Part III

The Administration of Justice: Characteristics and Performance

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Methodological Issues

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When discussing the African state or African law, we run the risk of making false generalizations: it is assumed that, since they are in the same continent, the social and political practices of the different countries have more in common with each other than they do with countries in other continents. The situation of some of these countries is used as a reference point and identical characteristics are attributed to all other countries. Africa has been the object of abstract and homogenizing characterizations which have converted the differences and specificities of each country into unimportant details (Mudimbe, 1988, 1994). It is certainly true that almost all of the African countries have been subjected to the same historical experience: European colonialism. But there are also specific internal differentiations within this experience and a lack of attention to these also risks creating spurious generalizations in relation to colonialism. The truth is that eurocentric social sciences, by uncritically taking English and French colonialism as their reference points, have created a unit of continental analysis which is eventually imposed on smaller analytical units, whether state or local, as if they were miniatures of a broader picture. This analytical procedure is still employed today, and is often justified by the homogenizing pressures of hegemonic globalization. This is, however, only part of the story. The social sciences produced in Africa have also favored the continent as the privileged unit of analysis, even when only one given society or region is being studied. In recent years this analytical procedure has also been justified in terms of the processes of globalization, though viewed from a different perspective – that of resistance to

hegemonic globalization. It is necessary to determine what the specific African characteristics are and what realities they contain, in order to produce emancipatory alternatives on a continental scale. These concepts, whatever their verisimilitude, do acquire a certain 'grain of truth' by transforming themselves into political and scientific common sense and, as such, they should be taken into consideration. The question of specific African characteristics and 'Africanness' is, to a great extent, a product of discourses that convert the description of certain African characteristics into uniquely African justifications of social practices and politics. The challenge we had to face, therefore, was to organize a research project whose analytical and methodological framework allowed for an understanding of the specific features of the multiple socio-legal realities at work in Mozambique.

The research conducted as part of this project enabled us to amass an enormous amount of new data, both on the official courts and on the unofficial mechanisms of conflict resolution in Mozambique. The theoretical and analytical frameworks underlying the research have already been discussed in previous chapters, but a short account of the difficulties the project faced allows for a broader understanding of the options that were favored and of the decisions we made.

Amongst the many other difficulties that the researchers involved in the project had to confront and overcome, the fact that the research team involved two nationalities should be emphasized. It was our aim to test out a new model of collective scientific work involving a team from two countries with two coordinators, one from each country, and a research team also consisting of researchers from both countries. This organizational model was more advanced than the conventional model of international research, and obviously it created new and more complex challenges. We felt that in this way the learning process would be richer, both for the Mozambican and the Portuguese researchers. It was also important to establish effective collaboration between the people and the institutions of both countries, which was to continue beyond the scope of the project.

Given the breadth of the field of analysis, the methodologies had to be adapted to the features of each of the subfields. Amongst the difficulties we had to confront and overcome, we would like to underline the following: the absence of official quantitative data that might give credibility to the exclusive reliance on quantitative methods; the chaos of the judicial archives, where they existed, and the consequent difficulties with the requisite documentary analysis; the enormous logistical difficulties and difficulties with access to the more remote areas of the country where we intended to carry out systematic observation and interviews. It should be added that the project did not restrict itself to simply coping with some of these difficulties but, on the contrary, attempted to overcome them, not only for the benefit of the project but also for the benefit of the country hosting it. Various seminars were held with magistrates, for example, with the aim of making them more aware of the importance of collecting statistical data and supplying them with the technical means to improve the process of record-keeping. In this and in other areas, the research was conducted

according to the principles of action research, which constituted an additional and complex factor. As a result, the research contributed towards improving the quality of the statistical information currently being produced in Mozambique.

Given the model adopted, it was neither possible nor appropriate to define the analytical framework of the project in great detail at the time when the project was initially proposed and the funds were requested. Most of the theoretical and analytical concepts underlying the project were arrived at through teamwork as the research group started the preparation of the fieldwork. Some important guiding ideas were identified and later converted into the general working hypotheses presiding over the research work: the administration of the judiciary had to be analyzed, as part of the process of consolidating and deepening the transition to democracy; the fact that Mozambique is a plural society in terms of the legal and judicial systems that provide normative government of the daily life of the population and the fact that this sociological pluralism had to be central to the research, even when not officially recognized; the fact that the research had, at all costs, to maintain its independence in relation to the government and the existing political forces, whilst at the same time listening to all of them.

Accordingly, one of the central topics was the analysis of the relationship between the state and the plurality of systems of law which, whether officially recognized or not, regulate conflict and social order in Mozambique. The idea of the modern state assumes that each state has only one system of law and that the unity of the state is based on the unity of the legal system. Sociologically speaking, however, various legal systems operate within the same nation-state and the state legal system is not even always the most important in terms of governing the daily life of the great majority of citizens. Such disjuncture between political and legal forms on the one hand and political and legal practices on the other, is probably more visible in Africa nowadays than anywhere else and has cultural, political, legal, economic and social ramifications. Such disjuncture has multiple impacts 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.

Contrary to one of the limitations of legal studies – the tendency to analyze law and justice in isolation, as if they existed hovering over society and untouched by it – , we sought to pay specific attention to socio-legal conditions in Mozambique. In fact, it was judged to be particularly important to increase the stock of information and macro-sociological characterization of the society to clarify the articulation between legislative law and the courts, on the one hand, and the normative needs and resolution of conflicts experienced by society, on the other. Therefore, the project embodied a broader concept of law that was not just limited to official, state law, but instead considered Mozambican society as legally and judicially plural.

We are living in a world of legal hybridizations, a condition which Mozambican state law itself cannot escape. The new hybrids are legal phenomena that mix heterogeneous entities, operating through a disintegration of forms and retrieval of fragments, giving rise to new constellations of meaning. The mixture involves not only heterogeneous legal elements and time-spaces, but also heterogeneous legal durations and degrees of embeddedness. This legal hybridization does not only exist on the structural or macro level of the relationship between the different legal orders. It also exists on a micro level, that is, on the level of the legal behavior and representations of citizens and social groups. The concrete 'legal personality' of citizens and social groups is increasingly composite and hybrid, incorporating several different representations. This new legal phenomenon is described by Santos as *interlegality* (1995: 473), meaning the multiplicity and combinations of legal 'layers' which characterize everyday legal life. As the phenomenological counterpart to legal pluralism, interlegality does not mean the mere juxtaposition of different legal orders and cultures but also the porosity between them, leading to constant transitions and trespassing, of which individuals and groups are often only vaguely aware, if at all. According to the situation and context, citizens and social groups organize their experiences around official state law, customary law, local community law – which may be guerrilla law or paramilitary law in countries under civil war – or different kinds of global law – from international human rights law to transnational labor contracts – and, in the majority of cases, according to complex combinations of these different legal orders.

In order to avoid uncritically importing models of analysis, the research was undertaken using several dichotomies that we sought out to help define the contours of our study. Situations involving hybridization and interlegality challenge conventional dichotomies to the extent that legal practices frequently combine the opposite poles of the variables and contain an infinite number of intermediary 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 an end point.

The conventional dichotomies considered most relevant to an analysis of legal plurality in Mozambique are the following: official/unofficial, formal/informal, traditional/modern, monocultural/multicultural. In addition, there is the variable trichotomy: local/national/global.

In the modern state, it is up to the state to dictate the criteria to define what is official and what is not, and the criterion has been, in the overwhelming majority of cases, that of the state itself. In other words, official law and justice are those types of law and justice produced and/or controlled by the state. In this dichotomy, the unofficial is everything that is not recognized as being of state origin. 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 and justice is informal when it is dominated by rhetoric and when, therefore, both bureaucracy and violence are absent or only marginal. The opposite configuration defines the formal. In the modern state, formality arises out of bureaucracy. In its ideal form, bureaucracy is a way of reducing the complexity of

social reality by reducing the infinite variety of interactions and practices to a stylized set of models for actions and sequences. Historically, bureaucracy has not been the only source of formality. In pre-modern societies other methods of reducing complexity predominated, such as ordeals and ritual. Today religious formality and magical formality still exist in social fields not penetrated by bureaucratic formality. There are also hybrid types of formality in which the bureaucratic element blends with the religious or magical element.

The traditional/modern variable relates to the origins and historical duration of law and justice. The traditional is that which is believed to have existed since time immemorial, in which it is impossible to identify with any accuracy the moment or the agents of its creation. Conversely, what is called modern is believed to have existed for less time than the traditional and its creation can be identified in terms of time and/or author. This variable, as we shall see later, is the most complex of all. Contrary to the previous variables, the traditional/modern variable relates to social representations of time and origins, which are always difficult to identify. Moreover, according to the differences in power between the social groups which support each of the poles of the dichotomy, traditional power may be just as much a creation of modern power as modern power is a creation of traditional power.

The monocultural/multicultural variable relates to the cultural universes in which the different laws and systems of justice occur.[1] There is mono-cultural 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.

Finally, there is the aforementioned trichotomy: local, national and global. This variable is seemingly obvious, as it refers to the spatial or territorial sphere of the laws or systems of justice in operation. In fact, however, these spheres are so defined because of the absolute priority granted to the national sphere by Western political and legal modernity.

As these definitions clearly show, the variables are partially superimposed. For example, the official tends to be formal, modern, monocultural and national, whereas the unofficial is often informal, traditional, multicultural and local. Yet these superimpositions are only partial and may occur more frequently in certain situations than in others. In addition, cultural or political contexts may determine that one particular socio-legal diversity is formulated in terms of one dichotomy or another. For example, in Latin America indigenous law and justice, although considered ancestral, is more commonly analyzed in terms of the monocultural/multicultural variable than the traditional/modern variable. In Africa, a diversity that differs only slightly from this – the existence of customary law and the traditional authorities side by side with the modern Western-centric legal system – is more often constructed, both academically and politically, within the sphere of the traditional/modern dichotomy.

Taking this set of variables or dimensions as starting points, we will briefly describe the three main topics around which the research was organized: the official judicial system, the community courts and the traditional authorities.

For this purpose, periods of extensive fieldwork took place in the city of Maputo, starting in 1997.[2] Fieldwork in the provinces was carried out between 1998 and early 2000.[3]

1. The Official Judicial System

In the domain of the official judicial system, quantitative methods prevailed although they were combined with qualitative methods. The methodology employed in this area of research was both intensive and extensive. It covered the extensive gathering of quantitative data from the lower courts (the district and provincial courts), the gathering and processing of legislation, a detailed analysis of case proceedings and other documents including press cuttings, the observation of trials, and interviews with specialist informants, legal actors (professional and lay/elected judges, lawyers, legal staff, representatives from the General Attorney's Office assisting the Public Prosecution Service, the justice officials, etc.) and non-legal actors (economists, business people, leaders of associations, administrators, etc.).

Inadequacies in the official statistics available (provided by the Department of Statistics of the Supreme Court) already identified by other researchers (Dagnino *et al.,* 1996), were one of the greatest difficulties we had to overcome. Faced with this situation, and taking into particular account the discrepancies in statistics recorded in certain years, it was necessary to gather samples of additional information that would enable us to confirm trends in the case flow and proceed with characterizing closed cases. This allowed us to obtain a profile of the different variables in civil and criminal justiceas well as in juvenile justice in the provincial courts and in some of the district courts.

Due to the timetable established for the completion of the project and the budget available, it was not possible to cover the entire geographical area of the country, except in terms of a broad characterization of provincial litigation, in collaboration with the provincial judges. It was therefore necessary to select the provinces and districts in which fieldwork could take place, which was done according to the following criteria: ethnic-cultural diversity; geographical location (particularly in terms of the coastal/interior variable); density of population; approximate volume of cases; existence/non-existence of courts; historical-political importance (see map 5.1).

2. Community Courts

In relation to the community courts, the combination of quantitative and qualitative methods was even more intense. For the first research project, the study on community justice included information relating to a total of 34 courts distributed over six provinces. The fieldwork took place between February 1998 and March 2000.[4]

Map 5.1: Regions Covered by Research (1997-2004)

North – the province of Cabo Delgado (the districts of Mueda, Chiúre, Mocímboa da Praia and Pemba-Metuge); Nampula province (Nampula city and Angoche district);
Center – the province of Tete (the districts of Cahora Bassa, Angónia and Moatize); the province of Sofala (the district of Dondo); the province of Manica (Macossa district); the province of Zambézia (the district of Alto Molócuè, Pebane and the city of Quelimane);
South – the province of Maputo (the districts of Namaacha and Moamba); Maputo city (which holds the status of province) and the province of Inhambane (the district of Zavala, Homoíne, Maxixe and Vilankulo).

Given the number and distribution of the community courts, it was necessary to limit the number of courts observed to one or two per district and also to reduce the number in which the most detailed observations took place. Therefore, from amongst the courts observed, it was only possible to prolong the observation period and gather the information which would enable us to understand their structural and functional characteristics with some degree of certainty in 13 of them. These were the community courts of the neighborhoods of Mafalala, Xipamanine, Minkadjuíne, Inhagóia A (Maputo city), Liberdade (Inhambane city), Munhava Central (Beira city), Cerema, Inguri A, Angoche sede, Johar and Mussoriri (Angoche city) and Boila-Nametória (Angoche district, Nampula) and Maimio (Mueda district, Cabo Delgado).[5]

During the course of the fieldwork we came up against two great difficulties. The first was the fact that the central administration held no records of either the numbers or the names of the community courts in operation. The information received from

the Ministry of Justice mentions the presence, early in 2004, of about 1,740 community courts functioning in Mozambique, 15.4% of which were created after 2000. There are about 8,300 judges assigned to these courts, if the statistics from the Ministry of Justice are correct[6]. Even at a local level we were faced with a serious lack of information on the part of the judicial and administrative authorities in relation to the community courts.

The second difficulty had to do with the problem of communication, since the researchers were not always fluent in the national languages of Mozambique. To overcome this difficulty translators had to be used, which required some preliminary preparation.

In order to determine which community courts were active in each district, it was first necessary to gather information from specialist informants. The following methods were used to collect this data: systematic observation, unstructured interviews and documental analysis. So far, in total, over seventy trials have been observed using systematic observation.

In the courts where systematic observation was employed, the presiding judges and the majority of other judges and participants in the court were interviewed. In these community courts it was also possible to interview the parties involved. In addition, we held interviews with the social actors who were most involved in the activities of the community courts, as well as with members of the *grupos dinamizadores*,[7] the heads of administrative sections, police stations and members of Ametramo,[8] and with specialist informants, namely religious leaders and presidents of community associations.

In terms of documentary data, there was an effort to create the most representative sample possible of case proceedings. In order to do this, we relied on the help of the presiding judges of the community courts, who made sets of proceedings available to us for random selection, photocopying or, when there were no other technical means available, copying them in their entirety. The information was collected by filling in a form that identified the cases, which was specifically designed for this purpose.

3. Traditional Authorities

Because Mozambique is a multicultural society where several bodies are involved in the process of conflict resolution, we observed and conducted interviews with multiple social actors who were considered pivotal in maintaining the social fabric of communities through their mediation. Although the research was centered on the *régulados* (chiefdoms and chieftainships), we always started off with a broad concept of the traditional authorities which, in addition to these, included religious authorities, traditional therapists, *grupos dinamizadores*, presidents of community associations, etc.[9]

Generally speaking, research into the traditional authorities as bodies intervening in the resolution of litigation faced the same constraints and difficulties as those already mentioned in relation to the community courts: the difficulty in identifying the number and location of the *régulados* or local leaders and the lack of up-to-date

bibliographical information on lineage or genealogical origins; criteria for establishing legitimacy; relationships with the state administration, etc.

In the study of traditional authorities, qualitative methods predominated. The methodology employed was based preferentially on systematic observation and interviews. Observation took place in different parts of the country (the provinces of Cabo Delgado, Tete, Zambézia, Nampula, Manica, Sofala, Inhambane and Maputo). The method most frequently used was that of unstructured interviews of varying duration, due to the fact that the traditional authorities, like the other informal bodies for resolving conflicts, have particular days for *mab'andla* (public meetings to hear cases and deal with various matters of interest to the community). Due to this difficulty, very often the researchers could only use interviews as a research method. In some *régulados* (*e.g.* the régulado Luís, the régulado Cumbana) it was also possible to collect a variety of documentation which is not normally easy to obtain, not only because of the lack of a tradition of written records, but also because of an almost universal unwillingness to disclose information considered to be restricted.

In addition, several branches of *grupos dinamizadores* (including neighborhood secretaries) actively involved in conflict mediation were also studied, including the observation of several cases. The *grupos dinamizadores* were mostly studied in the 'caniço' areas of Maputo city (the neighborhoods of Minkadjuíne, Mafalala, Xipamanine, Jorge Dimitrov/Benfica) and Horta, in Angoche city.

Traditional healers, mostly organized around Ametramo, are normally called upon by the *régulos* and community courts and even by the police to solve cases involving suspicion of practicing witchcraft. During the research project, seven cases involving accusations of witchcraft solved by traditional healers were observed (cases referred by other bodies, such as the community courts, or cases where the litigants sought the assistance of the traditional healers directly).

Finally, religious leaders, such as xéhès, were also interviewed.[10]

In addition to the difficulties listed above, the fieldwork also faced other methodological and epistemological complexities: the precarious guarantee of objectivity afforded by the research methods; the relationships, which were always political in the broadest sense of the word, between the researchers and the populations being studied; team research work as a social process in itself – and one which was experienced intensely by the research team.

It was a very complex and rich learning process that allowed us to build up a complex map of the legal orders active in the country by avoiding the temptation to transplant foreign models – produced to analyze other situations – in order to interpret the situation in Mozambique.

Notes

1 For a more detailed analysis of the debate on multiculturalism and the law see Santos, 2002c.

2 The initial research project ran from 1996 to 2000. A new project, aimed at preparing the legal reform, was initiated in 2003.
3 For the second research project, field work was carried out in the Nampula and Manica provinces (2003-2004).
4 To date (2005) the project has studied over 40 community courts; 34 during the first project and 8 during the second project. Some chapters already refer to data gathered during the second phase of the research.
5 These courts were chosen taking the following factors into consideration: (i) proximity to the district capital; (ii) the institutional context, especially the networking between the community courts, *grupos dinamizadores* and traditional authorities.
6 Ministério da Justiça (2004). *Relatório ao X Conselho Coordenador*. Tete, 13-15 July 2004.
7 See note 34 in chapter 1.
8 *Associação Moçambicana de Médicos Tradicionais* – Mozambican Association of Traditional Healers.
9 A word of caution is needed here, since, following the colonial example, most of the studies conducted on the subject tend to emphasize the role of the *régulos*, forgetting the enormous array of other entities who are considered legitimate and are legitimized from below by the communities that recognize their authority.
10 The above-mentioned report from the Ministry of Justice states that in Mozambique there are 592 officially registered religions, structured around 125 religious organizations.

6

The Judicial System: Structure, Legal Education and Legal Training

João Carlos Trindade and João Pedroso

Introduction

A characterization of the judicial system and the so-called 'Mozambican legal sector' is necessary in order to contextualize the litigation patterns and the performance of the official courts in Mozambique. This chapter presents a brief, purely descriptive account of the Mozambican judicial system. We do not propose an exhaustive approach to the subject but instead prefer to focus on the organization of the courts, their constitutional framework, their powers, etc. It is impossible, however, to avoid other questions relevant to the characterization of the judicial system of the country and the work of the courts. Special attention will be paid to the Supreme Court, the General Attorney's Office[1] and the particular institutions involved in legal education and training.[2]

1. The Evolution of the Judiciary (1975-1999)

The evolution of the organization of the judicial system from independence to the present is a reflection of the development of the political system and the legal-constitutional order of Mozambique. It is therefore possible to identify three periods in the evolution of the organization of the judicial system, which can be defined as:

a) post-independence (1975-1978);
b) the judicial organization of the 'new legality' (1978-1992);
c) the new judicial organization within the context of peace, political pluralism and a market economy, following the 1990 Constitution in which the separation

of powers and the independence of the judicial system are enshrined (since 1992).[3]

The Period from 1975 to 1978

The first period identified (from 1975 to 1978) represents the evolution of the colonial system into the construction of a new legal order. On 25 June 1975 the Constitution of the People's Republic of Mozambique was published, as the almost natural consequence of the declaration of independence. In it a new (political, economic, social, etc.) national order was proclaimed – popular power – which aimed to break with all the old operational frameworks of the colonial state. Expressly enshrined in the Constitution as one of the fundamental objectives of the Republic was "the elimination of structures of oppression and colonial exploitation […] and the mentality which underlies them" (Article 4 of the Constitution). Based on this political line, the 1975 Constitution envisaged, in abstract, the fundamental rules for the organization of the judicial system, referring them to statutory law for concretization.[4] In general terms, it consigned the basis of the judicial function to the courts (Article 62), with the Supreme Popular Court as the highest organ in the hierarchy of the system, responsible for promoting the uniform application of the law by all the courts and ensuring that the Constitution and all the legal norms of the Republic (Article 63) were implemented. In addition to this, particular attention was paid to the principle of the independence of courts in the exercise of their functions (Article 65).

The building of a new 'legal order' and a new judicial system was one of the objectives to be fulfilled. The Directive of the Third Frelimo Congress on Justice is particularly illustrative in this context, emphasizing urgency in the "destruction of the existing judicial structure, as part of the destruction of the colonial-capitalist apparatus" (*Justiça Popular,* 1980: 3). The goal was to construct a system of popular justice inspired by the experiences of the people, especially those in the liberated zones,[5] since "they show just how profoundly incompatible colonial and capitalist legislation is with the traditions, way of life and characteristics of our society and our people." It was in this context that the draft bill of the Law on the Organization of the Judiciary was discussed widely, at a national level. This experience constituted a high point in the history of Mozambican justice, with the establishment of a legal and judicial system that was intended to be unitary and based on the country's very reality.

The Judicial Organization of the New Legal Order (1978-1992)[6]

Three years after independence, the Law on the Organization of the Judiciary of Mozambique (Law no. 12/78 of 2 December) was approved.

After establishing some general principles to guide the activity of the courts (such as the guarantee and defense of the legal order and constitutional principles, the equal right of all citizens to have recourse to the courts, the independence of the courts, etc.), the law defined the division of the judicial system. This had "whenever

possible, and bearing in mind the needs of the system of judicial organization, to coincide with the division of the administration, with any alteration to the latter implying corresponding changes to the division of the judicial system" (Article 9). As a rule, a court was to be in operation in each administrative division. Therefore, in descending order of the hierarchy of the courts, the functions of the judiciary would be exercised by the Supreme Popular Court, the provincial popular courts, the district popular courts, and the local popular courts. Neighborhood popular courts could also be created "in cities where this was justified by the density of the population or by other circumstances" (Article 10). The fundamental right to have verdicts reconsidered – wherein each of the courts had to review, on appeal, the decision of the court immediately below them – was guaranteed.

In accordance with the Law on the Organization of the Judiciary of Mozambique, popular courts began to be created at all levels of the country's administrative divisions: locality, community village, neighborhood, district, province, right up to the Supreme Court.

The popular courts (with the exception of the local ones – the community village, locality and neighborhood courts, which functioned only with elected judges[7]) were composed of professional judges appointed by the Ministry of Justice and judges elected by the Popular Assemblies at the appropriate level.[8] Although Law no. 12/78 envisaged the creation of the Supreme Popular Court, the former Court of Appeals of the Portuguese judicial system remained in operation until 1979, when it was replaced by the High Court of Appeals. The Supreme Court only began to function after 1988, when the Chief Justice, the Deputy Chief Justice and the Justices were appointed.

One of the most striking characteristics of the Mozambican judicial system is that at all levels, including the Supreme Court, the exercise of judicial activity is not the sole prerogative of professional judges. Up to the new Constitutional reforms (2004), the law also required that elected judges should take part in judicial proceedings alongside them (see below).

Elected judges were lay citizens who were presented as candidates to the popular assemblies and elected by them to carry out judicial duties. Elected judges who had the confidence of citizens and the Frelimo party sat alongside professional judges and applied official law.

Elected judges, who still serve today, exercise authentic jurisdictional functions and intervene in decisions on matters of fact and matters of law in criminal cases.[9] They work in shifts, ensuring that there is a certain amount of circulation among them. During the time they are involved in working for the courts, they are given leave of absence from their regular employment.[10]

The Locality and Neighborhood Popular Courts

The locality and neighborhood popular courts formed the base of the judicial system. These courts were the only ones made up exclusively of elected judges and had to

number a minimum of three and a maximum of five judges (Articles 36 and 37 of Law no. 12/78).

In criminal matters, these courts only dealt with minor infractions liable to lead to sanctions such as a public warning, community service for no more than thirty days, payment of a fine not exceeding $ 1,000 or even compensation for the injured party. In terms of civil litigation, they could deal with cases involving amounts not exceeding $10,000.[11]

At local and neighborhood level all judges were elected and resolved the cases presented to them by reconciling the parties concerned. When this was not possible they made decisions on the basis of common sense and justice (Article 38) and could only apply measures that did not entail deprivation of liberty (such as fines, temporary suspension of a right, and community service).[12]

The District Popular Courts

In addition to the elected judges, the district popular courts included a judge appointed by the Ministry of Justice, on the advice of the Governor of the Province (Article 30). Both the appointed and the elected judges (a minimum of two and a maximum of four) had to participate in decisions (no. 1 of Article 31).

In terms of civil jurisdiction, they dealt with cases pertaining to family matters and all others in which the financial sum involved did not exceed $50,000 (Article 32, no. 1, a). If there was no special law delegating powers to any other court, they also dealt with all criminal cases liable to a prison sentence of no more than two years and with infractions committed by judges from the locality, community village and neighborhood popular courts involving criminal acts committed during the exercise of their duties (Article 32, no. 2, a and b). Finally, they also functioned as an appeals court for all decisions made by the locality, community village and neighborhood popular courts, which represented the base of the court system (Article 33, no. 2, c).

The Provincial Popular Courts[13]

The provincial popular courts consisted of a judge appointed by the Ministry of Justice (who acted as the chief judge of the court) and four elected judges. The presence of the appointed judge and at least two of the elected judges was required for the court to hear any case or trial (Article 22, no. 1).

These judicial courts had residual powers both in civil and in criminal matters. They heard all the cases which had not been previously attributed to other courts (Article 23, no. 1, a and no. 2, a). They also judged magistrates from the district courts for crimes committed during the exercise of their duties. In addition, they were empowered to reconsider, as appeals, all the decisions of the district courts (Article 23, no. 1, b and no. 2, b). However, in relation to civil jurisdiction, the law only allowed appeals on decisions made by the district courts in which the amount involved was in excess of $5,000 (Article 34 to the contrary). By decree the Ministry of Justice, special sections (civil, criminal, labor, etc.) could be created in the provincial courts

when justified by the amount of work. In this case, judges were nominated to preside over the various sections.

The Supreme Popular Court

The Supreme Popular Court was the highest body of the judicial system and had jurisdiction over the entire country. It was responsible for directing the entire organization of the judicial system, and could "issue instructions or directives of a general and mandatory nature" to the various courts, "in order to ensure uniformity in the application of the law." These directives assumed the status of laws.

The court had to consist of at least six justices appointed by the Ministry of Justice and a minimum of eighteen elected judges, nine of whom were substitutes. The appointed justices had to have a law degree and be over 25 years of age.

The court functioned in sections, as a higher court (reconsidering the decisions of the provincial courts), and as a lower court to – amongst other cases – judge magistrates from the provincial courts who had committed criminal acts during the exercise of their duties. In this case, each section could only deliberate if two elected judges and one appointed judge (the sentencing magistrate) were present.

Decisions made by sections, when operating as a lower judicial court, were heard as appeals at a Plenary Sitting of the Supreme Court. The Court was also authorized to standardize jurisprudence, settle disputes relating to jurisdiction between the courts and other authorities, judge criminal proceedings in which the accused were particular categories of people with an important position in the state or the Frelimo party (for example, the President of the Republic, the Popular Assembly deputies and the members of the Central Committee of Frelimo party),[14] etc. In order for the Plenary Sitting to deliberate on questions concerning its own powers, at least three appointed Justices and five elected judges had to be present, in addition to the Chief Justice.

In general, the popular court system as a whole (including the prosecutors who were an integral part of the system) played a double role: the courts contributed to the countrywide presence of the new independent state institutions, whilst promoting the transition from one legal system to another. Popular courts were perceived as part of a social laboratory where the 'old' and the 'new' characteristics of Mozambican society could find forms of coexistence and compromise that could be reflected in the creation of a new legal framework. However, a note of caution is required. In fact, genuine popular participation in the administration of justice did not really suit the centralized, authoritarian nature of the single party state of the time, meaning that, in many instances, the people's courts became vehicles for the imposition of state power, thus delegitimizing their own essence.

