained practically the same, with continuity clearly favored as a solution.[3]

In order to make it easier to understand our analysis of the evolution of the political and judicial systems over the course of the last twenty-eight years, we have subdivided this historical period into four main phases:

1. 1974-1975 – the phase of the Transitional Government, extending from the time when it took office on September 20, 1974 to the proclamation of independence on June 25, 1975;
2. 1975-1978 – From independence to the approval of the first Law on the Organization of the Judiciary, Law n° 12/78, of December 2nd;
3. 1978-1992 – the phase of the "construction of the political, economic, social and cultural basis of socialism" and of the so-called *Popular Justice* which, for purely descriptive reasons, we have extended to include the year of the Peace Agreement and judicial reform;
4. 1992-2002 – from the Peace Agreement to the present day.

1. The Transitional Government and the Preparations for Independence (1974-1975)

The indigenous regime introduced into the colonial legal-political order at the beginning of the *Estado Novo* (the *New State*)[4] constituted one of the structural elements of Mozambican society prior to independence. In the words of Narana Coissoró, the Statute of the Indigenous Populations of the Provinces of Guinea, Angola and Mozambique, approved by Decree-Law n° 39.666, of 20 May 1954, "established [...] a clear distinction between 'citizens' and 'indigenous populations', although they were all considered Portuguese nationals", subjecting the latter to "the 'protective paternalism' of the state, while denying them civil and political rights in relation to institutions of European origin" (Coissoró, 1966: 3).[5]

Under the terms of this Statute, the indigenous populations[6] would in fact be ruled "by the customs and usage of their own respective societies", this meaning "compliance with usage and customs [...] limited by morality, the dictates of humanity and the higher interests of the free exercise of Portuguese sovereignty" (Articles 3 and 1 respectively). For a long time, therefore, they were subject to the jurisdiction of the private courts,[7] and access to the law courts was reserved for the non-indigenous populations (whites, those of mixed race, Indians and '*assimilados*').[8] Even after the hurried reforms at the beginning of the sixties,[9] this situation did not alter significantly.

In fact, the end of the distinction between citizens and indigenous populations would reveal itself as an important formal measure, with obvious *de jure* implications, but with a reduced practical effect, since it was very limited in its *de facto* application. The field of labor relations provides perhaps one of the most illustrative examples of this: although forced labor and corporal punishment were abolished and the ex-native populations could then choose freely who they wished to work for, reality has come to show that racial discrimination was not eliminated

from the urban labor markets and that, until almost the end of the colonial era, black Mozambican workers never benefited from the same unemployment benefits, pension schemes, integration into the trade unions or legal minimum wage that Portuguese workers were entitled to (Penvenne, 1995; O'Laughlin, 2000: 23; Covane, 2001). Industrial statistics from the mid-sixties also show that the wages the Portuguese earned in the manufacturing industry were seven times higher in the district of Lourenço Marques,[10] and eleven times higher in other districts in the colony, than the wages the Mozambicans received in the same circumstances (Rita-Ferreira, 1967-1968: 346).

As far as the administration of justice is concerned, although the reorganization of the parish and municipal courts had some effect, the fact remained that the basic functions of the judiciary continued to be amalgamated with those of the administration. The law determined that the duties of a second class municipal judge should be carried out "[...] as inherited functions by the registrars of the [...] civil registry in the respective municipality or locality" (Article 11, n° 1, of Act n° 48.033 of 11 November 1967), but when it emerged that the majority of municipalities and local areas had no available registrars, colonial administrators ended up exercising these duties (n° 3 of the same legal precept). An identical solution was adopted in relation to the small claims courts judges (*'julgados de paz'*) (Article 16).

This concentration of duties within the person of the administrator was, in the end, an important means of political control in rural areas. As Rui Baltazar reported,[11]

> The colonial administrator held [...] in his hands all the tools necessary to secure and maintain colonial exploitation. The administrator supervised the economic sectors (from the distribution of land to the exercise of trade); he ensured the recruitment of forced labor for the plantations, public works or for emigration; he collected taxes; he was responsible for security; he distributed favors and judged and punished of his own free will. (1978: 31)

In this way, with the exception of positions in half a dozen of the first-class municipal courts which were very rarely filled, it was only on a larger territorial level (the actual provincial law courts) and at the level of the Appeals Courts that the system, in principle, possessed career magistrates with formal guarantees of autonomy and independence in relation to executive power. Even so, these positions were difficult to fill and operate. Rui Baltazar again, describing the state of the courts during the final period of Portuguese colonial rule in Mozambique:

Cases were piling up in the court registry offices and the judicial machinery responded only with great difficulty to those it was expected to deal with, [and then only] in the service of the dominant class and interests. In addition, foreign magistrates – for whom the monopoly on judicial posts was reserved [...] – were

also in short supply. It became increasingly difficult to recruit the personnel required to ensure the normal functioning of the judiciary from amongst the citizens of the colonizing country. In fact, in various provinces in our country, long before 1974, there were no judges or public functionaries. Even in the capital there were problems filling all the posts that had been created and which had to be occupied by career magistrates. The repressive machinery in general, and the judicial machinery in particular, were witnessing signs of rapid decadence and decay.

After 25 April 1974 the exodus of foreign magistrates serving in Mozambique accelerated to such an extent that when we reached the Transitional Government, out of the 75 existing positions, the number of magistrates appointed amounted to 25.

> When, in accordance with the Lusaka Agreement,[12] the Ministry of Justice was created, you could say we found ourselves in a favorable position, as it was necessary to deal with the problems of justice practically from scratch. (1978: 32)

The organization of the judiciary, designed to serve the interests of the bourgeoisie and the colonial bureaucracy, therefore reproduced the general crisis which heralded the end of the regime.

With its economy weakened by, amongst other factors, the exceedingly high costs of maintaining a war which had to be fought on three African fronts (in Angola from 1961, in Guinea-Bissau from 1963 and in Mozambique from 1964), a set of highly unfavorable international circumstances which had led to diplomatic isolation within the United Nations, an army comprised of soldiers who were becoming increasingly aware of the use being made of them by the political powers (Correia, 1985: 550), and increasing internal challenges led by the movements and political forces of the democratic opposition, Portugal approached the end of its long colonial cycle in the mid-seventies (Fortuna, 1985). The most direct cause, the 'detonating factor' in the process of decolonization, was the *coup d'etat* of 25 April 1974 in Portugal, at a time when "recognition of independence for the colonies [...] appeared historically necessary, ethically imperative, obligatory in the light of the law of the international community, militarily advisable, and altogether urgent" (Moita, 1985: 506).

In Mozambique, the formal beginning of this process was represented by the swearing in of the Transitional Government, for which provision had been made in the Lusaka Agreement, and which was composed of eleven members: three appointed by the Portuguese state and eight by FRELIMO. The political conditions created by ten years of war and the abrupt retreat of the colonials[13] enabled the liberation movement to maintain control of the mechanisms for the transfer of power and prepare the way for extending its ambitious project for the revolutionary

transformation of society—designed and tested in the so-called 'liberated areas'[14]—to the whole of the country.

It was necessary to establish priorities, particularly as the available resources were not particularly abundant. The strategy adopted was therefore directed towards achieving three main objectives: a) the first, to be carried out immediately, consisted of guaranteeing that the period of transition to independence proceeded in an orderly and peaceful manner, in accordance with the established agreements; b) the second, a medium-term goal, represented the creation of suitable instruments to gradually endow the country with the structures and human resources essential for its development, in accordance with major planned options to be defined by the Government after independence,[15] c) the third, which would take place over a prolonged period of time (as the conditions required for reforms to be introduced had not yet been created), aimed to ensure that the inherited institutions functioned as normally as possible in order to prevent their collapse, which could have created a dangerous institutional void.

In terms of the first objective, legislative provisions were adopted with the aim of repressing each and every act that threatened the social peace and economic progress of Mozambique. Some of the most significant of these were:

- Decree-Law n° 8/74 of 2 November, which punished the promulgation of false or tendentious news liable to affect public law and order, paralyze economic or professional activity, require the intervention of the authorities or in any other way cause unjustified public alarm;
- Decree-Law n° 11/74, of the same date, which considered crimes against decolonization to be all those covered by the Penal Code and, in subsequent legislation, that obstructed or endangered the process of decolonization as stipulated by the Lusaka Agreement, and established severe punishments for such crimes;
- Decree-Law n° 12/74, also of 2 November, which established that detainees suspected of committing crimes against decolonization would not benefit from the provision of *habeas corpus;*
- Decree-Law n° 16/75 of 13 February, which permitted state intervention in small or large-scale businesses when they ceased to make a normal contribution to economic development and satisfy collective interests.

Some very important decisions of the Transitional Government formed part of the spirit of the second strategic objective, such as the creation of a commercial and issuing Central Bank, (the Bank of Mozambique, whose Organic Law formed part of Act n° 2/75, of 17 May), or the appointment of a Research Committee

to assess the need for expert skills in Mozambique, not only at state level and in the various services provided by public organizations, but also in private companies.[16] A specific concern had, in fact, already been manifested in this area by the first Provisional Government in Portugal which emerged after the Revolution of 25 April, that it was "urgent to train specialists qualified in the various areas of the law, in order to replace the progressive draining away of overseas magistrates and jurists and to prepare groups of leaders for the foreseeable stages of the future" (preamble to Decree-Law n° 299/74 of 4 July). This diploma, which had introduced baccalaureate and degree courses in Law at the then University of Lourenço Marques,[17] had not, however, been regulated, and the Transitional Government therefore decided to complete the task. Thus, the terms of Decree-Law n° 7/75 of 18 January established a First Cycle, which lasted two years and corresponded to a baccalaureate. It was obtained by passing in the requisite subjects and also in History of the National Liberation Struggles in the Portuguese Colonies (taught in the Faculty of Letters) and Legal Medicine (taught in the Faculty of Medicine). The decree also established a Second Cycle, which also lasted two years and corresponded to a degree in either Private Legal Sciences or Public Legal Sciences, according to the options chosen.

However, the formation of specialist staff and a state bureaucratic apparatus in Law or other specialist areas was, by nature, too slow a process for the urgency with which the positions left empty by the colonial functionaries needed to be filled. Therefore, it was necessary to call into public service citizens who, although they did not have the appropriate qualifications, identified with the social and political project defined by the country, had some academic training and displayed qualities of wisdom and good judgment. Various pieces of legislation therefore appeared defining special regulations for this area, such as:

- Decree-Law n° 7/74 of 17 October, which allowed functionaries from other public services or individuals of recognized merit to be nominated to serve in the administration or secretariat of the Civil Administration Services;
- Decree-Law n° 14/74 of 12 November, which established the necessary internal requirements for suitability for serve on the staff of the secretariat of the General Attorney's Office, the Judiciary Police, the Prison Services, and the Government Registry, Notary and Identification Offices, for which individuals could be nominated if recognized as possessing the necessary aptitude for carrying out these functions, regardless of whether they possessed the current legal requirements for the positions or not;
- Decree-Law n° 27/75 of 1 March, which authorized for nomination as Inspectors and Deputy Inspectors of the Judiciary Police individuals over 21 years of age who had completed their general secondary

education or basic secondary education or equivalent, respectively, provided that they possessed the genuine qualities to carry out the work.

In this way the third objective referred to in the definition of priorities for the work of the Transitional Government was implemented.

2. From Post-Independence to the Reform of the Organization of the Judiciary (1975-1978)

The period immediately following the proclamation of independence was characterized by a radicalization of discourse and political action directed against the structures inherited from the colonial period. *'Revolutionizing the state apparatus'* was one of the fundamental tasks appointed to the Government during the first session of the Council of Ministers, which met from July 9 to 25, 1975.[18]

Priority was given to the development of rural areas in all sectors of state activity. This, by necessity, implied the abolition of the '*regedorias'*, which were considered feudal structures, collaborators with the colonial regime and incompatible with popular power. "Destroying the structures of the past is not a secondary task and it is not an 'ideological luxury'. It is a condition for the triumph of the Revolution", argued the document from the Council of Ministers.

As a political strategy to ensure the intended rural development, it was decided to create community villages (*aldeias comunais*), where it was assumed that the inhabitants — supporting each other with their own resources and using collective means of production — would, in the short term, improve their living conditions. At the same time, this form of organization would facilitate the provision of the material, technical and scientific resources which the Party[19] and the Government were trying hard to supply.

Financial resources, therefore, were directed to the sectors considered a priority in the process of 'national reconstruction': education, health, agriculture and defense.

In education, efforts were concentrated on combating illiteracy and enlarging the network of schools in order to benefit increasingly larger numbers of Mozambicans. In order to allow the Government to exercise direct and immediate control over the education system, private education was nationalized and brought within the state system.

In health care, working from the assumption that "the practice of private medicine constitutes a form of exploitation which uses illness as a means of making a profit", it was established that all private clinics were to be nationalized and a National Health Service created. This would be responsible for planning medical and sanitation services and ensuring medical support for all citizens, without discrimination, with priority given to preventative medicine and to the rural areas.

Taking agriculture as a base and industry as a dynamic and decisive factor, the Government directed its economic policies towards eradicating underdevelopment and the system of human exploitation, thus giving a concrete meaning to the principle enshrined in Article 6 of the 1975 Constitution. The Ministry of Agriculture was provided with two main objectives: firstly, to guarantee to improve the living conditions of the people, in particular the rural masses, by providing a qualitatively and quantitatively adequate diet and secondly, to support the industrial sector with agricultural raw materials.[20]

In the sphere of national defense, it was established that the tasks to be developed should be closely linked to the process of the economic and social reconstruction of the country, thus ensuring the popular character of the Army through its direct participation in production and close contact with the masses. To achieve this proposal, it was established that a National Service for Defense and Reconstruction should be created.

Consideration of the problems of administration and justice verified that access to the courts during the colonial period had been a minority privilege, that legal language was difficult for people to understand and could only be interpreted by resorting to specialists and that the penal system adopted by the law did not take into due consideration the need for the re-education of offenders and their reintegration into society.

Seeking to make the best use of experiences acquired during the armed struggle for liberation, the Council of Ministers therefore decided to undertake a progressive elaboration of new laws that would serve as an instrument for national unity and the defense of the Mozambican Revolution. This was accomplished by adopting a policy of simplifying the language of the law and launching campaigns to explain its content in order to popularize it, and by giving priority to the re-education of offenders, in collaboration with the Ministry of the Interior and the Ministry of Justice. The existence of private advocacy was also considered incompatible with the existence of a popular system of justice.

In the months that followed, various legislative provisions were adopted with the aim of concretizing these policies. Out of all the legislation approved during this phase, special mention should be made of the following:

- Decree-Law n° 4/75 of 16 August, which banned the practice of advocacy and the functions of legal consultant, solicitor and judicial or extrajudicial attorney as liberal professions. A National Service for Legal Consultation and Assistance[21] was created, subordinated to the General Attorney's Office[22], and new procedural rules were introduced, aimed at making it easier for all parties to put the procedures which affected them into practice;

- Decree-Law n° 5/75 of 19 August, which placed all activities concerning the prevention and treatment of illnesses, as well as the training of health care staff, within the exclusive domain of the state;
- Statute n° 12/75 of 6 September, which banned private education and brought all education under the control of the state;
- Decree- Law n° 21/75 of 11 October, which created the National Service of Popular Security[23] which was given powers to order and carry out any investigations, searches and arrests it considered necessary, proceed with the necessary requisitions, institute legal proceedings, detain individuals and decide a suitable outcome for them, namely by sending them to the appropriate police authorities, courts or re-education camps;
- Statute n° 25/75 of 18 October, which brought the Judiciary Police — soon to become the Criminal Investigation Police — within the structures of the Ministry of the Interior, in order to "avoid the dispersal of authority and to ensure the coordination and efficiency [...] of public services of the same type, and with identical objectives".