The New Judicial Organization in a Period of Peace, Pluralism and Market Economy

The political and economic reforms introduced in the country at the end of the eighties, following the change from a single party socialist regime to a multiparty

regime defending a market economy, had immediate repercussions on the judicial system.

The 1990 Constitution gave ample recognition to political and human rights, such as equality (Article 66), freedom of expression and information (Article 74) and the right to freedom of movement, as well as the right to reside in any part of the country or abroad (Article 83). It established the right to strike – except in the essential services – (Article 91) and freedom of religion and worship (Article 78). It also established the principle of strict legality to be observed in detentions and trials, the principle of the presumption of innocence (Article 98), the principle of non-retroactivity in penal law (Article 99), the right to resort to *habeas corpus* (Article 102) and the right to defense and to legal assistance and aid, regardless of financial status (Article 100).

This new Fundamental Law gave the country access to the global economy and established various types of ownership: state, cooperative, private-state joint ownership, and private (Article 41). While the land remained the exclusive property of the state, the Constitution established conditions for using and benefiting from the land which could be conferred upon individuals or collectives (Articles 46 and 47).

The 1990 Constitution, in proclaiming that "the courts shall penalize violations of the legal order and shall adjudicate disputes in accordance with the law" (Article161, no. 3) came, in the opinion of many, to reinforce a state monopoly over the production and application of the law and, consequently, the professionalization of the judicial function. Subsequent regulatory legislation, by producing a significant turnabout in the principles and practice of previous judicial practices – which had attributed great importance to the participation of citizens and communities in the entire process of the administration of justice – managed, among other things, to define the disintegration of the courts that had constituted the base of the judicial system (and which subsequently became known as the Community Courts).[15] In the same way, it altered the hierarchy of the judicial courts[16] by creating new courts with special powers[17] and established the Institute for Legal Assistance and Representation [18] and the Bar Association.[19] It became necessary, therefore, to formulate certain new rules for the organization of the judicial system. In addition to those laid down by the former 1975 Constitution, some general principles were announced which, in modern constitutions, are enshrined in the democratic rule of law. These include the principles of the general obligation to comply with judicial rulings (Article 162), the impartiality and independence of judges (Article 164), exclusivity in the exercise of judicial functions (Article 166), etc. The creation of special courts was also forbidden: "Other than the courts specified in the Constitution, no other court may be established with jurisdiction over specific categories of crimes" (no. 2 of Article 167).[20]

The new Law on the Organization of the Judiciary – or Organic Law of the Judicial Courts (Law no. 10/92 of 6 May) introduced profound alterations to the judicial system, in compliance with the political and constitutional philosophy which had been adopted, based on the separation of powers and the principles of independence, impartiality and autonomy of judges and their exclusive obedience to

the law. The elected judges became eligible to participate only in decisions on matters of fact, assisting the professional judges (Article 71 of the 1990 Constitution).

The 1990 Constitution defined the courts as sovereign bodies which guaranteed and reinforced the legal order, securing the rights and freedoms of citizens and the legal interests of the different bodies and entities officially in existence (Article 169 and 161). This constitutional innovation made judicial, executive and legislative powers independent, with the Minister of Justice no longer directing the judicial system.[21] The courts were no longer accountable to the Popular Assembly.[22] Since then, judges have had their own statutes, which establish basic principles such as their independence and tenure, define their career structure and establish their rights and duties (Law no. 10/91 of 30 July). The autonomy of the judicial system also had budgetary repercussions: the national budget has separate sections for the Supreme Court and the courts at provincial level.[23]

The Organic Law of the Judicial Courts establishes that "the courts are sovereign organs which administer justice in the name of the people" and regulates the organization, competence and functioning of the courts in the light of the new constitutional principles. The same law also stipulates new general principles (for example, citizens' access to justice guaranteed by the state, the presumption of the innocence of the accused, public hearings), thus complementing the constitutional guarantees.

One of the important changes in the new judicial organization was to limit formal jurisdiction to district level, by adopting the then-dominant interpretation of Article 161, no. 3 of the Constitution. As they did not apply purely legal criteria (written law), the grassroots (locality and neighborhood) courts created under the previous judicial organization were excluded from the official judicial system. At the same time, a new law was passed (Law no. 4/92) creating the Community Courts as bodies for conciliation and the resolution of minor conflicts under what could be defined as the informal administration of justice. The Community Courts continued to be ruled by the principles previously applied to the local and neighborhood courts and remained under the direction of the Ministry of Justice.

The separation of the executive, a fundamental step towards the construction of the rule of law, was established to the extent that the government had no responsibility for the management of the judicial system. This had collateral effects, for which the system was not prepared. Executive and management tasks increased substantially, without a corresponding increase in human resources. On the one hand, the courts, namely the Supreme Court, are currently responsible for the effective functioning and management of all levels of the official judicial system. On the other hand, the autonomy of the courts and the General Attorney's Office has had the parallel effect of making the attorneys 'guests' of the judicial courts, since they are now no longer an integral part of them. Consequently, the organization of the judicial system is no longer dependent on the Ministry of Justice,[24] the courts no longer use the term

'popular' and the elected judges can now only take part in lower court trials and deliberate only in matters of fact.

The Composition, Powers and Structure of the Courts

As had been the case under the previous systems, the current court structure was intended to make the organization of the judicial system correspond, as closely as possible, to the administrative divisions in the country.[25]

The system included the Supreme Court and the provincial and district courts (Article 19, no. 1), with the potential to create specialist courts and district judicial courts in the capitals of the provinces whenever justified by circumstances (Article 19, no. 2). In its internal order, the power of a court is established in terms of subject matter, hierarchy, value and territory (Article 22, no. 1). Whenever the circumstances justify it, specialist judicial courts and district judicial courts can be established in the provincial capitals. Some specialist courts have already been created – such as the Juvenile Court in Maputo city,[26] the Police Court in Maputo city and the Labor Courts. Although created by law in 1992 with competence in labor matters and constituting a specialist court system, the Labor Courts have not yet been formally established.

The hierarchical structure of the courts guarantees the right to appeal the court's decision. Appeals are allowed on matters of law and matters of fact, although in the latter case this is allowed only once. This means that, as far as matters of law are concerned, there can be two levels of appeal (from the district court to the provincial court and from there to the Supreme Court), depending on the requirements established in the Civil Procedure Code.

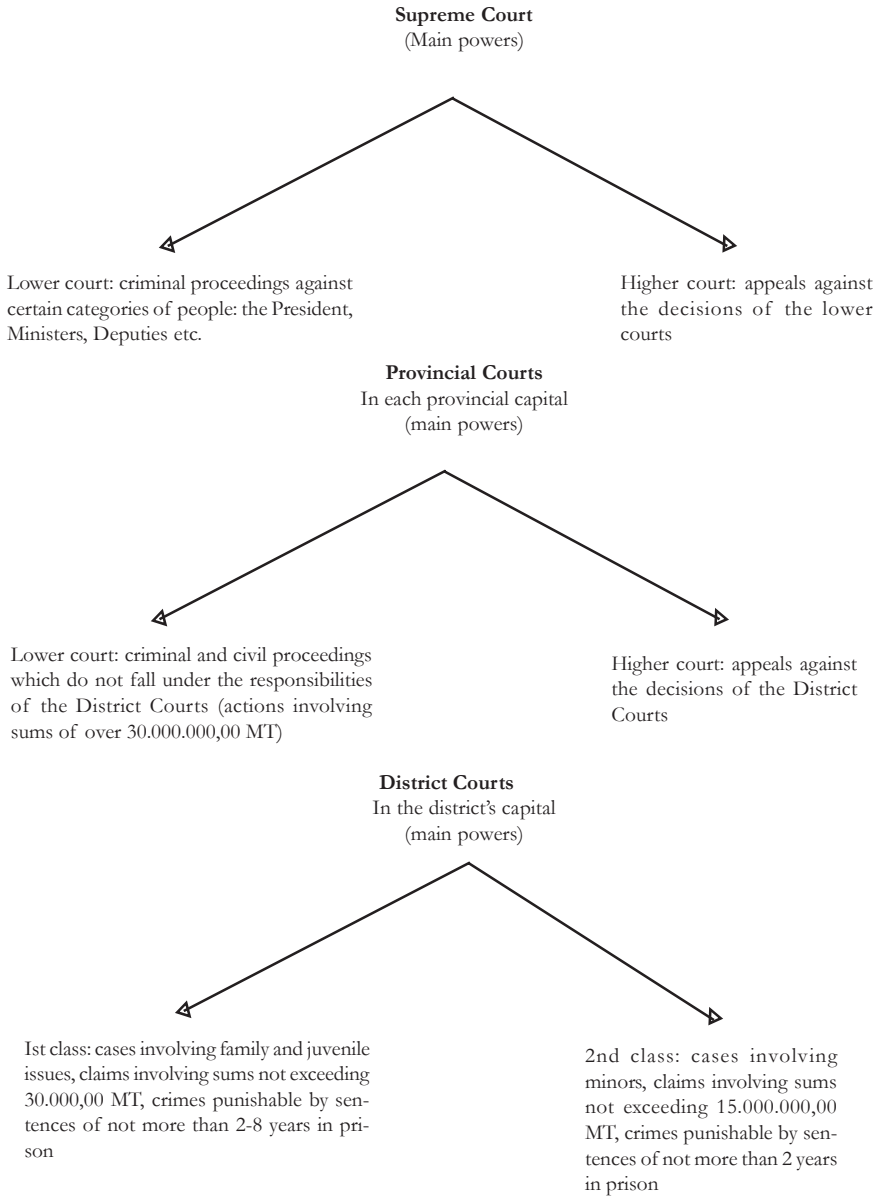
In accordance with the changes brought about by the Organic Law of the Judicial Courts under Decree no. 24/98 of 2 June, the first and second class district courts hear cases in which the sums involved do not exceed 30,000,000 *meticais* and 15,000,000 *meticais*, respectively.[27] The provincial courts are responsible for judging cases involving amounts of over 30,000,000 *meticais*. In criminal matters, the district courts are responsible for judging crimes punishable by sentences of not more than eight years in prison. The provincial courts, as lower courts, judge civil and criminal cases which do not fall within the responsibility of the district courts (see figure 6.1).

The District Judicial Courts: The Country, the Courts Created and the Courts in Operation

Given the exclusion of the base courts from the judicial system, the district judicial courts act as lower judicial courts. The law envisages the existence of first and second class district courts and establishes the powers of each. In practice, however, this distinction is not preserved.

Each of these courts is composed of a Chief Judge, who is a professional judge, and elected judges (Article 57).[28] If justified by the volume of work, they can be organized into sections, which must, in this case, include a Chief Judge. They function as a collective and at least two elected judges must be present, in addition to the Chief Judge when a case is to be decided (Article 58).

Figure 6.1: The Organization of the Judicial System



Source: Law no. 10/92 of 6 May and Decree no. 24/98 of 2 June.

Law no. 10/92 of 6 May presents a map of the judicial organization in which the administration of justice covers the whole country. As we have already indicated, this objective is far from having been achieved.

District judicial courts have limited competence in both criminal matters (crimes punishable by up to two years in prison) and civil matters. In civil matters, in addition to cases involving the aforementioned sums, they also hear cases involving the jurisdiction of minors (Article 60, no. 1, a). In relation to criminal litigation, they deal initially with infractions punishable with a prison sentence of not more than two years, but their powers were widened by Decree no. 24/98 2 June so as to include crimes punishable by a prison sentence of up to eight years.

In terms of the administrative division of Mozambique, the district courts must be created by legislation, but this has not happened in the case of 35 of the 143 district courts.[29]

An analysis of the districts where the district judicial courts have not been created by legal decree enables us to detect two kinds of rationale underlying their selection. The first is that they correspond to the districts which are farthest away from the capital and have increasingly smaller populations, which the state and the official administration have difficulty in reaching, or do not reach at all. The second logic is that of not creating district courts in cities in which provincial judicial courts are functioning or where other municipal district courts exist, as in the case of Maputo city.[30]

Among the courts that have been created, there are six municipal district courts in operation: three in the city of Maputo (six court offices), two in the province of Maputo (the city of Matola and Machava) and one in Gaza (the city of Xai-Xai). Of the 128 rural districts which exist in Mozambique, according to Dagnino *et al.* (1996) the appropriate judicial courts are only in operation in 80 of them. According to the Ministry of Justice, there were about 90 district courts functioning in rural districts in 2000.[31]

The situation observed in the field enables us to state that, of the 90 courts officially understood to be in operation according to the table above, at least four had not yet been legally created in 2000 (Chemba and Chibabava, in Sofala, and Mabote and Funhalouro, in Inhambane). In relation to Chibabava, the research team visited the district at the time of the first project (1996-2000) and found that the administration of justice was carried out by a 'Municipal Court' from the colonial period which was still in operation and was directed by an assistant district administrator and three 'elected' judges.[32] Also, the more recently created districts are not expected to have district judicial courts, this being the case in the Macossa district, in this Manica province.[33]

As we have already stated, in Mozambique the total number of both rural district and municipal district (urban) judicial courts with powers at district level is 143.[34] With only about 90 in operation, this means that over 50 districts still lack a judicial court. Thus, the judicial system ends at district level and barely covers 62% of the districts in existence.

Table 6.1: Judicial Courts in 'Rural' Districts

CABO DELGADO
1. Ancuabe
2. Chiúre
3. Macomia
4. Mocímboa da Praia
5. Montepe
6. Mueda
7. Namuno
8. Palma

NIASSA
1. Cuamba
2. Madimba
3. Maúa
4. Marrupa
5. Mecanhelas
6. Metangula
7. Unango
8. Mavago

NAMPULA
1. angoshe
2. Eráti (Namapa)
3. Malema
4. Meconta
5. Mecuburi
6. Moma
7. Monapo
8. Mossuril
9. Murrupula
10. Nacala (Porto)
11. Ribáuè
12. Ilha de Mocambique
13. Rapale
14. Muecate
15. Nametil
16. Liupo (Mogincual)
17. Memba

ZAMBEZIA
1. Chinde
2. Gurué
3. Ile
4. Alto--Molócuè
5. Mocuba
6. Pebane
7. Milange
8. Maganja da Costa
9. Morrumbala (to open)

MAPUTO
1. Boane
2. Manhica
3. Namaacha
4. Marracuene
5. Magude
6. Matutuine (Bela Vista)
7. Moamba

MANICA
1. Gondola
2. Guro
3. Machaze
4. Manica
5. Espungabera
6. Catandica

SOFALA
1. Buzi
2. Caia
3. Dondo
4. Gorongoza
5. Marromeu
6. Nhamatanda
7. Chibabava
8. Chemba
9. Inhaminga

Table 6.1: Judicial Courts in 'Rural' Districts (contd.)

INHAMBANE
1. Maxixe
2. Massinga
3. Morrumbene
4. Homoíne
5. Vilankulo
6. Zavala (Quissico)
7. Inharrime
8. Funhalouro
9. Panda
10. Inhassoro
11. Mabote
12. Nova Mambone
13. Langano (proposed)

GAZA
1. Bilene-Macia
2. Chibuto
3. Chicualacuala
4. Chokwé
5. Guijá
6. Mabalane
7. Mandlakazi
8. Massingir

TETE
1. Angónia
2. Chnagara
3. Marávia (to open)
4. Moatiza
5. Mutarara
6. Cahora Bassa
7. Magoé
8. Macanga (to open)
9. Zumbo (to open)

Total 90+5 (to open)

Source: Information from the Supreme Court 11/07/2000

The Provincial Courts

Provincial courts exist in all of the country's eleven provinces (including the city of Maputo, which has the status of a province), with one or more court offices. They are presided over by a Chief Judge and are divided into criminal sections and civil sections. All the provincial judges have a law degree. They can function as lower or higher courts. In the case of the former, they are competent to hear all civil or penal cases which are not the responsibility of the other courts, while still retaining their own residual powers. The provincial court also considers all crimes or illicit civil acts practiced by lower-ranking magistrates which are related to the exercise of their duties (Article 51). When it functions as a lower court, there must be a minimum of two elected judges and one professional judge present for it to be able to deliberate.

As a higher court hearing appeals against the decisions of the district courts, it consists of three professional judges, two of whom are required for any deliberations. As previously mentioned, the Constitution limits the elected judges to hearing cases in the lower court.

In the provincial courts sections can be created as required to deal with the demands of the workload.

In the city of Maputo, the provincial court has four criminal sections, three civil sections, two labor sections and one criminal instruction section. There are also two courts with special jurisdiction, the Juvenile Court (two sections) and the Police Court.

Between 30 December 1978 and 19 December 1979, legislation was produced to create today's provincial judicial courts (then known as the provincial popular courts). Later on, the Judicial Court of Maputo city (2 November 1983), the city of Maputo Juvenile Court (13 November 1980) and the city of Maputo Police Court were created. This meant separate jurisdiction for the city and the province of Maputo and an answer to the concentration, quantity and specific nature of litigation in the capital of the country.

Between independence and the creation of these courts, the former area judicial courts (*tribunais de comarca*) – dating from colonial times – remained in operation.

The process of specialization in the provincial judicial courts took place in two complementary ways. On the one hand, this occurred through the creation of courts with special jurisdiction (the Juvenile Court and the Police Court in Maputo) and, on the other hand, through the creation of both civil and criminal specialized sections and, in recent years, the creation of labor sections (in the city of Maputo, the province of Maputo and Sofala) and criminal instruction sections (the Court of Maputo city).[35]

2. The Supreme Court: The Guardian of the Judicial System

Judicial and Administrative Structure

In accordance with Law no. 10/92, the Supreme Court is the highest judicial court and is composed of the Chief Justice, Deputy Chief Justice, Justices and elected judges. It consists of a minimum of seven Justices and 17 elected judges, eight of whom are substitutes (Article 30).[36] As already noted, since 1992 the judiciary is no longer dependent on the Ministry of Justice and the personnel within it have become dependent on the Supreme Court.[37]

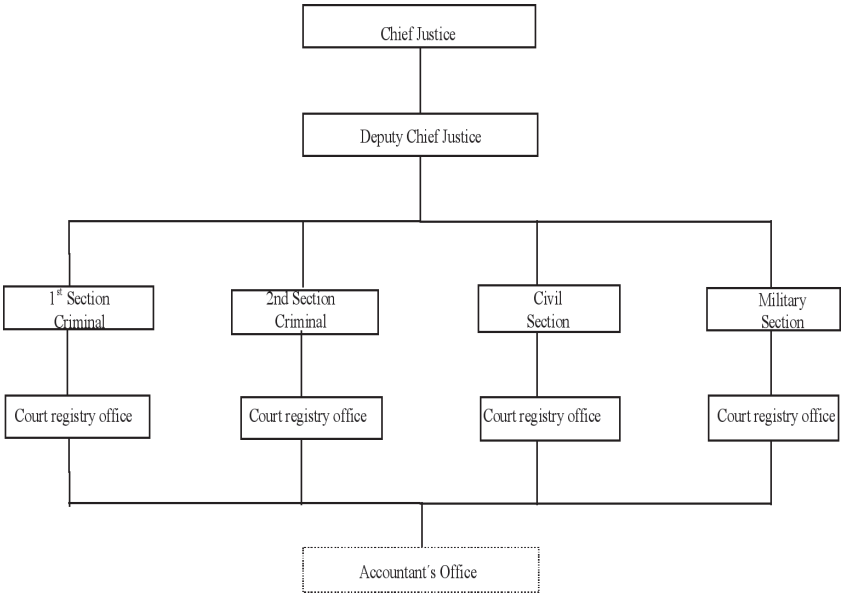
The Justices are nominated by the President of the Republic, on the advice of the Superior Council of the Judicial System (Article 226, no. 2 and 3 of the 2004 Constitution).

The Supreme Court is organized both as a plenary and in sections. Specializations are established by the internal regulations of the Supreme Court. The Chief Justice presides over the plenary sittings. He or she can also preside, when necessary, over the sectional closed sessions. In this case, the Chief Justice does not have the right to vote, unless there is a hung verdict (Article 41, no. 1, d and 36, no. 4). The Deputy Chief Justice replaces the Chief Justice whenever the latter is absent or sick. A plenary sitting can function as a lower or higher court. In the former case, it consists of the Chief Justice, Deputy Chief Justice, Justices and elected judges. To deliberate, the presence of at least two thirds of its members is required (Article 32). Just like the other attributes which may be conferred, by law, upon the plenary sittings as a unique body, it can judge crimes and illicit civil acts practiced by a particular category of

people (for example, the President of the Republic, the President of the Assembly of the Republic, the Prime Minister and the Justices of the Supreme Court – Article 34).

As a higher court, amongst its other duties, the plenary sitting is responsible for standardizing jurisprudence, hearing conflicts of jurisdiction between the courts and other authorities, judge (as the highest body and in matters of law) appeals against rulings made by the various jurisdictions and reconsidering (on appeal) the decisions of the sections of the Supreme Court as lower courts (Article 33). With regard to the sections, when they function as higher courts they are composed of a minimum of two professional judges. When they rule as a lower court, they also include two elected judges. The sections, as lower courts, are responsible for judging criminal cases in which the accused are deputies of the Assembly of the Republic, members of the Council of Ministers, magistrates and professional judges from the provincial judicial courts, etc. As higher courts, they judge appeals on matters of fact and matters of law against decisions which – under the terms of the law on civil proceedings – must be brought before the Supreme Court; rule on conflicts of duty in the provincial district courts, hear requests for *habeas corpus*, etc.

Figure 6.2: The Supreme Court – Judicial Structure



Source: Law n.o 10/92 and adapted from Dagnino *et al*., 1996.

The Supreme Court still assumes the powers of a higher appeals court in labor and military matters. The Constitution envisages the creation of labor and military jurisdiction, but this has not yet been implemented.[38] In fact, since 1992 – the year in which the justice and labor commissions were abolished and before the labor courts

were created – jurisdiction has been exercised on a lower level by the civil sections of the provincial courts and in appeal by the Supreme Court. The Supreme Court also rules – as a higher court – in military cases, with the provincial military courts acting as the lower court. Additionally, it acts as a lower court when dealing with the trials of higher-ranking officers. Finally, as established by the 1990 Constitution, the Constitutional Council was formed in 2003. Since then, the responsibilities previously assumed by the Supreme Court in relation to constitutional and electoral matters have ended.[39]

At present (2005), the Supreme Court has a Chief Justice, a Deputy Chief Justice and six Justices.[40] It has two criminal sections, one civil (and labor) section and a military section, each possessing its own court offices. The court also has an accountant's office (see figure 6.2).

In addition to its jurisdictional function, the Supreme Court is responsible for the general administration of the court system, including its human, financial and patrimonial resources. Thus, the Supreme Court is internally organized with the aim of carrying out various managerial and technical support functions for the judicial apparatus: the Department of Administration, Patrimony and Finance (DAPF), the Department of Human Resources (DHR), the Department of Information and Legal Statistics (DILS) and the Library.[41]

The Supreme Court: Functions, Independence and the Credibility of the Courts

The political and symbolic functions of the Supreme Court are of particular importance in Mozambique, because it is responsible for directing and supervising the organization of the judicial system. This encompasses internal control and discipline, management of the system, litigation resolution and social control, as well as jurisdictional functions, through its decisions. When it exercises its competence to judge cases of major social and political interest or those of a political nature, the Supreme Court also takes on the function of guaranteeing the stability and maintenance of the political system.

We will pay particular attention, in this chapter, to some of the decisions relating to the functioning of the political system. When the Supreme Court was entitled to exercise constitutional competence (up to the introduction of the Constitutional Council in 2003), its decisions (such as the decision on the unconstitutionality of the law that decided that Muslim holy days were to be national holidays, as well as its decisions on electoral matters) functioned as a guarantee of the stability and independence of the court system.

South Africa, Russia, Hungary or Colombia also provide examples of constitutional courts (or courts carrying out such functions) which can judicialize politics whilst maintaining (or constructing) their independence in relation to other bodies of political power, thus providing credibility for the judicial system. Heinz Klug (1996, 2000),

however, notes that in the construction of the South African judicial system, there is a gap between the credibility of justice and the credibility of the Constitutional Court.

The Supreme Court in Mozambique has given credibility to the courts by deciding, in an impartial and independent manner, to acquit a general accused by the party in power of treason and attempting a coup d'etat, as well as by penalizing and even dismissing judges involved in illegal activities.

In an analysis of the Mozambican judicial system, it may be seen that its credibility can be evaluated from four perspectives: 1) its distance from citizens, *i.e.* in relation to citizen access to the law and to justice; 2) the excessive length of cases; 3) the civil and criminal alegality and illegality of certain corrupt practices; 4) the independence of the judicial system.

In terms of the Supreme Court, we have to take into account that, at the moment, one source to its discredit is the excessive slowness of the proceedings, which requires us to analyze whether this is attenuated, compensated for or even overcome by the level of political independence which its decisions reveal.

The ability of the judicial courts to judge and sentence crimes of corruption committed by those who exercise political, economic and social power and/or by members of the judicial system is also a challenge to their own external and internal independence. On the one hand, there is an almost total absence in the courts of cases of corrupt practices imputed to citizens who exercise political, economic and social power. On the other hand, in cases of corruption practiced by magistrates and state officials who stand trial, the defendants are usually condemned.

Like the courts in the countries previously mentioned, an analysis of the Supreme Court's performance shows that it has been a guarantor of the consolidation of independent judicial power in this transitional period in the political system and that, through its supervisory and managerial functions, it has also established the credibility of the legal system. Nevertheless, in the opinion of many people we interviewed, the Supreme Court should be more active in tackling the evils of the system, namely delays, corruption, inadequate legislation and the poor qualifications of its human resources.

3. The Organization and Recent Activities of the General Attorney's Office

Since 1975, the Constitutions have defined the General Attorney's Office (the body of state attorneys) as a hierarchical magistracy that functions in parallel with the court judges, under the Attorney General.[42] As stated by the 1978 Law on the Organization of the Judiciary, its functions essentially consist of inspecting and controlling legality, promoting compliance with the law and participating in the defense of the established legal order. Together with the courts, it is its mission to file cases, that is, to present the state's case against the defendant in a criminal prosecution, to supervise criminal investigation, to control legality and periods of detention, to guarantee the protection of minors, absentees and the disabled, and to defend and represent the interests of the state.

However, in spite of the new functional model, the General Attorney's Office as an institution continued to operate, to a large extent, under colonial legislation.

Law no. 6/89 – approved on 19 September – created the General Attorney's Office as a central body of the state. The General Attorney's Office enjoys autonomy in relation to both the Ministry of Justice and the official court system and is bound only by the criteria of legality, objectivity and exemplary behavior. As this law – granting the General Attorney's Office a much wider range of powers than before – was only passed one year before the 1990 Constitution, it does not completely embody contemporary constitutional principles. For example, it states that the body of state attorneys represents and defends the property of the Frelimo party, that the Superior Council of the General Attorney's Office studies party and state decisions on the law, justice and legality with a view to their implementation and that the General Attorney's Office presents an annual report on its activities to the People's Assembly.

Both the 1990 and 2004 Constitutions did not include the General Attorney's Office among its sovereign bodies.

The General Attorney's Office has a dual nature. On the one hand, it is a central body of the state for controlling legality, promoting observance of the law and defending the legal order. As such, the Attorney-General and the Deputy Attorneys-General are appointed, released and dismissed by the President of the Republic. On the other hand it is the highest body of attorneyship in the country, being independent and accountable exclusively to the law. The General Attorney's Office therefore constitutes a parallel body to the judicial magistracy and has as its primary function the defense and control of legality. The attorneys are bound by the criteria of legality, objectivity, impartiality and subjection to the law. However, the current Organic Law of the General Attorney's Office – which was the first sign of a change in the judicial system – although advanced for its time, now needs to be adapted to the *status quo* created by the new constitutions.

The provincial and district attorney offices are peripheral bodies of the General Attorneys' Office. At a central level there is the Consultative Council (a counseling body comprising the Attorney-General, the Deputy Attorney-General and the Assistant Attorneys General) and the Superior Council of the General Attorney's Office, a management body comprising the leadership of the institution and the Provincial State Attorneys (still inactive).

The law envisages the creation of specialized departments and a secretariat with technical and administrative duties. The General Attorney's Office consists of specialized departments (the Department of Legal Control; the Department of Criminal Affairs; the Department of Civil Affairs, Juveniles, Labor and the Family and the Department of Administrative Affairs), a General Secretariat, a Judicial Registry Office, and the Library and technical infrastructure.