In February 1976 the Central Committee of Frelimo held its eighth session in Maputo. It took stock of the first months of government and undertook an exhaustive analysis of the internal situation of the country. Considering that they were passing through a particularly sensitive moment involving "the intensification of the class struggle, as a direct consequence of the state-level consolidation of the power of the worker-peasant alliance and the first revolutionary measures", the order of the day was to unleash a "General Political and Organizational Offensive on the Production Front" (Frelimo, 1976: 36). From amongst the various resolutions passed, we highlight the following:

- *Resolution on the Structures of State Machinery* – announcing the characteristics that the new structures (the representative Assemblies and their executive organs) would have at each level and the provisional rules for their composition, hierarchy and functioning, in relation to the principle of democratic centrism;
- *Resolution on the Community Villages* – establishing a set of principles to be respected during the process of structuring, establishing and organizing production and labor, as well as the conditions for the founding of the community villages;
- *Resolution on Education* – indicating the organizational forms which should be introduced into educational establishments and literacy programs already under direct state administration, so that they would be able to realize their social function and the revolutionary task allocated to them;

- *Resolution on Health* – defining the guidelines for orientating the political and organizational battle in the health sector;
- *Resolution on Justice* – conveying the fundamental political orientation underlying the nature and form of the legal system to be adopted by the country. At one point the document states that:

It is imperative at this moment to destroy colonial-capitalist law and its judicial structure as part of the destruction of the entire state colonial-capitalist machinery in Mozambique. The new judicial system must express the power of the worker-peasant alliance and reflect the dictatorship of the exploited majority. Its sources of inspiration must be:

a) The experiences of the struggle for national liberation
b) The experiences of the class struggle
c) The revolutionary experiences of other peoples

The organization of the Popular Courts will be as follows:

I. The Supreme Popular Court
II. The Provincial Popular Court
III. The District Popular Court
IV. The Locality, Community Village and Neighborhood Popular Court

In order for all the courts to be truly popular, on a local level they will be entirely composed of non-professional judges, chosen from amongst members of the Party, the FPLM[24] and the Mass Democratic Organizations. In the other Popular Courts, professional judges who are trained for their duties and nominated by the central organizations will, whenever possible, be employed, in addition to non-professional judges. Both will attend training and refresher courses and seminars periodically (Frelimo, 1976: 121).

This line is repeated consistently, both on the occasion of the Third Frelimo Congress (February 1977)[25] and during the First Session of the Popular Assembly (in its provisional form[26]), in August/September of the same year. Within this legislative organ, Resolution n° 3/77 of 1 September, on the Land Law, Nationalizations, and on the Popular Courts was approved, establishing "[...] that the organs of the state will take the necessary measures to accelerate the process of the creation of a revolutionary judicial system, namely through the creation of Popular Courts, from local to national level, subordinate at each level to the respective People's Assembly".

In compliance with the accepted political line, the Ministry of Justice concluded its draft bill for the Law on the Organization of the Judiciary

and made it available for public debate just as the first students were graduating from the Faculty of Law at Eduardo Mondlane University.

The first elections for the People's Assemblies were held at the end of 1977.[27] *Poder Popular* (Popular Power) consolidated its position in the various territorial hierarchies within the country.

In April 1978, around twenty newly qualified graduates from the Faculty of Law, joined by some of the most experienced judicial officials, were organized into brigades and dispatched throughout the country. The recent graduates had had experience in local political mobilization campaigns since 1974, as well as in preparatory activities for the General Elections. For about four months, in public meetings held in factories, *machambas* (family farmlands), government offices, army barracks, villages, residential areas and other conglomerations, they moderated debates and collected contributions to add to the draft bill. Simultaneously, in each of the eleven provinces, they prepared to open two pilot popular courts on an experimental basis, one at district level and the other local.

In August of the same year, a national seminar in Maputo brought together the members of the provincial brigades, judges, attorneys and senior staff from the Ministry of Justice to synthesize the proposals collected from these public debates. It was the first great reckoning of the revolutionary experiences of justice – from the time of the struggle for national liberation in the liberated zones, to the experience within the local *grupos dinamizadores* (dynamizing groups)[28] after independence - and an unrivalled moment for collective reflection on the need to widen the rupture with the colonial system and make the administration of justice better suited to the new social and political conditions in the country. Out of it came the final version of the bill, which the Permanent Commission of the Popular Assembly would adopt in its December session later in the year, under the title of the Law on the Organization of the Judiciary.[29] Finally, a legal foundation had been established for the creation of popular justice.

3. The Rise and Fall of the Socialist Experience (1978-1992)

In accordance with our chronology, the phase following the establishment of the People's Assemblies and the adoption of the Law on the Organization of the Judiciary corresponds to the rise and rapid decline of the project for building socialism in Mozambique. It covers the whole of the eighties and extends until the reforms of 1992, which were anticipated in the 1990 constitutional revision.

It is therefore worth defining two sub-periods within this phase: one which corresponds to the concretization of the socialist development strategy, or top-down planning, and another which coincides with the first years of the liberalization of the economy, or outside-within planning, to use the term coined by António Francisco (see chapter 4).

The first sub-period is characterized in political terms by a progressive 'hardening of the regime' as the South Africa-backed[30] war of internal destabilization intensified, and in judicial terms by the widening and consolidation of the network of popular courts.[31]

It was, understandably, an era of profound contradictions and ambiguities. Alongside measures to provide full and effective democratization of the state bodies, including those concerned with the administration of justice, some political decisions were announced and some legal measures approved which were amongst the most repressive of the entire revolutionary process.

The authenticity of Mozambican popular democracy was evident in the voluntary participation of millions of citizens in government activities of a wide-reaching social nature – such as national vaccination campaigns,[32] literacy and adult education programs, elections for People's Assemblies and others, – or in grassroots organizations, such as the local *grupos dinamizadores*, the mass democratic organizations (OMM,[33] OJM,[34] OTM,[35] and the socio-professional organizations), the popular militias, the agricultural and consumer cooperatives and, of course, the popular courts.

Various procedural mechanisms were introduced into the judicial system and new epistemological attitudes proposed which aimed to secure and widen this participation, including:

- a collegiate of all the courts;
- the participation of lay judges in the district and provincial popular courts, on the same level as the professional judges and as their equals;
- the composition of grass-roots popular courts, in which non-professional judges, directly elected by the community, could intervene exclusively and judge "according to good sense and justice, taking into account the principles which preside over the building of a socialist society";[36]
- greater interaction between the courts and the community, by hearing trials, in cases of a criminal or social nature, in the areas where the disputed events occurred;
- the chance for all parties to act for themselves in their particular cases, without the need obtain a legal mandate[37];
- a new attitude towards the law and the way in which it interacted with the social and cultural environment in which it was implemented (Baltazar, 1978: 38).

The most radical, and therefore the most unpopular, political decisions adopted included the so-called '*Operation Production'* and the various campaigns of the

'*Political and Organizational Offensive',* as well as the following legislative provisions:[38]

- Law n° 2/79 of 1 May, better known as the Law on Crimes against the Security of the People and the Popular State, of which the main innovations to the legal system were the introduction of the death penalty (Article 6, n° 1, paragraph d) and n° 2), and the equating of complicity in a crime with the actual commission of a crime (Article 4) and attempted or frustrated attempts at committing a crime, with actual crime (Article 13);
- Law n° 3/79 of 29 March, which instituted the Revolutionary Military Court, a special court designated as the only body for judging crimes against the security of the state[39];
- Law n° 5/82 of 9 June – the Law of the Defense of the Economy – which also equated crimes actually committed with those which were frustrated or attempted, and accomplices or recipients with the authors of crimes, in addition to refusing bail, suspended prison sentences or their replacement by fines for certain crimes;
- Law n° 5/83 of 31 March, which introduced the sentence of whipping to punish the authors, accomplices or recipients of certain serious crimes, whether committed, frustrated or attempted, since it was considered that the punitive measures employed until then had not been adequate to deter a crime wave;
- Law n° 10/87 of 19 September, which introduced alterations to various precepts of the Penal Code, making the sentences for violent crimes against persons more severe.

The direction and management of the entire judicial system remained heavily centralized within the Ministry of Justice, in accordance with the powers authorized by Presidential Decree n° 69/83 of 29 December. As a general rule, management was exercised by means of directives, which could be sent directly from the Ministry or through the Higher Court of Appeals and the General Attorney's Office.

Directive n° 3/83, of 6 June can be cited as an example of the first instance. It was intended to "endow the courts with the operational means to guarantee that the offensive taking place [in the state residential area, managed by the APIE[40]] realized its objectives, developed in other cities and took root". Another example is Circular n° 3/84 of 2 June, which concerned procedures for granting parole to prisoners who fulfilled the legal requirements. Typical examples of the second instance are the Directives of the Court of Appeals n° 3/81, of 25 November, which considered the disposition of Article 18 of the Penal Code[41] 'revoked' whenever it impeded the punishment of anti-social conduct which offended 'socialist values and principles', and n° 1/82 of 27 February, ordering the courts,

in cases submitted for their consideration and in derogation of what had been established both in the Civil Code and the Civil Procedure Code, to immediately apply the general principles enshrined in the Act on Family Law in relation to contested and uncontested divorce cases, *de facto* union (legal recognition, dissolution and impediments to marriage) and polygamy. In addition, there was the Joint Directive of the Court of Appeals and the Attorney General's Office n° 1/86 of 14 April, on the handling of criminal cases arising out of the context of the so-called '*Operação Chapa Cem*'.[42]

From the second half of the eighties onwards, due to a combination of highly unfavorable internal and external factors,[43] the political leadership began to confront the need to take a new line on its global development strategy.[44] The redefinition of alliances and international alignments had already been set, since at least 1982.[45] It is within the framework of this new foreign policy that the 'Agreement on Non-Aggression and Good Neighbor Relations', otherwise known as the N'Komati Agreement, signed with apartheid South Africa in March 1984, must be understood.

An integral part of the country's repositioning was also the decision to adhere to the Agreements established at the United Nations Monetary and Financial Conference held in Bretton Woods, New Hampshire, on 22 July 1944 and, consequently, to comply with the programs of structural readjustment defined by the World Bank and the International Monetary Fund.[46] The launch, in January 1987, of the Economic Rehabilitation Programme (PRE), served as a counterpart for obtaining the necessary credit for the recovery of an economy devastated by war and the other previously cited factors. The PRE represented adherence to a new ideology which would soon dominate in the entire world: neo-liberalism. With subsequent measures including the liberalization of prices, the reduction of the budget deficit, the privatization of state companies, monetary contraction, the raising of interest rates and drastic cuts to social spending, the country was set definitively on the course of a capitalist market economy (Anderson, 1996: 12). This initiated the second sub-period of the phase under analysis.

As a rule, this new economic model corresponds to a political superstructure based on multiparty representational democracy and tripartite state power and so the way had to be paved for the constitutional reforms that the circumstances dictated. Alongside the intensification of diplomatic efforts aimed at ending the long armed conflict in which the country was floundering, a series of legal and institutional measures were passed which had the clear aim of, on the one hand, facilitating this end and, on the other hand, winning the confidence of the core countries and international humanitarian organizations. Mention should be made of the main pieces of legislation that emerged at the time:

- Law n° 14/87 of 19 December, which declared "an amnesty for crimes against the Security of the People and the Popular State which had provision

in Law n° 2/79 of 1 March, committed by Mozambican citizens who have, in any way, fought against, or promoted the use of violence against the Mozambican People or State, inside or outside national territory, provided that they surrender themselves voluntarily" (Article 1, n° 1);

- Law n° 15/87 of 19 December, which offered a pardon to the authors of crimes against the security of the state who had, by their behavior, "revealed a willingness to peacefully reintegrate themselves into society and redeem themselves through socially useful work" (preamble to the law);
- Resolutions n° 9, 10, 11 and 12/88 of 25 August, in the Popular Assembly, which ratified the African Charter on Human and Peoples' Rights, the Convention on the Transfer of Sentenced Persons, the OAU[47] Convention governing Specific Aspects of Refugee Problems in Africa and the Additional Protocol to the Geneva Convention on the Status of Refugees, respectively;
- Law n° 4/89 of 18 September, which revoked Law n° 5/83 of 31 March (the Law on whipping) and granted pardons to those sentenced to prohibitions or limitations on residence, as well as sentences of whipping which had not yet been carried out.

In the same context, the decision was finally made to found and put into operation the organs at the head of the judicial system – the Supreme Popular Court and the General Attorney's Office[48] – as foreseen in the Constitution and in Law n° 12/78 of 2 December. Through Presidential Decrees n° 22, 23, 24 and 25/88, of 17 October, the Chief Justice and the Deputy Chief Justice of the Supreme Popular Court and the Attorney General and the Deputy Attorney General were nominated.[49] Law n° 6/89 of 19 September defined the organic statute of the General Attorney's Office.

The pace imposed by the internal process of capitalist economic reconstruction and the precipitation of events in East Europe leading to the downfall of the socialist regimes had, as was expected, a decisive influence on the changes taking place in the political and ideological superstructure. Constitutional reform, which had begun as a series of limited proposals with the simple aim of adapting Fundamental Law to the realities of the market economy – or, in the words of the deputies of the Popular Assembly, "to make it more suited to the new challenges of establishing a national consensus on the normalization of the life of the country"[50] – finally gave way to the approval of an entirely new Constitution.

From the political regime to the system of government and from the catalogue of basic rights to the organization of the judiciary, the 1990 Constitution had very little in common with that of 1975.

With the new constitutional framework approved and with the PRE proceeding within the regulations laid down by the BWs institutions, it was now necessary,

on the one hand, to proceed with a reform of ordinary legislation in order to make it compatible with the new principles and norms of the Constitution and, on the other hand, to 'encourage' the negotiators who, through the mediation of the Community of St. Egidio in Rome, were seeking to launch the longed-for Peace Agreement.

To a certain extent, this is a possible explanation for the promptness with which certain legislation considered 'politically expedient' was drawn up and approved. Here is an incomplete list of the main standard acts approved in 1991/92:

- Law n° 6/91 of 9 January – which established the regulations that should be obeyed when exercising the right to strike;
- Law n° 7/91 of 23 January – which established the legal framework for the formation and activities of political parties;
- Law n° 8/91 of 18 July – which regulated the right to free association;
- Law n° 9/91 of 18 July – which regulated the exercise of the freedom to meet and demonstrate;
- Law n° 18/91 of 10 August – which established freedom of the press;
- Law n° 19/91 of 16 August – which defined and sentenced crimes against the security of the state;[51]
- Resolution n° 5/91 of 12 December – which ratified the International Covenant on Civil and Political Rights adopted by the United Nations General Assembly on 16 December 1966;
- Resolution n° 6/91 of 12 December– which ratified the Second (optional) Additional Protocol on Civil and Political Rights with the aim of abolishing the death penalty;
- Law n° 23/91 of 31 December – which regulated the exercise of trade union activity;
- Law n° 26/91 of 31 December – which authorized the provision of both for-profit and not for-profit private health care services by individuals or collectives.

Equally, in the area of economics and finance, important new legislation was produced during this period, of which the following merit attention:

- Law n° 15/91 of 3 August – establishing rules for the restructuring, transformation and repositioning of the business sector of the state, including the privatization and transferal – with financial compensation – of companies and other production units;
- Law n° 24/91 of 31 December – liberalizing insurance and reinsurance activities;

- Act n° 28/91 of 21 November (complemented by Act n° 20/93 of 14 September) – defining the means of transfer or privatization of companies, establishments, installations and financial institutions owned by the state;
- Law n° 28/91 of 31 December – establishing the legal framework for credit institutions.

Of specific interest to the system of the administration of justice are Law n° 10/91 of 30 July, which approved the status of judicial magistrates and Laws n° 4, 5 and 10/92, all of 6 May, which concerned the functioning of the community courts, the organic statute of the Administrative Court and the organic statute of the judicial courts, respectively.

Among the various changes that these laws brought to the organization of judicial power, there are two which, due to their significance and implications for the future, should be highlighted: the creation of autonomy for the courts and attorney's offices in terms of their executive powers, and the removal of the community courts from the formal judicial system.