In recent years some of the functions attributed to the Attorney-General have been carried out by entities within civil society, as is the case with actions aimed at raising the legal awareness of citizens. Others, such as the control of legality, the

issuing of legal opinions and the inspection of prison establishments, have been partially attributed to them, or else are being exercised by other institutions, namely the Administrative Court, the Constitutional Council and the Ministry of Justice.

According to the annual report of the General Attorney's Office for the year 1999,[43] the Consultative Council issued legal opinions and analyzed enquiries arising out of denunciations against deputies in the Assembly of the Republic and the non-governmental organizations (NGOs). The same document stated that, in the period under analysis, the Department of Legal Control received and acted on denunciations through public institutions and bodies of the state in order to achieve legality. The departments of Criminal Affairs and Civil Affairs, Juveniles, Labor and the Family helped meet needs and fill internal gaps, working together with civil society and other state bodies in order to fulfill their mission. The Department of Administrative Affairs took charge of personnel problems – particularly training – and oversaw actions brought against the Mozambican state. The General Secretary initiated a process of administrative and financial restructuring, replacement of personnel, the computerization of services and the standardization of statistics from judicial proceedings.[44]

The General Attorney's Office: Problems, Crises and Opportunities

The General Attorney's Office, like the Mozambican courts, has serious shortcomings in relation to human resources (in terms of recruitment, selection and training), insufficient financial resources, inadequate premises (offices and housing for state attorneys) and equipment. This situation is made worse,, on the one hand, by the autonomy of the General Attorney's Office and its separation from the judicial courts, which has made the state attorneys tolerated 'guests' of the court system, and on the other hand because 15 years after the autonomy of the General Attorney's Office was legally established (Law no. 6/89), legislation has still not been issued to approve the statutes of its magistrates.

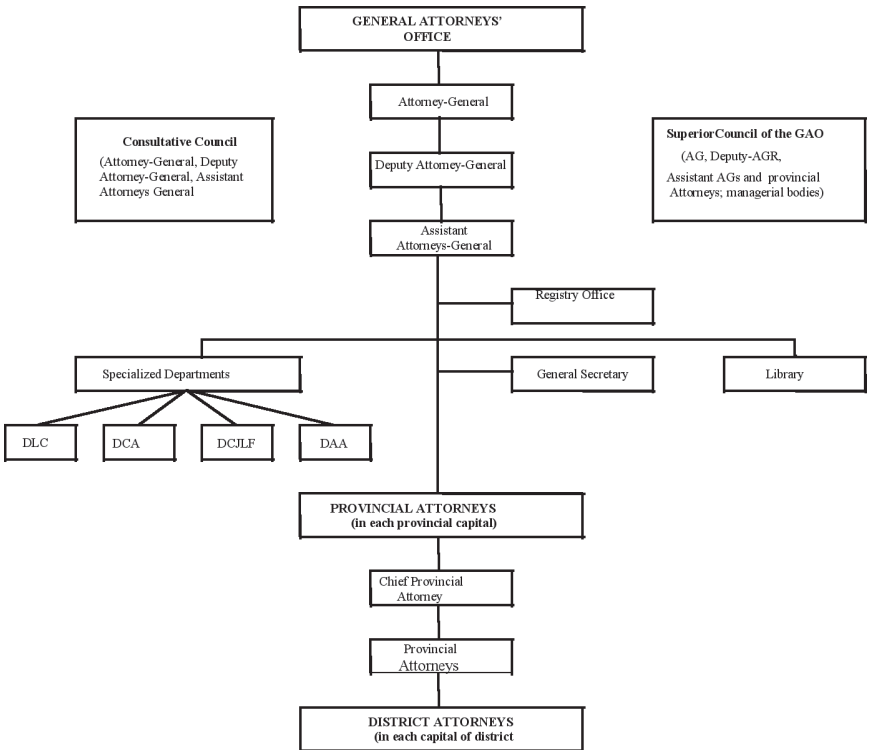
Since the early nineties the rise in non-legal, illegal and criminal corruption, violent crime and urban insecurity have placed the General Attorney's Office at the center of controversy in Mozambican society.

Paradoxically, rather than increased support for the idea of consolidating the General Attorney's Office, support has frequently been given to the creation of new bodies to carry out functions within the areas of responsibility of the General Attorney's Office.

First of all there were the 'external' and 'internal' supporters of the Higher Authority to Combat Corruption within the state, which has not yet been created. The Superior Council of the General Attorney's Office was obviously, against the establishment of such an authority. Secondly, and more recently, the 2004 Constitution created the legal figure of an Ombudsman, "as an office established to guarantee the rights of citizens and to uphold legality and justice in the actions of the Public Administration" (Article 256). So far, however, the new bodies competing with the

Attorney-General have not begun to operate, although the latter has neither reinforced nor improved its performance.

Figure 6.3: The Organization of the General Attorney's Office



In short, the General Attorney's Office is repeatedly accused of a lack of action and of apathy. There have been several successive crises involving the Assembly of the Republic, which has echoed these criticisms, and which led to the President of the Republic, in 1997 and again in 2000, to relieve the General-Attorney from office. It is to be hoped that the solution to the crisis will open up a window of opportunity for the General Attorney's Office to establish itself within the landscape of justices in Mozambique.

4. The Institutional Structure of the Administration of Official Justice

The administration of official justice is not limited to the judicial courts, the community courts or even the various modes of legal representation (lawyers, legal technicians and legal assistants)[45] and their organizations (the Bar Association and the IPAJ). We therefore need to summarize the basic institutional structure of the administration of justice, with some notes on the following categories of institutions: a) the managerial and consultative institutions of the judicial courts; b) the Ministry of Justice; c) the Administrative Court; and d) the Constitutional Council.

Table 6.2: The Main Institutional Structures of the Administration of Justice

Ministry of Justice	Responsible for the Prison Services, Registries and Notary Public services, Religious Affairs, Investigation and Legislation, inter-institutional legal advice to the Government, technical supervision of legislation drafted by other Ministries, awarding legal recognition to associations, foundations and political parties, articulation between the State and religious organizations. Responsible for the Law Reform Commission recently transformed into a Technical Unit for Law Reform (UTREL), the Centre for Legal and Judicial Training (CFJJ), and the IPAJ.
Judicial Courts	Consisting of a Supreme Court based in Maputo which began operating after 1989, 11 provincial judicial courts – including the City of Maputo Court – and about 90 of the 147 district judicial courts throughout the country. The judicial magistrates are appointed, promoted, removed or dismissed by the Superior Council of the Judiciary – the self-governing body of the judges – under the direction of the Chief Justice of the Supreme Court.
Constitutional Council	Responsible for weighing the constitutionality of laws and the illegality of other normative acts of state offices, assessing electoral complaints and appeals in the last instance and validating and proclaiming electoral results.
Administrative Court	Responsible for judging actions which have, as their aim, litigation resulting from administrative fiscal and customs matters and controlling the legality of administrative acts, in addition to inspecting the legality of the State Budget and public expenditure (the Court of Accounts).

Table 6.2: The Main Institutional Structures of the Administration of Justice (contd.)

General Attorney's Office	Responsible for initiating and carrying out legal actions, especially criminal proceedings; controls the legality of detentions, guarantees the protection of minors, absentees and the disabled, and defends and represents the interests of the state at central, provincial and district level.
Institute of Legal Assistance and Representation (IPAJ)	Guarantees access to justice and free legal assistance and defense to economically disadvantaged citizens. Dependent on the Ministry of Justice.
Bar Association	Created in September 1996, consisting only of law graduates (around 300 lawyers, the vast majority of whom are based in the city of Maputo).
Faculties of Law[46]	Currently under the guardianship of the Ministry of Education and Culture. Since the early 1990s several private universities have been offering law courses. The main Law Faculty, however, remains the one at Eduardo Mondlane University. In 2002 it had 947 students enrolled in daytime and evening courses (the Faculty also has a branch in Beira city). The undergraduate course lasts 4 years. In October 2002 a Masters course was also introduced,
Community Courts	Fully integrated into the Judicial System (as the local popular courts) until 1992. Since then, considered bodies for the extra-judicial resolution of minor disputes. Although supervision of the Community Courts has been assigned to the Ministry of Justice, these courts remain separate from the official justice bodies.

Source: Dagnino *et al.*, 1996; 1990 and 2004 Constitution; CFJJ/CES, 2004

The Management and Consultative Institutions of the Judicial Courts

In accordance with Law no. 10/92 of 6 May, management of the judicial organization is exercised by the Chief Justice of the Supreme Court and by the Judicial Council. This body – which normally meets once a year or else extraordinarily, whenever justified by circumstances and convened by the Chief Justice – includes the Deputy Chief Justice, the Justices and General Secretary of the Supreme Court and the Chief Judges of the provincial courts. It is their responsibility, amongst other important matters, to establish the guiding principles of judicial activity, assess their efficiency and consider and approve the plans, programs, and annual budget proposals of the courts. In addition to this body, a Consultative Council also operates at the level of the Supreme Court, consisting of the Chief Justice, Deputy Chief Justice, General Secretary and four other senior judicial individuals appointed by the Chief Justice. Its function is to analyze and issue opinions on matters submitted for its consideration.

In turn, the statutes of the Judicial Magistrates instituted the Superior Council of the Judiciary as a self-governing magistrates' organization, responsible for nominating, appointing, transferring, promoting and dismissing members, as well as evaluating professional merit and exercising disciplinary action.[47] It is composed of the Supreme Court Chief Justice, the Deputy Chief Justice, two members appointed by the President of the Republic, five elected by the Assembly of the Republic and seven members of the judicial system elected by their peers.[48]

The Ministry of Justice

After the courts and the General Attorney's Office became autonomous, the Ministry of Justice suffered a substantial reduction of its powers. It is responsible for legal reform, the community courts, the Prison Services (a responsibility which it shares with the Ministry of the Interior), the IPAJ, the Registry and Notary Public services, the editing of legislative texts and the supervision of legislation from other Ministries. Recently the Centre for Legal and Judicial Training was created within the Ministry and put in charge of training for all the legal professions and for socio-legal research into law and justice in Mozambique.

The Ministry of Justice Department of Research and Legislation is responsible for developing research into legal matters as well as compiling and publishing the main legislation of the country. Nevertheless, this Department has been practically inoperative in this respect for some years.

The Administrative Court

After the new 1990 Constitution came into force, the Administrative Court was revitalized. It decides on administrative litigation in a single instance (conflicts arising from administrative acts, mainly between the citizen and the state) and decides on appeals in fiscal and customs litigation. In addition to its jurisdictional competence, the Administrative Court is responsible for controlling the legality of administrative acts and inspecting the legality of public expenditure, thereby assuming the function

of a Court of Accounts. This has, to date, been its main activity, giving the Administrative Court functions similar to those of the General State Auditor.

Having emerged from a period of stagnation and almost complete inaction, the Administrative Court is still in a phase of replenishing its human (magistrates and functionaries) and material resources. Some legislative measures have been taken in order to update its methods of operation and help it adjust to the new situation in the country. There still remains, however, an urgent need to reform the Administrative Code.[49]

The Administrative Court is not yet represented at provincial level, but three 'regional' administrative courts are planned (with competence for the provinces in the north, center and south of the country, respectively) when enough appropriately trained auditors are available.

5. University Law Education and Legal and Judicial Training Institutions

Universities Law Schools

An analysis of education and legal training is essential to an understanding of the performance of the courts and the reform agenda for the legal system. Having opened in 1975, shortly before independence, the Law Faculty at Eduardo Mondlane University was closed between 1983 and 1987, following a review of its academic curriculum. Now it offers daytime and evening law courses, the latter attended mainly by student-workers. Both courses last four years. In 2002, 947 students were enrolled in the Faculty of Law. The data available indicates that there is a growing demand for admission (in 2002 about 2,000 candidates applied for the 100 available daytime vacancies). Recently, this School – the oldest in the country – opened a branch in Beira city.

Whilst in the late 1990s one of the strongest criticisms of this Faculty was the low number of graduates (amounting to 32 in 1999), conditions have since improved, with a significant increase in the number of students graduating since 2002 (see below).

The curriculum, like others in the country, is very similar to the curricula of the European Law Faculties in the Roman-Germanic tradition. In other words, there is a strong emphasis on legal dogma and specialist legal-technical knowledge, with little emphasis on subjects or areas of study that provide an understanding of the plurality of legal orders in Mozambican society and the need for articulation between oral and written law, so that the social and cultural contexts in which each of these operates can be understood. The teaching of state criminal law is based on sanctions, yet the cultural practices of the people of Mozambique are based on reconciliation. The teaching of law must free itself from the strict formalist limits of a curriculum structure that is excessively dogmatic, reconciling expert legal knowledge with a general understanding of the production, function and conditions for the application of positive law. A multidisciplinary approach to the teaching of law which is able to reveal the social contexts underlying the norms and legal relations entails providing students with new working methods, encouraging active participation in teaching,

teamwork, seminars, applied research or legal aid wherever needed. It also requires the introduction of new subjects which focus more on areas such as the History of Law, the Sociology of Law, the Anthropology of Law or the Philosophy of Law.

Very recently, the Eduardo Mondlane University's Law Faculty initiated a pilot legal clinic (the Law Practice Centre) in Maputo, so that students could put the knowledge they had acquired into practice, whilst granting legal aid to the more needy citizens.

Since the mid-nineties new Law Schools have opened, all in private universities. For example, the ISPU,[50] ISCTEM[51] and the Catholic University of Mozambique[52] – in various regions of the country – all offer law degrees. Therefore, in addition to students graduating in foreign countries, there has been a substantial increase in the number of law graduates in recent years, generating a wealth of lawyers for the private sector and a greater possibility of integrating law graduates into all levels of the state apparatus, namely the courts and state attorney offices.

As a result, there has been a dramatic increase in the number of law graduates. In 2003, 353 students graduated from the various Law Schools, 42% (147) of whom were from the Eduardo Mondlane University. In the same year over 2,300 students were enrolled in Law Schools (Ministério do Ensino Superior, Ciência e Tecnologia, 2004: 5-6, 10).[53]

The Center for Legal and Judicial Training

The scarcity, quality and fragmented nature of legal training created the need to establish a central entity responsible for the legal training of magistrates: the Centre for Legal and Judicial Training (CFJJ).[54] With the CFJJ, the coordination of training activities – previously undertaken separately by each judicial institution – was achieved, thereby contributing to the creation of a common legal culture for the various actors in the justice sector.

Created by Decree no. 34/97 of 21 October, the CFJJ provides initial, continuous and specific training for judges, prosecutors, justice officials, public defenders and other sector employees (for example, court registry office and public notary staff).

In order to complement the professional training that should be adapted to the country's circumstances, the CFJJ seeks to create a new profile for the magistrate, in which the normative and technical-bureaucratic culture is replaced with a legal, political and democratic culture – a culture that has justice as its strategy and, on this basis, makes it possible to handle legal cases and legal judicial activity advantageously. Justice is, therefore, strategically in the service of social cohesion and the deepening of democracy, which means effective respect for human rights.

The general principles behind this new training, selection and recruitment correspond, first and foremost, to an initial training that cannot be obtained within the Law Faculties alone.

The CFJJ also provides for the possibility of having magistrates whose initial training is not in law. This will be tried out in pilot projects, for example in the area of

family, juvenile or labor law, and the profile of the judge must emerge from this intervention.

In short, this means that in-service and complementary training are becoming increasingly important.

Training must also be specialized, or contain periods of specialization within it. The number and quality of trained judges is inadequate. Whilst almost all the judges and prosecutors at provincial level are law graduates and have entered their professions after a period of specific training at the Centre for Judicial Studies in Lisbon or, more recently, at the CFJJ, there are very few graduate judges at district level; the rest have only received basic training. Hence, the CFJJ also offers improvement courses, moving away from the dogmatic and formalistic legal education provided by the Law Faculties and seeking to discuss with the trainees the real problems faced by citizens, for which they demand justice.

Increasingly, courts with specialized competence must also have specific forms of training, with specific entry conditions and specific exams – which is the case in the criminal instruction courts, the sentencing courts and the administrative, maritime, commercial, arbitration and fiscal courts.

The Centre was therefore designed to serve a new judicial, political and democratic culture. It is structured according to the following principles:

a) the CFJJ teachers are, as far as possible, people with a wide range of professional experience – internship should not just take place in the courts;
b) with regard to formal law, the judicial courts are not the only instances for settling conflicts in Mozambique; it is deemed important to acknowledge the complex legal reality that characterizes Mozambican society;
c) the computerization of the judicial system is a crucial process and it is therefore necessary to acquire some basic knowledge of information technology;
d) recruitment and selection have to be pluralistic;
e) evaluation and disciplinary systems must be strict, but always contain two phases: firstly, pedagogical evaluation, followed by corrective evaluation.

In addition, in order to complement a professional training that should reflect the country's circumstances, the Centre also undertakes research into the administration of formal and informal justice. Although it is one of the most recent institutions in the justice sector, the Centre already enjoys considerable prestige, has held many courses and training activities for a variety of judicial actors (including criminal investigation officers) and has assembled a group of highly qualified Mozambican trainers and researchers (including lawyers, anthropologists and sociologists).

Conclusion

The evolution of the organization of the judicial system from independence to the present mirrors the development of the political system and the legal-constitutional order of Mozambique. It is therefore possible to identify three periods in the evolution

of the organization of the judicial system which can be defined as: a) post-independence (1975-1978); b) the judicial organization of the 'new legality' (1978-1992); c) the new judicial organization within the context of peace, political pluralism and a market economy, following the 1990 Constitution in which the separation of powers and the independence of the judicial system are enshrined (since 1992). After 2004 a new period began, based on the new constitutional principle of recognizing legal pluralism (Article 4).

In contemporary Mozambique, the Supreme Court manages the administration of the court system, including the lower district courts, as well as the provincial courts. The district courts suffer from a lack of human resources, as well as from insufficient financial and material resources. In addition, not all districts have a formally established and/or functioning official court.

The intermediate-level or provincial courts also suffer from a serious lack of both human and financial resources, although the judges who serve in them do have law degrees. Nonetheless, some of these courts are already operating with general and more specialized sections (civil, labor, and criminal instruction). Specialized courts also operate in Maputo city (Police and Juvenile courts).

The administration of official justice is not limited to the judicial courts, the community courts or even the various forms of legal representation (lawyers, legal technicians and legal assistants) and their organizations (the Bar Association and the IPAJ). The main institutional structure of the administration of justice is divided into the following categories of institutions: a) the managerial and consultative institutions of the judicial courts; b) the Ministry of Justice; c) the Administrative Court; d) the Constitutional Council.

In conclusion, it should also be noted that two important changes have taken place in recent years that are central to the development of the justice system in Mozambique. Firstly, new private and state Law Faculties have been opened (in Maputo, Beira, Quelimane and Nampula). Secondly, the Centre for Legal and Judicial Training has been established and is responsible for training judges and state attorneys, as well as other judicial officials. In the near future, this will provide more and better qualified human resources for the courts.

Notes

1 *Procuradoria Geral da República*, in Portuguese.
2 See also chapter 2, which presents an overview of the main political and legal changes in Mozambique.
3 Recently a new period was initiated, following the approval of new constitutional reforms (2004) which led to the recognition of legal pluralism in the country. Since the necessary – and long-awaited – reform of the judiciary is still in progress, this period will not be analyzed in this chapter.
4 The option was to build a unitary legal system within a unitary state, prompting a transitional process in which the new Law had to be constructed from the concrete

experience of conflict resolution at the local level. Although the 1975 Constitution did not contain any specific reference to customary law, several Frelimo directives on law reform pointed to the need to gather and study local customs for conflict resolution, as well as to the experience of the liberated areas during the struggle for independence.

5 Regions of Mozambique controlled by Frelimo during the struggle for independence. There, the nationalist leaders devised the entire strategy for future political and social development of the country.

6 On this period of popular justice, see Sachs and Welsh (1990); Gundersen and Berg (1991); Gundersen (1992).

7 These judges were elected directly, by the community.

8 See also note 27 in chapter 2.

9 This situation was to change with the 1990 Constitution and with the present Organic Law of the Judicial Courts (Law no. 10/92 of 6 May), as we shall see later. After the constitutional reforms of the early 1990s, elected judges could only intervene in decisions on matters of fact and lower court trials. The 2004 Constitution reaffirms, in Article 216, the principle of the participation of elected judges in court, maintaining their intervention in lower court hearings and decisions on matters of fact (no. 2). This article imposes some conditions on their participation, by affirming that their presence will "be compulsory in cases where procedural law requires it, or when the trial judge so decides, when the Attorney's office recommends it or when the parties request it" (no. 3).

10 This system of using lay judges elected by assemblies representing the people to exercise judicial functions is not unique to the Republic of Mozambique. There is also, for example, the case of the former Soviet Union, in Terebilov (1978), or even the social judges which Portuguese legislation admits in jurisdiction relating to Labor, the Family and Minors; in the latter case, the jury can intervene, at the request of the interested parties, in penal judgments.

11 The colonial *escudo* was replaced by the *metical* – the new Mozambican currency – in 1980.

12 In this section of the chapter, legal references without further specification belong to Law no. 12/78 of 2 December.

13 The equivalent of the High Court.

14 Until the beginning of the 1990s, Mozambique had a single party political system.

15 See Law no. 4/92 of 6 May, which created the community courts. This topic is analyzed in detail in chapter 10.

16 The base of the formal judicial system became the district courts, with the creation of 1st and 2nd class district courts envisaged, in addition to the provincial courts and the Supreme Court (Law no. 10/92 of 6 May).

17 For example the labor courts, which replaced the former Labor Commissions of Justice (Law no. 18/92 of 14 October).

18 *Instituto de Patrocínio e Assistência Jurídica* – IPAJ, in Portuguese. On this subject see chapters 2 and 9.
19 See Laws no. 6 and 7/94 of 13 and 14 September, respectively.
20 This constitutional guarantee becomes extremely important when we look at the history of post-independence Mozambique. The 1975 Constitution, incomplete in terms of basic rights, allowed the creation of the Revolutionary Military Court. This aimed to combat crimes which threatened the political, social and economic order of the country. It is known that this Court, albeit in another political context, eventually threatened some guarantees which nowadays are considered inalienable (for example, the right to defense and protest, the right to a retrial by appeal, etc.) and sanctioned the death penalty.
21 The scenario of law and justice during the period from independence to the end of the eighties was dominated by extreme institutional simplicity and strong centrality. The Ministry of Justice was in control and was responsible for the courts, public prosecution, the defense and representation service and the prison system. There was a single line of command and a unitary policy on building justice, dominated by a concern to create popular courts as bodies for the administration of justice. The goal was both to resolve conflict and to educate citizens in the new values that needed to be affirmed and imposed.
22 Now the Assembly of the Republic.
23 Since then, the Supreme Court proposes a budget to the Ministry of Finance, which draws up the final budget.
24 But the President of the Republic appoints the Chief Justice and the Deputy-Chief Justice of the Supreme Court, and the Chief Justice of the Supreme Tribunal then proceeds with the investiture of the President of the Republic. The appointment of the Chief Justice and Deputy-Chief Justice is ratified by the Assembly of the Republic. The other professional Justices in the Supreme Court are appointed by the President of the Republic on the advice of the Superior Council of the Judiciary (which, apart from the automatic inclusion of the Chief Justice and Deputy-Chief Justice of the Supreme Court, also consists of two members designated by the President of the Republic, five elected by the Assembly of the Republic and seven members of the judiciary elected by their peers – Article 221 of the 2004 Constitution).
25 At this point, citations from legal norms which are otherwise unspeccified belong to Law no. 10/92 of 6 May.
26 The Juvenile Court only functions in Maputo city, with competence in civil matters (maintenance, attribution of paternal power, recognition of paternity, among other matters). In 2000, the criminal section, which was to deal with juveniles below the age of criminal responsibility (under 16 years of age), was not operating.
27 At the time, the exchange rate for 1 US$ was about 12,000 *meticais*. Nowadays, it is about 24,000 *meticais*.

28 Most of the district judges however, have only had an *ad hoc* training lasting six months to one year, initially organized by the Supreme Court and later by the Centre for Legal and Judicial Training (CFJJ). Only a few district courts have judges with a law degree, although the number is on the increase.

29 In 2000, the districts which did not have courts were: eight in the province of Cabo Delgado (Ibo, Mecúfi, Meluco, Quissanga, Balama, Muidumbe, Nangade and Pemba-Cidade); seven in Niassa (Majube, Mecula, Muembe, N'gauma, Metarica, Nipepe and Lichinga-cidade); one in Nampula (Nacaroa); three in Tete (Chiúta, Tsangano and Chifunda); three in Manica (Tambara, Macossa and Chimoio-cidade); four in Sofala (Chemba, Chibabava, Maringuè and Muanza); four in Inhambane (Mabote, Jangamo, Funhalouro and Inhambane city); three in Gaza (Xai-Xai, Chigubo and Massangena) and two in the city of Maputo (municipal districts 2 and 3).

30 The court in the city of Beira (with district powers) functions as the 3rd Criminal Section of the judicial court of the province of Sofala (Law no. 12/78). According to information provided by the Chief Judges of the judicial courts of Zambezi and Nampula provinces, the 2nd Criminal sections of the provincial judicial courts function as judicial courts with district powers (information from February 1998).

31 In 2003, besides the 11 provincial courts, the Supreme Court Statistics Department reported the existence of 105 district courts (including city courts). However, during the research carried out in 2004 we observed that some of the district courts were not operating.

32 These judges were not elected according to the principles established in the Organic Law of the Judicial Courts, but appointed from amongst worthy local candidates.

33 This information was obtained during the second part of the research project. See José *et al.*, 2004.

34 Dagnino *et al.*, (1996) refers to the existence of 147 district courts.

35 The creation of labor sections fulfills a legal requirement and is also part of Law no. 18/92, of 14 October. The criminal instruction sections derive from Law no. 2/93, of 24 June.

36 The 2004 Constitution does not refer to the possibility of incorporating elected judges into the Supreme Court (Article 226), as opposed to the earlier 1990 constitution. The latter specifically stated, in article 170 no. 1, that "the Supreme Court shall be composed of professional judges and elected judges". The participation of elected judges may occur in lower trial court hearings, and upon request, as determined by law.

37 Personnel from the Justice Department now come under the General Attorney's Office.

38 In addition to judicial courts, Article 167 of the 1990 Constitution envisaged administrative, military, customs, fiscal, maritime and labor courts, the majority of which are still not in operation. Article 223 of the 2004 Constitution defines the existence of several categories of courts: the Supreme Court, the Administrative

Court, and the courts of justice. It also recognizes the possibility of administrative, labor, fiscal, customs, admiralty, arbitration and community courts.

39 As the Council began operating in 2003, it was not included in our initial research and therefore we only comment briefly on its activities.

40 In August 2000, after one of the Judges was appointed Attorney-General, only six Justices remained in the Supreme Court. In 2003 two new Justices were nominated, including the first woman Justice in Mozambique.

41 Those responsible for the departments are ordinary-ranking functionaries but, in fact, up to 2000 only the DAPF had an appointed head. The organization of the Supreme Court establishes two more divisions, both under the DAPF: General Administration, and Patrimony and Finance, which, however, are still not in operation. The DHR is basically responsible for managing the non-specialist personnel working in the courts. In relation to magistrates, all matters are now the responsibility of the Superior Council of the Judiciary, which has its own individual procedures. As far as justice officials are concerned (notaries and bailiffs), responsibilities are shared between the Superior Council itself, which "evaluates professional merit and exercises disciplinary actions" over justice officials, and the DHR/DRH of the Supreme Court, which is responsible for appointing them. The DAPF has similar duties to those existing in other state departments, particularly in the Ministries. However, in the case of the Supreme Court, it shares some responsibilities with the Treasury. The DILS compiles the statistical data received from the provincial judicial courts and the sections of the Supreme Tribunal itself and publishes them annually as Legal Statistics. This department, however, operates under great difficulty, due to the fact that it has no specialized staff and there are no reliable controls on the trustworthiness of the data received from the provinces. It may be said that this has been a neglected area to date, which is only occasionally revitalized, usually around the beginning of the judicial year (Dagnino *et al.*, 1996).

42 The Provincial Attorney's Offices and the District Attorney's Offices are peripheral bodies of the General Attorney's Office.

43 The Attorney-General informs the Assembly of the Republic annually on the activities of the body of state attorneys, the crime situation in the country and initiatives to prevent and fight crime.

44 The report also stated that the registry office had received 525 cases and decided over 448 cases from the Supreme Court, provincial and district attorneys.

45 The bill for the Decree which will create a new system for access to justice and to the law recognizes paralegal staff – whether professionals or volunteers without a university degree – who will "be especially trained to work in the future 'Centers for access to justice"'.

46 This subject is covered in more detail below.

47 Articles 220 and 222 of the 2004 Constitution.

48 Article 221 of the 2004 Constitution.

49 It is not our intention here to go into the full details of the functions of the Ministry of Justice, since those that are of interest to this study (the IPAJ and the Community Courts) will be covered in greater detail elsewhere. Administrative justice is not the object of this study, and for this reason we have limited ourselves to a few brief observations.

50 The *Instituto Superior Politécnico e Universitário,* which offers a four-year law course. It awarded its first bachelor degrees in 2000.

51 The *Instituto Superior de Ciências e Tecnologia de Moçambique,* which offers a four-year law course.

52 The UCM law course lasts five years, including an introductory year of general studies. The UCM Law Faculty awarded its first bachelor degrees in 2000.

53 Early in 2002, Masters courses were also introduced into some of the Law Faculties, including at Eduardo Mondlane University.

54 *Centro de Formação Jurídica e Judiciária*, in Portuguese. The CFJJ depends on the Ministry of Justice, although it holds administrative autonomy. Most of its activities are funded by international organizations (on the subject of foreign aid to the justice system, see also chapter 7).

7

The Courts in Action: Functions, Resources, Case Flow and Characterization of Litigation

João Pedroso, João Carlos Trindade, Maria Manuel Leitão Marques and André Cristiano José

Introduction

The Functions of the Court in Contemporary Societies

In contemporary societies courts have different types of functions. Three main functions may be distinguished: instrumental, political and symbolic. In complex and functionally differentiated societies, the instrumental functions are those which are specifically attributed to a given sphere of social action and which are said to be fulfilled when the said sphere operates effectively within its own functional limits. The political functions are those through which the sector-based spheres of social action contribute towards maintaining the political system. Finally, the symbolic functions are the set of social orientations which the different spheres of social action use to contribute towards the maintenance or destruction of the social system, as a whole.

The instrumental functions of the courts are as follows: the resolution of conflict, social control, administrative acts and the creation of law. Resolution of individual or collective conflicts is the aim of court activity. Social control is the set of measures – internalized or imposed – that are adopted within a given society in order to prevent individual actions from deviating significantly from the overall pattern of sociability, which, for this reason, is called the social order. The social control function of the courts relates to their specific contribution in maintaining the social order and restoring it when it is violated (Santos *et al.*, 1996: 51-52).

The administrative functions refer to a series of actions which involve neither the resolution of conflict nor social control (processes which merely involve certification in situations in which there is no litigation or non-judicial functions are carried out by magistrates).

An analysis of the performance of the courts in terms of penal justice corresponds therefore to an analysis of the effectiveness of the judicial system within the area of social control. This becomes more problematic when the pace of social change becomes increasingly rapid. The judicial system – with its institutional, normative and bureaucratic weight – has always experienced difficulties in adapting to new situations involving deviant behavior. Control of corruption and transnational crime are good examples of the difficulties in adaptation faced by judicial systems.

Political systems can live with high levels of so-called common criminality, but not with organized crime, political crime and crimes committed by politicians during or as a result of the exercise of their functions, as in the case of corruption. The impunity of this type of criminality, beyond certain limits, threatens the system's own conditions for reproduction. In exercising social control, the courts – as sovereign bodies – are also exercising an eminently political function, either through repression or through the selective way in which they act.

Besides being instrumental and political, the control function is also symbolic, since it acts on values recognized as being particularly important to the normal reproduction of a society (the values of life, physical integrity, honor, ownership, etc.). Effective action in this domain has the effect of confirming the values that have been violated. Since citizens' rights, when internalized, tend to become the basis for concepts of retributive and distributive justice, the guarantee that the courts protect these rights usually tends to have the powerful effect of a symbolic confirmation (Santos *et al.*, 1996: 52 and ff.).

The political functions of the courts do not only extend to social control. Recourse to the courts by citizens for civil, labor, administrative matters, etc. always implies exercising an awareness of rights and, in this sense, it is a means of exercising citizenship and political participation. In democratic societies the extent of the legitimacy of the political system also depends on the quality of the courts' performance and, consequently, whether they function independently and are accessible, quick and effective.

In this, and the following chapter, our analysis of the human, material and financial resources of the judicial system, litigation (*i.e.* the conflicts that are brought before the courts) and the main constraints on the system will enable us to assess the performance of the courts in exercising their functions and in relation to the exercise of citizenship in Mozambique.

1. A Characterization of the Resources of the Judicial System

Human Resources in the Courts

It is generally accepted that human resources – the judges, state attorneys, functionaries and justice officials – are insufficient and that they are not adequately qualified. In addition, the staffing is inappropriate for the situation in Mozambique, with an 'unrealistic' number of professional posts and categories. With the exception of those commanded by the Supreme Court Justices, salaries are demoralizingly low, and frequently are not paid on time. In addition, elected judges spend long periods of time without receiving any compensation and their fees are very low.

According to Dagnino *et al.* (1996), in 1996 the Supreme Court considered that Mozambique needed more than 200 judges with academic training to get the judicial organization into good working order. In 1996 there were scarcely more than 120 judges in existence; in 2003 this number had risen to 159.[1] Of these (including the eight Justices in the Supreme Court), only a small number (27) were law graduates in 1996; in 2003 the figure had doubled (56).[2]

Table 7.1: Provisional Analysis of Judges (from official courts)

Courts	Estimate
Supreme Court (6 Court Registry Offices: 2 Civil, 2 Criminal, 1 Labor, 1 Military)	14
Provincial Courts (Civil, Criminal, Juvenile, Police and Criminal Instruction)	56
Provincial Labor Courts	12
District Courts (160 Court Registry Offices, Civil and Criminal)	160
District Courts (147 sections, Criminal Instruction)	147
Total	389

Source: Decree no. 40/93 of 31/12; Law no.18/92 of 14 October and Dagnino *et al.*, 1996.

The first question we should pose in relation to the provincial courts is whether at this stage in the development of the Mozambican judicial system it is necessary to have a criminal instruction judge (*i.e.*, a judge in charge of pre-sentence investigation) and a labor judge in all the provincial judicial courts. In light of the analysis of the

movement of cases which we are about to present, it is certainly not a priority that all these positions should be filled.

In the mid 1990s, of the 39 provincial judges appointed, only 20 were law graduates. This number includes those who had finished the academic part of their course in the Law Faculty at Eduardo Mondlane University and were waiting to defend their final dissertation. Of the rest, some had only attended a one- or two-year course, whilst the others were judges who had had no higher education but had attended *ad hoc* courses organized by the district magistrate training program.

As far as the district magistrates were concerned, they supplied around 47% of the total number needed. This figure is reached by considering that 147 district courts should have been in existence, with a total of 160 court offices or sections. It does not take into account the labor courts and criminal instruction judges at district level (Dagnino *et al.,* 1996). A strict application of Decree no. 40/93 of 31 December and Law no. 18/92 of 14 October would imply a labor court and criminal instruction section in each district court, which would mean that 454 judges would be needed to serve in the total number of existing and planned district courts. Direct observations from our case study revealed, on the one hand, a conviction that this number of judges was not necessary and was even absurd and, on the other hand, that we are not sure of the needs of the district courts in all districts.[3]

In fact, from the point of view of training, the picture has changed over the last decade. In 1996 most judges had only had an *ad hoc* training, acquired through courses organized either at a central or provincial level, with some having benefited from additional training programs. More recently, after the Centre for Legal and Judicial Training was created, many district judges benefited from more specific training. In 1996, in addition to the existing 76 district judges, there were also eight substitute judges who carried out their duties without possessing the status of a magistrate and without any specific legal training. They were very experienced elected judges or court clerks. In 2003, the data available suggested that the number of judges with *ad hoc* training had been reduced to about one hundred.

The number of judges trained in law is still far from ideal to ensure the functioning of the judicial sector under the terms envisaged by the law, with citizens' rights guaranteed and defended. It is therefore imperative to establish a plan for recruiting or contracting judicial magistrates in accordance with particular priorities, which will have to be defined.[4]

This aspect will have to merit special attention, since it will have to be balanced against many other factors such as the availability of funds to pay the magistrates and justice officials who have been contracted, the availability of the officials themselves, and the existence of premises for courts and residences for magistrates, court clerks and other court officials (Dagnino *et al.,* 1996).

However, recruiting magistrates is not easy, bearing in mind the unattractive salaries.[5] In 1998, magistrates' salaries varied from between a maximum of 8 to10 million *meticais* at the top of the scale, to around 1,700,0.00 *meticais* for first class

judges and a minimum of 650,000,00 *meticais* for district judges. To this basic salary were added the emoluments derived from the income of the courts (on average a few hundred thousand *meticais*) and the extra benefits established in the Statute of Judicial Magistrates: housing, water, electricity, telephone (up to a certain limit) and a vehicle. However, due to the scarcity of resources, these benefits very often did not materialize, which prevented judges from being assured of a standard of living which, if not equal to, was at least sufficiently competitive with what they could obtain in other professions with the same or equivalent training.

Although by 2004 the picture had significantly improved, much more still needs to be done. It would not be an exaggeration to state that if decent conditions are not created for judicial magistrates at all levels of the profession – as well as for the magistrates in the General Attorney's Office – the country runs the risk of having weaker magistrates and jurists who are less well prepared academically, intellectually and culturally and who lack the solid moral training that will prevent them from incorrectly exercising the immense power they wield.

The number of judicial employees is still clearly insufficient and they are not adequately trained.

According to statements made by the Chief Judges and the court clerks in the respective provincial courts, the main bottlenecks in terms of personnel concern bailiffs and court clerks or assistant court clerks — the posts which demand greater knowledge of civil and criminal proceedings in general.

Moreover, the staff requirements established in Decree no. 40/93 of 31 December impose levels of specialization and specific qualifications that are unrealistic considering the overall administrative situation in the country.

The salaries, privileges and general working conditions established by law for justice officials and functionaries are clearly inadequate to guarantee quality professional work and, consequently, the correct, effective and transparent implementation of justice.

Material Resources in the Judicial System (Infrastructures and Equipment)

In addition to the aforementioned problems pertaining to the human resources allocated to justice in Mozambique, there are other serious problems related to the infrastructure, support equipment and materials needed for the work of magistrates and justice officials.

The management of justice administration premises is an issue that has been resolved in various ways over time. From the proclamation of independence in 1975 until the end of the 1980s, the courts and attorneyships were subordinate to the Ministry of Justice. When these institutions were declared independent of the Government in 1989, it was subsequently decided that assets should be shared. In practice, and with the exception of some residences belonging to the Courts' Fund (the revenue from the courts) which were retained by some magistrates from the General Attorney's Office, all assets went to the courts (the working premises) and to

the respective magistrates (the housing). It is, however, important to mention that, with the nationalization of real estate in 1976, the Courts' Fund lost many residences which were transferred to APIE[6] management. Some of these have already been recovered, while others are still in the process of being reclaimed.

The Supreme Court is installed in the state building where the highest body of judicial power in Mozambique has always functioned – including the former Courts of Appeals from the colonial period and, in the immediate post-independence era, the Appeals High Court (from 1979 to 1988).[7] In the 1990s, with financing from the General State Budget (GSB), a new building was constructed next to the old one, where the Supreme Court now operates. In the provinces, the courts usually operate in premises separate from the attorneyships, although at the district level the two institutions quite often share the same building. Of the eleven provincial courts, only the Zambézia Provincial Court has its own premises, rented from the *Banco Comercial de Moçambique*.[8] Similarly, in the late 1990s, of the 92 district judicial courts, 50 rented premises from the APIE, which serve as courts and magistrates' residences.

The management of property assets relating to the Supreme Court and the other courts is undertaken by the Courts' Fund, which also manages the revenue from judicial services. It should be mentioned, however, that the creation of a Property Assets Management Office is envisaged within the structure of the Supreme Court, which we feel is laudable. This structure is to be entrusted with managing investments established as part of a project financed by DANIDA,[9] which basically consisted of building courts and residences for judges in 20 districts in the country. It remains to be seen whether the management of the current assets will continue to be the responsibility of the Courts' Fund or whether this will also be transferred to the Office that is to be created.[10]

It is also important to look at property that is connected to the services, either at central or peripheral level. Although in 1996 there was no Supreme Court inventory (Dagnino *et al.*, 1996), the Court does possess, in addition to furniture, reasonable office equipment, including a certain number of computers which are used by the Justices, among others, for writing up their decisions. The provincial courts possess at least one computer, a printer and a fax machine, whilst the district courts do not possess any of this type of equipment, apart from some ancient manual typewriters.[11] The most distant courts are centrally supplied with cars and office equipment. However, in general, resources are bought locally.

The Financial Resources of the Judicial System

The judicial system is financed by the current and investment budgets of the Supreme Court and the Ministry of Justice (GSB), revenue from the courts (the Courts' Fund) and foreign aid (DANIDA,[12] UNDP,[13] the World Bank,[14] USAID,[15] etc.).[16]

With the 1990 Constitution – establishing the separation of powers and the independence of the courts – the judicial system started to attract substantial attention from external donors. The subsequent peace process and its consolidation through the first multiparty elections made it clear that the stability desired by the country also

required the strengthening of public institutions, including the justice institutions. 'Good governance' and 'strengthening democratic institutions' became the new banners for international assistance, which considered them a prerequisite and guarantee of the success of other initiatives carried out in the more traditional development aid sectors. Consequently, the 1980s tendency to see the state and its institutions as an obstacle to the liberalization of the economy began to change, and the 1990s were generally characterized by the incorporation of international aid measures aimed at institutional capacity building, since institutions had seen a consistent reduction in their operating capacity during the previous period.

Additionally, at the same time the judicial institutions themselves became more open to international cooperation. One of the reasons for this lies in the serious crisis the sector was experiencing during the 1990s. Human resources in the provincial courts had become increasingly weaker, both in terms of numbers and quality and the district courts were largely paralyzed or left to their own devices as a consequence of the war. There was a situation of almost total collapse that the State budget could not resolve on its own.

In recent years, despite a gradual rise in public expenditure on the justice sector, it is still an open question whether the judiciary is a high priority for the state. In fact, in real terms, GSB funding for the sector has remained almost unaltered, thus blocking any real perspectives for the growth and expansion of the judicial network in the country.

In 1996, the Salaries and Operational Fund which the GSB attributed to the Supreme Court and the General Attorney's Office amounted to 1.9% and 1.3% respectively of the total state budget. In relation to the provinces, the percentage of the provincial budget attributed to the courts (including the district courts) ranged from a minimum of 1.1% in the Zambézia province to a maximum of 2.9% in the Manica province, while that of the Attorney's Offices varied from between 0.6% in Zambézia to 1.7% in the Cabo Delgado province.

In 1996, 26.2% of the Supreme Court's budget was for salaries and 73.8% for expenses such as equipment and services. In the same year, the investments budget amounted to 23,728,000,000,000 *meticais*, designated for the renovation of the Maputo City Court, equipment for the Supreme Court, renovation of the old Supreme Court building and the beginning of construction work on the new provincial courts of Maputo, Inhambane, Zambézia and Niassa, with the construction of a district court also envisaged (Dagnino *et al*., 1996).

Between 1996 and 1998, the allocation of public funds established by the GSB for the Supreme Court continued to grow, especially the funds designated for salaries, which increased by approximately 100% between 1996 and 1997. Between 1996 and 1997 there was also a significant increase in funds for the acquisition of goods and services, amounting to nearly 30%.

The Courts' Fund

In addition to the revenue from the GSB, the biggest source of income for the courts is from judicial costs and from the fines levied in civil cases (court costs) and infringements of the law (punished by fines), respectively. Of these, 40% of the respective amount goes to the state (via the Ministry of Finance), while the remaining 60% is allocated to the payment of functionaries and to cover other costs related to building maintenance and the current expenses of the courts, since the GSB funds are not sufficient to cover this. This income is managed by the Courts' Fund,[17] an institution considered a self-governing body of the judiciary, although its independence has proved damaging to the sector, as the majority of its income came from court registry offices. Housed in a small office in the Maputo City Court, the Courts' Fund is managed by an Administrative Council which should consist of two Justices from the Supreme Court (one acting as President and the other as First Spokesperson) and one representative from the General Attorney's Office, acting as Second Spokesperson. In reality, since 1992 the Administrative Council has functioned solely with a President, who is a Justice from the Supreme Court. Outside the Supreme Court, each duly constituted Court has a Treasury delegation that functions under the same criteria.

In 1994, the total revenue of the Courts' Fund was around 391 million *meticais*, whilst in 1995 it was close to 400 million *meticais*. Due to the fact that the amounts charged in the Code of Courts' Costs are completely out of date, this income cannot approach the levels which in previous times had enabled the Justice Treasury to make important investments, even if productivity increased in the courts.[18]

It is therefore through the income of the Courts' Fund that the magistrates and functionaries supplement their (meager) salaries. In the Supreme Court, as there is a common fund the magistrates received a fixed emolument of 100,000 *meticais* per month in the late 1990s. In the provinces, on the contrary, emoluments are linked to the income of each section and magistrates and functionaries therefore receive an 'addition' to their salary according to their productivity. Additionally, current expenses are always covered by this income when GSB funding runs out (Dagnino *et al.,* 1996).

Under these circumstances, external aid and loans are one of the conditions that allow for a more rapid development of the judicial system.

2. The Case Flow: Cases filed and closed by the courts

Case flow is understood to mean the variation in the number of cases filed, pending and closed. The cases filed correspond to the effective demand for the judicial system. The cases closed show the supply of judicial protection. The pending cases are a measure of unsatisfied judicial demand. An analysis of the evolution of the case flow must take into account two sets of factors: endogenous and exogenous factors. Endogenous factors are those inherent to the system, namely legislative, substantive or procedural legal changes, and institutional or technical changes. Exogenous factors are those outside the system, such as social, economic, political and cultural changes

and their impact on the administration of justice in general and on the case flow in particular.

Due to a variety of statistical incoherencies and inconsistencies, the statistics on justice prepared by the Supreme Court initially only allowed for an indicative analysis of the period between 1992 and 1998. Later, more recent data was obtained (extending up to 2003), which is used here for the purposes of comparison. In addition, the data is limited to case flows in the Supreme Court and in the provincial courts (cases filed, pending and closed).

An Overview of the Procedural Case Flow in the Provincial Courts

Between 1992 and 1998 there was a reduction in the number of cases brought before the provincial courts. A rise in cases filed since 1994 occurred in the provincial courts of Tete, Manica, Sofala, Gaza and the city of Maputo, particularly in the Maputo Juvenile and Police courts, with the latter having been in operation since 1996. Between 2002 and 2003 we observed a decrease of 7.3% in the number of cases filed in provincial courts, from 23,618 cases in 2002, to 21,884 cases filed the following year.

Between 1992 and 1998 there was a significant rise in the number of cases pending, from 83,932 to 115,369. This increase occurred both in civil and criminal litigation, and reveals the declining efficiency of the provincial courts, where, in 1992, 14,451 cases were closed, as opposed to 12,368 in 1998. This situation is particularly evident in the Maputo City Court, where the cases pending accounted for over half the total number of cases pending in the provincial courts.[19] By contrast, in 2002 and 2003 the situation had changed radically, with the vast majority of cases pending being from the Police Court (about 26%). The next provincial courts with significant percentages of cases pending were Zambézia (14.3%) and Maputo city (14.1%).

It should also be noted in this context that there are qualitative differences in court performance in relation to cases pending, filed and closed, with some courts closing relatively larger numbers of cases than others.

The Case Flow of Criminal Jurisdiction in the Provincial Courts

More than half of the litigation handled by the provincial courts involves criminal complaints. For example, in 1998, 18,981 criminal proceedings were brought before these courts, corresponding to 80.9% of the total number of cases filed in the judicial system. In 2003 this figure dropped to 57%, due to a marked increase in civil and labor actions brought before the courts.

Between 1992 and 1998, the number of criminal proceedings filed decreased (from 20,210 to 18,981) but an increase was registered in cases pending (from 70,249 to 92,130). The amount of cases closed varied, in some instances registering a significant increase and sometimes a reduction.

Between 1992 and 1996 the amount of criminal proceedings filed decreased markedly and only approached the initial (1992) level in 1998. The period between 2002 and 2003 witnessed a continuing reduction in the number of criminal proceedings

filed, with 13,560 cased filed in 2002 and 12,637 the following year. One possible explanation is the deteriorating performance of the Police and the General Attorney's Office following changes to the state and in society (the peace process, the market economy, the destabilization of the administration), as it is highly unlikely that crime fell sharply during this period.

Between 1992 and 1998 an increase was registered in the number of proceedings involving serious crimes,[20] which became more marked after 1996. The largest number of cases filed was at the Maputo City Court. However, the numbers were also significant in the provinces of Nampula, Manica, Zambézia and Tete which, in 1998, together represented 40.9% of the total number of cases filed. The data available indicates that in 2003 the situation remained the same.

In general, the number of felony cases[21] filed and closed decreased, whilst pending cases increased significantly. In fact, in 1992, there were around 2,453 cases pending and in 1998 this figure had almost doubled to 4,065. Contrary to the other forms of criminal litigation, relatively few cases were brought before the Maputo City Court, with the Provincial Court of Sofala having the largest number of cases. Ten years later the picture was quite different: in 2002 there were 1,026 cases pending and, a year later, the figure had fallen to 1,161 cases, the heaviest concentrations occurring with the provincial courts of Manica, Zambézia, Niassa and Nampula.[22]

The Case Flow for Civil Jurisdiction in the Provincial Courts

Civil jurisdiction, which includes civil litigation *per se* together with labor litigation, also accounts for a substantial proportion of the cases heard in the Maputo City Court. Together with Maputo, the provinces witnessing a rise in the general movement of cases filed were Sofala and Nampula.

In short, an analysis of case flows reveals an increase in civil demand between 1992 and 1998 and the rise in this type of litigation is, in itself, enough to explain the huge increase in the number of cases pending. It means that procedural delay has become one of the problems affecting the legitimacy of the judicial system in Mozambique today, in addition to the other problems that have intensified during the same period of time.

The ratio between the number of cases closed and the number of cases pending and filed provides an index of the system's efficiency. Thus, in 1992, the index was 7.49, and in 1998, 11.22, although in 2003 the index had lowered to 6.50. This suggests that whilst inefficiency was on the rise in the provincial courts in the late 1990s, it seems to be improving in the early twenty-first century.

The Case Flow of the Supreme Court

The performance of the Supreme Court has been characterized by a singular inability to respond to solicitations. Less than 300 cases are brought before the Supreme Court every year. Although the cases filed have registered varying figures – 102 in 1992, 213 in 1996, 218 in 2002 and 171 in 2003 – over the same period the number of cases

pending has increased steadily (524 in 1992, 934 in 1998, 1,121 in 2002 and 1,013 in 2003). The number of cases closed is quite low, even insignificant. In 1996 only 52 cases were closed, although this figure rose to 123 in 2002, only to drop dramatically to 43 in 2003. The number of cases pending has risen in all areas of litigation.

Unlike the provincial courts, where most proceedings are criminal, most of the appeals heard in the Supreme Court are related to civil and labor matters. Thus, in 1998, 25 criminal appeals and 160 civil and labor appeals were filed in the Supreme Court, with 450 criminal proceedings and 477 civil and labor proceedings pending. In 2003, the pattern remained similar: the majority of appeals were civil (368 proceedings, corresponding to 32.8%) and labor (327 proceedings, corresponding to 29.2%) cases.

This is obviously due to a demand for the Supreme Court by litigants with economic interests who lodge appeals against civil and labor actions of significant economic status. Despite a few highly publicized cases of social, economic and political significance, on the whole criminal litigation involves crimes committed by ordinary citizens, or situations of social or virtual exclusion. The Supreme Court is unable to satisfy the demand – more than 50% of which comes from the Maputo City Court. The increase in the number of cases pending is in line with the general opinion amongst judges and lawyers that the Supreme Court is a 'burial ground for cases'.

3. The Characterization of Judicial Litigation in Mozambique

As mentioned earlier in chapter 5, the research team created a form for gathering data that was used to categorize the conflicts brought before the courts, as well as the people who used the courts. This form was used for the Supreme Court and the provincial and district courts in order to gather a sample of the cases, whose analysis helped to characterize the litigation and the litigants who made use of the courts.

Civil Justice in the Provincial Courts

Civil justice in Mozambique, together with other systems of justice, benefits from great structural stability. Despite differences in procedural and substantive law and in levels of development, the different systems of civil justice tend to present very similar configurations in relation to their essential features, both in terms of the types of users and most frequent types of litigation, and in their operational problems.[23]

This relative homogeneity, however, masks important differences in degree which reveal themselves in almost all the variables usually used to characterize civil justice and which can be detected in a more detailed analysis of the litigation and the organization of the judicial system in its proper context.

In the vast majority of civil judicial systems the major types of litigation consist of payment of debts, family litigation (particularly divorce cases), labor litigation and litigation involving property. However, the relative weight of each of these types of litigation varies greatly and the extent of this variation can significantly modify the characterization of civil justice.

If the payment of debts is dominant, justice serves regular, collective users, whereas if family or leasing issues predominate – as is the case in Mozambique – the majority

of litigants are individual and occasional users. Although in all systems, lawyers prefer civil cases or drafting contracts to being involved in criminal cases, the results of this preference can be very different: either the latter cases are usually not defended by professionals or they are dealt with by the least well-known or experienced lawyers.[24]

Civil Justice and Economic Development

The true profile of civil justice in each country is also marked by differences in degree which are registered in other problems – usually considered common to almost all systems – such as excessive slowness and delays in proceedings, the frequency and magnitude of corruption cases, the lack of resources or the high cost of access to justice. The greater or lesser availability of either formal or informal alternative means of resolving litigation is another relevant factor in the analysis of similarities and differences and, above all, in the study of reforms which could improve the resolution of litigation in the different areas in which they occur.

Only a study of this type enables us to accurately define the common and specific problems in each system and find adequate solutions for them, which may combine those already used in other countries – with all the necessary adjustments – with solutions of our own, forged out of local experiences and resources, or purposely designed in response to very specific problems.

The table which follows (table 7.2) is the result of an exercise comparing the main characteristics of civil justice in the more developed market economies and consumer societies with market economies in a phase of consolidation (including any possible reforms which may be aimed at them), known respectively as cases A and B. For case B, we have taken civil justice in Mozambique as our example.[25]

Some differences are enduring and difficult to overcome in the short term, which confers a structural quality on them. Others are only transitory and evidence shows that they will diminish or disappear in the short or medium term.

Among the structural differences, the context of the judicial system should be singled out. In the first example (case A), this context is characterized by weak legal plurality (Santos, 1995; Castrillo, 1997), since the official judicial system clearly predominates in the resolution of litigation. In the second example (case B), legal plurality is strong, with different laws and means of resolution – particularly those of an informal nature – competing with each other.

Equally hard to overcome in the short term is the difficulty in increasing resources, particularly financial, for public service. This problem is common to both cases, but is much more serious in the second. The persistent lack of resources will make it difficult to extend access to justice, particularly in terms of the potential rural demand in case B.

Above all, these two differences – the context of the legal system and its resources – end up by consolidating the merely formal centrality of the judicial system in B, which is valued more from the top-down (in the organization of political power, in the constitutional text and in the hierarchy of the state) than from the bottom-up (in

the culture and experience of the majority of the population). However, we cannot ignore the fact that the development of a market economy tends to favor greater affirmation of the system of civil justice.

Table 7.2: Characteristics of Civil Justice in Relation to Economic Development

Characteristics of civil justice	More developed market economies and consumer societies	Market economies in consolidation (e.g. Mozambique)
Context of judicial system	Weak plurality	Strong plurality
Resources for the official system	Substantial but always subject to limits	Insubstantial and insufficient
Magistrates	High pay, average legitimization	Low pay, legitimization badly affected
Legal services market	Excess supply / corporate organization	Incipient supply / corporate organization
Cost of access	Variable	Generally high
Access	Differentiated	Very limited and selective
Origin of effective demand	Urban/ rural	Urban
Main type of use in most common types of litigation	Collective and frequent (consumer and production)	Individual and sporadic (family, property, employment)
Large-scale economic litigation	Absent	Absent
Official defense by professionals	Usual / poor quality	Rare / poor quality

Table 7.2: Characteristics of Civil Justice in Relation to Economic Development (contd.)