In effect, the Organic Law of the Judicial Courts - issued in accordance with the new constitutional framework - established in Article 65 that "direction of the judicial apparatus is exercised by the Chief Justice of the Supreme Court and by the Judicial Council".[52] It was the responsibility of these organs, therefore, to, on the one hand, issue instructions and directives of an organizational and methodological nature – intended to ensure the good functioning and efficiency of the work of the courts – and, on the other hand, to make fundamental decisions concerning the development of judicial activity, the improvement of judicial institutions, budgetary matters, administrative management and other concerns (see Article 69 of Law n° 10/92). In the same way, Law n° 6/89 of 19 September had already established that "the General Attorney's Office enjoys autonomy in relation to the various state organs [...]" and must "without threatening judicial confidentiality [...], present information annually on its activities to the Popular Assembly" (Article 2, n° 1 and 3).

With the creation of these two organs, the Ministry of Justice — which, as we have seen, under the previous law had exercised full management of the system[53] - was virtually reduced to a coordinating and information-providing role.[54]

As for the removal of the community courts from the formal judicial system, this resulted from a strict interpretation by the legislature of Article 161 of the 1990 Constitution. Under the terms of this precept,

1. The aim of the courts is to guarantee and reinforce legality as an instrument for the stability of the law, to guarantee respect for the laws and to ensure the rights and liberties of citizens, in addition to the legal interests of the different organs and entities in official existence.

2. The courts educate citizens in voluntary and conscious compliance with the laws, thus establishing just and harmonious social relationships.
3. The courts penalize violations of the law and decide litigation in accordance with the law (our emphasis).

Considering that the community courts decide cases "with impartiality, good sense and justice" (see Article 2, n° 2, of Law n° 4/92) and not according to what is established by law, it was concluded that they neither could nor should form part of the judicial system, but should become organs of justice "for the purposes of reconciliation or the settling of minor disputes" (see Article 63 of Law n° 10/92).[55]

If, as previously stated, the intense legislative activity of the single party Assembly of the Republic, which concentrated on some of the most basic democratic rights and liberties, can be seen as part of the 'pressurizing' (in a positive sense) strategy brought to bear on the peace negotiators, we are then forced to conclude that it was very successful. On 4 October 1992, the Agreement between the Frelimo Government and Renamo was finally signed in Rome, putting an end to the armed conflict that had lasted for nearly two decades.

4. From the Peace Agreement to the Present Day (1992-2000)

The final phase in the historical period under analysis corresponds to the replacement of a logic of armed confrontation with a logic of political confrontation without the use of violence – the materialization of the structural and institutional changes planned at the end of the previous phase and of the relative economic growth, within the conditions imposed by hegemonic globalization.

It is therefore natural that, after the Rome Peace Agreement, new legal frameworks emerged to regulate the so-called 'transition to democracy' in areas such as the legitimization of political power, incentives for investment in the economy or the consolidation of the rule of law. The following legislation serves as examples:

- Law n° 2/93 of 24 June – establishing the criminal investigation judges;
- Law n° 3/93 of 24 June (the Law on Investments) – defining a basic and uniform legal framework in the Republic of Mozambique for the process of making national and foreign investments eligible to benefit from the guarantees and incentives provided under the law;
- Act n° 12/93 of 21 July – approving the Tax Benefits Code;[56]
- Act n° 14/93 of 21 July – approving the Regulation of Law n° 3/93 of 24 June (the Law on Investments);
- Act n° 18/93 of 14 September – approving the Regulation of Industrial Free Zones;

- Law n° 4/93 of 28 December – establishing the legal framework for holding the first multiparty general elections;
- Law n° 6/94 of 13 September – creating the Institute for Legal Assistance and Representation (IPAJ);[57]
- Law n° 7/94 of 14 September – creating the Mozambique Bar Association and approving its statutes;
- Act n° 39/95 of 2 August – approving the statutes of the Investment Promotion Center;[58]
- Law n° 2/97 of 18 February – defining the legal framework for the establishment of local autarchies;[59]
- Law n° 7/97 of 31 May – establishing the legal regime for the state administrative protection to which the local autarchies are subject;
- Law n° 8/97 of 31 May – defining the special regulations which govern the organization and functioning of the Municipality of Maputo.

After the political openings created by the adoption of the 1990 Constitution of the Republic and the end of armed conflict, the non-governmental organizations (NGOs) also emerged. The most significant of these were the ones that had as their aim the defense and promotion of human rights – whether the so-called first generation rights or those of the second and third generations – and that formed part of the embryonic Mozambican civil society.[60]

In the political sphere, the general elections of 1994 and 1999 and the local elections of 1998 were the most significant and relevant events during the historical period under analysis. Although dozens of parties and coalitions have emerged since the beginning of the nineties, the most recent trend is towards a progressive political polarization of Mozambican society.[61]

The process of political and administrative decentralization, begun in 1991 with the launch of a government program to reform the local organs (PROL), has also assumed fundamental importance. Decentralization, a controversial issue on which it has not been easy to obtain the necessary political consensus,[62] is seen by many as an empowering element in economic and social development, an answer to regional and inter-regional imbalances, a factor in the re-legitimization of the state and an important instrument for bringing peace and democracy to Mozambican society (Faria and Chichava, 1999: 3; Soiri, 1999: 5).

Designed to press forward with the reform of the local administration system through the creation of new organs – each with its own legal character and endowed with administrative, financial and patrimonial autonomy – the PROL included the elaboration of a diagnosis and in-depth studies into legal, administrative and financial areas, infrastructures and the environment. These studies later served as the basis for the elaboration of Law n° 3/94 of 13 September on the institutionalization of municipal districts (approved by the Assembly of

the Republic while still under single-party status), which represented the first regulatory instrument of decentralization. There are those who believe that the objectives and principles enshrined in this legal document contain the ideal format for broader democratic decentralization (Soiri, 1999: 6), defined by James Manor (1997: 7), as a mixture of fiscal and administrative decentralization (deconcentration) and democratic decentralization (devolution of power).[63]

This law, however, would not be implemented, because the regulatory legislative bills which were to follow it and which had already been drawn up after the general elections of 27-29 October 1994 (and therefore in a new multiparty political context), were vehemently contested by Renamo and the UD[64] – the opposition forces in parliament – and created serious rifts within the Government party (Faria and Chichava, 1999: 4). The conflict which this created and the debate on the constitutionality of these bills for legislative approval finally led to the delaying of the municipal elections which should have established the new local organs of power.

It was therefore decided to proceed with a timely review of the Constitution (Law n° 9/96 of 22 November). In addition to altering some precepts relating to the chapter on 'Local Organs of the State', a completely new title was introduced into the Fundamental Law, Título IV, with the epigraph 'Local Power', which made provision for the existence of local government, the aim of which was to "organize the participation of citizens in resolving their own problems within their communities, promote local development, and deepen and consolidate democracy, within the framework of the unity of the Mozambican state".[65]

This constitutional amendment determined significant changes in the philosophy underlying the aforementioned Law n° 3/94. Once again, in the midst of great controversy and party political dispute, another law outlining the local organs (the aforementioned Law n° 2/97 of 18 February) would soon be adopted, backed by the votes of Frelimo and the UD. Renamo boycotted not only the vote on this law – which expressly revoked the previous law – but also the elections themselves, which took place in June 1998.

Table 2.1 (taken from Faria and Chichava, 1999: 6) indicates the main differences between the two documents to which we have referred:

Table 2.1: Differences in the Legislative Frameworks Relating to Local Power

Law n° 3/94	Law n° 2/97
Administrative division into 128 rural municipal districts and 23 urban municipal districts.	Creation of local government authorities, subdivided into (urban) municipalities and (rural) settlements. Cities, towns, villages and settlements (544) now eligible for local government status. The 128 districts governed by local administrative organs remain outside the scope of local power and consequently come under central administration.
Direct election by secret ballot of the three municipal organs: the municipal President-Mayor (Administrator in the rural zones), Assembly and Council.	Direct election by secret ballot of the President (Mayor) and the Municipal Assembly. Half the members of the municipal Council are appointed by the President and half are members of the Municipal Assembly.
Clear enumeration of the functions and services of local governments (including public safety, the use of land and the water supply, among others).	Functions of local governments reduced to essential matters (such as the use of land) and depend on the existence of local financial resources.
Clear definition of the prerogatives and powers of the central and municipal administrations.	Organs of central administration represented in the territorial jurisdiction of the local government. Possibility of their control of, and participation in, local government (dual administration).

Table 2.1: Differences in the Legislative Frameworks [contd.]

Law n° 3/94	Law n° 2/97
Budgetary, fiscal, patrimonial, planning and organizational autonomy.	Administrative, fiscal, patrimonial and organizational autonomy. Local government administration subordinated to the principle of 'unity of political power'.
Provision for budgetary support in the GSB.[66]	Provision for budgetary support in the GSB.
Traditional authorities integrated into local consultation and decision-making processes (namely in the arbitration of conflicts and in matters relating to the use of land).	Participation of the traditional authorities substantially limited and subject to ministerial regulation.
The right to form an Association of Municipalities.	No reference to the right of municipalities to form an association.
The principle of gradualism: gradual establishment of municipalities based on socio-economic and administrative conditions and on minimum infrastructures.	The principle of gradualism. The law on the creation of local governments (drawn up, discussed and approved later) limits the number in the first phase to 33.
Legal and financial guardianship of municipalities by the Ministry of State Administration and the Ministry of Finance, respectively.	Legal and financial guardianship of municipalities by the Ministry of State Administration and Ministry of Finance respectively. The law on state administrative guardianship over local governments (drawn up, discussed and approved later) determines that this may be delegated to provincial governments.

Many observers and specialists who have analyzed the path followed from the adoption of this law in 1994 up to the first local government elections in 1998 consider that there has been a clear regression, from the point of view of making the process of decentralization more democratic (Soiri, 1999: 7). The biggest critics point to the fact that, on the one hand, Law n° 2/97 applies to a restricted number of cities and towns previously defined as local government authorities – and consequently leaves out the great majority of the rural population and a significant part of the resources that enable local governments to secure their own autonomy – and, in addition, does not take communities into account or promote any form of involvement for the traditional authorities.

Even so, it is generally admitted that, in spite of its limitations, the current policy of decentralization "is a positive step forward towards greater democratization and political openness" (Faria and Chichava, 1999: 8).

The declaration of the government's intention to advance with a vast program of reforms to ensure "the rationalization and modernization of public administration, with the aim of making ongoing improvements to the quality of the services offered to citizens" met with the same expectations. With this objective in mind, an Inter-Ministerial Commission for the Reform of the Public Sector[67] was created by Presidential Decree n° 5/2000 of 28 March and was presided over by the Prime Minister. Its objectives were:

a) To elaborate and propose a global reform policy for the public sector;
b) To ensure the coordination, management and implementation of reform, namely by facilitating the interaction and harmonization of programs from several sectors;
c) To promote and guarantee the integrated participation of all the services and civil society in reducing bureaucracy, and in the simplification, modernization and professionalization of public administration.

This commission is supported by a technical unit, the UTRESP,[68] which is responsible for ensuring the integrated planning, coordination, articulation and supervision of the reform programs and projects.

In terms of structural reforms to the economy, policies aiming to reduce inflation and macro-economic imbalances are generally agreed to have had positive results. However there is also concern that, in terms of human development, the country is still far from achieving satisfactory results. According to PNUD[69] indicators, more than half the population in Mozambique live below the poverty line, less than 40% have access to state health care services and only about 46.5% are literate (UNDP, 1999, 2004).[70]

As for the Judiciary, the reforms initiated by Laws n° 4 and 10/92 of 6 May consequently led to the almost total abandonment of the community courts, due to a lack of clarity with regard to their institutional position and a general rising crisis in formal official justice (the courts, attorneys, legal assistance).[71]

An Inter-Ministerial Commission for Legal Reform was also instituted which, amongst other sub-commissions, included one in charge of the preparation of the Family Law (approved in 2004[72]) and one for the Penal Procedure Code and the Civil Code. The revision of the Commercial Code was entrusted, under contract, to a consortium of specialists, and is awaiting approval. The Commission is also preparing bills on the inheritance law and on fiscal and customs litigation.

More recently, recognition that professional training is a priority for all sectors of the administration of justice has led to the creation of the Centre for Legal and Judicial Training.[73] This Center has developed its activities not only in the training and empowerment of judges, prosecutors, justice officials and assistants, legal staff, public defenders and other sector employees (e.g. court registry offices, members of the Criminal Investigation Police, etc.) but also in carrying out research into common law systems for resolving litigation and promoting and leading the national debate on Mozambican law.[74]

5. Concluding Notes

The three decades which have passed since Mozambique became independent have been intersected by two contradictory processes of political, economic and social transformation.

One, typically revolutionary, took place during the Cold War period and therefore in an international context of confrontation between two antagonistic systems. It determined a break with "the traditional structures of colonial oppression and exploitation and the mentality underlying them",[75] and adopted central planning and administration of the economy as a development strategy.

The other, typically reformist, unfolded at a time in which the Cold War had given way to a period of *détente* and neo-liberalism had become the hegemonic model of development. It is now proceeding with the implementation of programs of structural adjustment, deregulation and the liberalization of the economy, as determined by a conference of the multilateral agencies usually known as the Washington Consensus.

As quite profound processes of change, their evolution was neither linear nor peaceful, since they were subject to the dialectics of social transformation itself and the conjunctures in which this unfolded. In our description of the political-economic options and the legal contours which emerged in each of the stated historical periods, different types of situations may be detected: a) the ruptures of the revolutionary period with the colonial period, which are still valid today; b) the ruptures of the

revolutionary period, undone by neo-liberalism and replaced with the previous *status quo;* c) the ruptures of the neo-liberal period with both the preceding periods.

Perhaps the clearest example of a political decision of the first category concerns the ownership of land. The regime established under Article 8 of the 1975 Constitution,[76] which represented a break with the situation prevailing under colonial law, maintained its continuity in Article 46 of the 1990 Constitution[77] and strongly influenced the debates surrounding the process of drawing up a new Land Law (Law n° 19/97 of 1 October).

In terms of the judicial system, in spite of the reforms brought in by the new Organic Law, the full panel of courts was maintained as well as the participation of (elected) lay judges, which had been an innovation of Law n° 12/78.[78]

The second category of ruptures can be illustrated by two examples among many: in the economic sphere, the mutation between market economy/centrally planned economy/market economy and, in the judicial sphere, the permitting/banning/permitting of private advocacy.

Examples from the third category of rupture include the single party/multiparty or subordination/autonomy (of the administration of justice system in relation to the executive) dichotomies, wherein the single party system and subordination are common to both the colonial and the revolutionary periods.

At the beginning of this chapter it was said that the ruptures in the legal and judicial system which have occurred from independence to the present day were essentially institutional. The observations woven into our analysis of the various stages of the periods outlined, show, in fact, that the fundamental politics and philosophies of official (or state) law remained unchanged during the historical period under analysis. Underlying them are a dogma and a rationality which essentially correspond to the liberal matrix of the modern state, the main ideas of which are the theory of tripartite power, the sacredness of the principle of legality or the rule of law, the reactive and retroactive nature of the function of the judiciary and the logical-formal subsuming of facts to norms as the method of applying the law (Trindade, 1997). There is, however, a structural continuity which is reflected in other spheres of the legal order, namely in codified law – some of which has been in force for over a century[79] – and in the division of the judiciary, which itself has always followed the territorial division of the administration.

Notes

1 FRELIMO stands for *Frente de Libertação de Moçambique* (Mozambican Liberation Front) – which transformed itself into a political party after independence.

2 See '*Decisões do Conselho de Ministros'* (Decisions of the Council of Ministers), *Boletim da República*, 1st. Series, n° 15, 29 July 1975.

3 For which, the principle enshrined in Article 71 of the 1975 Constitution (which corresponds to Article 305 of the present 2004 Constitution) was of fundamental importance, establishing that "All previous legislation which contradicts the Constitution is automatically revoked. Previous legislation which does not contradict the Constitution remains in force until such time as it may be modified or revoked". For a commentary on the issues raised by the implementation of this principle, see Dagnino (1980: 15).