Private legal defense	Usual/quality average-high /costs high	Rare/ quality very variable / costs very high
Delays	High, in general	High
Type of resolution	Low intensity, in general	High intensity/ withdrawals
Quality of decision	Average/good	Very variable/ unpredictable
Weight of judicial system	Substantive centrality for non-self-composed litigation	Formal centrality for non self-composed litigation
Perspectives	Lowering of ability to respond to continued rise in demand	Lowering of quality and ability to respond, even to very moderate rise in demand
Consequences and possible reforms	• Development of new ADRM[26] procedures for different litigation and litigants • Procedural reforms and reformsto judiciary • Modernization of the management of the courts	• Development of new ADRM procedures and reinforcement of formal and informal types • Resources for the base of the judicial system • Procedural reforms and reforms to the judiciary • Modernization of the management of the courts

With regard to the transitory differences, the one which stands out most is the situation in the legal services market, where the offer which is at the moment incipient in case B will tend to increase when new law graduates enter the market. The predictable consequences of this increase will be a lowering of fees and an increase both in the number of cases involving private legal defense and those in which the official defense

is undertaken by professionals (although the quality will remain low). In addition, depending on the type of legal education and supplementary training given, this increasing number of professionals may contribute towards an increase in the quality of judicial decisions. The differences between the dominant type of users in the system and the means of resolving litigation in the courts are equally transitory, although these differences will decrease much more slowly than those previously discussed. The time that this takes will depend on the process of consolidating the market economy and the rate of expansion of consumer society. These are the changes that will most influence the increase in demand by frequent litigants as well as demand relating to minor disputes such as the payment of debts, which will tend to superimpose themselves onto inter-individual litigation.

In terms of similarities, the absence of large-scale economic litigation and the increasing delays in providing the protection of the law should be emphasized as two characteristics that still persist in most civil systems.

When we consider the evolutionary perspectives of cases A and B, we can observe a common difficulty in responding to the increase in effective demand for civil judicial protection, which enables us to anticipate common points in the reforms that need to be adopted. These concern what will happen in terms of procedural material, of modernizing the managements of courts and of developing new procedures for the resolution of litigation (for example, 'arbitration'). Nevertheless, the aforementioned structural differences between cases A and B should demand that specific responses be found which make use of the potential characteristics of the local context.[27] For example, in case B, the context of strong legal plurality is a recommendation for strengthening interaction between the official judicial system and the traditional and alternative means of resolving litigation already in existence, without precluding the incorporation of new forms. In fact, alternative means of resolving litigation are being sought out and even reinvented today in all judicial systems, as these systems find themselves unable to deal with the large-scale demand in particular areas of litigation.

It is equally admissible that, in situations in which resources are scarce, the base of the system, rather than the top, should be favored in order to increase access and influence.

In spite of the existing differences that are liable to remain in the coming years – namely those which require the large-scale mobilization of qualified human resources and increased financial resources – there may be points in common in terms of the strategic orientation of some reforms. This is the case with the management of the courts, the increasing transparency of procedures, the development of a justice of proximity (a very fashionable concept in the reform of judicial systems) and the diversification of the means of resolving litigation by making it proportional to the seriousness of the litigation involved.

An Overview of Civil Justice in Mozambique

Main Litigation

A closer analysis of civil justice in Mozambique confirms that, like the economy and the civil society of which it is a part, civil justice in Mozambique is going through a period of transition.[28] In addition to divorce cases, in recent years civil justice has, above all, been used to manage the privatization of the housing market[29] and the loss of jobs resulting from the restructuring of businesses in the wake of structural adjustment policies.

An overview of the profile of plaintiffs and defendants shows that inter-individual litigation still predominates, with a particularly heavy emphasis on family and labor conflicts and those associated with housing (possession or ownership). The complexity and variety of the latter reflect the difficulties encountered as part of the shift from a publicly administrated system to one based on private interests.

In fact, in recent years, we have observed an increase in the relative weight of civil cases in the judicial system. For example, between 2002 and 2003, the number of civil cases filed rose by 6.3% (whilst the criminal cases filed fell by 6.8%)

There was very little economic litigation up to the mid 1990s, but this has been rising steadily since then. This situation encompasses not only large-scale litigation, which is common to most market economies, but also debt collection, the most frequent litigation in these economies. What we are witnessing is a moderate increase in demand, to which, nevertheless, the civil court system has great difficulty in responding. As mentioned earlier, between 2002 and 2003 the provincial courts witnessed an increase in economic cases especially in the Maputo City Court and the Maputo, Sofala and Nampula provincial courts.

The Users

The users of the system reside in the most developed urban areas, particularly Maputo city, which clearly stands out from the rest of the provinces in terms of the number of cases filed, closed and pending, even taking into account their smaller population.

Rural areas are virtually beyond the reach of the civil judicial system, partly because they use a different type of law and partly because there is no court or it is geographically, financially and culturally removed from them. The predominantly urban nature of civil justice, which is restricted to the main urban centers, means that it is less affected by the inter-penetration of the various different legalities than the other forms of justice analyzed in this book. Even so, some local cultural practices and habits do stand out in the litigation brought before the judicial court, above all in family conflicts.[30]

In urban centers it is mainly people with low and/or moderate incomes who resort to the courts. Access remains very difficult for the poorest, and the wealthiest exclude themselves from the courts because they distrust the quality of the court's decision and its independence. For these reasons they try at all cost to prevent conflict or else resort to various forms of negotiation to resolve it.

Those who do resort to the justice system often find themselves 'unprotected' in terms of legal defense and sometimes in a very unfair position, due to the high cost of the services of a lawyer.[31]

In order to reach a final verdict, most civil actions have to go through all the phases of the judicial proceedings. Cases are usually decided in court, and an increasing number of appeals are being brought before the Supreme Court. In recent years, the Supreme Court has heard an increasing number of economic cases in appeal, thus reflecting the structural changes that the society is experiencing.

Criminal Justice in the Provincial Courts

Social control through criminal justice is a specific contribution towards maintaining the social order. However, it becomes difficult and complex to exercise this control when the communities'culture is based on reconciliation within the community and not on the application of punishments and sanctions.[32]

In Mozambique, it is not possible, at the moment, to determine the volume of undenounced crimes[33] and therefore only denounced, accused and sentenced cases of criminality have been analyzed.

The number of cases denounced has not increased (in the period between 1997 and 1999) in the attorneyships and for this reason it has to be accepted that there is an accumulation of cases at the Criminal Investigation Police (PIC).

The rate of accusations is very high. Only 12.2% of the cases have been shelved or ordered free by acquittal. According to the General Attorney's Office, 50% of cases involving accusations that are brought to trial fill the lists of cases pending. Denounced and accused crimes concentrate on crimes against property (in its broadest sense), followed by crimes against people. With the privatization of state companies there has been a reduction in embezzlement. In the mid 1990s, the almost total absence of crimes involving the use and trafficking of drugs was explained by the inability of the police to tackle such crimes; an image that has seen some changes over the years. The reduction in car thefts may signify better coordination between the regional police forces (both at national and international level, especially in relation to South Africa).

There was a reduction in the average number of defendants held in custody, which may have been caused by various factors: increased awareness of the law on the part of law enforcement agents and a consequent increase in compliance with the law with respect to the regulatory norms for custody; a decrease in crimes against assets not subject to bail; the action of the judges in charge of pre-sentence investigation; possible leniency on the part of law enforcement agents as a result of being bribed by delinquents. Consequently, there was also a reduction in the number of suspects held in custody by order of the court.

According to a report by the Attorney General (1999), the judicial system's capacity for investigation has been reduced. In 1998, the PIC handled 42,106 cases, but only 9,637 of these reached the General Attorney's Office.

The Characterization of Serious Crimes and Felonies

The proceedings for serious crimes and felonies analyzed in the courts indicate that denunciations made by the victims (predominantly male) are, as a rule, made through the police.

In general, cases that are denounced, presented to court and sentenced relate to crimes against property and physical integrity (bodily harm and attempts on life). In 1987 there were still many crimes of embezzlement. The defendants are usually men, as are the victims, which gives criminal justice a predominately masculine character. The defendants are either salaried employees or unemployed, with little education or illiterate and are not members of the victims' families. As a rule, the defendant is immediately detained and awaits trial in custody. The intervention of the criminal instruction judges in the first hearings and in the validation of preventive detention has increased in recent years (70%, in 1997). Sometimes the legal validation of detention is very slow.

There is also a very high rate of conviction (78%, in 1997), with the courts usually opting for imprisonment. Fact-finding procedures for this 'common criminality' usually involve gathering evidence on how the crime was committed. The Provincial Attorney's Office does not appear at the trials and the defense is normally undertaken by a public defender without a law degree (a legal technician or legal assistant).

Due to the extent of the burden facing the courts, most trials have been delayed at least once. However, from the time when a case reaches the court until the sentence is pronounced, the case proceeds rapidly, due to the fact that 80% of the defendants await trial in custody.

Proceedings for Misdemeanor

In criminal cases which follow the proceedings for misdemeanor[34] and are judged in the provincial courts, the victim is usually male. Usually it is the victim who files the complaint with the police (in most cases they are security agents or soldiers). In general, proceedings for misdemeanors involving bodily harm or car accidents predominate; they are committed by both salaried employees and unemployed people, not related to the family of the victim. A legal technician or assistant from the IPAJ[35] usually defends the defendant. Despite the growing presence of the Attorney's Office, it was still absent in about 40% of the cases; as a result, a citizen was usually appointed as an *ad-hoc* substitute for the attorney. In about 80% of the cases the defendant was convicted and fined or sent to prison, although the latter sentence was normally converted into a fine later. An analysis of the duration of the proceedings for misdemeanor indicates that they are normally quick, with only a small number lasting a long time.

The Absence of Criminal Litigation in the Provincial Courts

The absence of criminal litigation in the provincial courts is due in part to two factors: the 'refusal' of the judicial courts to judge certain crimes and the fact that there are institutional, social and economic structures which 'filter out' criminal litigation

involving political or judicial bodies, so that these 'types of crime' do not reach the formal institutions of control. In the case of the former, there are situations in which judicial courts do not accept certain cases, namely those relating to family matters, and refer them back to the family and the community (the community courts, traditional authorities, etc.). In the case of the latter, there are the crimes which harm the state and society, namely crimes against public health, speculation, the illegal exchange of currency, the illegal exportation of money, unauthorized foreign trade, corruption, theft of energy cables, vagrancy, prostitution, illegal hunting, environmental crimes, sexual crimes, domestic violence, international trafficking and money-laundering.

The General Attorney's Office is an institutional means of addressing absent litigation, but in practice it takes very few proactive measures to enable this discourse to materialize.

4. Justice in the District Courts

The current Law on the Organization of the Judiciary establishes that the district courts are the first formal instance in the judicial system.[36] However, from the information gathered, it can be concluded that, as previously mentioned (see chapter 6), around one third of the districts in Mozambique still do not have a district court, and that the function of resolving litigation is undertaken by the community courts, the police and other formal or informal bodies.[37]

In addition, all the judicial courts face enormous difficulties in complying with the requirements of the Organic Law (Law no. 10/92) with regard to the *quorum* needed for them to function. There have been no elections for lay judges at any level in the court system since 1987. Many of the judges elected at that time have now given up, moved away or simply died. The few who remain are not motivated to continue with their activities, as they receive very little, and sometimes no, financial compensation for their work.

A Brief Characterization of the District Courts

From the direct observation of 16 district courts[38] we can, in spite of their differences, establish a certain pattern in relation to human resources, material resources, the movement of cases and performance.

Resources and Working Conditions

In the courts studied during the first research project (1996-2000), human resources were considered inadequate. However, given the volume of cases registered it appears to us that the fundamental issue is that of the training and technical upgrading of the functionaries, clerks, bailiffs and other justice officials already employed in the courts.

The level of professional training for justice officials is, as a rule, extremely low. Despite their great willingness to learn and improve the quality of their work, most officials never have access to adequate training programs and their links with the court administration are precarious, involving interim or provisional nominations.[39]

With the exception of the Maxixe District Court, whose premises had already been renovated by DANIDA at the time of our study, all the others were located in precarious premises and suffered from a lack of equipment and supplies.

In terms of the condition of the premises, most buildings used by the courts are rented from other entities and are, in general, severely run-down, with no electricity or mains water supply, sanitation, archives or adequate furniture. The courts also face enormous difficulties due to a lack of – or an insufficient amount of – transportation (even bicycles), equipment (typewriters, calculators, photocopiers, telephones and fax machines, etc.), paper and other consumables. Not infrequently, they receive assistance from private individuals or through the goodwill of entities outside the judicial system.

It is imperative that efforts to renovate district courts' premises should continue, so that dignified working conditions can be provided. The district courts need a courtroom, offices for the judge and the attorney and a room where court files can be kept.

The district courts do not have their own budget. They operate on the basis of funds made available to them by the provincial courts. Even paying salaries to the serving magistrates and justice officials (clerks, bailiffs, etc.) requires a courier to go to the provincial capital each month to withdraw the funds needed to pay the salaries of the judges, attorneys and other court staff. This creates serious problems with delayed payments and even embezzlement.

The efforts to renovate district courts and improve interaction with provincial courts with regard to budgets and the supply of materials must continue. In addition, it is necessary for the courts to stop being dependent in terms of premises, equipment and materials needed in order to implement the resolution of litigation and preserve their own legitimacy, independence and impartiality.

The Self-Transformation of a Community Court into a District Court

During our research, we encountered one district court (Pemba-Metuge, in the Cabo Delgado province) that is not official but acts as if it were, having built its own court headquarters with local materials. This court, which started off as a community court, is now recognized by the local inhabitants, local authorities and the provincial court as a district court and it aspires to formal recognition by the Supreme Court, which recognizes it *de facto*.

Litigation in the District Courts

Civil Litigation

As a rule, the 16 district judicial courts visited by our research team[40] and subjected to direct observation have witnessed a fall in the number of cases presented to them between 1987 and 1997 in eight courts, and an increase in only six.[41] With the exception of two of the district courts in which wide-ranging civil litigation is emerging and has been registered (payment of debts, alimony, leasing, etc.), the demand in the district courts centers on criminal litigation. From the interviews carried out during our research

we detected that many district courts frequently refuse to handle family litigation, claiming that the conflict should be solved by the community courts or even within the family.

From the data analyzed and in light of the current socio-economic development in the country, it seems likely to us that the demand for penal cases is on the rise and that civil cases are beginning to appear in the district courts. This being the case, these courts need to prepare themselves for the situation which is likely to occur in the coming years.

Criminal Litigation

In the proceedings for serious crimes and for felonies that were analyzed,[42] offenses were reported to the police by the victims. Most cases filed concerned property (petty theft or medium-scale burglary – 49.5% in 1987 and 64.4% in 1997) or bodily harm.[43] Most of the plaintiffs were male (over 80% during 1987-1997). This information, together with the fact that most of them were also the victims of the crime, leads us to conclude that there is a gender bias in the criminal justice system, as men seem to be the ones who have been able to overcome the barriers that stand in their way when filing a case (both at the police headquarters or in court). Women remain the silent victims.[44] In terms of age, most of the plaintiffs are between 20 and 50 years of age, although we identified an increasing number of younger people (between 18 and 25) in the most recent years of our sample.

In terms of occupation, in the mid-1990s most of the plaintiffs were salaried employees, workers or unemployed (30.1%), as well as security agents and soldiers (26.5%). Towards the end of the 1990s we observed a wider variety of occupations, the majority being fishermen, peasants, (19.6%) housewives, self-employed citizens, security agents and soldiers (13% altogether). The greater 'democratization' of criminal justice can clearly be observed.

Finally, it should be pointed out that after a case was filed, in most situations the defendant did not hire a lawyer, either for financial reasons, a lack of awareness of their rights or a shortage of lawyers and legal technicians or assistants.

Most of the offenses reported were committed by single individuals, indicating the predominance of a small-scale, non-organized criminal activity. The defendants were also mostly men, confirming the male character of criminal justice in Mozambique (94.8% in 1997 and 95.1% in 1997). The age range of the defendants was quite wide, although most of them were between 25 and 35 years old (36.8% in 1987 and 32.6% in 1997).[45]

The defendants were either salaried employees (workers, service sector employees) or unemployed,[46] with little education or illiterate, and were not members of the victims' families. The defendants were usually held in custody – which, in the majority of cases in 1997 (75%) was authorized by one judge – and defended by legal assistants or legal technicians from the IPAJ or by a defender appointed on an *ad-hoc* basis. In 1997, in 35% of cases, the District Attorney's Office was not present at the trial or

was represented by an *ad-hoc* attorney. Cases were tried quickly, as the accused was held in custody.

In the proceedings for misdemeanors judged in the district courts the defendants shared the same characteristics previously described, except that in terms of occupation they were mainly farmers, fishermen or unemployed. In this type of case, the order of importance of the crimes practiced is reversed, with crimes involving bodily harm appearing first, followed by crimes against property.

The vast majority of the trials were postponed at least once (84.2% in 1997). This occurred both for reasons internal to the court (absence of the judge, court inspection) or because the parties had not been notified.

In a significant number of trials, the state attorney was absent (54.2% of the cases in 1987 and 36.9% in 1997). We also identified a significant number of cases in which a citizen was appointed as an *ad-hoc* substitute *for* the attorney.

Most of cases lasted less than a year (92.2% in 1987 and 82.3% in 1997). The sentence was either a fine or a prison sentence converted into a fine. Fines varied from 500,00 to 700,000,00 *meticais*.[47]

The main reason why criminal litigation reaches the court is that in cases of bodily harm a hospital or health center does not provide treatment unless the police are present, and when they intervene the case is subsequently sent to the district court. In addition, most plaintiffs report crimes against property directly to the police. In 90% of the cases analyzed in our sample, the police had initially filed the cases. The number of cases directly filed by the attorney's office or at court was extremely small.

The District Courts: the Crossroads between Community Justice and the Judicial Courts

The district courts face various constraints, amongst which the following should be emphasized: budgeting and finance to prevent dependency; motivation of the elected judges; the recruitment and training of magistrates and judicial functionaries; working conditions.

The district courts lie at the crossroads between community justice and the judicial courts, establishing both complementary and competitive relationships between them. On the one hand, the district courts make use of the community courts and the traditional authorities in order to ensure that court summons are complied with.[48] In addition, they establish a special relationship with these entities, by ruling that questions relating to family matters are their responsibility. In the district courts the police function as the distributor of litigation to the instances that can resolve it, sending the more serious cases to the district or the provincial courts.

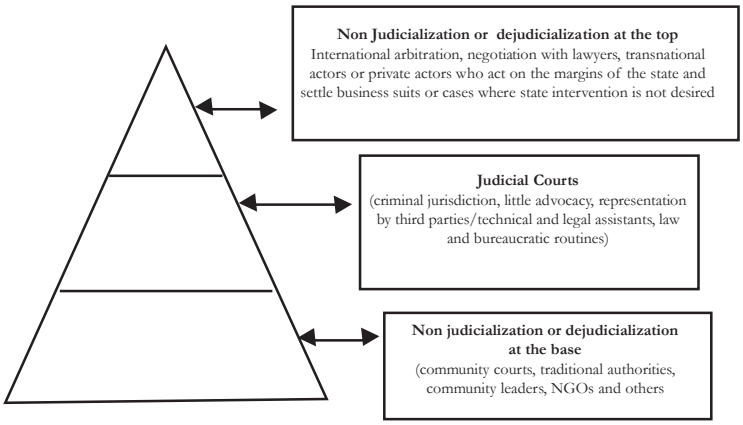
5. Courts: the Illusion of Centrality

As already stated, the administration of official justice is not limited to the judicial courts. The community courts form the base of the system for the resolution of conflict and, in practice, continue informally to be the lower instance in the judicial

system. Simultaneously, new legislation on arbitration, conciliation and mediation as alternative means of resolving litigation (Law no. 10/99 of 7 June) aims to create 'new' means of resolving litigation to meet the demand that the judicial courts cannot satisfy. Mozambican state justice thus finds itself squeezed between two waves of non-judicial or de-judicial processes: one at the top of the social hierarchy (arbitration or negotiation with lawyers, transnational actors or private actors who act on the margins of the state and settle business suits or cases where state intervention is not desired), and another at the base (the community courts and the whole set of authorities who are designated traditional and who resolve local suits affecting the life of the society).

The judicial system therefore has an illusion of centrality, but the state and official justice penetrate neither the bottom nor the top. Moreover, public and private are merged so that, for the time being, justice follows the trend towards the 'privatization' of political power.

Figure 7.3: The Resolution of Litigation in Mozambique and the Social Pyramid



Conclusion

Human resources – judges, state attorneys, functionaries and justice officials – are insufficient and not adequately qualified. In addition, the staffing is inappropriate for the situation in Mozambique, with an 'unrealistic' number of professional posts and categories. With the exception of those commanded by the Supreme Court Justices, in general salaries are demoralizingly low and are frequently not paid on time. In addition, elected judges spend long periods of time without receiving any compensation and their fees are very low.

The Government budget and Court's Fund are inadequate for the needs of the system and consequently external aid and loans are one way of securing the more rapid development of the judicial system.

More than half of the litigation handled by the provincial courts involves criminal complaints corresponding, in 1998, to 80.9% of the total number of cases filed in the judicial system. In 2003, however, this figure fell to 57%, due to a marked increase in civil and labor actions brought before courts.

To sum up, in Mozambique provincial criminal justice is characterized by litigation centering on crimes against property and involving bodily harm. The defendants are predominantly men, who are normally held in custody, have no lawyer and are, in almost all cases, found guilty. There are also some cases of misappropriation and several high profile cases of crimes against human life or economic crimes which have a great public impact and receive extensive media coverage. However, there are also types of litigation that are almost absent from the criminal justice system, such as most economic crimes, domestic violence and violence against children.

Civil justice in Mozambique is facing the problems inherent to an emerging judicial system operating under both new and old concepts of the rule of law. It suffers from a lack of resources and competences, which lowers its quality and makes the judicial system susceptible to corruption. At the same time, it is already experiencing the problems of the more structured judicial systems, such as high costs and excessive delays. The reforms that have been initiated seek to combine the successful measures tried out in other countries with a process of taking carefully measured advantage of the potential within its own mechanisms and specific local features.

The district courts lie at the crossroads between community justice and the judicial courts, establishing both complementary and competitive relationships between them. The judicial system therefore has an illusion of centrality, but the state and official justice penetrate neither the bottom nor the top (revealing an absence of judicial litigation). Justice is following the trend towards the 'privatization' of political power.

Notes

1 This figure refers to judges both with and without a degree. It does not include, however, the judges temporarily transferred to other areas of the administration of justice (information kindly provided by the Supreme Court's Statistical Department).

2 All the 11 provincial chief judges have a law degree, while law graduates have gradually been appointed to several district courts over the last years. In mid 2002 the first district judges who were law graduates were appointed, for example, in the law courts of the districts of Chókwè and Macia, in the Gaza province. See also chapter 6 for an analysis of some of the changes in legal education and training in Mozambique over the last few years.

3 This also depends upon the future status of the community courts (see chapter 10).The new law of the community courts is currently being discussed.
4 Although the situation has changed significantly since 2000, as some of the figures in this chapter illustrate, the justice system still needs many more law graduates.
5 Recently (2004), the salaries of the Mozambican magistrates (judges and state attorneys) were increased.
6 See note 40 in chapter 2.
7 On this subject, see chapter 2.
8 Commercial Bank of Mozambique – CBM.
9 Danish Agency for International Development Assistance.
10 For further details, see Dagnino *et al*., 1996, the source of the above information.
11 Information from the Supreme Court, obtained in July 2000.
12 DANIDA has been the most important donor in the justice sector. Over the 1990-1995 period DANIDA implemented a US$ 2.8 million project involving the Eduardo Mondlane University Law Faculty, the INAJ and the Supreme Court; this project was followed by another (1996-2001) valued at US$ 8.3 million that concentrated its support at the district level, rehabilitating and equipping 20 priority district courts and promoting training for their judges. To complement the rehabilitation of the district courts, support was also given for law reform, in particular the revision of the procedural codes, considered one of the reasons for the poor administration of justice. Toward the end of the project DANIDA provided support for the strategic planning process. A US$ 8.5 million project was approved for the period 2002-2005, to be used to provide continuing support for integrated strategic planning, support for law reform through UTREL, training and research through the Centre for Legal and Judicial Training, access to justice and human rights through organisations in civil society and support for informal justice.
13 United Nations Development Program. The project 'Support to the Justice Sector in Mozambique' was initiated in 1999. Overall, this project received contributions from the UNDP itself, Norway, Ireland, Portugal and UNICEF of about US$ 4.9 million in its final year of implementation. The project had two components: (a) support for the establishment of the Centre for Legal and Judicial Training, equipment, training courses for judges and technical assistance; (b) support for the reform of the prison system. In 2002 another initiative aimed at fighting corruption was added to the project. The available funds (US$ 300,000) were used to organise a forum on corruption, train judicial inspectors and journalists and the first survey of the needs of the Criminal Investigation Police (PIC).
14 A financier through loans, the World Bank is one of the largest participants in the justice sector in Mozambique. Under its 1994-1999 US$ 6.6 million 'Capacity Building Program – Legal Component', funds were provided for training initiatives, Masters degree courses and equipment for the Ministry of Justice, the Administrative Court, the General Attorney's Office, the Supreme Court, the Law

Faculty of Eduardo Mondlane University, the Bar Association and some NGOs active in the sector.

15 The first USAID project in the justice sector (1997-2000, valued at US$ 580,000) focused on the civil section in the Maputo City Court, where a computerized case management system was introduced and proposals were prepared for the reform of the Civil Procedure Code. More recently, USAID has been supporting the Anti-Corruption Unit in the General Attorney's Office.

16 The source of information in notes 12 to 15 is Dagnino, F. et *al.*, (2003). *The Justice System: Past and Present.* Maputo.

17 Created by Decree no. 22/89, of 5 August.

18 In 1996, court costs were composed of: legal charges, part of which were sent to the state; additional costs, which, in turn, included a surcharge of 30% on the legal charges; stamps; postage costs (when necessary); the cost of paper and journeys, or, in other words, the monetary value of the distances which a bailiff had to cover in order to carry out his/her work. In civil cases, there was also the 'payment of costs' corresponding to the amounts the courts levied in advance from the individual involved in a claim, which were subsequently deducted from the sum of the legal costs when the case ended. Legal costs relating to civil cases depended on the amount of money involved, whilst in criminal cases they depended on the seriousness of the crime, the type of case and the financial means of the accused. In terms of amounts, in summary proceedings the charges varied between a minimum of 5,000 *meticais* and a maximum of 40,000 *meticais*, whereas in uncontested divorce cases they were around 50,000 *meticais*.

19 However, in 2002 and 2003 there was a significant decrease in pending cases (a total of 90,153 for 2002 and 98,842 for 2003).

20 Proceedings which allow court to apply a mandatory prison term of over two years.

21 Proceedings which allow for the court to apply a short prison sentence (between one and two years).

22 There were no data available for Sofala Provincial Judicial Court for the 2002-2003 period.

23 For a comparison of different systems of civil justice and their problems, see Zuckerman, 1999.

24 On this subject, see chapter 9.

25 For the main characteristics of civil justice in Portugal, see Marques *et al.*, 1999:413.

26 ADRM – alternative dispute resolution mechanisms.

27 According to Bourmaud (1997: 84), "the transposition of administrative structures into very different cultural universes, in which a relationship with modernity is largely unknown" and "in which there exists a manifest dysfunction between the means which the administrative apparatus possesses and its official objectives" leads to serious dysfunctioning and an inability to adapt, on the part of the administration, to the human context in African countries.

28 See chapters 2, 4 and 6, for a better perspective on the current changes and challenges which the Mozambican society is facing.
29 Resulting from the abolition of the APIE, the state real estate management in charge of the real estate that was nationalized immediately after independence (see chapter 2).
30 The topic of family conflicts is also covered in chapters 10 to 13.
31 On this subject, see chapter 9.
32 On this subject, see chapters 2, 9 and 10.
33 Many criminal cases are solved through 'informal', unofficial channels of conflict resolution, as analysed in different chapters of this book.
34 A proceeding which allows for the court to apply a quite short prison sentence (from three days up to one year).
35 Institute for Legal Assistance and Representation.
36 On this subject, see chapter 2.
37 In 2003, 28 districts remained without formally established district courts and in the districts where they did formally exist, 17 were not operational at the time (Supreme Court Statistical Department, 2003).
38 The district courts studied were: Namaacha and Moamaba (Maputo province); Homoíne, Maxixe and Vilankulo (Inhambane province); Dondo (Sofala province); Pebane and Alto Molócuè (Zambézia province); Angónia, Cahora Bassa and Moatize (Tete province); Chiúre, Mueda, Mocímboa da Praia and Pemba-Metuge (Cabo Delgado province). During the first research project, the provinces of Niassa, Nampula and Manica were not included. The latter two provinces were studied in the second project.
39 As a result of this observation, and following the creation of the Center for Legal and Judicial Training (CFJJ), several justice officials from district judicial courts have undergone training in recent years (see chapter 6).
40 It was difficult to evaluate the court flow due to the fact that there was no statistical data for the district courts at the Supreme Court. The data analysed in the project and discussed here result from counting archived cases, the court claims register, etc.
41 This general rrecovery took place after a greater fall which occurred between 1987 and 1992 (corresponding to the period of civil war that ravaged the country). In 1992 the Rome Peace Agreement was signed. See chapters 1, 2 and 4 for a broader understanding of the socio-political scenario in Mozambique over the last three decades.
42 Overall, for the characterization of the ten-year period (1987-1997) 1,282 cases were analyzed. Of these, in 1987, 72 were proceedings for serious crimes and for felonies, and the vast majority – 1,002 – proceedings for misdemeanor. In 1997, we identified 72 proceedings for serious crimes and 68 proceedings for felony. The remaining proceedings did not refer the type of case.

43 In the early years of our sample, attempts on life were more significant (16.5% of cases in 1987, against 2.6% in 1997).
44 See also chapter 9, where the issue of domestic violence (including gendered violence) is analysed in more detail.
45 In 1997 we observed an increase in felonies committed by younger men between the ages of 18 and 25 (30.8% in 1987 against 36.1% in 1997).
46 Towards the late 1990s we identified a significant trend in the increase of unemployed people among the defendants. This figure confirms the opinions of several interviewees who associated the social and economic problems of Mozambican society with a strong increase in unemployment and criminal activity.
47 We also identified cases in which at least a sentence of flogging was given when Law no. 5/83 of 16 March was in force.
48 On the multiple forms this relationship may take, see also chapters 10 and 11.

8

The Judicial Courts' Performance: Main Blockages in the Court System

João Carlos Trindade, João Pedroso, André Cristiano José and Boaventura de Sousa Santos

Introduction

The patterns of litigation present in the judicial system – civil, juvenile or criminal – as well as the patterns of litigation absent from the judicial system analyzed in previous chapters, are in themselves indicative of the first major blockages in the system: the distance between citizens and the judicial courts, and the economic, cultural and social barriers affecting access to the law and the official courts. According to the interviews and observations carried out during our research, this gap between the judicial courts and the majority of Mozambicans is due to the following: the fact that written law is ill-suited to the Mozambican situation; a distrust for the workings of the judicial courts; the official, legal, written culture of winner/loser and sanctions, instead of a local culture of reconciliation; misunderstandings concerning the purpose of the funds raised from fines and bail.

This distance from the courts and the social discrimination affecting access to official justice are much more complex phenomena than they may at first appear to be. In addition to economic factors (which are always the most obvious), they also involve cultural factors resulting from socialization processes and the internalization of prevailing values which are very difficult to transform. It is up to the state and the judicial system to work to reduce the selectivity of the legal system and the economic, social and cultural barriers and to transform the potential citizen demand for legal protection into an effective demand.

Access to official justice is extremely selective. The state machinery is incapable of responding satisfactorily to the increasing needs of citizens because it lacks the

financial, human, technical and organizational resources, as the previous articles in this section have outlined.

1. The Media View of the Judicial System

The assessment of public opinion concerning the problems of justice is a rather recent phenomenon, promoted mainly by organizations from civil society, donors and, in some instances, the institutions themselves. Listening to citizens' opinions reveals a somewhat new concept of justice in Mozambique, more akin to the provision of services than the exercise of power, which can help strengthen a democratic and participatory culture.

On the assumption that the official legal system is much more accessible to those who can read and write Portuguese (thus reflecting some school education), we analyzed articles on the institutions and activities of the official legal system published by the Maputo press in 1999.[1] Later on, we analyzed the results of several surveys on the attitudes and performance of the legal institutions.

In recent years, several Mozambican radio and television programs have been organizing discussions between representatives from the justice institutions and the public, raising questions about issues such as crime, the performance of the courts, family law, state corruption, etc. Although the public involved is only a small fraction of the urban population, this kind of discussion is indicative of a maturity of opinion and a clear perception of the inadequacies and abuses of the institutions that oversee law and public order.

Up to 1999, the media described the Mozambican judicial system as suffering from various problems that were destroying its foundations. Amongst other aspects reported by the media, there was repeated discussion of its lack of financial and human resources, mainly affecting the upper echelons of the judicial system. There were also accusations of a lack of political will to resolve these problems.

Judges and attorneys were also criticized, with accusations focusing mainly on the passivity of the judicial institutions. According to the press there were also suspicions that ethnic and religious biases had influenced the behavior of the judicial institutions, resulting in huge delays in the justice system that prevented the Mozambican courts from functioning properly.

More specific criticisms were made of the Supreme Court. One of the problems noted in relation to this Court was its excessive slowness and another was its lack of impartiality in rejecting a request by one of the Mozambican political parties to contest election results.[2]

The General Attorney's Office was also criticized in the press for its lack of action and the same questions were asked about the reasons for such inertia. In addition, the papers reported suspicions that state attorneys may have been involved in a large-scale case of corruption. As a result, in 2000 a new Attorney-General was appointed by the President.[3]

Several surveys have also directly or indirectly revealed the interviewees' views on their level of confidence in justice in a broader sense. For example, in March 2000, the Ministry of Justice promoted an opinion poll on human rights, covering such subjects as respect for fundamental freedoms, citizens' knowledge of their rights, police actions, the right to defense and representation in court and the main human rights violations in the country. The results showed that, on the whole, Mozambican citizens have little knowledge of their rights and relative confidence in the state as the guarantor of these rights. However, half of the interviewees felt that the police did not respect human rights and a significant majority (63%) was aware of the growing 'privatization' of justice in Mozambique, affirming that "in Mozambique justice is only for those who have money." With regard to the violation of rights, those mentioned most frequently were second generation social and economic rights such as the right to health, a reasonably-paid job and education. The main problems in relation to human rights violations were illegal detentions, mistreatment in prisons, the slowness of trials and corruption in the civil service and the courts. Another situation indicated as an example of the violation of human rights was violence against children and women.

When the first research was carried out, the murder of Carlos Cardoso, a renowned Mozambican journalist, had not yet taken place.[4] The media sought to transform the trial of Carlos Cardoso's murderers into the struggle of civil society against corruption. The trial became an example of the role of the judiciary for most Mozambicans, since it was widely publicized and broadcast. Newspapers, weekly publications, and radio and television news programs featured interviews with citizens about the trial. The attention paid by the media to the Carlos Cardoso case was justified by the fact that it was linked to a major bank fraud that he had been investigating which still has not been fully explained and which gave rise to suspicions about the possible involvement of public figures and their connections with organized crime.

In addition to the interest raised by the subject itself, the Cardoso trial offered a rare opportunity for citizens to observe closely how justice works, including its various different procedures. The way the trial was conducted – almost always in a simple, direct and sometimes 'didactic' manner – transformed this trial into a collective learning process on penal law, helping to demystify the unfriendly and distant character of official law in the eyes of the ordinary Mozambican.

One of the reforms to the Mozambican justice system which has received the most media coverage is the Labor Law, for reasons which are sometimes rather strange. Criticisms center on the ineffectiveness of labor jurisdiction. Although established by legal diploma, the labor sections operating in the common courts have not yet been transformed into real and effective labor courts. By 2005 this situation still had not changed.

The press also gave coverage to constitutional reforms.[5] Most of the criticism was leveled against the introduction of new institutions (such as the proposal for the creation of the Constitutional Court and the introduction of the position of

Ombudsman)[6] without the adequate establishment and consolidation of those which already existed

2. Ritual and the Length of Justice

Ritual and the Chief Judge

The distance between citizens and the courts is also reflected in the formal nature of courtroom practice. Observation of both the provincial and district judicial courts led to the conclusion that the entire ritual of the hearing is conducted in an atmosphere of formality which distances the court from the parties and is filled with symbolism. The ritual and formalities are centered on the chief judge, to the detriment of cross examination and the active participation of the prosecution and the defense. The chief judge conducts the hearings in an inquisitorial and relatively discretionary manner. In effect, the prosecution and the defense barely participate, as previous chapters have shown.

It should, however, be emphasized that elected judges participate in trials as a form of popular participation in the administration of justice, in spite of the difficulties the courts have in mobilizing them, due mainly to the fact that they receive little or no payment.

In the judicial courts the ritual of the trial, which has essentially symbolic functions, still does not fully guarantee legality and debate, as it is a ritual that focuses on the chief judge.

The Length of Justice in Mozambique

The theoretical construction of the duration of a case must distinguish between its necessary duration – the reasonable period of time needed to defend individual or collective citizens' rights – and delay, *i.e.* the unreasonable or excessive duration of a case that is not required – and is sometimes even damaging – in order to protect the parties concerned. The necessary duration of the case should correspond to the legal duration of the case. However, according to previous research, in many cases it is the law itself which causes delay. Delays may also be organizational or endogenous to the system and may result from the volume of the work or routines acquired, as well as the (dis)organization of the courts.

Finally, the excessive duration of court cases can also be caused by the judicial actors (judges, attorneys, lawyers, parties, police, experts, legal officials, etc.). Such delays may, or may not, be unintentional. The former situation arises out of organizational delays resulting from involuntary negligent behavior on the part of the judicial actors. The latter is caused by one of the parties involved in the litigation, or someone acting on his/her behalf, defending his/her own interests.

In the lengthier proceedings we studied, for example, the progress of one of the civil cases analyzed — from the allocation of the judge to the hearing of the trial — occurred at the pace of procedural law, except for the documentary evidence, which got 'stuck' in the courts. The biggest delay occurred when the case was transferred

from the provincial court to the Supreme Court. From the time the appeal was lodged with the Supreme Court to the time when it was allocated to a Justice, about 15 months had elapsed.

In addition to this, one criminal case analyzed had been running for over 10 years. Slightly less than five months had elapsed between the filing of the case by the police (November 7, 1986) and the date of the trial (April 10, 1987), with the judge having previously ordered a reformulation of the accusation and the release of the defendant. In addition to problems with the instruction of the case, the legal claim for the case and the inability to notify one of the interested parties has meant that it has been awaiting a verdict for over ten years. This was initially because of delays with the 'transfer from one instance to another' and later because the case was 'held up' for many years following an appeal to the Supreme Court. In Mozambique, as used to be the case in Portugal, criminal cases proceed whilst the defendants are in custody and come to a halt when there are appeals. This indicates that reforms to the penal procedure are imperative.

3. Delays in the Provincial Courts

An analysis of these cases and legal claims identified the following as determining factors in the crisis in the judicial system in Mozambique:

1) a legal culture based on normative abstraction and logical-formal deduction, which produces a form of self-sustaining, complete and coherent knowledge within the system itself, but is alien to the society;
2) a highly complex, bureaucratic procedural structure that relies almost exclusively on adjudication (involving a win/lose decision) to settle litigation, with no systematic recourse to mediation, negotiation or arbitration processes. In addition, the way in which cases are processed results in their dragging on for a long time (more on this below).

There is a general consensus that the accumulation and excessive duration of cases, particularly in the Supreme Court, combined with corrupt practices, are the main reason for the judicial courts' loss of credibility and legitimacy.

In spite of a relatively controlled civil and labor court demand, civil and labor actions on average take between three months and two years (196 cases in 1987 and 473 in 1997), although a significant number last between two and five years. In 1997, when the situation became more serious, the slowest cases were labor cases, litigation on housing and debt collection. By province, the greatest delays occur in courts with the most litigation, or, in other words, in the city and province of Maputo.[7]

In general, the situation regarding the time required for a decision on criminal cases brought before the provincial courts[8] has deteriorated. In 1997, a quarter of the cases lasted over a year. This apparent speed was due to the fact that, in almost all cases, the defendant was held in custody, so that the case became urgent and the trial had to be completed before the period of custody expired.

Table 8.1: Length of Civil and Labor Actions in Provincial Courts (sample of proceedings)

Duration	1987	%	1997	%
< 3 months	71	20.4	171	22.6
3 months–1 year	104	29.8	291	38.5
1 year–2 years	92	26.4	182	24.1
2 years–5 years	65	18.6	102	13.5
> 5 years	17	4.9	10	1.3
Total	**349**	**100**	**756**	**100**

Source: CEA/CES, 1999.

Table 8.2: Length of Criminal Proceedings in Provincial Courts (sample of the proceedings)

Duration	1987	%	1997	%
Up to 6 months	269	67.3	349	49.7
6 months–12 months	97	24.3	175	24.9
12 months–24 months	21	5.3	99	14.1
18 months–24 months	7	1.8	50	7.1
24 months–36 months	6	1.5	29	4.1
Total	**400**	**100.0**	**702**	**100.0**

Source: CEA/CES, 1999.

The increasing delays in cases and deteriorating criminal justice has been accompanied by a rise in the number of cases pending. This situation can only be explained in part by a severe deterioration in the performance of the judicial system from the late 1980s onwards, when many judges left the courts. In addition, the Supreme Court Justices became less able to supervise and monitor the provincial courts. Finally, the increasing inefficiency of the judicial system is also due to the poor performance of the court offices.

Although there has been some growth in the number of juvenile cases brought before the Nampula Judicial Court, child justice is specific to the city of Maputo. It should also be emphasized that, between 1987 and 1997, juvenile litigation was resolved more quickly. In spite of the increasing number of cases, it can be seen that most of these were resolved in less than 3 months.

Due to its specialized nature and, as a rule, the absence of contestation, juvenile justice is a type of jurisdiction which may be considered exceptionally rapid in comparison with the length of civil and criminal justice.

4. Reasons for Court Delays

The identification of the causes of delays must be the object of a study that is independent of the corporate civil interests of the various operators within the system. In terms of the legal duration and the delays resulting from excessive legal time limits, as previously stated, the law, namely procedural law, is a far more significant factor in delay than is necessary. The accumulation of different types of delays – legal, organizational (or endogenous) and provoked (unintentionally or intentionally) – means that a certain number of cases are held up in the system for years.

We have identified the following causes of endogenous (or organizational) delays and deliberate delays:

- the organization of the judicial system and the concentration of competences in the judicial courts;
- the rise, albeit slight, in demand;
- the working conditions (premises and equipment);
- the recruitment, selection, training and management of human resources;
- inadequate legal and managerial knowledge;
- negligent behavior – or behavior which causes delays – on the part of magistrates, court officials and lawyers or legal technicians and assistants;
- inefficient organization and management of the court's work;
- the weaknesses of the General Attorney's Office;
- the inefficiency of criminal investigation;
- the absence of any means of controlling the system;
- the financial resources and lack of political will.

The judicial system is poorly and inappropriately organized and remote from most of its potential users. It only covers the provincial capitals and about two-thirds of the district capitals.

The size of the population and the socio-economic context of some of these districts means that, in practice, the geographical distribution of the courts sometimes does not coincide with the administrative divisions in Mozambique (and that therefore they should have more than one district court). In some districts, however, a district court is not warranted for the time being, as the demand for justice can be addressed by the community courts. There is also a need to consider the advantages and disadvantages of the effective application of the Organic Law, which classifies the district courts into first and second-class courts.

Table 8.3: Length of Juvenile Proceedings (sample of proceedings)

Duration	1987	%	1997	%
< 3 months	80	51.3	156	60.0
3 months–1 year	39	2.5	93	35.8
1 year–2 years	17	10.9	11	4.2
2 years–5 years	16	10.3	0	0.0
> 5 years	4	2.3	0	0.0
Total	**156**	**100.0**	**260**	**100.0**

Source: CEA/CES, 1999.

One of the specific and innovative features of the judicial system in Mozambique is that the management of the judicial system has been handed over to the courts themselves. This has had a paradoxical effect. On the one hand, it guarantees and symbolizes their independence yet, on the other hand, it has the adverse effect of judges accumulating obligations and thus having less time for their main job, which is to judge cases. Thus, the concentration of organizational and administrative management tasks in the Supreme Court, usually carried out by Supreme Court Justices, leads to a considerable dispersal of tasks and what should be the Justices' main activity – judging the appeals submitted to them – is relegated to second place. This situation is reflected in the declining number of cases closed annually in the highest judicial court.

The recognition that at this stage in the development of the judicial system, such a concentration of duties and obligations creates a bottleneck that affects the performance of the courts does not mean that it should be abolished. Retaining this function implies that the courts should be supported by auxiliary judges or advisors, so that pending cases and delays do not increase uncontrollably. As previously stated, delay is one of the main reasons for the judiciary's loss of credibility. As the highest instance in the court structure, the political and symbolic functions of the Supreme Court are of particular importance in legitimizing the system and preventing it from becoming trivialized or discredited.

At the moment, the growth in court litigation is more apparent than real, although it was the dominant topic in our interviews, as citizens are becoming more aware of their rights and there is a growth in new litigation arising out of the development of the market economy. The number of cases brought before the judicial system does not justify the increase in the number of cases pending in the judicial courts, which is disproportionate to the cases received. It is a sign that the courts are more inefficient. For some years now the courts have been unable to close even the same number of cases as have been filed and, as a result, there has been no reduction in cases pending. In some provinces, apart from civil and labor cases, demand has risen very little. The

same cannot be said of the cases brought before the Supreme Court. The explanation for delays in the Supreme Court is the rise both in demand and in the volume of work. The number of cases has risen and the capacity to handle them has fallen.

An analysis of reports from the Judicial Council and Superior Council of the General Attorney's Office as well as interviews with the judicial stakeholders has led us to identify insufficient human resources, recruitment and training difficulties and low and irregular salaries as the main blockages in the system. Issues related to insufficient human resources include the accumulation of judicial duties, vacancies or the absence of positions and even a lack of movement.

Training magistrates and judicial officials is now a major priority, which has recently become the responsibility of the Centre for Legal and Judicial Training (CFJJ).[9]

One of the interesting characteristics of the Mozambican judicial system is the existence of non-professional judges. However, they are poorly motivated, as they usually receive no regular compensation, fee or remuneration in return for providing their time. Moreover, some judges, namely in the Maputo City Court, have started to hold trials without the presence of the elected judges. In addition to the fact that these trials are invalid – the grounds for some appeals to the Supreme Court – it seems that the abolition of elected judges would be a loss to the courts, since it would distance citizens even further from the administration of justice.

The low salaries paid to district and provincial magistrates (judges and attorneys), whether graduates or not, is a problem that must be analyzed in depth and reviewed in detail. The magistrates of the General Attorney's Office, who have no statutory law (since the Statute of the Magistrates of the General Attorney's Office is awaiting approval), also feel that their profession is underrated.

The very important role played by the justice officials, as auxiliaries in the administration of justice and in processing cases, has also been undervalued.

The most highly qualified lawyers in Maputo city attribute the excessive slowness of cases to the fact that judges have technical difficulties in deciding on some types of cases. Insufficient knowledge of the law and inexperience are therefore important reasons why cases drag on. The labor sections, the judges in charge of pre-sentence investigation and the district courts are mainly singled out for criticism. Inadequate legal knowledge is blamed primarily on a lack of adequate legal training.

In a metaphor used by one of the judges interviewed, the judge is the head, the court clerk the heart and the bailiff, the legs. Thus, the performance of the court office is fundamental to the overall performance of the system. The court notary is responsible for preparing cases for trial and for handling those already decided. The organization, management and modernization of notary offices is a priority factor in reducing pending cases and unblocking the workings of the judicial system.

Lawyers are blamed for applying various delaying tactics or for causing cases to accumulate (*e.g.* by appealing to pendency, provisional orders and the failure of parties to appear in court).

Criminal investigation, though not the object of this research project, is one of the factors influencing the performance of criminal justice. The main problems lie in the quality of the investigative work. In addition to criticisms of the Criminal Investigation Police (PIC),[10] there is also a consensus on the relative inactivity of the General Attorney's Office and the state attorneys. Their function is to direct the fight against crime and control and supervise legality in general, but they are usually passive and bureaucratic and thus jeopardize the individual and collective interests of citizens and other legal staff.

Throughout the first research project,[11] we also identified a feeling that the court sentences were not being properly administered, which was blamed on the court officials.

A complex organization such as the judicial system requires properly functioning internal control systems. The absence of active and operational court audits as instruments for controlling, inspecting and correcting the work of the judges and justice officials, thereby helping to improve the quality of the public service offered by the justice administration institutions, is one of the great problems which affect the system.

The low or (in the case of the district courts) almost non-existent budget allocation for courts does not allow them to develop. According to one of the people interviewed, "we are still at the first stage, the time of peace and macro-economic policies […]. First, peace and economic stability. Then there will be a time for justice."

5. The 'Privatization' of Justice and Corrupt Practices

The 'privatization' of public practices and the occurrence of corrupt practices which are non-legal, illegal or criminal is 'the talk of the town' in Mozambican society, as stated earlier in this chapter. Embezzlement of funds, without doubt, lies behind the majority of corruption cases. Perpetrators range from government officials, or, in a wider sense, state employees, to customs officials, sports managers, etc. and cases can involve large or small amounts of money.

This image of corruption in its broadest sense has become firmly established, despite the reactions of the Superior Council of the Judicial System, the Judicial Council and the Supreme Court, as the rulings of the Supreme Court reveal. In his speech to the Judicial Council in 1997, the Chief Justice said:

> When illicit mechanisms are used in government offices or court registry offices – sometimes making use of bureaucracy – thereby forcing the citizen, whose resistance is exhausted, to give in to the intentions of a corrupt official, this is considered an act of violence against the citizen in a disguised form. Although judges and justice officials recognize the need for certain material conditions which the state is no longer able to provide adequately, this in no way justifies perverse acts directed against the rights of the citizen […]. The material condition of the judges will not be remedied by corruption. The iniquitous judge, like the soldier using his sword as a source of revenue, will not be

> moved to honesty by a larger salary or handouts. The need to improve our material conditions should not, under any circumstances, be a justification for iniquity, like a shield against spears [...].

The concept of corruption that features in this chapter is not used in the specific sense laid down by penal law as a 'legal type of crime'. It is a very relative concept. The social phenomenon which nowadays is seen to be widespread in public administration and in society not only violates criminal law but also other forms legislation, such as administrative legislation. Therefore we prefer the concept of *corrupt practices* and argue for a proactive response to these phenomena, with their immediate incorporation into current legislation. According to Graça (1992),

> It may be said that these practices occur, above all, in connection with the appropriation, possession and use of food and equipment, as well as funds. Areas such as the armed forces, the police force and the paramilitaries, as well as the important distribution and marketing chain, seem to be the ones most affected by corrupt practices. There is also a tendency on the part of professionals working in the public services sector, in which salaries are extremely low in relation to the current cost of living, to trade services in order to facilitate quicker decisions, documents, interviews and other services. This affects state housing, teaching appointments in secondary schools, health care, bureaucratic services and support from bureaucratic staff and public institutions. Corrupt practices also exist at management level, although their extent is not known. There has been publicity about irregularities involving directors of companies or autonomous institutions. This phenomenon of corruption is becoming more widely established, so that it is imperative to find measures to contain it.

It has, in fact, not been contained and since 1992 corrupt practices have also extended to the administration of justice, in spite of the reactions of the Supreme Court and the Superior Council of the Judicial System whenever facts are denounced to them which enable them to intervene. As acknowledged by the Judicial Council in its Fifth Session (from 9 to 12 September 1997),

> The wave of corruption, of reprehensible unethical behavior, of gross violations of professionally correct behavior, are not virtual realities but objective facts, which are part of the daily routine in our courts [...]. It is not only magistrates who are involved [in this] but also justice officials at various levels.

With the exception of the Supreme Court, all those interviewed always accused the other judicial courts of corrupt practices and referred to the total inability of the police to proceed with any credible form of investigation, thereby preventing penal justice from being just. Frequently the judge takes the initiative and asks the parties

for money, even those whom he knows are in the right. Again according to Graça (1992), the following measures need to be taken:

> The legal system currently in force covers corrupt practices adequately, allowing for a 'passive' as well as an 'active' fight against corruption. However, there is a need to improve it and make it clearer, more comprehensive and more up-to-date. It is also important to think in terms of providing mechanisms for direct prosecution by citizens or legally constituted organizations and for legal action against those involved in criminal offences such as corruption and the embezzlement of property, funds and other items, which is very common. We should also consider creating a system of independent audits of the effectiveness of the administration and strengthen internal inspections in institutional terms. For a start, the areas of legal control and internal inspection are clearly lacking in human, financial and material resources and the government should attend to these minimum basic needs.

In addition to these measures, there is also a need for a permanent system for auditing and inspecting the judicial system that is both educational and disciplinary. The problem of corruption also affects the independence of the magistrates. This situation is obviously serious, given that magistrates are underpaid and sometimes very poorly trained. Avoiding corruption and guaranteeing the independence of the judges requires not only greater transparency and control over cases by the parties involved, but also improvements in the salaries and working conditions of magistrates and justice officials as well as efforts to build up the credibility of the judicial system.

Conclusion

According to our research, the distance between the judicial courts and the majority of Mozambicans is due to the fact that written law is ill-suited to the Mozambican situation, there is a distrust of the workings of the judicial courts and an official, legal, written culture of winner/loser and sanctions, instead of a local culture of reconciliation.

The excessive formalism of judicial justice, the delays in judicial procedures and corrupt practices are also key factors that create blockages in the overall performance of the judicial court system.

We have identified the following causes of endogenous (or organizational) delays and deliberate delays: the organization of the judicial system and the concentration of competences in judicial courts; the rise, albeit slight, in demand; the working conditions (premises and equipment); the recruitment, selection, training and management of human resources; inadequate legal and managerial knowledge; negligent behavior – or behavior which causes delays – on the part of the magistrates, court officials and lawyers or legal technicians and assistants; the inefficient organization and management of the court's work; the weaknesses of the General Attorney's Office;

the inefficiency of criminal investigation; the absence of any means of controlling the system; the financial resources; a lack of political will.

The judicial system is poorly and inappropriately organized, remote from most of its potential users – since it only covers the provincial capitals and about two-thirds of the district capitals – and reflects an image of corruption despite the reactions of the Superior Council of the Judicial System, the Judicial Council and the Supreme Court.

Notes

1 Nine newspapers were analyzed overall and 49 articles on judicial issues were considered.
2 *i.e.* the general (presidential and legislative) elections of 1999.
3 On this subject, see also chapter 6.
4 Carlos Cardoso was murdered on November 22, 2000.
5 This culminated in 2004 with the approval of the new Constitution.
6 The idea of a Constitutional Court was not reflected in the recent changes to the Constitution (2004). However, the office of Ombudsman has been established (Article 256 of the 2004 Constitution).
7 Although other provinces which have witnessed a strong economic recovery, such as the Nampula and Sofala provinces, are also indicating a substantial increase in case flow, with an escalating number of pending cases (data from 2002 and 2003).
8 For a description of the type of proceedings predominant in Mozambique, see chapter 7.
9 On the role of CFJJ in training the main actors of the judiciary, see chapter 6.
10 *Polícia de Investigação Criminal* - PIC, in Portuguese.
11 From 1996 to 2000.

9

Access to Law and Justice: Advocacy and Legal Assistance Between the State, the Market and the Community

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Introduction

In Mozambique, although the right to defense, assistance and legal representation is a fundamental right for all citizens (Article 62 of the present Constitution), this constitutional requirement has not yet become a reality.

Throughout the early revolutionary period in the country,[1] legal assistance was the monopoly of the state. In an attempt to redress the lack of defense lawyers, especially for the accused in criminal cases, the first 20 people's defenders were trained on an intensive course in the late 1970s. As state employees in the Ministry of Justice, they were sent to the country's various provinces and started practicing in the newly created People's Provincial Courts. Gradually, they were incorporated into the *Serviço Nacional de Consulta e Assistência Jurídica*[2] that became the only entity qualified to supply free legal assistance.

In 1986 the *Instituto Nacional de Assistência Jurídica* (INAJ) was founded, with its own statutes but still under the Ministry of Justice.[3] The INAJ was created to try to reconcile the growing demand for legal services (defense and representation in the courts and extra-judicial consultation) with the limited availability of qualified lawyers. By 1990, the INAJ was already establishing branches in the main provincial capitals.

With the reintroduction of private advocacy in the 1990s, the INAJ was replaced by the *Instituto de Patrocínio e Assistência Judiciária* (IPAJ[4]) in 1994, although its functions and performance remained similar.