4 See Legislative Diploma n° 162, published in the *Boletim Oficial* n° 22, 1st. series, 1 June 1929.

5 According to Marcelo Caetano, quoted by Braga da Cruz (1988: 66), the indigenous populations were "Portuguese subjects subject to the protection of the Portuguese state without being part of the nation, whether this is considered as a cultural community (since they lack the requisite assimilation of culture) or a political association of citizens (as they have not yet won citizenship)". For an update on the debate on the indigenous system as an instrument of oppression and exploitation and its influence on post-colonial politics, see the critique by Bridget O'Laughlin (2000) of Mamdani's book *Citizen and Subject* (1996a) and this author's response (2000).

6 Considered to be "individuals of the Negro race or their descendants who, having been born or having permanent residence [in Guinea, Angola or Mozambique], do not yet [possess] the education and individual and social habits deemed necessary for the full application of the public and private law pertaining to Portuguese citizens" (Article 2 of the Statute).

7 See the *Regulamento dos Tribunais Privativos dos Indígenas*, (Regulations of the Private Tribunals of the Native Populations), approved by Legislative Diploma n° 37 of 12 November 1927. Article 3 establishes that

> the private tribunals of the indigenous populations will consist of an administrative authority from the main town in the district, municipality, fiscal or administrative area, who will act as chief judge, assisted by two indigenous assessors of the highest level and authority within the district, one nominated by the governor of the district and the other chosen by the Committee for the Defence of Native Populations. Both will serve for two years and will have the right to meals and a monthly payment, to be decided by the Governor General.

Provision was also made for a Private High Court for Native Populations, with its headquarters in the colonial capital, to hear appeals against the decisions of the private indigenous courts. It consisted of the Governor General, who presided over it, a Chief Judge of Appeals, a representative elected annually by the Government Council from amongst individuals who had worked in local administration, and the Director of Native Affairs (*Director dos Serviços e Negócios Indígenas*).

8 Still within the terms of this statute, the '*assimilados*' were ex-indigenous people who had acquired Portuguese citizenship after proving that they satisfied the following conditions: a) they were over 18; b) they spoke Portuguese correctly; c) they exercised a profession, skill or office which provided them with enough income to support themselves and any members of their family who were in their care, or possessed enough private means to do the same; d) they were of good character and had acquired the education and habits deemed necessary for the full implementation of the public and private law pertaining to Portuguese citizens; e) they had completed their military service and were not registered as a deserter (Article 56).

9 The so-called 'Adriano Moreira Reforms', (Coissoró, 1966: 6) a legislative package approved on 6 September 1961 – after the first armed action against colonial occupation which took place in northern Angola – which included the abolition of the indigenous regime (Act n° 43.893), a review of the occupying regime and the concession of land (Act n° 43.894), the creation of *Juntas* de *Povoamento* (Settlement Boards - Act n° 43.895), the restructuring of the *Regedorias* (chiefdom councils - Act n° 43.896), the recognition of local customs and usage (Act n° 43.897), the reorganization of the *Julgados Municipais e de Paz* (Small Claims Courts and Municipal Courts - Act n° 43.898) and the Registry services (Act n° 43.899).

10 Currently including both Maputo Province and Maputo city.

11 Minister of Justice in the Transitional Government and in the first post-Independence Government (1975-78).

12 The Lusaka Agreement, signed by the Portuguese Government and FRELIMO on September 7th 1974, constituted the legal instrument and institutional platform which established the cease-fire and led Mozambique to independence the following year.

13 Already by 1973, 22,000 Portuguese had fled the colony (Verschuur, 1986, cited by Magode, 1998: 112). This number increased to around 100,000 between September 1974 and June 1975 (Gentili, 1999: 363) and continued to rise in the first years after independence. The majority of these people had occupied key posts in public administration and had controlled strategic sectors of the economy, such as the construction industry, the banking system, the small and medium-sized manufacturing industries, the fishing industry, the rural trade network and the large and medium-sized agricultural companies.

14 Areas in the interior of the territory, mainly in the regions of Cabo Delgado, Niassa and Tete, which, as a result of the struggle being advanced, had been removed from the control of the Portuguese colonial administration. Here alternative forms of political, economic and social organization had been

rehearsed which, after independence, were an inspiration for the Government's development strategies and programs.

15 In a message transmitted via Dar-es-Salaam (Tanzania) on the occasion of the swearing in of the Transitional Government, Samora Machel, the president of FRELIMO, indicated the following guidelines for the system of the administration of justice:

> The judicial machinery should be reorganized so that justice is accessible and understandable to the ordinary citizens of our land. The bourgeois system involved the administration of justice in unnecessary complexity, a legal system that was impenetrable to the masses, a deliberately confusing and obscure language and at such a slow pace and such costs that it created a barrier between the people and justice. In short, the legal system that exists in our country serves the rich and is accessible only to them. The path we intend to follow is one of simplifying and accelerating the process of applying justice within the framework of new laws and regulations which the Transitional Government must now study, bearing in mind the existing situation and the gradual transformation which must be undertaken (Machel, 1983: 18).

16 See the Dispatch of the Prime Minister of the Transitional Government of 25 January 1975, published in the *Boletim Oficial* n° 13, 1st. series of 30 January of the same year.

17 The University of Lourenço Marques was later on renamed Eduardo Mondlane, after the first president of Frelimo.

18 See the reference in note 1.

19 By then Mozambique had a single party political system, led by Frelimo (the nationalist movement transformed itself into a political party, after independence).

20 See Article 25 of Act n° 1/75 of 27 June.

21 *Serviço Nacional de Consulta e AssistÍncia Jurídica* (SNCAJ).

22 The SNCAJ would never effectively exist, due to a lack of regulation and lack of means. Later the National Institute for Legal Assistance (*Instituto Nacional de AssistÍncia Jurídica* - INAJ) would be created to replace it. Its evolution into the current Institute of Legal Assistance and Representation (*Instituto de Patrocínio e AssistÍncia Jurídica* - IPAJ) is analyzed in more detail in chapter 9.

23 *Serviço Nacional de Segurança Popular* – SNASP.

24 The Popular Forces for the Liberation of Mozambique, the national army (*Forças Populares de Libertação de Moçambique*).

25 See, in particular, the section entitled "*A edificação da Justiça Popular*" ("The Building of Popular Justice"), in Point 5 of the Report of the Central Committee to the Third Congress (Frelimo, 1977).

26 See Article 37 of the 1975 Constitution.

27 In accordance with the regulations established in Article 21 onwards in Law n° 1/77 of 1 September, deputies in the Locality and City Assemblies were directly elected by open ballot at meetings of eligible voters in residential areas and workplaces. In their first sessions, these Assemblies elected delegates to the District Electoral Conference from among their members and from among members of the Party structure, the FPLM, other defense and security organizations, the mass democratic organizations, the state institutions and the units of production. Following the same procedure, the District Assemblies elected their representatives to the Provincial Electoral Conference and, finally, the Provincial Assemblies elected – this time in a secret ballot – a total of 230 deputies to the Popular Assembly.

28 See note 34 in chapter 1.

29 Law n° 12/78 of 2 December.

30 On the role of the *apartheid* regime in destabilizing countries in the region, particularly Mozambique, see the Final Report of the *Commission for Truth and Reconciliation*, South Africa, Volume 2, Chapter 2, which can be consulted at http://www.polity.org.za/govdocs/comissions/1998/trc/2chap2.htm (assessed in September 2002). On the subject, see also Hanlon, 1991; Minter, 1998.

31 By 1985 11 provincial popular courts had been created and had begun functioning, including that of the City of Maputo, in addition to 60 district popular courts and around 700 local popular courts, incorporating approximately 4,000 judges altogether (*Justiça Popular*, *Bulletin* 10: 10).

32 For example, the National Vaccination Campaign, which ran from June 1976 to February 1979, enabled over ten and a half million Mozambicans to be vaccinated against smallpox, measles, tetanus and tuberculosis, thus covering a percentage of people never previously achieved anywhere else in the world (see the preamble to Ministerial Diploma n° 88/79 of 4 August, published in the *Boletim da República*, 1st Series, n° 90, 1979).

33 *Organização da Mulher Moçambicana*, (Mozambican Women's Organization).

34 *Organização da Juventude Moçambicana*, (Mozambican Youth Organization).

35 *Organização dos Trabalhadores Moçambicanos,* (Mozambican Workers Organization, the main trade union).

36 See Article 38, n° 2, of Law n° 12/78.

37 See Article 3 of Decree-Law n° 4/75, of 16 August.

38 '*Operação Produção'* (Operation Production) was carried out following the decisions of the IV Frelimo Congress (Maputo, 26 to 30 April 1983), which adopted the slogan *Defend the Country, Defeat Underdevelopment, Build Socialism*. It involved political actions of a repressive nature, which aimed to forcibly remove to the most under-populated rural zones (in particular the northern province of Niassa) all those in the large cities who, "lived as delinquents, idlers, parasites, outcasts, vagrants and prostitutes", in order to transform them, through productive work and involvement in the local community, into "useful elements of society, honest workers, citizens who fulfill their civic duties and responsible people, worthy of being accepted into society" (see the preamble to Law n° 7/83, of 25 December). The 'Political and Organizational Offensive', for its part, aimed to provide a "historic contribution to the Mozambican Revolution through the enrichment of Marxism-Leninism", and was a method of work based on " the spirit of rigorous demands, maximum effort, efficiency, productivity, honesty and dedication", through which the central organs of the Party and the state would make an ongoing assessment of the "process of building the new society and the new Mozambican man" (see Resolution n° 9/80, of the Popular Assembly, published in the *Boletim da República* n° 33, 1st Series, of 20 August 1980). In spite of their upright intentions, both processes in fact ended up by creating countless numbers of innocent victims, as was later recognized.

39 The Revolutionary Military Court consisted of five judges appointed by the Ministry of National Defense. The choice always fell on career soldiers, who had no legal training. Although the law established the principle of public hearings (Article 14), in this Court the hearings took place behind closed doors and there could be no appeal against their decisions (Article 3).

40 APIE – *Administração do Parque Imobiliário do Estado*, that is, the State Real Estate Management in charge of the nationalized real estate.

41 Which gave dispensation for the following:

> Analogy or the deduction of parity or majority reason is not admissible in qualifying any fact as a crime, without it also being necessary to verify the elements which essentially constitute the criminal fact as expressly defined in penal law.

42 A political campaign against speculation in the transport of people and goods.

43 Which included the following: intensified armed conflict between the government forces and Renamo; a long and persistent drought which exhausted the region, had irremediable effects on the whole of agricultural production, especially the family sector, and created a chronic dependence on the exterior for food; the failure of the rural development

policies adopted; the intensification of the international economic crisis, whose repercussions were felt throughout the continent in a particularly dramatic way, to the extent that some consider the eighties a *'lost decade for Africa*' (M'baya, 1995: 62; Abrahamsson & Nilsson, 1996: i).

44 There is a vast amount of literature on the causes of the collapse of the socialist option in Mozambique. From amongst those authors who emphasize external factors (South African destabilization and a difficult set of international circumstances) mention should be made of Joseph Hanlon (1991), John Saul (1990), Bridget O'Laughlin (1992), Abrahamsson & Nilsson (1995). Authors such as Clarence-Smith (1989), Peter Fry (1990), Jean Copans (1990b), Michel Cahen (1996), and others prefer to emphasize internal factors (the denial of ethnic differences, the technocratic model of development, etc.).

45 Abrahamsson & Nilsson (1995: 104) note that in August of 1982, at a session of the Frelimo Central Committee, the decision was made to adopt a new foreign policy based on the principle of 'making more friends and fewer enemies'. This change occurred after the refusal of the former Soviet Union to provide greater economic and military aid to Mozambique and evident signs of a serious swing in Moscow's own foreign policy.

46 See Act n° 6/84, of 19th. September.

47 The Organization of African Unity was an international organization founded to promote unity, solidarity and international cooperation amongst the newly independent African states. It was transformed, in 2002, into the African Union (AU), aimed at promoting cooperation amongst the independent African countries.

48 Until then both the Higher Court of Appeals, created by Law n° 11/79 of 12 December – which replaced the former Appeals Tribunal – and the General Attorney's Office, whose structure had remained unaltered since the colonial period, had been functioning provisionally. Both organs had been charged with the exercise of some of the powers attributed by the Law on the Organization of the Judiciary to the Supreme Popular Court and the General Attorney's Office and, simultaneously, with creating the conditions to ensure these could begin to function.

49 The other judges in the Supreme Tribunal were shortly afterwards nominated in a dispatch from the Ministry of Justice, in accordance with the provisions in Article 14, n° 1, of Law n° 12/78.

50 See the "Motion for a Salutation to the Central Committee of the Frelimo Party, the Central Commission and the people of Mozambique", of 2 November 1990, published in the *Boletim da República*, 1st Series, n° 44, of 5 November 1990.

51 Much less severe than the previous law, it acknowledged the contents of Article 70 of the 1990 Constitution ("1. All citizens have the right to life. They have

the right to physical integrity and cannot be subjected to torture or cruel and inhumane treatment. 2. The death penalty does not exist in the Republic of Mozambique") and subjects this special type of infraction to ordinary jurisdiction.

52 The Judicial Council is defined as "an organ directed by the Chief Justice of the Supreme Court, the function of which is to analyze and rule on fundamental issues relating to the judicial apparatus" (Article 66). It consists of the Chief Justice and Deputy Chief Justice of the Supreme Court, Justices, the Chief Judges of the Provincial Courts and the Secretary General of the Supreme Court (Article 67).

53 Nominating and discharging judicial magistrates and those of the General Attorney's Office at all levels and exercising disciplinary action over them; determining the specialization of the courts and their respective sections and their commencement of operations; defining the selection criteria for candidates, rules for procedures and time limits for the election of non-professional judges; establishing the budgets for the different institutions, etc.

54 After the judicial courts and public prosecution became autonomous, the Ministry of Justice was left with part of the prison services, the Registry and Notary Public services, the IPAJ and the community courts. Later on, two more institutions were created which came under the supervision of the Ministry of Justice: a Law Reform Commission, recently transformed into a Technical Unit for Law Reform (UTREL) and the Centre for Legal and Judicial Training (CFJJ). This subject will be analysed in several other chapters in section 3 of this book.

55 We shall return to these issues in part 3 of the book.

56 Some of the provisions in the Tax Benefits Code were subsequently altered under Act n° 45/96 of 22 October.

57 The Organic Statute was approved by Act n° 54/95 of 13 December.

58 CPI – *Centro de Promoção de Investimento*, in Portuguese.

59 The municipalization process is part of broader political and administrative reforms that are being carried out in Mozambique (more on this subject below).

60 This subject is analyzed in more detail in chapter 9.

61 In the legislative elections of 1999, Frelimo obtained 48.5% of the votes, Renamo 38.8% and the remaining 10 parties and coalitions together managed no more than 12.7%. In 2004, Frelimo obtained 62% of the votes, while Renamo dropped to 29.7%.

62 Renamo and almost all of the other opposition parties refused to take part in the 1998 local government elections because they disagreed with the legislative package approved by the Frelimo parliamentary majority and the way in which the process of decentralization was being carried out by the government. The

number of abstentions reached the unexpected figure of 85.42%. In most of the 33 municipalities involved in the dispute, only the party in power stood for election. Even so, in the two largest cities in the country, Maputo and Beira, the citizens associations *'Juntos pela Cidade' ('United for the City')* and the *'Grupo de Reflexão e Mudança' ('Group for Reflection and Change')* achieved significant results, obtaining 25.6% and 39.9% of the votes respectively and electing 15 and 17 members to the corresponding Municipal Assemblies (AIM, 1998). In 2003 the second local elections took place; for the first time Renamo (sometimes in coalition with other parties) won 5 municipalities.

63 The difference between 'deconcentration' and 'devolution of power' lies in the fact that the former, in contrast to the latter, does not imply a definitive transfer of the authority of the central administration (the power of decision-making and execution) to the elected local organs.

64 The *União Democrática* (Democratic Union) – a coalition which existed during the first legislature.

65 See Article 188, n° 1, of the 1990 Constitution.

66 General State Budget.

67 CIRESP – *Comissão Interministerial de Reforma do Sector Público*, in Portuguese.

68 See Act n° 6/2000 of 4 April.

69 United Nations Development Program.

70 See also the *1999 UN Resident Coordinator Annual Report*, at http:// www.unsystemmoz.org, as well as the data from the last census.

71 On this subject, see chapter 10.

72 Law n° 10/2004 of 25 August.

73 See Act n° 34/97 of 21 October.

74 See *Notas sobre a Formação Jurídica e Judiciária em Moçambique* (CFJJ, 2000). See also chapter 6 in this book, which contains more detailed information on the activities carried out by the CFJJ.

75 See Article 4 of the 1975 Constitution.

76 Which declared the following: "The land and the natural resources situated on and beneath the earth, in territorial waters and on the continental platform of Mozambique are the property of the state. The state decides the terms of its use and benefits".

77 Which states: "1. All ownership of land shall be vested in the State 2. Land cannot be sold or otherwise disposed of, nor may it be mortgaged or subject to attachment. 3. As a universal means for the creation of wealth and of social well-being, the use and enjoyment of land shall be the right of all the Mozambican people". Article 109 of the 2004 Constitution reads similarly, although it differs in point n° 2, which declares that "land may not be sold […]" thus opening the possibility for private ownership of land.

78 With the new 2004 Constitutional reform, which introduced –among other changes – the notion of legal pluralism in the country, the need for a reform of the judicial system became more than obvious. The reform of the court system was initiated in 2003.

79 The Commercial Code dates from 1888, the Penal Code from 1886, the Penal Procedure Code from 1929 (although it only came into force in Mozambique in 1931), the Civil Code from 1966 and the Civil Procedure Code from 1961.

3

Toward Interlegality? Traditional Healers and the Law

Maria Paula G. Meneses

Introduction

Mozambique is a large country, with a population of approximately 19 million, almost all native Africans, belonging to several ethnic or linguistic groups. Until the onset of Portuguese colonization, toward the end of the nineteenth century, the various peoples that made up Mozambique did not live under a single political authority. They existed as independent entities, with various forms of political and social organization: some were kingdoms with centralized governments; others existed mainly as headless units, the largest political units being the tribes or chieftaincies.[1]

The transition to the twentieth century became synonymous with the implantation of colonial rule, introducing a critical period of radical changes that brought about the Mozambican political reality. The different economic and political strategies applied by the colonial state in Mozambique resulted in important changes to the organization of power (where and for whom this power operated). The forms of colonial domination and resistance in different spaces and locations are a reaction to the systems of exploitation that depended on slave and free labor – a situation that explains the colonial regime that existed in Mozambique, as well as the different stages that succeeded it (O'Laughlin, 2000: 11). The *Indigenato* regime[2] was the political system that subordinated Mozambicans to leaders of communities described as tribes. The construction of traditional or common law therefore arose as an integral part of this process of subordination and domination out of which the colonial state emerged (Young, 1994; Gentili, 1999). Political control was highly concentrated under the colonial state, while administrative control was much more selective and decentralized. Thus, in rural settings, the colonial state agreed that the administra-

tion would be carried out by local, traditional authorities, applying a private, customary law for the resolution of problems in local societies, whereas in urban areas civilians (mostly Portuguese colonials) operated under the rule of law.

In ideological terms, the colonial system was a dualistic system which attempted to oppose the different forms of governance, legal systems, land possession, and labor regulation (Mamdani, 1996a; Newitt, 1995). The colonial state guaranteed the existence of an official, modern legal system for citizens (i.e., for the colonials and *assimilados*). The state would issue birth certificates and identity cards to citizens. Citizens could use these documents to register goods (*e.g.*, land) under their names, and could appeal to state courts to resolve legal conflicts. Civil identity was, therefore, the identity of the civilized citizen; the only one who retained political and civil rights. On the other hand, indigenous rights were defended by traditional authorities through traditional law. Because indigenous identity was drawn along regional ancestral lines, it was mainly defined according to ethnic criteria.

By attributing a political identity to Africans through local (indigenous) authorities, Portuguese colonialism sowed the seeds of the ethnic, racial and identity-based, widespread opposition that characterized Mozambique in the post-independence period.

As Santos claims in chapter 1, after independence, from 1975 on, diverse eurocentric political-legal cultures were added to the extant mix of legal orders. These 'new' cultures added new elements to the resources available locally. These previous resources were remnant structures from earlier periods in the life of the state, some of which, although legally suspended for a while, had continued to survive sociologically (such being the case of the so-called traditional authorities). As a result, the contemporary landscape of Mozambique can be described as a mosaic of legal hybridization, in which there is a mixture of elements of different legal orders (official/state law, common law, various religious laws, etc.). At the same time, in the field of conflict resolution, innovative legal entities are created out of such mixtures.[3] This legal phenomenon has been described as *interlegality* (Santos, 1995).[4]

In this chapter I seek to explore some of the conflicts in the realm of justice administration in Mozambique. My reason for adopting the global-national-local perspectives derives from the need to interrogate the reasons for the mismatch between traditional and modern law, between the official and unofficial settings of conflict resolution.

The 'traditional' sphere – the institutions which take on the protection of the welfare of the local communities – are simultaneously political, curative, juridical and religious; they cover an extensive field of competencies and functions which place the efficacy of problem-solving within a more enveloping context, bringing into play institutions of authority, normative and symbolic structures, and relations of force, knowledge and power. Nonetheless, until 2004 – when the new Constitution recognized the plurality of legal orders in Mozambique (Article 4), only the judicial instances recognized as official have been the object of support by the state; the other legal structures not recognized as official are tolerated but, most frequently, ignored.

Problems related to witchcraft continue to be one of the most visible areas of activity of the traditional institutions, where culture and power are continuously contested and recreated.[5] In the modern view, the qualifier 'traditional' – when applied to conflict resolution or social integration – refers to practices and knowledge that are perceived as opposing and/or complementing the official conflict resolution system. Using witchcraft practices as a window onto the broad subject of 'other authorities', I try to show some possible ways of approaching the question of law and justice in Mozambique as a problem-solving tool.

Having set the analytical framework, it should be said that the analysis studied in this text is mostly based on the practices and discourses found in Maputo city and its environs, as well as in distinct areas of the Maputo province, in southern Mozambique, where the research has been carried out. Also, I gathered information from libraries and from several research organizations. The major sources of information, however, are interviews and participant observation, since little research has been produced in the country on this subject.

1. The Colonial and the Postcolonial State

In 1975, with Independence,[6] the country adopted a Westernized constitution, with a parliamentary system of government. It also provided for an independent judiciary with the power to review acts of both the legislature and the executive. However, since the Frelimo[7] government's goal was to achieve the level of development to be found in the West, recognition of the ethno-cultural differences was seen as a wrong political move, as a path that would advance internal regional fractions; at the same time, many of the local African traditions were regarded as backward and at odds with the road towards development. During the first decade after independence, it became practically impossible to speak of social differences other than the obvious differences between colonialists and the oppressed, between rich and poor. Reference to other forms of difference – be they cultural or even ethnic — would be condemned as pandering to regional divisions in the country. Literate people became an almost inevitable part of Frelimo's effort to extend the modern state[8] into rural surroundings. Their power came from a form of knowledge that denigrated the 'traditionalism' of the tribal chiefs and the 'obscurantism' of their rural culture (Machel, 1981: 38; Roesch, 1992: 472; Geffray, 1990: 34-44, 78-80). Frelimo had won the struggle against colonialism and, on its ruins, was to transform the mentality of native society. Literacy would bring about a transformation from metaphysical reasoning, typical of a traditional society, to scientific and materialist reasoning. Characteristic of the dominant ideology of that time was the fact that scholars ignored some of the main questions that people were posing in legal terms, such as the theme of witchcraft. Instead, witchcraft was described as an impediment to national unity and to the project of liberation: pernicious evidence of the 'traditional', obscure past (Castanheira, 1979: 12).

The Creation of the Customary

The 'invention of tradition', the 'making of customary law' has become a symbol of 'the traditional' in Africa, a product of the colonial past. In other contexts, tradition has become a symbol of a pre-colonial past.

Despite the fact that the *Indigenato* Code was only adopted in the late 1920s, it was preceded by a complete series of codes and sanction regimes, which demarcated the distinction between 'the civilized' and 'the natives'. The essence of the colonial system, thus, was based on the existence of a 'traditional' ruling system, upon which the colonial administrative and judicial system exerted its action. In colonial Mozambique, local, traditional chiefs were closely linked to the colonial system. Although some of the local chiefs (*régulos*) were of 'noble' lineages,[9] several other people appointed by the colonial authorities often lacked traditional legitimacy.[10] At the same time, the positions to which they were appointed were either created by the colonial administration or had been so corrupted by its demands to collect the hut tax, raise the labor force and regulate the forced production of agricultural products that they no longer legitimately represented autochthonous patterns of authority, but rather the co-optation of complex ruling mechanisms.

In its essence, the *Indigenato* regime symbolized the 'making of customary law' from above, with the support of the colonial administration. Modern law – brought about by the colonial state – regulated relations among the non-indigenous as well as relations between non-indigenous and indigenous. It should therefore be evident that political inequality emerged side-by-side with civil inequality, as both were based on the instituted legal pluralism: the colonial/state law and customary rights. The analysis of this process has shown how a web of actors (including colonial authorities, missionaries and African notables/elders) cobbled together local customs, giving it the form of colonial law. While indigenous law was more like a legal claim than a legal code, contrary to the dominant pattern seen elsewhere in colonial Africa, in Mozambique the attempts to codify the customary (Gonçalves Cota, 1944, 1946) were never given the force of law.

A careful study of the customary clearly shows a call for the preservation of the social fabric, through the social construction of tradition, law and ethnicity, throughout the impositions of the colonial system. For Mamdani, this system of 'indirect rule' – a characteristic of the British colonial administration in Africa – established a "decentralized despotism" as the British learned to marshal authoritarian possibilities in the native culture (1996a: 23). However, at the same time, in a game of mirrors, one has to pay attention to the role played by local actors, as people continually reinterpreted and reconstructed tradition in the context of broader socio-economic changes. As Spear notes, "far from being created by alien rulers, tradition was reinterpreted, reformed and reconstructed by subjects and rulers alike" (2003: 4). Thus, 'tradition' emerged as a multi-dimensional landscape, an interactive historical process that was the antithesis of the 'static' colonial state.

Despite being 'punished' by the colonial state, the chieftaincy and related institutions – specifically in the Mozambican colonial context – were an important factor in terms of cohesion and cultural identity, which legitimized authority and regulated relations among the population by administering any occurrences of local conflict. Far from conveying an unchanging past, tradition undergoes continual renewal as new concepts are brought in or old concepts readjusted according to changing realities. Tradition is then composed of fixed principles and fluid processes of adaptation that regulate societies. In colonial times, the *régulos* represented the consolidation of judicial, legislative and administrative authority at the center of the state. In order to keep their position, these traditional chiefs depended on the support of colonial power. But simultaneously, colonial authorities depended on traditional authorities to make their rule effective and legitimate.

Under the Portuguese, the *régulos*[11] were the repositories, administrators and judges of 'customary law', the rules that governed colonial social, political and economic relations. In short, from a political tool for re-negotiating the social status and access to resources, the customary was transformed into a set of enforceable rules that froze its status and restricted access to it.

In a situation where 'traditional' problems were, by law, to be resolved under the 'customary' rules (but where no codification of these rules was ever officially accepted), both the Portuguese administrators and the *régulos* retained the possibility of adjusting the 'traditional' to respond to different situations. As a result, "Africans [chiefs] determined the content of the law in the course of individual decisions in which they provided a more nuanced interpretation of the law than colonial constructions allowed" (Spear, 2003: 16).

In sum, the administrative and judicial power of the colonial state was quite limited, and it became subject to local discourses of power that state neither fully understood nor controlled, as was the case of witchcraft.

The history of colonization and modernization (both in its European and African guises) has been a history of suppression of the demands for justice in the face of witchcraft. In Africa, colonial authorities dismissed customs found to be 'repugnant' to civilized standards. However, as will be further discussed, from the perspective of Mozambicans, the modern, 'enlightened' and rational legislation came sometimes as a perversion of justice. In pre-colonial and even in colonial times witches were frequently expelled from the community, or killed, or forced to pay compensation for the damage caused. Under the colonial state, in neighboring British colonies, witchcraft practices became outlawed, accused of reflecting 'a retrograde past' (Melland, 1935; Roberts, 1935).[12] The nineteenth and early twentieth centuries witnessed the enactment of 'suppression of witchcraft' legislation, designed less to suppress the practice of evil, as understood by locals (which the colonial authorities took for superstition), than to suppress anti-witch activities (which the colonials deemed barbarism); as a result, sanctions against witches were declared offensive and threatened with long prison sentences (Krige, 1936: 252; Chanock, 1998). In a colonial context, witchcraft

victims got the impression that they were rendered powerless in the face of the pursuits of witches. From their point of view it was completely incomprehensible why the colonial administration was particularly eager to protect the most dangerous villains. In a colonial context, as we will discuss further on, the state, while not protecting people from witchcraft spells, emerged as the protector of witches, thus making itself illegitimate in the eyes of the native populations. In what was a slightly distinct approach, probably due to its weakness, the colonial administrators in Mozambique, in order to avoid being portrayed as sponsors of witchcraft, never formally accepted the inexistence of witchcraft practices, and allowed 'traditional' courts to conduct trials against avowed witches (Meneses, 2000). Traditional authorities were even allowed to deal with charges of witchcraft, as long as they did not involve accusations of murder (Meneses, 2000; Honwana, 2002).

What gives tradition, custom and ethnicity their coherence and power is the fact that they lay deep in people's popular consciousness, informing them of who they are and how they should act. Yet, as discourses, traditions, customs and ethnicities are continually reinterpreted and reconstructed as 'regulated improvisations' subject to their continued intelligibility and legitimacy. Thus the postcolonial state, in order to be recognized as a legitimate authority, knew the new 'judicial structure' had to be anchored, at least to some extent, in the everyday life of both rulers and subjects alike. In order to be accepted as legitimate, a new 'legal framework' must bear a semblance to the legal corpus upon which it has been built. This is the challenge that, since 1975, has been posed to the state. Inevitably, when addressing the question of analyzing the socio-legal cultures present in the country, the question of witchcraft emerges as probably one of the major *loci* of conflict between the traditional and the modern.

The Traditional Side of Modernity

Over the last two centuries, the dominant discourse in Mozambique has made constant appeals to 'native' peoples based on the colonial drive to modernize by acquiring the 'right' values and knowledges (Meneses, 2003). Progress towards modernity has been defined as good and desirable, understood in a linear, historical progressive fashion: the indigenous must evolve into modern, civilized citizens. As for the former colonies, they were required to evolve from the time of 'tradition', in which they were still living, to an era of civilization, progress and modernity, where the 'most advanced' countries in the world stood (Santos, 2002a: 243-245).

In the political-legal sphere, the dominant discourse, seen as a means of contributing to development, mirrors the kind of peripheral postcolonial states aspiring to modernization. Both the 'native' and the 'civilized' are given fixed ideological meanings, resulting in the impossibility, in terms of socio-legal theory, of connecting different legal systems from the perspective of *interlegality*. This became particularly notorious during the last stage of the colonial presence in Mozambique. The result of the attempt to apply indirect rule to a colonial process where the colonizing power was –

in terms of social, economic and political intervention – quite fragile, produced a hybrid system of traditional authorities. On the one hand, these chiefdoms – whether 'original' or adapted – represented a guarantee of continuity for the functioning of the communities; on the other hand, they constituted the bases of colonial administration within the local setting. In this sense, the customary represented a safety cushion between the communities and the agents of the colonial administration, who were entrusted with resolving various administrative, economic and legal problems, and allowed for a more or less harmonious relationship between the two. Despite being modified under pressure from the colonial entity, in a certain sense the actions of the traditional authorities continued to be seen as local in origin and as the result of a profound familiarity with the feelings, existing norms and language of the communities. These were the factors that permitted and legitimated their actions.