According to the INAJ and IPAJ statutes, there were three categories of legal defenders: lawyers with a full law degree; legal technicians with a bachelor's degree in law; and legal assistants trained on *ad hoc* courses. These professionals could provide paid legal and extra-legal representation and consultation services, according to rates established by INAJ. However, free legal representation was provided for people who were unable to pay, in which case INAJ itself covered the fees.

Nowadays access to the law depends, to a great extent, on the work of the non-governmental organizations (NGOs). With the opening up of the political sphere since the late 1980s, the NGOs began to play an important role in defending human rights and denouncing their abuse by the authorities. In fact, it may be said that the right to legal defense and legal assistance has been guaranteed more by NGO initiatives than by the state institutions.

1. Advocacy and Legal Assistance

In 1994, private law practice was permitted once again and the law creating the Mozambique Bar Association[5] was approved (Law no. 7/94 of 14 September). In one sentence, Law no. 7/94 enshrined advocacy as one of the three pillars of the administration of justice. The Mozambique Bar Association is a collective body governed by public law, independent of any organs of the state and possessing administrative, financial and patrimonial autonomy. It reproduces the public organizational model of the Associations which exist in most continental European legal systems.

Simultaneously, the legislation deemed that the INAJ had already fulfilled the objectives which had led to its creation and also affirmed the need to "adopt legal mechanisms more suited to the new demands of society, in terms of practicing advocacy," in order to effectively guarantee that the right to legal defense was recognized for all citizens. Therefore, as the INAJ was brought to an end, it was replaced by the IPAJ in response to the need to create an organization that could guarantee access to justice for citizens who were economically disadvantaged (a Constitutional right).[6]

Rules of Access and the Practice of Private Advocacy

The Association is entrusted with certain obligations, namely those of defending the rule of law and individual rights, liberties and guarantees, collaborating in the administration of justice, contributing towards the development of the legal culture and perfecting the law, the obligation to pronounce on drafts of legislation of interest to the practice of advocacy; participation in the study and dissemination of the law, and the promotion of respect for the legal order (Article 4). The statutes of the Bar Association also establish norms which provide for the independence of lawyers in relation to other professions by identifying practices incompatible with the exercise of advocacy. In addition they emphasize the ethical-social role of advocacy by establishing the moral obligations by which lawyers should regulate their professional and civic conduct.

The Bar Association exercises its prerogatives through its organs, which are the presidency, the general assembly, the jurisdictional council and the governing council. Each one of these exercises disciplinary action over its members, in accordance with its statutes and regulations. Official ceremonial honors, similar to those of the Attorney General's Office, are conferred upon the president.

Only lawyers and trainee lawyers[7] enrolled in the Bar Association can practice professionally, or, in other words, exercise their judicial mandate or offer legal consultations as a paid member of the liberal professions. The beginning of legal practice has to be preceded by a training period. Law graduates from Mozambican universities, as well as graduates from foreign universities whose diplomas have been officially recognized, can request to enroll as trainee lawyers. Enrollment as a lawyer is also offered to foreign citizens awarded a diploma by a Law Faculty in Mozambique. Foreign lawyers who have qualified in faculties abroad can also enroll in the Association if there are government agreements which establish a reciprocal regime and satisfy the necessary requirements.

In certain cases, legal technicians[8] and legal assistants are also allowed to practice as lawyers if there are not enough lawyers in their area.

Legal technicians are allowed to intervene in cases in which the amount involved does not exceed the range of the provincial judicial court or in criminal cases which do not involve prison sentences of more than two years, with or without a fine. Legal assistants may defend cases which do not exceed the range of the second-class district court or crimes which do not involve a prison sentence of more than one year, with or without a fine.

Power of attorney, in principle, corresponds to a paid activity and the criteria for determining fees, to be paid in cash, are the time involved, the difficulty of the case, the client's means and the result obtained. A prior adjustment of fees is allowed, with the lawyer able to demand a sum of no more than half of the total. The '*quota litis*' (or 'contingent fee', in the North American system) — in other words, the setting of fees in relation to the final settlement, especially when this involves a purely monetary content – is forbidden. The sharing out of fees is also forbidden, except with colleagues who have collaborated on the case.

The Market for Legal Services in Mozambique

At present in Mozambique, an imbalance has been observed in the legal services market, with the number of lawyers low in relation to the potential demand for this type of service. At present, about 300 lawyers (and respective trainees) are enrolled in the Bar Association, almost all of whom are concentrated in the city of Maputo. Some also go out to the provinces; however, in 2000 only about half a dozen lawyers were established outside the capital and today the numbers remain strikingly similar. This imbalance shows that the Bar Association only guarantees the right to judicial or extra-judicial legal representation and assistance for a clientele belonging to the urban elite living in the capital. If we consider only the most well-known or those who work

professionally on a full-time basis, this imbalance becomes even more evident. This situation allows many to specialize, almost exclusively, in sophisticated business law, preferably working for large companies (especially those with foreign capital) and public institutions, and to do consultancy work. Apart from this, some civil economic litigation and large-scale economic crimes are the only other cases handled by these law firms.

The cost of a lawyer's services is therefore extremely high, both in absolute and relative terms. Moreover, the fee system of payment by the hour practiced by some lawyers makes legal services even more expensive.

Up until 2000, the majority of lawyers interviewed had either had a European training acquired abroad (particularly in Portugal) or at the Eduardo Mondlane University, whose faculty and curriculum are still Portuguese-influenced.[9] Consequently, for the time being law firms have foreign partners, predominantly Portuguese law firms. Portuguese lawyers also have a direct presence in the Mozambican legal services market, through their own law firms and in partnership with Mozambican lawyers. There is little regional integration within the SADC area,[10] evident in the type of training lawyers receive and in the absence of regional networks of law firms. Even interpenetration in professional practices is weak, except for the embryonic influence of Anglo-Saxon legal practice in the drafting of contracts for South African investors.

The Bar Association still has little legitimacy among the most well-known lawyers in the city of Maputo, where it has its headquarters. Its model is that of a classical corporate civil organization, with rules controlling access to the profession. Consequently, apart from the habitual disadvantage of this kind of organization in terms of limiting competition, there is the additional fact that the market itself is already not very competitive.

The Bar Association and the Legal Technicians and Assistants

Legal technicians and assistants with inadequate training and without any institutional framework continue to share part of the legal services market with lawyers, whilst struggling against the Bar Association in Maputo city in order to maintain their professional status. Since lawyers prefer consultancy work and business advocacy (which does not require their presence in court), and taking into account their reduced number, there is reasonable potential demand for legal technicians and legal assistants, whether for minor civil litigation – which they prefer – or in the penal field. This is due, above all, to the fact that their fees are much lower than those of the lawyers and also because lawyers are inaccessible to the majority of citizens and small businesses. It is these professionals who defend almost all interests outside Maputo city. Although the position of the Bar Association is more restrictive, some judges and even several lawyers recognize the need for these kinds of professionals to continue working in the judicial arena of Maputo city and in the provinces.

The Institute for Legal assistance and Representation (IPAJ)

Access to justice is extremely selective, as stated above. The state legal assistance system is incapable of responding satisfactorily to the increasing needs of citizens because it lacks the financial, human, technical and organizational resources.[11]

Over the years following its creation, several branches of the IPAJ have opened in all the provincial capitals and their members (legal technicians and assistants) have been assigned to the provincial courts to ensure public defense. However, these legal aid services are marginal, functioning under poor conditions and are hardly known or recognized by most citizens.

As an institution dedicated to providing legal assistance and representation for the needy, the IPAJ has been unable to ensure that legal defense is actually free of charge for the citizens that resort to its services. Most of its members have no institutional, contractual link with the IPAJ. They are left to their own devices, charging low fees for their work.

In 1999 the IPAJ had approximately 360 registered members: 232 legal technicians and 128 legal assistants. However, the Ministry of Justice acknowledged that these figures had to be read cautiously. Their current number throughout the country is impossible to obtain; however, we estimate that in 2004 there were around 400 IPAJ members. Of these, only ten legal technicians actually held a formal contract with the IPAJ head office in Maputo.[12] The Institute does not cover the salaries of the remaining assistants.

Our research has shown that five main problems affect access to the public system of defense and legal assistance in Mozambique: a lack of political commitment; inefficient leadership and management in the IPAJ; a lack of resources; a lack of dialogue and links with the NGOs; the *de facto* privatization of the system.

The lack of political commitment on the part of the Ministry of Justice has meant that the (human, material, financial and organizational) institutional resources available to the state are insufficient to meet the growing needs of citizens. The IPAJ's inadequate funding, together with a high turnover of senior staff has led to its present day inefficient management (characterized by a lack of rules and procedures) and poor quality service.

The lack of any links between the IPAJ and other associations which promote and defend human rights is one of the weaknesses of the system given that, as previously stated, these are the organizations which citizens resort to most frequently to defend their rights.

Most of the IPAJ's affiliates work privately, as 'lawyers' for example, being less well-paid than the licensed lawyers and offering a barely adequate service.[13] They have to live off the income from their profession, which means that legal technicians and assistants end up giving priority to civil cases for financial reasons and neglect criminal cases, even though these account for most of the courts' activities and the accused are almost always needy or even poor. Therefore, neither the legal technicians nor the legal assistants, much less the lawyers and trainees, actively intervene in official

defenses, which are left up to *ad hoc* appointments, sometimes even clerks of the court. This situation is particularly serious given the almost total absence of lawyers in the courts, particularly in criminal cases. People with limited resources therefore have no chance of obtaining legal representation, and if the quality of defense in the courts is weak in general, public defense is much worse. These factors have led us to question whether the actual IPAJ is, in fact, capable of offering a service to the public for whom it was created, namely the most disadvantaged citizens. In effect, given that the geographical area covered by any of the alternatives (lawyers, legal assistants and legal technicians) is very restricted, and the costs prohibitive, most individuals using the courts are prevented from resorting to any specialist professional service to defend their rights, either at the pre-trial stage or during the trial itself.

In Mozambique, access to justice and the law is therefore very selective – given the inability of the public defense system (the IPAJ) to provide an adequate service and to function efficiently and the difficulty of hiring lawyers due to cost and scarcity – so that the constitutional objective guaranteeing this right has yet to materialize.

It is not surprising therefore that the human rights NGOs are the most prestigious organizations in the eyes of citizens, due to the defense and legal information services they offer.

Sometimes these NGOs are actually the only support organizations people are aware of (see below). More recently, the Law Faculties (*e.g.* Eduardo Mondlane University and the *Instituto Superior Politécnico e Universitário*, ISPU) appear to have altered their views on the effectiveness of the right to justice by creating legal clinics for needy citizens, an institutional innovation also geared toward giving practical training to final year students. Despite this, there is little close or regular collaboration between this type of organization and the IPAJ or the Bar Association.

2. The NGOs, Access to the Law and the Defense of Human Rights

The Mozambican League of Human Rights (LDH)

Given that, at the moment, access to the law and justice is largely dependent on NGO activities, the research project included a case study on the Mozambican League of Human Rights (LDH).[14]

The LDH was the first institution in civil society created with the fundamental aim of offering legal assistance to the most disadvantaged citizens and leading and promoting the campaign for the defense of human rights. Its central role in this struggle – with all the socio-political implications this involves – and the evident popularity it enjoys in the country, justify its inclusion in this work.[15] The aim of the study was to analyze the League's performance and its importance to citizens and to the consolidation of human rights policies in the country. In fact, in contemporary Mozambique the LDH stands as an example of a NGO which takes the defense of human rights as its central objective.

The Organization of the League

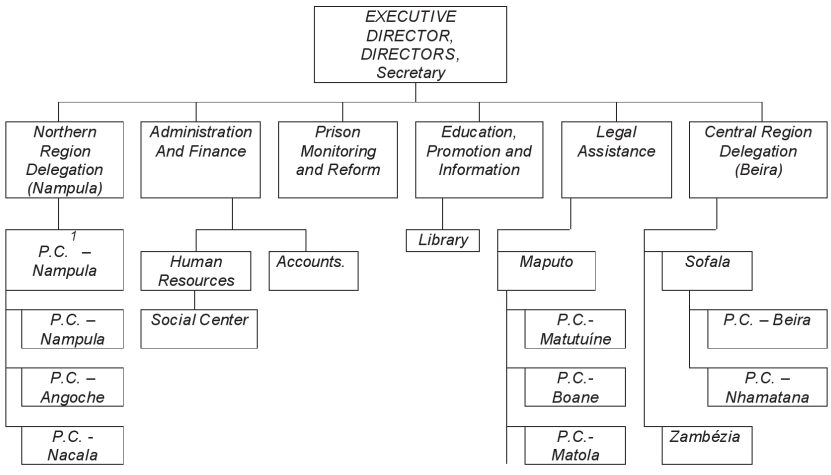
The League is a relatively new institution with a highly centralized structure. The majority of its human and financial resources are concentrated in its head office, located in Maputo city. Moreover, it is an organization personified by its president, Alice Mabota, whose courage has enabled her to resist pressures and external obstacles. The structure and the profile of the League are, to a great extent, defined by its President's powerful personality.

Moreover, this stance also characterizes relations within the institution – which are vertical – with paralegal staff and support services personnel subordinate to lawyers and these, in turn, to the president.[18] The very image of the institution is safeguarded by the rigor imposed by the president. Misbehavior by members that might damage the organization's prestige is promptly sanctioned by the president.

However, from the outset the LDH has always struggled with a lack of full-time lawyers. It only has professionals who are hired and paid for the work they do. There are strong indications that this situation can result in some of them practicing privately as lawyers within League premises and transferring the cases that involve less money to the institution itself.

Finally, the paralegal centers (PCs) located outside Maputo struggle with difficult conditions, both in terms of premises and equipment. Sometimes paralegal staff even lack basic working conditions, such as chairs and office desks.

Figure 9.1: Organization of the League's head offices (in 2000)



The Development of the League

The League has extended and developed its structure and, at the time when the research was carried out, covered large areas of the country.[19] This situation requires very tight and very much more visible coordination. However, financial and staffing constraints mean that there is inadequate supervision of the paralegal centers.

In addition, centralization in the head office, accompanied by bureaucratic procedural rules, can constrict the activities of the paralegal staff. For example, the credentials of paralegal staff in the Matola Center (Maputo province) must be obtained from the head office in Maputo. In cases where these credentials are required by other entities, this bureaucratic condition makes proceedings even slower. Even in the head office, as solicitations are increasing, the supervision and sanctioning of paralegal staff is inadequate. Furthermore, there are no guaranteed mechanisms for any ongoing interaction that could anticipate errors arising out of the inadequate training of the paralegal staff.

The Scope of the League's Activities

Given the general lack of action on the part of the higher state institutions to put an end to human rights violations by public and private entities, the League appears as the main denouncer, and therefore mobilizes national and international public opinion on the human rights situation in Mozambique. Following the creation of the LDH, the issue of human rights has begun to be debated in the country in a much more open and incisive way. The pressure that the League exerts on the state has, to a certain extent, found a response, if we consider the substantial reduction in cases of police abuse in recent years. The coverage of the so-called *Tchembene case* by the LDH was instrumental in forcing police authorities to initiate criminal proceedings; it precipitated the downfall of the Minister of the Interior at the time, who was strongly suspected of illegal conduct.

According to the League's 2001 Annual report, the Maputo office handled 731 cases, two thirds of which were classified by the LDH as labor and civil matters. The great majority of civil matters are filed by women and involve questions of child custody, child support, alimony or separation payments and inheritance matters. It should be pointed out that, out of 252 labor cases, about half of them (128 cases) were settled by out-of-court mediation conducted by the League's paralegal staff. Finally, 109 cases were classified as criminal (Liga de Direitos Humanos, 2001).

Nowadays the LDH is an essential point of reference as an institution that defends human rights. Its legitimacy in the community is unquestioned. Moreover, the maturity and credibility of its programs of action has helped mobilize financial resources from international agencies.

As reported, the League receives a very heterogeneous selection of cases and handles situations that extend beyond the legal sphere. The subjects under discussion do not follow rigid criteria, in contrast to the proceedings in judicial courts where discussion meets the criteria of *legally relevant material*. Ordinary citizens have problems

and face social conflicts which need to be resolved. They usually find a response in the League, regardless of the legal nature of their problems. User participation is much more widespread. The absence of solemn formalities when dealing with people permits broad-based participation in the relevant hearings. In addition, there are no so-called limits to the cases on trial. Cases can be discussed and (re)discussed several times. Everyday language and the national languages predominate, so that there is no need for an interpreter, facilitating free dialogue between members and users.

The Mozambican League for Human Rights plays a substantial role, not only in improving the conditions for citizens' access to justice, but also in denouncing actions and omissions which contend with the rights, freedoms and guarantees of citizens. The League often replaces the government and the courts, performing functions that, according to formal law, are reserved for them.

In Mozambique, as in other peripheral countries, the contingencies of democracy – intersected by long periods of war – and even the processes which gave rise to the third sector, have made relations between it and the state much more unstable and problematic. There is great resistance and many constraints on its activities, as is the case today with the LDH. Given that, on its own the extremely weak state is performing its role inadequately, new forms of collaboration with the community need to be found in order to guarantee that its power is extended more effectively. As Santos affirms, "complementarity between the third sector and the state is, in democratic countries, the other main way of creating a public, non-state arena. For this to happen, however, it is necessary to distinguish between complementarity and substitution" (1999: 46). In addition, the LDH can grant Mozambique very important subsidies in its field of activity.

3. Domestic Violence: Gendered and Child Violence – the Role of the NGOs and the Maputo Juvenile Court

The emergence of the League has provided an impetus for the creation of other NGOs with identical aims, although with very different profiles in relation to their specific objectives. There are various organizations which defend the rights of the most vulnerable groups in society in general and the rights of women and children in particular.[20]

Gendered and child violence has become a worldwide problem covering all aspects of the lives of women – the family, the workplace and the public arena. Although efforts have been made to understand the nature and global dimensions of violence in order to define more efficient strategies to combat it, it is only very recently that gender theories have been incorporated into an analysis of violence.

The International Context

The United Nations Decade for Women (1975-1985) triggered a focus on the problem of gendered violence. During this decade, world summits and conferences took place, organized by the United Nations, during which themes relating to equality, development and the need to increase the role of women in production and development were

presented, both by governments and NGOs. However, even in the mid 1980s it was recognized that in spite of the integration of women into development, they continued to play a subordinate and dependent role, which led the feminist movement to raise the issue of violence against women and the violation of human rights.

Even at world events dedicated to women, where the theme of gendered violence was on the agenda, there were few speeches delivered on the subject (*e.g.* the Copenhagen Conference); five years later at the Nairobi Conference (1985) the theme of violence received more attention, although it was not considered relevant to development.[21] By 1986, during a meeting in Vienna, the theme of violence against women within the family was given priority, resulting in the United Nations Convention on the Elimination of All Forms of Discrimination Against Women. The Declaration of the Elimination of Violence Against Women (December 1993) defined violence as one of the gender-based forms of discrimination and inequality. The culmination of this process occurred at the Beijing Conference in 1995.[22] Discussions on violence against women within the family, within marriage, in the workplace, in the public arena, and against children took place, examining different perspectives. The very active participation of Mozambican NGOs and government organizations at the Conference, which contributed towards the theme receiving the attention it did, should be emphasized. In addition, the networks that were established after Beijing became an inspiration for the start of an open process of challenging and combating violence.

The Debate on Domestic Violence in Mozambique

The debate on domestic violence in Mozambique has been particularly intense since the start of 1996. At that time various public figures and particular members of various women's organizations were deeply involved in debating the issue, both on television and in the newspapers.[23] The debate was highly indicative of the ideas which common sense conveys of domestic violence and the place of women within the family. That is to say, the 'preconceived ideas' about violence were full of meanings based on presuppositions about the construction of masculinity and femininity and about the relative positions of women and men. It should be noted that when we speak about common sense, we are referring to the dominant discourse which is imposed and conveyed by social institutions and which, by gaining the appearance of a consensus, becomes even more effective.

However, in general, one of the areas of litigation absent in the courts is that of domestic violence, due to the barriers which its victims experience in terms of access to the law. Domestic violence constitutes a particularly visible manifestation of the imbalance of power between women and men and occurs at all levels, regardless of any specific cultural, religious or class characteristics, even when it assumes different forms. Domestic violence is revealing of the system of male dominance, particularly at the level of the institutions of marriage and the family. As the research carried out – as part of a project on domestic violence[24] – has shown, this phenomenon can only be understood through the social roles that men and women are destined to play,

which attribute decision-making responsibilities and control of resources to the former. We aim to treat domestic violence not only descriptively but also by considering the representations of the agents involved, which can contain different perceptions according to whether they are male or female. Nevertheless, they are based on an acceptance of common presuppositions, such as the subordination of women to male authority.

It is only through this perspective, which contextualizes domestic violence as part of gender relationships and as yet another mechanism of social control and preservation of the patriarchal order, that social acceptance of this phenomenon can be explained. Throughout our study we saw that fathers, family members, neighbors and even professionals from legal and social services institutions became accomplices to domestic violence by preaching acceptance or minimizing the complaints made by victims of violence. This is one of the reasons why many women feel intimidated and incapable of asking for help in exercising their rights to life and physical integrity.

Although gendered violence may be increasingly incorporated into the human rights agenda and is becoming increasingly recognized in universal models for equality and social justice, these models are ignored when applied to women.

The Increasing Visibility of the Problem and Political Will

The increasing participation of women and men in the struggle for respect for human rights has, to a certain extent, influenced the visibility of the problem of domestic violence. Campaigning strategies will only be effective if there is the political will to put domestic violence into its true perspective, given that it affects over half the population of the country. It is necessary to recognize publicly, and without any ambiguity based on cultural or traditional justifications, the unacceptability of gendered violence. Often public discourse condemning violence does not, in itself, generate change, but it may be decisive in facing up to the resistance of patriarchal institutions, since women have no real power to alter the situation.

It therefore becomes crucial that legal mechanisms are created for combating domestic violence, which, as has already been mentioned, must envisage a change in the political will of the government.

Our research has shown that there is an important relationship between domestic violence and the legal system. Currently there is no law that makes domestic violence a crime in Mozambique. Many women believe their spouses have the right to beat them and cultural pressures discourage women from taking action. As a result, domestic violence is only judged as a minor physical offence. In fact, the Penal Code[25] today has still not been updated with regard to punishment for bodily harm committed by one spouse against another or by parents against their children, the crimes of abuse, rape and procurement for prostitution, adequate protection for women who are victims of violence and the ill treatment of women within the family.

However, once again, the NGOs are playing an extremely important role by publicly defending women's rights and denouncing their abuse, both in public and private

arenas. For example, the recently approved Family Law may serve as a precedent on which future gains in gender-related legal reform can be consolidated.[26] In fact, the work carried out by a network of women's organizations has already succeeded in establishing domestic violence as grounds for divorce. Today, it is advocating new legislation to criminalize spousal abuse. The network is also seeking to enforce inheritance laws for polygamous unions. The Constitution states that all wives in a polygamous union should be treated equally when their husband dies and should inherit property. Yet only too often these women are left with nothing.

The Role of the Maputo Juvenile Court:[27] An Emerging and Localized Justice

In addition to women, domestic violence also victimizes children through lack of parental support or negligence and the psychological, physical and sexual abuse they may suffer.

The Maputo Juvenile Court is a good example of how the rights of children may be promoted through the combined actions of the NGOs and the General Attorney's Office, who have already brought many cases involving family conflicts before the courts in order to defend the rights of minors and their mothers.

Until 1998 less than one thousand juvenile cases were filed annually, but this figure rose in 1998 to 1,210, a figure that represented over half the civil cases filed in the city (2,182 civil cases).[28]

It is essentially women (domestic employees, workers, etc.) who resort to the Maputo Juvenile Court in order to obtain alimony for children under 12 or to sue for divorce, as a result of a family separation.

The Maputo Juvenile Court responds to a specific demand in the city of Maputo, as a result of an increased awareness of women's and children's rights through access to the General Attorney's Office and some of the NGOs, such as the Mozambican League of Human Rights or MULEIDE. In a sentence, the promotion of child justice in Maputo is the result of a combination of four factors: the role of the NGOs in raising awareness of children's rights; the existence of a specialist court; the legal role of the Attorney's Office in this jurisdiction; and the speed of the proceedings.

Conclusion

In Mozambique legal representation and defense were nationalized after independence (1978), when private advocacy and legal representation were banned. Following the Peace Agreements and a change in the political regime, in 1994, private advocacy was once again sanctioned and the Mozambique Bar Association was founded. At the same time the National Institute for Legal Assistance (INAJ), which later became the Institute for Legal Assistance and Representation (IPAJ), was created with the aim of providing a state system for access to justice and the law for those who were unable to contract the services of a lawyer.

The legal services market may be defined as a market which contains few lawyers, almost all of whom are based in Maputo, offering services which are prohibitively expensive for the vast majority of the population.

The state system of access to justice and the law (IPAJ) does not cover the whole country either, since it centers on Maputo, functions poorly and is inefficient. We identified five major problems: inefficient leadership and management in the IPAJ; a lack of political commitment; a lack of financial and human resources; a lack of dialogue and links with the NGOs; and the *de facto* privatization of the system, as a result of which the IPAJ technicians operated according to market principles.

In Mozambique, access to justice and the law is therefore very selective – given the inability of the public legal defense system (the IPAJ) to provide an adequate service and to function efficiently and the difficulty of hiring lawyers due to cost and scarcity – so that the constitutional objective guaranteeing this right has yet to materialize.

The human rights NGOs are the most prestigious organizations in the eyes of citizens, due to the legal information and defense services they offer. Their geographical base is also distinctively different, since some, such as the Mozambican League of Human Rights (LDH), are represented in all the provincial and some of the district capitals. In 2003, for example, the LDH in Maputo accepted over 1,000 cases of varying types (labor, civil and criminal). These NGOs receive international aid and operate with a combination of lawyers and paralegal staff. The former carry out all the activities that are defined by law for their profession. The paralegal staff are responsible for providing supplementary legal information and support services and for extra-judicial conflict resolution.

The activities of the League have provided an impetus for the creation of other NGOs with identical aims. There are various organizations which defend the rights of the most vulnerable groups of society in general and the rights of women and children in particular.

The Maputo Juvenile Court responds to a specific demand in the city of Maputo and is essentially used by women to defend the rights of children under 12, and to sue for divorce, as a result of a family separation. The emergence of child justice in Maputo is the result of a combination of factors: the role of the NGOs in raising awareness of children's rights; the presence of a specialist court; the legal role of the Attorney's Office in this jurisdiction; and the speed of the proceedings.

In sum, the endemic lack of legal defenders is a feature of many African countries. On the one hand, for legal assistance to be provided effectively to the needy there must be enough trained defenders and they must be paid for the services they provide. On the other hand, it would be illusory to expect the Government to be able to pay civil servants in sufficient numbers, given the fact that the entire justice sector receives only a very small share of the overall state budget. Therefore, privileged legal actors must be involved in reforms, but must not be allowed to take them over, much less obstruct them.

The picture present in Mozambique is merely a much sharper and more severe image of what happens in other countries and continents. It is therefore important to avoid certain errors made elsewhere – with excessive corporate professionalism blocking reforms leading to increased dejudicialization or anything else that may affect the potential income of lawyers. Consequently, initiatives that combine the efforts of public institutions, NGOs, universities and private lawyers are extremely important, so that the most pressing demands can be addressed, especially in the criminal field where personal freedom is at stake.

Notes

1 On this subject, see also chapter 2.
2 National Service for Legal Consultation and Assistance.
3 National Institute for Legal Assistance.
4 Institute for Legal Assistance and Representation, approved by Law no. 6/94 of 13 September. The organic statute of the IPAJ was only approved a year later, in 1995 (Decree no. 54/95 of 13 December).
5 In Portuguese, *Ordem dos Advogados de Moçambique* – OAM.
6 i.e. with the aim of guaranteeing economically unprotected citizens the right to defence.
7 All Law Faculty graduates have to dedicate some time to clerkship before becoming full lawyers.
8 Currently, a legal technician is someone who has attended classes in a law faculty. He/she does not need to hold a Bachelor's degree to be admitted to the IPAJ (see below).
9 Since the late 1990s various new Faculties of Law have opened in the country. On this subject, see chapter 6.
10 The Southern African Development Community SADC – is a regional organization uniting fourteen countries from southern-central Africa, aimed at coordinating development projects. On this subject, see chapter 4.
11 The Ministry of Justice – which as an institution supervises the activities of the IPAJ – cannot even pay the minimum IPAJ operating costs at central and provincial level.
12 Also, over the last few years, the IPAJ Nampula office has been supporting another 20 legal technicians through regional governmental funding.
13 However, the statute of IPAJ clearly states that their members must give adequate legal assistance and aid free of charge for those who, for economic reasons, are unable to engage their own attorney (Article 8 of Decree no. 54/95).
14 *Liga Moçambicana de Direitos Humanos,* in Portuguese.
15 Due to lack of time and financial resources and because it had not been created when the research work was planned, it was not possible to develop the same type of work on the *Associação Direitos Humanos e Desenvolvimento* (Association for Human

Rights and Development – DHD), an organization whose formal objectives are identical to those of the MLHR. Moreover, since 2000 the activities of the DHD have declined dramatically for several reasons and the association has almost disappeared from the political landscape.