But the ideological campaign of Frelimo during the period of nationalist struggle for independence, as well as throughout the postcolonial setting, was aimed at reinforcing the dualist nature of the system: the citizens as oppressors and the natives as the true Mozambicans. Yet, the socio-political and legal fabric appears much more complex at the height of independence in Mozambique. Despite the continued importance of coercion and colonial administrative control, there was no binary structure in the country as advocated by Frelimo. In the post-independence period, this policy has prevented the recognition of the existence of a plurality of interactions among distinct socio-legal fields, since the dominant discourse (and praxis) only allowed this interaction to occur either as a confrontation of legal orders, or as competing, rival legal systems. In both cases, one legal order would emerge as the dominant, the remaining ones being classified as subaltern or peripheral. However, as Santos suggests (2002c, 2003), complementarity, cooptation, convergence, assimilation, suppression and junctions, are just some of the many possibilities under which interlegal interactions may take place. Hence, how much of the discussion regarding the modernization of the legal structure indeed allowed for a successful empowerment of Mozambicans? Aren't they, instead, through the recourse to the fixity of the traditional vis-à-vis the modern, promoting the impossibility of contacts between distinct systems of social regulation?

The Mozambican postcolonial state emerged in a context where both chronological and territorial differentiation were achieved by a unitary compulsion that tended to underplay differences, insisting upon the homogeneity of the future, and failing to acknowledge the existing socio-legal heterogeneity. Thus, to be part of the 'present' required freezing everything that represented an obstacle in the historical path to modernity, thus seen as part of the 'old' past, as traditional. The other cultures, viewed as inferior under the colonial order, (re)emerged again now in a post-colonial setting, as backward in the dominant legal discourse. The extremely complex cultural mosaic of socio-legal cultures in Mozambique, with their own characteristics and structures, kept being routinely described as a homogeneous entity, which resulted in the general reference to a single traditional judicial structure (Carrilho, 1995; Nilsson, 1995; Lundin,

1998). In terms of legal systems, this approach justified the dominant presence of an official legal system, built upon the principles of Western rationality.[13]

The initial process of incorporating the newly independent postcolonial states into 'the family of nations' resulted in a process of reinforcement of the differentiation between the universal legal framework and the local, traditional legal frameworks. Indeed, the continuity of the principles of Western rationality in the social ordering of Mozambique resulted in a sequence of attempts (Santos, 2003) to integrate the other, the traditional indigenous, under a dominant legal rationale, without acknowledging the fact that the existing differentiation in terms of rights is the result of specific historical and contemporary experiences. This sort of amnesia regarding the other enables the Western-based legal narrative to remain ever-present, without ever being questioned for the bias provoked against the plural arena of socio-legal orders. As before, during the post-independence period the native peoples were viewed as uncivilized, lacking sufficient legal sophistication for their normative systems to be part and parcel of the new national legal order. The stimulating results of a research project on the heterogeneous nature of the Mozambican state pointed out that one of its main characteristics was the fact that only a very narrow segment of the population would appeal to the official, state-oriented judicial system to try to solve their problems. The presence of a Westernized approach to the judicial culture is an example of the bequeathed suppression of other knowledge and practices in the construction of the legal landscape of the country. The international legal framework became the normative episteme other cultures and countries had to accept in order to be recognized as a state. Instead of building a new legal order based on the realities present in the country, the contemporary Mozambican legal framework may be described as one that establishes overall supremacy over other competing modes of rationality, which are either silenced or appropriated according to the interests of the dominant model. In contrast, we maintain that an autocratic approach to consolidating national unity only results in the amplification of the cultural differences and identities, as we have been observing. These observations require a deeper evaluation of the very character of modernization, since the intransigence of the dominant legal model towards the other socio-legal structures (resulting in their subordination or invisibility) indicates the presence of an inflexible modern state, frozen in its past. As the study led by Santos and Trindade (2003) clearly indicates, it has been possible to detect the development of dynamic legal hybridizations in Mozambique – hybridizations that accept the modern model of law, even creating the space for its action. Seen from this angle, the vitality of traditional normative systems reflects the difficulties of a state legal body, which appears unable to achieve its objectives. The hybridization of legal orders reflects the diversity of knowledges present, which are by no means fixed in space and time, as so often is imputed to traditional values.

Because other political, judicial and administrative entitites have been developing and adjusting to contemporary situations, the result is an innumerable array of metamorphoses in the socio-legal field. The fundamental question to be posed is

how the dynamics of hybridization of these legal orders have developed, and which forms they have acquired. Contemporary Mozambique is a mosaic of traditional (i.e., non-official) authorities whose role, functions and performances are quite difficult to fit under a common canon.

Conflicts of Power, Conflicts of Knowledge

Imbued with colonial standards, most of the studies conducted on the subject tend to insist on the role of the *régulos*, thus forgetting the enormous array of entities present, who are legitimized from below by the communities that recognize their authority. Such personages as traditional healers (*tinyànga*[14]) are also part of the concept of traditional, local authorities, despite the fact that their political importance seems to be less visible. Another aspect to bear in mind is the fact that the traditional authorities and their means of dealing with social problems are not confined to the strict ambit of law; on the contrary, they cover several other sectors of social life.

In this sense, they require a reshaping of the concept of 'conflict', which includes the notion of misfortune, and which translates the cognitive, symbolic and institutional order of society itself. The universe under study is a good example of the coexistence of several institutions, which aim at welfare and social integration.

In a community for which the cosmological apparatus is perceived as representing a closed environment, and where the concept of disease is perceived as a shared 'problem',[15] the source of the problem has to be detected and expelled on time, for the problem poses the risk of spreading to everyone. However, the search for the source of the disease becomes broader, including the treatment of the social and the physical ailments.[16] Indeed, society is seen as being threatened by a 'disease' whose etiology has to be discovered and combated: traditional healers treat people at the same time as they treat society itself, whether such treatment is to ensure the reproduction and maintenance of the existing order (norms, representations) or its perturbation (tensions, conflicts, collective misfortunes). The disease results in an ailing body, but the source of trouble can be found in a spell or wrongdoing produced by a witch. To cure someone means to eradicate the source of troubles, including the identification and neutralization of a witch. This task can only be accomplished using 'local' medicines, local knowledge. In this process lies the heart of the internal resilience of the traditional in Mozambique.

2. The Ambiguous Nature of Witches and Healers

In Mozambique, as is the case in many African countries, the threat of witchcraft is very difficult to tackle, as one feels exposed to intangible forces, not knowing exactly how they work and where they originate. This feeling of insecurity helps to explain the desperate attempts to expose the culprits, forcing them to confess what nobody could have observed directly. Witches are considered to be inhuman and not fit to live; thus, they have to be removed from the community or destroyed. But official law seems unfit to deal with this problem.

A sociological analysis of this phenomena provides an understanding of the nature of witchcraft as a regulatory element of dissonant social pressures (Meneses, 2000; Santos, 2003: 85-86). In the context under analysis, witchcraft suggests the manipulation by malicious individuals of powers inherent in persons, spiritual entities, and substances to cause harm to others (Asforth, 1998b). Those who have a lot of money or power are perceived to have obtained or gained it because they have taken 'power' from, and thus have been helped, by someone else. Those who die, who suffer misfortunes, do so because they are sick, have problems with success, or there is someone who dislikes the fact that they are different or that they are trying to be different; it may also be somebody trying to tear apart the micro-network of social belonging in which he/she has emerged.

This short introduction to the subject of witchcraft unambiguously indicates the presence of two sides to the matter: beliefs and action. Accusations are made and action is taken; thus, beliefs and action reinforce one another. In a sense, witchcraft is a sort of occult wisdom (Geschiere, 1997), used to rule over a group or a community. However, witchcraft can also be used by its practitioners to harm others or to obtain various types of benefits, as when they sell their services. It may be used with malicious motives for acts of vengeance, forming a wide web that holds villagers and urban dwellers together through discourses and images that continually explore the moral dimensions of poverty and prosperity. Because witchcraft is just as likely to be a matter of the wealthy attacking the poor as the poor harassing the well off, it is the prerogative of neither.

Among the Changana and Rhonga people of southern Mozambique, for example, perceived victims of witchcraft took, as they continue to do, the law into their own hands to rid the community of the peddlers of this evil craft. It is this latter component that is crucial for a broader understanding of the nature of conflicts and the processes of dispute resolution in Mozambique.

The Nature of the Accusations of Witchcraft

The Changana apply the term *nòyi*[17] to all 'supernatural' attacks. The term is used to refer to attacks or to the power to kill or injure people by means of spells, including also the use of 'medicines', often generally referred to as *murhì*.

Both men and women, old and young, have been accused or have been the object of gossip relating to witchcraft practices, although more generally one would find older (and often widowed) women to be targets of anti-witchcraft action.

Accusations of witchcraft and witch attacks are not rare events. Almost every person in southern Mozambique knows that witches have the power to make lightening strike to injure or kill people; to damage property; to destroy crops, and to cause calamities or accidents. As a victim of a witch affirmed in an interview, "it is not a question of believing or disbelieving. It's difficult for outsiders to understand, but our daily life relies heavily on the world of spirits, for good or evil."[18]

The people afflicted with acts of witchcraft are usually in more or less intimate relationships with the perpetrators – relatives, neighbors, lovers, schoolmates and workmates top the list of the usual suspects. Witchcraft may be motivated by jealousy, or by unsolved conflicts between or among community members. People are particularly scared of the latter possibilities, since they may occur at random inside the community.

One of the motives for witchcraft is usually said to be jealousy, in situations of envy of emerging wealth. This is the reason why the ambiguity of witchcraft is often referred to as an "occult economy" (Geschiere, 1997). People say that someone desiring to become rich might go and ask for support from a 'bad' *nyàngà*, who would collect the support of all the ancestors, thus leaving the rest of the family unprotected by them.[19] Worse still, several medications can also be applied to protect and preserve wealth, while sometimes requiring the sacrifice of a relative or of non-kin.[20] People seek in witchcraft an explanation for events and circumstances for which they would otherwise have none. Thus witchcraft is believed to be at the root of many misfortunes, thanks to the actions of one's neighbors or kin. In this the inhabitants of Maputo city are no different from the inhabitants of urban and rural communities elsewhere in Africa. The examples available suggest a number of explanations for accusations of witchcraft in general, focusing on hardship and circumstances that cause tension, conflict, suffering, anxiety and uncertainty. As a person struggles to get by in a world where livelihoods depend almost entirely on earning an income, competition for jobs and other income-earning opportunities becomes intense. Those who succeed are prone to become the object of suspicion by those who do not. Suspicion may degenerate into actual accusations or even in an appointment with the traditional healer, so as to garner protection against a witch attack produced by a potentially envious or jealous community member.

In addition to being a malevolent force, witchcraft is also, paradoxically, believed to be a source of good fortune. There are reported cases in which political success is seen as the outcome of the possession of or an alliance with the powers of ancestors. In Cameroon, for example, as Geschiere and Nyamnjoh show (2000), rumors link witchcraft to the rich and powerful; here, witchcraft emerges as a central piece in the electoral process, since several of the powerful are described as allegedly owing their success to the use of varied occult sources and forces. In Maputo city, as we observed, the situation is similar. Businessmen and politicians, who have become wealthy in the urban centers, are easily suspected of having pursued their careers with the help of obscure methods, including the use of traditional medicine. The state elite is deeply rooted in these cultural practices, and resorts to this kind of protection whenever in need of access to special promotions, wealth, etc. The elite need special powers to fight off potential rivals, and vice versa: their impoverished relatives or neighbors, who have stayed in the villages, are also accused of witchcraft. Since they have not amounted to anything, one assumes that they watch the success of their affluent relatives with an evil eye, and – driven by envy and resentment – try to destroy them.

This explains the ambivalent relationship to witchcraft. Witchcraft is ambivalent in the sense that it is hard to establish a decision/action as being totally good or totally bad.

Research in urban and rural areas of Mozambique shows that social and economic inequality is firmly entrenched, and that communities, deep down, are socially heterogeneous. Wide gaps between the better-off and the worse-off cause social tensions, as the former try to avoid excessive demands by worse-off neighbors and kin, and as poorer members of the community increasingly perceive the better-off as selfish. As the better-off suspect deprived neighbors and as deprived neighbors gossip about and accuse the well-to-do of having prospered through witchcraft, the tensions erupt into suspicion and accusations of witchcraft.

The constant demand for traditional medicine is more visible today because there are many more individuals on whom fortune has not shone, and who are searching for success – through promotion, wealth, and social opportunities. Current means of coping with uncertainty involve seeking protection. As the Comaroffs have described for neighboring South Africa (1999: 283), in Mozambique the violence and insecurity that accompanied the rapid political and social transformations the country underwent over the last 10-15 years – under historical conditions that yielded an ambiguous mix of possibility and powerlessness, of desire and despair, of mass joblessness and hunger amidst the accumulation, by some, of great amounts of wealth associated with the introduction of a new liberal economic strategy – greatly exacerbated the fear of witchcraft, for people felt unprotected. Thus the appeal to traditional healers was an anticipated response in the search for protective and supportive actions against witchcraft and crime.

With time, the outcome of a clash of values leads to strains and tensions in social relationships and eventually to suspicion and accusations of witchcraft.

Accusations of witchcraft are a form of social control. Witchcraft acts as a 'leveling force' (Geschiere, 1999: 213) in that it undermines inequalities in wealth and power. It happens when, given the fear of attack by jealous mates, people desist from accumulating or displaying amounts of wealth that might elicit envy and jealousy from potential witches. It acts as a pacemaker, a means of setting and limiting the rhythm of social change. If this argument is to be accepted, then by arresting social differentiation, witchcraft prevents the growth of social tensions that might arise from it. Also, accusations are said to discourage socially unacceptable behavior, as sometimes it is people who behave in unusual or eccentric ways that become the target of accusations.[21]

As Santos points out (2003: 86), although culturally witchcraft affirms itself as being at the opposite pole of modernity, witchcraft is essentially an example of an alternative modernity, in which social change takes place without serious ruptures in the networks of social security and identity fixtures.

In sum, witchcraft and accusations of evil-doing may correspond to various situations of social unease, such as divine retribution or punishment by ancestors for

breaking taboos or committing sins, or even as a spell cast by another person who caused harm under hypnosis, as we shall see further on. So the question that those afflicted must address in relation to this sort of misfortune is less what has caused this suffering than who is responsible for the suffering. To treat the malaise of witchcraft is to struggle with the witch by mystical or social means, or both. That is, either the malevolent powers are combated by occult or spiritual means or the individual deemed responsible is identified, induced to retract the evil powers, and punished (or cleansed and redeemed). Because the official means made available by the Mozambican state are usually unwholesome in situations of accusations of witchcraft, people believing themselves to be under attack at any one time may visit a traditional healer, seeking to establish the cause of their troubles, as well as who is behind them and how to take counter-measures (Green, 1994: 30).

The Tinyàngà and the Struggle against Social Illnesses

As we have just explained, witchcraft has a dual nature: on the one hand it seeks new means – apparently beyond human control – to achieve goals that would otherwise be impossible (such as the 'betterment of life' in situations of extreme social exclusion, which is a current reality in Mozambique); on the other hand it functions as a way to voice a desire for punishment of those who one envies and those who, for whatever reason, stand out. Since witchcraft deals with the 'occult', it becomes quite difficult to identify the 'modern' means, the sources and evidence to prove the presence of acts of witchcraft. The detection of the traces of witchcraft activity is normally left to the *tynyàngà*.[22]

Under the scientific model of rationality, the processes of fact-finding, guilt determination, the ritualized expressions of remorse and the demand for immediate, though often symbolic, reparation strike Western sensibilities as weak, irrational and unjust (Seidman, 1965; Horton, 1993; Nsereko, 1996).

The hegemony of modern science results in the local confinement of 'other' knowledges, which can be both the cause of its discrimination and the basis for its resistance to the singularity of knowledge. The finding of a *tinyángá* appears both as a form of security and an affirmation of what is specific to them, of ways of knowing what belongs to them and which thus enables them to acquire room to maneuver, *i.e.* spaces of empowerment. The process of negation of knowledge and strength of the 'traditional field' of knowledge equated the image of this action with that of witchcraft. But these are in fact entirely different personages, as both patients and practitioners of traditional medicine attest. "There is a difference between a healer and a witch doctor. A healer cures and a witch doctor kills. A witch doctor knows potions that kill. But healers cure."[23]

In southern Mozambique, good health is a broad concept, requiring inner equilibrium within one's self, peace with one's ancestors, with one's neighbors, and with one's own body; adequate food (which in the present context includes having a job and therefore an income) and protection from evil – whether natural or 'sent' by

a witch. If this situation is altered, either by the individual's failure to carry out necessary rituals or by greater forces at play, then the individual and/or the group become ill and everything must be done to identify not only the symptoms of social disorder, but moreover the origins of the evil and the contamination that results from it.

The *nyàngà*'s power resides in his/her ability to identify existing social tensions, contradictions, and areas of distrust, as well as the latent antisocial grudges that could manifest themselves as an illness, or bad luck, or even bring death to the community. To expose a witch, to locate the person and lead her/him to confess is seen as a means of 'emptying themselves' of the burden of evil and restoring feelings of lightness and emptiness which signify balance, health and good relations.

The *nyàngà* plays a dual role – divinatory and curative – based on a broader concept of illness, understood at two levels: as a social phenomenon, resulting in a deep alteration of everyday life, and as a physical phenomenon – a manifestation of something happening through pain in someone's body. The divinatory function seeks to identify the sources of the illness, prescribing several means to solve it. The curative function seeks to eliminate the physical symptoms. These two functions complement one another, and both help to cure. Thus the traditional healer knows best how to deal with these so-called 'traditional' illnesses, *i.e.* disorders with a heavy emotional component, because they deal with the body and the spirits which 'invade' the body and cause diverse problems to patients.

The healing process, aided by the *nyàgà,* is two-fold: it fosters a return to physical equilibrium as well as a psychological and emotional balance by overcoming the sanctions that befell the individual as a result of his/her disregard for the established norms.

However, if in the past people accused of practicing witchcraft were condemned to death, expelled from the community, or ordered to seek a doctor to help him/her to 'remove' the evil, nowadays the problem is quite a bit more complex.

The *tinyàngà* hold the knowledge (and therefore the power) to diagnose people's problems and to identify their causes; they claim to be able to counter spells, find witches that are allegedly responsible for their clients' ills, and to find remedies to their supplicants' problems. In Maputo, consulting a traditional healer will result in a *séance* of divination, followed by the application of the *muavi* or ordeal. The ordeal is a form of divination that simultaneously exposes wrongdoers and punishes them.[24]

As we will explain below, nowadays, in cases in which the *régulos* or community courts cannot find a culprit for the act of witchcraft, they send the parties involved to seee a *nyàngà* (Meneses, 2000; Gomes *et al*., 2003; Meneses *et al*., 2003).[25] The selection of the *nyàngà* is normally carried out by Ametramo.[26] The association decides which *nyàngà* will carry out the divination and the application of the ordeal, so as to ensure the neutrality of the witch-finding process.

In the cases reported to us where the *muavi* was applied, suspects were made to ingest a beverage. Once ingested, it is supposed to run through the body looking for *witchcraft*: if it does not find any, it will be excreted or vomited, thus proving the

innocence of the person falsely accused; in that case the accusers will compensate him. If *muavi* locates *witchcraft,* it will stop, and the accused will 'fall down' and even die. In the past the ones found 'guilty' used to be left to die; nowadays they are removed from the community.

I was told both that ordeals were forbidden since colonial times and that they could be authorized as part of the legal process nowadays (using dogs or roosters to symbolize people). The latter forms of ordeal were performed openly when we were carrying out our fieldwork, in early 2000.

Ordeals can also be a last resort for those made to feel vulnerable, when someone chooses to undergo them in order to show he/she is not guilty of witchcraft (Tonkin, 2000: 377, 381). Thus to investigate judicial ordeals involves analyzing different notions of guilt, innocence and the scope of human judgment – all part of a sociology of knowledge.

Witchcraft helps produce social balance within communities, a balance that is always precarious and in need of reconstruction. Both in an individual's life and in the life of the community, a continuous movement is present, oscillating between the moral ideal of community and the embarrassing reality of individual assertion. This contradiction is controlled through witchcraft. Witchcraft holds the balance of power relations: forces beyond one's power control the excessive success or power of a community leader – be it a traditional leader or a *nyàngà*. As a mechanism for controlling power, witchcraft is especially sensitive to changing patterns of social conflict, adapting rapidly to new situations.

When the state seems unable to resolve the conflicts and envy which arise from profound exclusion and social instability, the legitimacy of other forms of administering justice is greatly amplified. Traditional healers establish a very clear distinction between the limits and application of the official legal system and their possibilities of action. The process of locating the agent of evil by the *tinyàngà*, followed by the process of compelling the witches to confess their actions, should be analyzed as a way in which these persons are cleansed of the burden of evil, thereby opening the door for the restoration of equilibrium and good health of the community.

3. The Official Judicial System and the Problem of Witchcraft

In a recognized plurality of systems of conflict prevention and resolution, what does it mean to deal with witchcraft as part of this plurality?

In Mozambique, it is tantamount to saying that part of the normative, official system of justice rejects the possibility of the existence of witchcraft and, as a result, denies the potential for its practice. As noted by one *régulo*, "when they send cases of witchcraft to be resolved in the courts, they say that there is no basis [evidence]."[27] Consequently, witchcraft is not punishable as a crime. The failure to condemn witchcraft frequently leads to two paradoxical situations: on the one hand, the *nyàngà* can become a pernicioous actor because he produces invisible evidence that results in the social or physical exclusion of the subject of the accusations; on the other hand, because the

definitions of good and evil and the concept of evidence are evaluated quite differently at the local level, the Mozambican state, by using the current penal code to continually uphold the accusations against the healers while dismissing those against the witchdoctors due to lack of evidence, risks turning away from being a defender of the community and turning into a defender of the evildoers – the *tinyàngà*.

After independence people expected the state to fight for them, to stand by them and free them from the long period of colonial exploitation. Traditional doctors expected greater openness "now that the country was finally ours,"[28] but that did not happen. In Mozambique, postcolonial legislators, following an approach that was also present in neighboring countries,[29] regarded witchcraft as a merely imaginary offense and tried to impose this view on the majority of the population. Frelimo's ruling elite looked at these practices as a shameful phenomenon that had to be overcome through modernization. Rather than punishing the witches, all those who tried to defend themselves against witches were threatened with prison sentences: the traditional doctors, who can 'smell out' culprits, as well as ordinary citizens, who accused others of witchcraft, in addition to everyone who used violence against alleged witches.[30] However, whereas in the colonial period some of the activities of traditional healers were tolerated, after independence and the prohibition of their trade, the healers were persecuted (even those who were able to deal with witchcraft issues and cure people). The healers came to be seen as old-fashioned defenders of 'obscure ideas' (Castanheira, 1979; Machel, 1981). In short, in the postcolonial period the presence of a plurality of legal systems continues to be ignored by the formal court system; people remain barred by official law from acting against the threat of witches in an open, legal, official manner.

The Absence of 'Facts' and the Testimony of the Nyàngà

As we have shown, the main available source for the analysis of witchcraft consists of accusations and rumors, which results in numerous problems in the evaluation of its efficacy. Thus, how can it be ascertained that it was exactly the accused person who caused the fatal lightning? And how does a plaintiff hope to prove that a malicious neighbor 'sent' him a disease or a serious accident? Given these difficulties, under the scope of official law it is basically impossible to prove witchcraft, since it cannot be witnessed by the naked eye.

From the perspective of the modern state in an era of human rights and the rule of law, there are unsurpassable problems involved in the judicial management of witchcraft.[31] Under official law it is impossible to prove witchcraft offenses, since there is usually no physical or tangible evidence, facts that 'prove' what the witch does. Therefore, witches cannot easily be brought to court for prosecution. Accusations of witchcraft can be presented as sworn testimony in courts of law easily enough. Witnesses can present evidence of motives that might plausibly be read as inclining a person toward witchcraft. They may also give precise testimony as to the opportunities that a person so inclined might have exploited in pursuit of their evil deeds. Such

witnesses might be cross-examined and their veracity tested. But the evidentiary essence of culpability, such as an eyewitness account of the criminal act in cases of suspected witchcraft, is forever occluded from view. In cases of witchcraft, silence and discretion are the norm.[32] The forces at work are unseen, so an eyewitness is nowhere to be found, although when witchcraft is suspected herbs that might otherwise be acknowledged as innocent medicine can take on a harmful aspect (Ashforth, 2001: 15).

For the judicial court, it seems to be less difficult to make a fair judgment when judges do not have to deal with witches in a strict sense, but only with evidence of witchcraft practices, that is, apparent evidence of the aggression: *e.g.* fetishes buried under someone's door or hidden in a house. However, what those objects could prove is still questionable. Is a bunch of herbs a love incantation, aimed at regaining the affection of an unfaithful husband? Or is it intended to harm or kill him? (Schapera, 1975: 109) Ordinary judges would never be able to determine what power those fetishes possess; in case of doubt, evidence is sought in different forms. Because the official court cannot deal with these questions, if a case reaches the court, the judge usually sends it to be debated before community courts or directly by the *tinyàngà*.

As described above, traditional healers are called in since they do have the power to 'sniff out' the actions of a witch's craft; besides, their accounts of communication with ancestral spirits are taken as genuine forms of knowledge. But this knowledge is not open to direct corroboration in the manner typically required by modern jurisprudence (Peek, 1991; Meneses, 2000). The central proof provided by divination is directly accessible only by the *ŋyàngà*. Divination, especially when performed in a communal context where the 'predictions' of the diviner are legitimized by the response of an audience, can undoubtedly serve as a powerful means for unifying a community against a perception of internal threat. But such procedures are hardly consonant with the rituals of official court practice, due process, or doctrines of human rights. Within the witchcraft paradigm, it can be argued that requiring corroboration of accusations by independent *tinyàngà* can safeguard the veracity of divination as a form of evidence in judicial proceedings, as is the case in the procedures applied by Ametramo. By most accounts this was, and remains, the preferred practice in witch trials. But even independently corroborated narratives of the unseen worlds can leave questions of guilt unanswered. In order for justice to be perceived as being served in cases of witchcraft, the guilty party must ultimately confess. Given the inherent secrecy of the act, only the guilty can know what he/she has done.

Judicial Hybrids and Accusations of Witchcraft

According to Maciane Zimba,[33] in the first years after independence,[34] although *tinyàngà* were forbidden to carry out their medical activities, the popular courts would periodically turn to the *tinyàngà* to look for ways to resolve cases involving witchcraft. In vast areas of the country, rather than being persecuted by the state, they continued to perform their role as expert witnesses to help the judges solve the problem of how

to establish evidence against witches. The solution found by the judiciary, still officially not acknowledging witchcraft as a criminal offense, was, as before, to solve these issues by using the customary rules.

During the early revolutionary years, and while searching for a symbiosis of the 'progressive' forms of the customary with more democratic principles of justice, some of the traditional practices were translated into newer institutions of popular justice – the people's courts – which worked both in urban townships and rural settings (Sachs and Honwana Welch, 1990). The post-colonial state knew that in order to be recognized as a legitimate authority, the new judicial structure had to be anchored, at least to some extent, in the everyday life of both rulers and subjects alike. People's courts meted out a sort of popular justice, allowing for accusations of witchcraft to be brought to these courts. People's courts – later transformed into community courts, an embryonic form of hybrid justice between the official justice and common law – can prosecute witches and seek support from traditional doctors to detect the culprit (Gomes *et al*., 2003, and chapter 10 in this volume). Hence, ancient practices were transformed into new forms of community justice, operating both in rural and urban environments.

Traditional healers keep their role in administering justice: as intermediaries between community courts or traditional authorities and the local population, they take control over the final decision. Indeed, because the detection of the 'witch' has to happen *post factum,* the figure of the traditional healer, whose power and knowledge legitimize his/her decision regarding the responsibility of the culprit, remained central. Therefore, a large hybrid fringe of legal bodies, such as community courts and traditional authorities - representing non-state bodies before which traditional healers are recognized as key elements in 'detecting' traces of evil presence – continue to be the entities that can act against and punish witches.

The analysis of several accusations of witchcraft, as well as of other conflict situations, leads one to understand that the absence of formality in these types of community justice has the advantage of fomenting community participation. Once both parties to the dispute are heard, the issue is discussed in an open debate, thereby permitting various views to be aired and allowing the community members to question the parties on any aspect that may be considered relevant to the dispute. Any final solution, however, depends ultimately on a consensus between the conflicting parties, as the ultimate objective is to restore harmony within the community by reaching a compromise. In general, the appropriate sentence is determined in accordance with a majority vote of the 'court' and sentences are applied in the spirit of reconciliation and re-education.

Locally, the sanctions applied by the *régulo* on those accused of practicing witchcraft – physical punishment (shaving their heads, *chambocadas*,[35] money fines and even expulsion from the group) and fines – are seen as forms of sentencing (Meneses *et al.,* 2003). Community courts normally apply fines (Gomes *et al*., 2003).

One of the great strengths of these institutions of community justice is that justice is immediate, public, collective, face-to-face, and relatively transparent, and is based on local knowledge which is flexible and always re-worked in the context of a debated and contested reality.[36] That is why traditional notions of justice[37] should be viewed as one way of evaluating individuals through their own eyes, where the power to discredit and defame function within traditional codes of honor and dignity. The *nyàngà* is therefore feared by what could be considered evil – he/she controls and oversees irregular actions, assists the powerless, upholds morals and disciplines the group. The *nyàngà* powerless the individual in an interplay of interests based on solidarity, seeking to keep pressure on emerging conflicts while acting as the 'knower' – the possessor of a knowledge that is continually expanding and changing – to assure the stability of the group.

Traditional healers, as part of the customary judicial process, are consulted because they 'talk' the language of the local culture, they are speedy in their intervention, informal, not intimidating (since the applied customary law consists of rules and customs of that particular group or community), and accessible. Many of the people interviewed stated that they would rather appear before these entities of conflict resolution than before a magistrate. But the role they play in the contemporary state system remains unclear.

In short, among the aspects which distinguish the practices of community justice from those of official, codified law, the following are particularly critical: while the former is normally consensual and seeks to avoid the escalation of situations of conflict, the latter is based on the individual and seeks to resolve situations of open dispute. This situation is associated with another important phenomenon: traditional justice does not operate in a unilineal way. Because it deals with a system that attempts to regulate and avoid problematic situations within a certain group, the traditional chief and the community court members cannot risk losing the support of the social base, the community. Hence the prominent members of the community act as counselors and the population as evaluators of the appropriateness of the final decision.

These hybrid legal community bodies – traditional authorities or community courts – have shown a clear willingness to depart from a closed conception of the interpretation of law (either official or customary), in order to afford believers in witchcraft some defense. As a result of this attitude, some form of defendants have been saved from the gallows. This has been accomplished by (*i*) using these non-state bodies of conflict resolution to comply with the findings of the traditional healers, and (*ii*) allowing such bodies to address the questions accordingly.

4. Different Views on Legitimacy

Notoriously difficult to define, legitimacy implies an acceptance of the 'right to rule' of the authority concerned, and a compliance that is more or less voluntary.

An analysis of the privileged role the state wants to play in the field of justice permits a better understanding of the ruptures and continuities in terms of the legal framework from the colonial to postcolonial times. By looking at who is authorized and/or favored by the state, what knowledge is tolerated or suppressed, recognized and even left unknown, it is possible to get a stronger and more profound idea of the logic of the state's action.

From the people's point of view, the picture is somehow distinct. People do legitimize the experts they consult, whether they are trained in the official or in the so-called traditional arena. In fact, in terms of problem solving, normally traditional legitimacy is spontaneously associated with the *nyàngà* and rational legitimacy with the modern lawyer, the latter as a result of his or her degrees. The acceptance of traditional healers depends on the loyalty and confidence of those who recognize them as the inheritors of wisdom. The legitimacy, the recognition of their competence, of their merit in that profession, is attested to by those who constantly consult them.

The paradox which many insist constitutes an impediment to development – the persistence of traditional values – deserves careful analysis. Traditionalism can only be that to the extent that it is distinguished from Western modernity by virtue of their differences, but in fact traditionalism is continuously fed by modernity. The crossover of various roles occurs at several levels: the state ignores traditional doctors, while its functionaries have frequent recourse to them; the Law Faculties do not recognize their knowledge while many lawyers do not hesitate to consult, or to send their clients to the *tinyàngà*. This paradox is only an apparent contradiction: the norm established and imposed by the state is based on a legal and rational model of legitimacy. The agents that make up these institutions, however, dispense with these principles when they behave as patients, obeying only practical rules. This is a phenomenon that Santos (2002b) describes as reactionary multiculturalism, when differences crystallize knowledge, compartmentalizing them as a means of recreating the traditional as immutable in time and space. What one observes from below is an active hybridization, an active meshwork which recognizes cultural differences but aims to construct a democratic interrelationship among them.

However, the *tinyàngà* may constitute a source of the problem, because they may prey on the ignorance of the people to extort gain for themselves, to accuse other people falsely of being witches, and to lead their clients to commit dastardly crimes against innocent people, usually close relatives. Accusations of involvement in witchcraft have become a convenient way of getting rid of opponents, rivals or unpopular people in the community. In a highly communal social setting, eroded by neo-liberal economic moves, witch-hunts often reflect the jealousy felt toward others who succeeded inside the group, or the envy aroused by successful individuals in the community.

Even in the case of trials by community courts or customary law, given that witch trials encourage arbitrary judgments, there is a danger of misusing them for personal vengeance. To denounce people as witches and drag them before a court may turn

into a convenient means of intimidating one's political rivals or private foes. Also, due to the extreme ambiguity of witchcraft practices (in the sense that a person fighting to achieve a certain goal may leave the conflicting party totally unprotected by monopolizing, with the help of the traditional healer, the power of the spirits), in certain instances only plaintiffs who can gain the backing of a strong and influential witch-hunter (*i.e.*, someone who can fight a powerful traditional healer protecting the other party) will have a chance to succeed with their charges of witchcraft. Such backing, however, is not free. As a consequence, it is quite frequent for the wealthy to make use of witch trials to terrorize their opponents (Geschiere, 1997: 114, 170-72).

In any case, the competition for power and the overlapping of the spheres of intervention of the different structures in the resolution of conflicts on the ground is notorious. The landscape of justices in Mozambique is made up of a series of institutions whose performance depends on the fluidity of the connections between them. The better these relative roles are defined and the duties attributed to them by society in general and the communities in particular are fulfilled, the more efficient their performance will be and the more concrete citizens' rights and state interests will be.

The risk of involvement of traditional healers with the political and economic elite may lead to an increasing association of the state's representatives with traditional authorities, thus reinforcing the heterogeneous character of the state (s Santos, in this volume).[38] In a context of increased demand for community participation in the resolution of its problems, there needs to be a harmonization between constitutional principles and the administrative organization of the state, in terms of styles of action, cultural assumptions and the normative structures of traditional authorities, regardless of the form or guise that may have developed. The analysis undertaken corroborates the fact that a legal hybridization has long been developing in Mozambique; such hybridization even accepts the official modern legal model while creating the very space for its application. Seen from this perspective, the vitality of the justices in which the traditional authorities are located mirrors (albeit inversely) the difficulties faced by an official justice that appears more and more unable to meet its objectives, given the distance from its subjects.

Conclusion: Challenges for a Greater Democratization of Justice

Unofficial dispute resolution has been the norm in the urban areas in Mozambique for as long as these areas have existed. Official legal institutions have been regarded as secondary in importance, seemingly because of the inability to satisfy the community's sense of justice.

However, as the study on accusations of witchcraft and the role of community justices at work in Mozambique demonstrates, the most notable defect of the existing system of justice is that the majority of Mozambicans were (and still are) alienated from the court system due to the alien nature of the courts, based on an exogenous cultural system. Judicial systems have to be understood primarily in terms of their

own dynamics, which are the product of the interplay of internal and external forces, whose legitimacy resides in the fact that they respond to the needs and perceptions of the local communities. Thus the reason for the presence of an immense display of alternative judicial systems is that "they are really ours, they are from here, and we see and know how they function […] they understand the problems and know how to solve them."[39]

Witchcraft has not disappeared under the onslaught of modernity; instead, it has encroached itself in the very heart of modernity. In contemporary legal practice in Mozambique, witchcraft figures as a reality and as an actionable offense in its own right. In the region where this study took place, witchcraft operates as a privileged mirror which permits a greater manipulation of the traditional. Such a mirror suggests that one should perhaps be analyzing the mosaic of problems and solutions sought as examples of resistance towards the construction of another modernity, a situation which is not exclusive to Mozambique, or even to Africa.

Discourses concerning witchcraft do not express a resistance to modern development; rather they constitute reflections of a constant struggle for a better life. Because 'community justice' is an open system, formally delimited only in its practice, the possibilities to explain the problems of life are innumerable, allowing for an anthropophagic interaction with different elements and thus forming the cornerstone of projects of 'other forms of modernity', as several authors have pointed out. In this sense, accusations of witchcraft, far from reinforcing a radically different, alternative means of conflict resolution, constitute a discourse concerning the problems affecting the family, the community and society at large.

In Mozambique, as in most African countries, intellectuals, politicians and healers maintain that they, like all common citizens, share the belief that witchcraft is part of the cultural landscape, and that they act accordingly. Therefore there is a growing awareness that all efforts must be made to ensure that access to a broader conception of justice becomes a reality for the majority of the citizens. This is no small task, but the experience in Mozambique shows that it is possible to give established, distinct systems of dispute resolution the opportunity to be a part of this process. As with all alternative remedies for a problem, each should be carefully analyzed so as to formulate the best practical solution.

In short, the analysis of accusations of witchcraft and their trial constitutes a window that allows us to suggest that there are well-founded reasons for a 'Mozambicanization' of legislation. To the extent that the people's personal sense of justice and their state-imposed law diverge, nobody can expect them to have confidence in the institutions of a democratic state. If state authorities continue to avoid dealing with legal aspects of such facts of daily life as witchcraft, people will surmise that this is the result of the witches manipulating the state (Ashforth, 1998a; Niehaus, 2002). This probably helps to explain the recognition, in the 2004 CCConstitution (with the

new Constitutional reforms), of Mozambican society as being characterized by legal plurality.[40]

The strengthening of local power presupposes the search for cohesive partnerships between local forces that, from below, can pressure the higher levels of the state to favor these changes (Ngugi, 2002). It introduces a dimension which lies far beyond the question of the search for a new strategy to respond to fears of witchcraft. Here lies perhaps – in the midst of tension and dialogue between communities, civil society and the basic structures of the state – the beginning of the uphill path to what Santos (1998b: 34) calls the "the state as a new social movement," a construct which envisages the building of a state in which the present emphasis on the Westernized approach to law and problems, and the lack of concern for the future, will be substituted with an emphasis on solidarity, social welfare and security for all Mozambicans.

Notes

1 Both terms were used, under the assumption of the presence of a common history, language and culture shared by specific, self-contained collectives. Customary law provided the prescriptive rules binding such units.
2 On this subject, see chapters 1 and 2.
3 The theme of legal pluralism and community justice in Mozambique is analysed in more detail in chapters 10 and 11.
4 Santos describes *inter-legality* as a dominant characteristic of our times. "We live in a time of porous legality or legal porosity, multiple networks of legal orders forcing us to constant transitions and trespassing. Our legal life is constituted by an intersection of different legal orders, that is, by *inter-legality*" (1995: 473).
5 I am aware of the unsatisfactory nature of 'witchcraft' as an analytical term. A detailed discussion of the concept and distinct definitions proposed in distinct contexts in Africa, as well as on the ambiguities of a transfer of Westernized concepts of magic and witchcraft in African societies can be seen in Douglas (1977: xiii-xxxviii); Last and Chavunduka (1986); Horton (1993); Geschiere (1997: 12-15, 215-24).
6 Even though the nationalist movement – Frelimo – was predominantly composed of natives of Mozambique.
7 See note 23 in chapter 1.
8 That is, the assumption of a country made of free and equal citizens.
9 In southern Mozambique, among the machangana, they were called *hosi*. In other parts of the country the designations differ – for example, they are called *mwene* in the northern, amakhuwa regions.
10 Indeed, whenever these traditional chiefs opposed the colonial authorities in one way or another, they were replaced with more prudent individuals.
11 And their assistants, the *cabos de terra*. To exercise their political power, traditional authorities had their own small police forces (and resorted to physical punishment).

Yet, the *régulo* did not act individually, but rather as a type of catalyst of opinions, such that a case was presented not only to the chief, but also to his counselors. The sentence was produced after hearing the opinion of the *b'andlha'*, i.e. the assembly of prominent members of the local community. Indeed, physical force was insufficient to guarantee the legitimacy of their actions. To that end, traditional authorities had to appeal to the support of the local lineages (to which they frequently did not belong, as mentioned above) to negotiate the demands of the colonial administration and find solutions to emerging conflicts.

12 This law criminalized both those who were regarded as practicing witchcraft and those who accused them of doing so, but 'witchcraft' itself was neither described nor defined. There was therefore considerable fluidity and room for interpretation as to what, exactly, constituted 'witchcraft', thus generating an ambivalent answer of the colonial state about the nature of witchcraft.

13 The failure of 'recognition' of the aims of local communities by the modern state was one of the main reasons that led Renamo (the National Movement of Resistance of Mozambique) to carry out a long civil war that ravaged the country for more than a decade. In 1992, Frelimo's government and Renamo signed a peace agreement, a fact that allowed for political and social stability in the country. Meanwhile Renamo transformed itself from a movement of resistance into a political party, thus becoming the second political force in the political landscape of Mozambique.

14 Plural of *nyàngà*. Although there are various designations for traditional therapists, this is the most commonly used designation in southern Mozambique. The *nyàngà* is the person who can smell out the evil person among the neighbors, who aims to bring disaster onto the community. The *nyàngà* has the knowledge and power to heal, counting on the help of ancestral spirits to protect the local community. Hence the healer is one of the pillars upon which the welfare of society rests and for this reason he is most highly respected (Krige, 1936: 297 ff).

15 In the sense that it will affect the entire community.

16 African healing traditions are generally described as holistic and do not recognize the Western distinction between medicine, justice and spirituality.

17 The *nòyì*, is a spirit with evil powers that can provoke trouble even from a distance, through the help of somebody whose body he/she uses. Usually the *valòyì* act at night, through the introduction of foreign pieces (bones, blood) into somebody's body; as a consequence, the person is poisoned and risks dying. During the day the evil spirit can act through elements he has previously contaminated. The *nòyì* can still use a person whose body he/she 'opened' and occupied, making that person his slave. These people can be transformed into animals, such as leopards, hyenas, serpents, as well as be forced to work in the fields for the spirit, or to steal goods to feed the spirit (Muthemba, 1970; Honwana, 2002).

18 P. Xavier. Personal interview. July 2000.

19 The crucial point is that the knowledge used by traditional healers is itself ambivalent. They can heal or kill. The distinction between good and evil in this struggle of knowledge powers is mainly a question of perspective. Everybody involved has to protect him/herself from the aggression of others, and, if possible, gain influence over the opponents, that is, to weaken and ultimately destroy them. Since this knowledge can be used for the most disparate purposes, it becomes almost impossible to draw a clear line between healers and witches.

20 This issue has been reported by the local and international media, and is usually described as cases of 'human organs trafficking'.

21 Besides, fear of accusation may enforce conformity, thereby preventing what might be perceived as anti-social behaviour (Marwick, 1965: 282).

22 Also known since colonial times as witchdoctors, given their power to fight witchcraft.

23 M. Suzana, traditional healer. Personal interview. February 2000.

24 Ordeals by fire or the administration of poisonous beverages, for instance – widely reported in time and space – burn the guilty or impure but leave the innocent or the genuine devotee unharmed. In other parts of Mozambique heated knives have been used as well.

25 The role of Ametramo in community courts is briefly addressed in chapter 11.

26 Ametramo stands for *Associação dos Médicos Tradicionais de Moçambique* (Mozambican Association of Traditional Healers). This association was formalized in the late 1990s.

27 *Régulo* Santaca. Personal interview. May 1995.

28 Zimba, M.F. Personal interview. March 2000.

29 In Tanzania, for example – though revised in 1958 to take into account changes in local government structure – the Witchcraft Ordinance of 1928, "declares both the practice of witchcraft and the accusation of another as a witch, unless before a local authority or a court of law, to be illegal" (Green, 1994: 23). Prescribed punishment, though not always applied, includes fines, imprisonment and house arrest under the supervision of district officials (*ibid.*: 24).

30 Zimba, M.F.; Tamele, C. Personal interviews. April 2000.

31 As Ashforth notes (2001: 16), another problem with the complex relationship between official, state justice and witchcraft, which we will be tackling only superficially, is of an ontological nature. No matter how culturally sensitive legal codes are, from the point of view of someone imbued with the Western human rights tradition it is impossible to understand the type of social exclusion and punishment to which traditional communities subject witches. Thus, anyone accused of witchcraft in an era of human rights can call upon these doctrines to trump the claims of their accusers. For people who live in a world populated with witches, however, the willingness of a person to practice witchcraft automatically cancels out his/her rights to membership in the 'human' community. From this perspective, if witches are something other than human, they can hardly claim

human rights to protect themselves from the righteous anger and justice of the community and of the society.

32 For many people, the identification and/or expulsion of an alleged witch represent the permanence, in the community, of a source of possible danger, since the witch may strike back, now that he/she has been exposed. Also, the 'official' detection of very few witchcraft cases is due to the fact that people like policemen, judges, etc. share the fears and beliefs that witches are a danger to well-being, and thus refuse to point them out and accuse them.

33 Personal interview with *nyàngà* F. Maciane Zimba. April 2001. See also Meneses, 2004.

34 In the early revolutionary years, when the *nyanga*'s therapeutic role was prohibited.

35 A form of physical punishment consisting of blows administered by a heavy wooden object, called *chamboco*.

36 In contrast to official, formal justice. Formal justice is extremely slow and removed from most of the population due to the hermetic nature of its design (Santos and Trindade, 2003). The language of the official courts is Portuguese, although less than 40% of the population is fluent in it; together with the 'foreign' court procedures, official justice is hardly accessible, user-friendly, or even fair to most people in the country.

37 Of course this, too, has many negative implications (including flagrant discrimination against and diminishment of women, physical punishment, etc., which are unconstitutional).

38 However, it may also have the opposite result, when important decisions are made in exclusive circles, to which one would only gain access by being a member of a restricted group or by possessing a specific knowledge, thus bringing up the question of legitimacy in a democratic state. Whoever rises to the highest political offices and knows how to defend himself against his rivals seems to have the necessary spiritual protection at his disposal.

39 V. Banze. Personal Interview. July 2000.

40 Article 4 of the Constitution states: "The State recognizes the various normative and conflict resolution systems that coexist in Mozambique, as far as they do not contradict the values and fundamental principles granted by the Constitution".