16 Paralegal Centers. The category of paralegal assistant was inspired by the experiences in several Third World countries where citizens without full technical training give legal support to fellow citizens – above all, the most needy – in situations where state and even private legal assistance is scarce. Paralegals dedicate themselves mainly to providing defence and legal assistance; in many cases they also develop conciliation and mediation activities, make new laws known (mainly in the field of human rights), denounce situations of arbitrary arrest, etc.

17 Maputo city has the status of a province; therefore it is divided into five municipal districts, previously known as 'urban districts'.

18 The League's activities have spread through Mozambique, through the complex networking of paralegal centers, both in the central and northern part of the country. Each of these regions constitutes a regional head office. Each regional head office controls various subordinate centers.

19 In 2002 the League had 20 offices spread across the country, employing a total of 40 paralegals and a significant number of activists.

20 Among the very active NGOs one could refer MULEIDE (Women's Association, Law and Development), aimed at promoting and defending the legal rights of women, particularly as they pertain to improving social conditions and ensuring participation in the development process; ORAM (Rural Association for Mutual Support), and UNAC (National Peasants' Union, coordinating various grassroots associations); these two main peasant organizations have been pivotal in the defense of land rights of peasants (women are the primary cultivators of family land in rural areas).

21 Reference to the World Conferences on Women, held in Copenhagen and Nairobi, which have contributed to the progressive strengthening of the legal, economic, social and political dimensions of the role of women (editor's note).

22 Corresponding to the fourth United Nations World Conference on Women.

23 In relation to this, see the article by Meneses and Adam (1996).

24 This study was carried out under the scope of the program 'All against violence', initiated in 1996 by *Forum Mulher* (a Mozambican network of women's organizations).

25 The current Penal Code, with several changes, dates back to 1886.

26 The new Family Law approved in 2004 raises the minimum age for marriage from 14 to 18, allowing women to inherit property in divorce cases. This legislation represents a step forward for the women of Mozambique, who have long suffered from profound discrimination. It also legally recognizes traditional marriages, which constitute the great majority of marriages in Mozambique.

27 In Mozambique, juvenile justice is administrated by outdated legislation dating from colonial times. Whether dealing with minors 'in moral danger', minors who are 'undisciplined or abandoned' or minors 'in conflict with the law', measures are always applied to protect and defend minors, seeking to prevent them from turning to a life of crime. Promoting the well-being of deprived, abandoned, ill-treated, neglected or traumatized children, as well as the education and correction of juveniles who commit crimes, therefore forms part of the instrumental, social control and resolution of litigation functions.

28 For 2002 and 2003 the figures are: 2,132 cases filed in 2002 and 1,764 the following year.

10

Community Courts

**Conceição Gomes, Joaquim Fumo,
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1. The Creation of Community Courts

In the process of breaking with and dismantling the colonial state after independence, the new Mozambican state created a new judicial system (Gundersen and Berg, 1991; Gundersen, 1992; Lundin, 1994).[1] In this judicial system – the main objective of which was to serve all Mozambicans – the popular courts, at different levels and with different forms of organization, were the guarantors of the implementation and reproduction of popular justice.[2]

The Mozambican Constitution of 1990 abandoned the judicial system of 'Popular Justice' and created a new paradigm. The new political-constitutional framework adopted a judicial organization "consistent with the new philosophy of the organization of the State and the many democratic institutions in the country" (Preamble to Law no. 10/92 of 6 May – the Organic Law of the Judicial Courts).

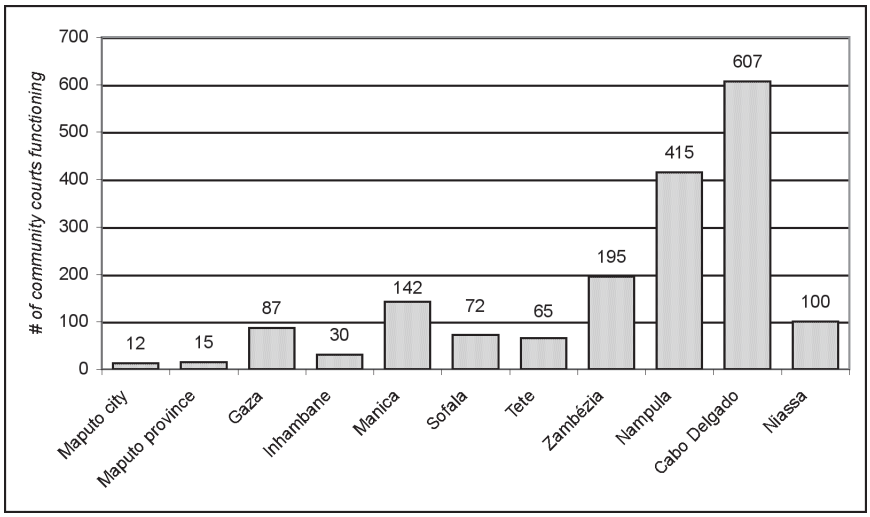
The community courts created by Law no. 4/92 of 6 May remained outside this judicial organization. The main objective of these courts was to fill, at the base level, the void created by the formal abolition of the popular courts. Defending the supremacy of social justice, equal rights for all citizens, social stability, the value of tradition and many other social and cultural values, the Law recognized that the country's experiences of a community style of justice "indicated the need to value and deepen it, taking into account the ethnic and cultural diversity of Mozambican society." It therefore justified the creation of "bodies which enable citizens to resolve small differences within the community and contribute towards harmonizing the

various practices of justice and enriching rules, habits and customs, thus leading to a creative synthesis of Mozambican law" (Preamble to Law no. 4/92).

Despite defining the parameters within which the future community courts should develop their work, Law no. 4/92 was never regulated, which means that the Mozambican state never formally fulfilled its desire to create these courts.[3] For almost all the judges in the community courts, this legislative omission represents a strong sign of delegitimization on the part of the state.[4] Compared to the former popular courts, which formed the base of the official judicial system, the community judges interviewed considered that the state, by not establishing a legal framework of operations for the community courts and by not making support available, particularly material support and training, delegitimized them both in the superstructure and in the communities.

Although the available data regarding the distribution of community courts in Mozambique is quite feeble, figure 10.1 is indicative of their strong presence in the country (a total of 1,740 community courts).[5]

Figure 10.1: Distribution of Community Courts by Province (2004)



Source: Ministério da Justiça (2004). *Relatório ao X Conselho Coordenador*. Tete, 13-15 July 2004.

The Relationship Between Community Courts and Official Courts

In general, the provincial courts do not have any links with other non-judicial bodies involved in the resolution of conflict. As for the district courts, their relations vary according to geographical proximity, the personal bent of the judge in the judicial court, the legitimacy and efficiency of the other bodies, their willingness to cooperate (particularly in the case of the traditional authorities) and the implementation of

research and support projects specifically for the community courts, which can also benefit the judicial courts and the judges themselves (as was observed in the province of Cabo Delgado).

There are cases of close collaboration between the district courts and community courts which may assume various forms. In the district of Mueda (Cabo Delgado province), for example, the district court and the community courts in the district headquarters have maintained a stable relationship which has progressed from discussion and clarification of the responsibilities of community courts to the joint definition of the sanctions to be applied in various cases and the rapid handling of cases emanating from the community courts. Although on a different level of intensity, a similar situation was observed in the district of Alto Molócuè (Zambézia province). Here the relationship had developed mainly into the presentation of monthly reports to the district court and the depositing of the revenue collected in the Bank.

The official judicial system does not wish to function as an appeals body or an alternative to community justice when the latter is not efficient or when its decisions are not accepted by one of the parties involved. For instance, in trial sessions observed in a provincial court, the judge refused to hear family conflicts (in one case, this involved the crime of bodily harm in which the victim was the sister of the aggressor and in another, material damage carried out by a husband) and sent the parties involved back to their neighborhood. According to the judge, these types of conflicts "are not for a judge to hear, but should be resolved within the family or in the neighborhood". He was referring to the structures of the local *grupos dinamizadores*,[6] the community courts and the families themselves. In both cases the accused[7] benefited from legal defense by being appointed a legal assistant. However, in these situations, denial of access to the law affected the victim and had nothing to do with any problem on the part of defense, since both cases had been brought before the court by the attorney's office.

The Law that created the community courts was never regulated. This law limited itself to defining the courts' institutional framework. It determined that the judges of the former popular courts at the level of the localities and neighborhoods would continue to exercise their functions until the first elections for judges for the community courts were held.[8] However, as there have been no elections, the judges at the time kept their positions. Due to reasons arising out of normal occurrences and circumstances of life, such as death, illness, migrations caused by the long civil war and professional moves, the body of judges naturally suffered some reductions. These reductions were also affected by some people leaving their posts due to the loss of social prestige attached to the position and to the feeling of having been 'abandoned' by the government, which was (and is) the case of many of the judges, as well as the unpaid nature of the work. In some courts these absences were filled by new members. In the absence of any regulatory law to define the rules of recruitment, these replacements were made from within the same socio-political environment as that of the previous judges. The new judges were elected through the local *grupos dinamizadores*,

proposed by neighborhood structures or by the direct intervention of individuals connected with the Frelimo party.[9] It may therefore be said that the creation of community courts by the state, to function as a bridge between the judicial system and the community, failed due to a lack of political will or attention. A vacuum was created at this level, which, as soon as political conditions allowed, has been filled by other social regulation mechanisms, the most important of which are the traditional authorities.[10]

2. Brief Characterization of the Community Courts

The community courts are, therefore, a hybrid legal entity which combines the characteristics of official justice with those of unofficial justice. As the law that instituted them was never regulated, in sociological terms the characteristics of unofficial justice predominate.

In the areas in which they remain active and operational, community courts are entirely maintained by the strength of their previously conquered legitimacy. Throughout our period of research we had the opportunity to observe some courts which were very active and involved with the community. Among these, we wish to highlight the community court of Vilankulo-Sede (Inhambane province) and those in the neighborhoods of Mafalala, in the city of Maputo and Munhava-Central, in the city of Beira. However, exceptions do not make the rule. The human and infrastructural needs which, in general, affect the community courts, and the competition they face from the other entities involved in the resolution of litigation (the police, local *grupos dinamizadores*, the religious authorities, the traditional authorities, etc.) are contributing to their gradual disappearance as the favored centers for the *creation of a new law* and as the disseminators of rights. The crisis in their legitimacy is evident in the number of cases they handle: in many of the courts observed there is less than one case a month. According to many of the judges interviewed, the main causes of this crisis are that the state does not provide material resources (paper, pencils, pens) and financial compensation for their work, that there is a lack of training or guidelines on working rules, and that the judicial courts do not give them any support in social cases. In other words, there is no adequate institutional integration.

The Judges

As established in Article 7 of Law no. 4/92, the community courts are composed of eight judges, five of whom are full members and three are substitutes. However, in seven community courts in various regions of the country, namely Ingonane, Mafambisse, Chipangara, Morrumbala-Sede, Sansão Muthemba, Chingodzi and Dómuè, there were not even enough judges to allow the court to function with its minimum legal *quorum* (two members, in addition to the presiding judge). Other courts, although composed of three judges, are very often forced to function without a *quorum* whenever one of the judges, for some reason, is unable to attend. For example, in the Maimio Court (Cabo Delgado province), when two judges were ill, the *quorum* was made up by the secretary of the neighborhood *grupo dinamizador*, a situation which, as

we observed, was considered normal.[11] The reasons for the lack of judges in the community courts have already been discussed. About half the courts have a clerk or a messenger or both in their service.

It should also be pointed out that there is an overwhelmingly male presence. Of the 174 individuals who make up the 34 courts initially observed, only 19% (33) were women.[12] This percentage is even lower in relation to judges. Only 26 of them were women, which amounts to only 18%.

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, in some cases, particularly when the replacements are women, they do tend to be younger. In societies with a strong rural element, as is the case in Mozambique, age is very significant in relation to the exercise of authority and this is the main reason why people in such positions tend to be older than the legally stipulated minimum age.[13]

In terms of occupation, the majority are peasants (they work in the fields at their *machamba*, including most of the women), whilst others are retired people, artisans and workers. In four courts the stated profession was head of the district market, post-office worker, school functionary, health authority worker and police officer. In Murrébwè (Cabo Delgado province) one judge also stated that he was a *régulo* (traditional leader) and in Muélé (Inhambane) one was a member of Ametramo.[14]

The Politicization of the Community Courts

Given the socio-political context in which the community courts have been functioning, there is no discontinuity with the popular courts (for instance, the judges are, in most cases, still the same). Almost all of the judges in the courts observed said they belonged to the Frelimo party and many of them also participated in party organizations such as the OMM[15] and the local *grupos dinamizadores*. This duality is one of the reasons why the courts have a party identity and also a degree of ambiguity. It is also the source of the problems they confront in the exercise of their duties. The persistence of this connection – both in terms of the political loyalties of the judges and the human component and also the community court premises in which the courts operate – encourages the courts' widespread identification with the Frelimo party.

This fact, combined with a certain marginalization of the traditional power structures, has led to the increase of political bipolarization, with the community courts regarded as the instruments of Frelimo and the traditional authorities as instruments of Renamo.[16]

This identification has led a group of judges in one community court in Mocímboa da Praia (Cabo Delgado province), presumably supporters of Renamo, to create a parallel community court.

In 2004, observations of several community courts in Angoche – a municipality won by Renamo in the 2003 elections – revealed an intensification of the political differences between the parties (Renamo and Frelimo), a situation that was dramatically affecting the existence of the local community courts. Accused of being controlled

by Frelimo, the judges seemed incapable of attracting litigants. In fact, the extreme politicization of these courts had resulted in a profound distrust, by the parties, of the community courts' ability to judge their cases with the impartiality they required.

Working Conditions in the Community Courts

The vast majority of community courts observed operate in the same premises as the former grassroots popular courts. One characteristic common to all the courts is the precarious condition of the buildings where they function. Out of the total number of courts studied during the first research project, eight were held in the open air, eighteen worked in buildings offered by the *grupo dinamizador*, the Frelimo party, the Administrative Post, the school director or the Municipal Councils, and two functioned in the house of the presiding judge – one on the veranda and the other in the yard. Only six courts have their own premises.

The fact that a court operates in the open air obviously influences its activities, making them seasonal – sessions must be interrupted every time it rains.

When courts operate in buildings that are loaned, usually by the local *grupo dinamizador*, they have to be shared. This situation displeases the majority of judges interviewed. From the outset, it affects the working hours of the court. In several sessions and in various courts observed, the judges warned the parties or the witnesses during the trial session of the need to adhere to the session schedule because the room was due to be occupied 'by others' later. In addition, as observed during the trial sessions, sharing facilities means that trials are frequently disturbed by members of the *grupo dinamizador* consulting documents filed there, fetching papers, etc.

The lack of premises of their own prevents community courts in general from having any space for their own exclusive use, to keep and file their documentation. For this reason, in many of the courts the case files and other documents were stored in the house of the presiding judge or the court clerk. This situation also occurred in cases where the community courts had their own premises. Their advanced state of disrepair meant that no materials could be stored in them. Quite apart from practical concerns, sharing premises with structures linked to political parties naturally makes it difficult for the community courts to function autonomously, as well as to affirm their status as independent structures.

Even when courts operate in buildings, the furniture is very simple and sparse, generally consisting of a table or desk, chairs for the judges, one or two long benches for the parties and, in some cases, a cabinet. In some courts the parties had to bring their own benches or sit on the floor. In others, the furniture for the trial session was loaned from other nearby entities, either the local *grupo dinamizador*, the Frelimo party or others or, in cases where the courts functioned in the open air, the residents of the nearby houses. It is, however, interesting to note that, within the general precariousness in which the community courts operated, there were substantial differences in the material assistance they requested. For example, whilst the community court of Bairro Sansão Muthemba[17], in Tete city, requested a typewriter – because "the modern world

has an advanced technology" – and the "Penal Code", the community court of Vilankulo and the community court of Bairro de Machavenga (both in the Inhambane province) asked for notebooks and pencils.

Working Hours

The court schedules vary considerably. Few courts are open every day. Most are only open twice a week and on those days, few function throughout the day, usually only in the morning or in the afternoon. This situation is a result of the fact that the great majority of courts observed did not have their own premises, but had to share a building with other structures.

The fact that they cannot operate on a daily basis prevents community courts, from the outset, from intervening in urgent situations such as minor disputes between spouses or neighbors which in turn can result in many people 'running straight to the police', a frequent complaint of many community court judges. The population does not, therefore, have easy access to community court justice.

3. The Nature of the Cases

For reasons previously explained, it was only possible to gather, by random sampling, documents and data on 436 cases in 15 courts (see table 17.1). Using a form to describe the cases, we obtained data relating to the characteristics of the parties involved, access to the courts and the nature of the problems dealt with.

The socio-legal demand is dominated by marital issues (35%), followed by theft, slander, and bodily harm. There are also cases relating to debt, land and housing issues. In a more fragmentary manner, cases of suspicion of witchcraft, abuse of trust, and labor issues (related to contracts and indemnities) also occur. Additionally, the survey encountered cases involving lack of hygiene, a complaint about a large fine, a disturbance at work, the attribution of a name and the formation of a partnership, a case of sexual harassment, a rape, arson, the sale of another person's property, and an accusation of cutting firewood without authorization.

Conflicts involving relations within the family have significant weight in our sample, particularly marital conflicts, although there are also issues relating to minors, the division of property and the breach of promises of marriage (the latter amounting, on the whole, to 169 cases – 48% – out of a total of 350).

Marital issues were the most frequent type of litigation in all the community courts observed. The great majority of cases involved adultery, domestic violence, abandoning the home, lack of support from husbands and divorce claims. In the community court of Mafalala (Maputo city), for example, the plaintiff wanted a divorce "because the first wife is possessed by a bad spirit".

Table 10.1: Types of Issues in the Community Courts Studied (1996–2000)

Type of issues	Number of cases
Marital conflicts	121
Marriage	9
Minors	23
Family conflicts	10
Division of property	6
Housing	13
Burglary (petty theft)	34
Bodily harm	24
Abuse of trust	8
Witchcraft	10
Land tenure	18
Debts	21
Contracts	4
Compensation	6
Labor issues	5
Other	9
Total	**350**

Source: CEA/CES, 1999.

There are major differences in the working conditions of the community courts and in the way in which they operate. However, these differences, as we shall see, exist mainly in terms of emphasis and degree. In fact, as we are dealing with a community justice which is not professionalized, aside from being informal and not subject to predefined standard rules and procedures – as is the case in the judiciary and the procedural codes that govern formal justice –, this operational diversity is only natural. Moreover, their non-professional nature and the structural differences confer different competences on the community court judges and result in specific kinds of behavior. For example, a presiding judge who is more familiar with the judicial courts, as is the case with the presiding judges at the Bairro da Liberdade community court (Inhambane city) and the Mafalala community court in Maputo city (who are both also elected judges in the judicial court), will be more likely to reproduce the procedures of formal justice. Naturally, the level of education is also reflected in the litigation procedures, particularly in relation to written records.

The Parties

Plaintiffs comprise a more or less equal number of men and women, with men slightly outnumbering women.[18] At first glance this information does not seem to correspond to the nature of the conflicts, which predominantly constitute marital litigation, with most of the complaints being brought by women. In fact many of the cases, particularly those in which a wife has been abandoned, are presented not by the woman concerned but by her father, who appears at the trial as the plaintiff.

In terms of the accused, men predominate substantially, representing 68% (285 men and 132 women). Accused males are the majority in samples from all the courts, with the exception of the community court of Bairro da Liberdade (Inhambane city), in which both men and women brought forward complaints in identical numbers.

There were no differences in relation to the age of the plaintiffs and of the accused. In both cases, the most common age group is between 20–40 years, followed by the 40–50 group. However, the main incidence for both plaintiffs and accused was in the 20–30 age group.

Housewives predominated amongst the plaintiffs – which is explained by the high number of cases relating to family conflicts – followed by workers, service sector employees, and small farmers. On the side of the accused, there were no significant differences in terms of occupation, although they included fewer housewives and more unemployed people. There also appeared to be more security agents (police and military), as well as more senior officials and retired people. This distribution seems to indicate that the socio-economic status of the clients of the community courts, whether plaintiffs or accused, is similar.

The Complaints

Complaints submitted directly to the court predominated – 57% of the complaints were presented directly to the community court; in other words, the plaintiff had not previously resorted to any other community body to resolve the dispute. There were, however, a significant number of cases in which the offended party had previously presented a complaint to the local *grupo dinamizador* or to the police (24% and 14%, respectively). In addition, some other cases had been brought before the community court via the judicial court or Ametramo.

This absence of reference to an intermediary structure does not mean that it did not exist. In the sessions observed we found various cases in which, although it was not reported that the case had been taken up by another community body, this was in fact what had happened. In general, when a case is transferred from another community body a document is created (a "guide" to the transfer of the case) which is directed to the community court. As the transfer documents show, the deescription of the case can be very brief or more detailed. The document is signed by a representative from the body that is forwarding the case and bears its stamp.

Court Proceedings

In the judicial courts, the procedural formalities required by procedural law constitute one of the pillars on which official, formal justice rests and represent one of the fundamental guarantees for those who have recourse to them. The procedural rules are uniform and the assumption is that they are known and used by all agents of justice. In contrast, community justice is a non-professional form of justice based on oral, informal and, naturally, non-uniform procedures. For this reason, it is a very heterogeneous form of justice in terms of proceedings. In the case of the community courts, this heterogeneity also arises out of the fact that they operate outside any formal, organizational context, and are left to their own devices and to the local ability to improvise, innovate and reproduce.

There are, in fact, significant differences between the courts, whether in terms of the organization of proceedings or the language used. In some courts, as is the case in the community court of Mafalala (Maputo city), Munhava-Central (Beira city), Bairro da Liberdade (Inhambane city) or Chipangara (Sofala province), the very close relationship with formal justice has led to a selective adoption of the formulae, styles and language inherent in that type of justice. The proceedings are more formal, with all complaints recorded in writing as a document of notification or formal complaint.

The court record sometimes contains other notes, such as an indication that a given party or witness has been notified, the terms for payment of compensation, or the setting of a trial date. Proceedings are, in general, handwritten. However, in most courts we observed, the complaints are registered in a much more summary form: on a school notebook, merely recording the identification of the parties and the object of the litigation.

It is interesting to see that, even in the most formal of proceedings, the use of legal terminology was combined with the use of simple language, directly linked to the oral nature of the surrounding culture. In any case, this formality did not influence the outcome of the litigation. It seemed, above all, that the prime objective was to establish a distance vis-à-vis the parties and to legitimize the power of the court. When the statements were written down, they were signed by the party who had made them and by the presiding judge or his/her substitute. Having received the complaint, the accused was notified to appear on a particular day and time at the court.

In this respect, too, there are many differences between courts; whilst in some courts notification may be written on any sheet of paper (including, in one case, the blank space on an election leaflet), in other courts embossed sheets of paper existed. In addition, in these notifications, the procedural law of the judicial courts was used as a means of imposing the power of the community court. In the cases to which we had access, these notifications always ended with the threat of punishment in accordance with the law.

There were no significant differences in terms of proceedings during the hearings. Once again, the differences were, above all, those of emphasis and depended very

much on the presiding judge. The judges use their resources in the way they feel is most effective in order to impose the power and the decision of the court. Consequently, the hearings can be ritualized to a greater or lesser extent, with greater or lesser recourse to the 'threat' of the law. The hearings always created an effect of distance between the parties and the court, achieved mainly by the distinction between the area reserved for the court and that of the parties.

All the hearings observed took place in a context dominated by rhetoric, translated into verbal expressions, silences and gestures. National languages predominated in the hearings; Portuguese was very seldom used. The court used the same language as the parties; there was no need for interpreters or rephrasing. On rare occasions there was recourse to the concepts and formulae of judicial law, and when this happened, it was always done very selectively and instrumentally, with the aim of legitimizing the court. The parties never intervened spontaneously. In many courts, excessive gesturing by the parties was punished.

The Decision

The most common verdict was condemnation (58%), irrespective of the nature of the conflict concerned. The sentence could consist of the payment of a fine, the payment of compensation, the restoration of a situation to its normal order, the termination of marital or family problems, or the authorization of the payment of alimony. There were, however, cases in which the guilty verdict was reversed, that is to say that the plaintiff rather than the guilty party was condemned if it was proved that the plaintiff had been lying, had behaved in an offensive manner during the trial, or had presented a complaint without proof against the accused. In many cases, the payment of a fine or an indemnity was associated with other sanctions, such as, for example, community service and *levar chamboco* (a beating with a wooden stick).

Many complaints arising out of family conflicts ended in agreement between the parties, especially when they involved child support payments and the payment of compensation by either the plaintiff or the defendant. Reconciliation of parties is most frequent in marital conflicts. The judges always sought to obtain reconciliation between the couple or between the accused and his relatives. When this was unsuccessful, the conflict ended with the separation of the couple and the subsequent division of property. Our sample contained very few examples of cases being withdrawn – only 6 out of 291 cases.

In various situations the court decided that cases had to be dealt with by another entity which had more specific powers to resolve the conflict. The dispute could therefore be sent back to the family, to Ametramo or to the judicial courts.

In situations specifically involving pending cases, the reasons given for this were as follows: in five cases this was due to the non-appearance of parties or witnesses; in six cases the court decided to delay the trial; in one case it was decided, on the request of the plaintiff, "that she should be submitted to certain traditional investigations to determine the truth about whether she had sent evil spirits to her nephew's house, as

the spirit has said"; finally, in another case, this was because the wife of the accused "had acquired a pregnancy".

Analysis of the documentation enables us to verify that pecuniary sanctions have become, in recent years, the standard measure for all types of litigation. The courts have virtually ceased to apply the other measures envisaged in the law – such as community service, or the loss of any right whose immoderate use had led to the transgression of Article 3, no. 2, of Law no. 4/92 (paragraphs b and d) – as was often the case at the time of the popular courts. Although it is not acknowledged by the judges in these courts, it may be stated that very frequently the amounts of the fines and legal charges levied considerably exceeded those stipulated by law, which certainly affects the access to the justice offered by the community courts.

Conclusion

Community courts in Mozambique today are entities for resolving very complex litigation. They have taken over the human and institutional legacy of the popular courts, but not their formal organizational legacy. Unlike the formal courts, they are not part of the judicial structure nor do they receive any technical and material support from the judicial courts. Under these circumstances, wide variations in the way community courts work are only to be expected. With all kinds of human and infrastructure shortages, and faced with competition from other litigation settlement mechanisms – from the police to the *grupos dinamizadores* to the churches to traditional authorities –, the community courts have been left to their own devices and to the local capacity for improvisation, innovation and reproduction. This explains the almost chaotic variation in the way in which they operate. The absence of any recognition of this *de facto* situation has led to the absence of any mutually beneficial interaction between official justice – which is almost exclusively at the service of the urban population – and a form of justice that is not official but reaches the areas where most of the population live.[19] This poses the risk of formal justice becoming more and more formalized and of informal justice not having a regulatory framework in which constitutional principles and respect for human rights represent the limits of its autonomy.

As legal hybrids community courts are producing a 'creative synthesis of Mozambican law'. However, the uncertain environment in which they operate, if not corrected soon, could in the short term jeopardize their very existence. In light of this, Mozambique has been developing a broader project for legal reform since 2003, which is aimed at democratizing and decentralizing the court system whilst improving access to law and justice and this project includes, as one of its pillars, the reform of the community courts.

Notes

1 On this subject, see chapters 1 and 2.
2 The popular courts were considered the instrument which enabled the people "to resolve the problems and difficulties arising out of daily life in the community, the

local area and the village and neighborhood communities." The popular courts were also considered to be a guarantee of the consolidation and unity of the Mozambican people, "the great forge in which the people create the new law which continues to drive out the old law of colonial-capitalist feudal society" (Preamble to Law no. 12/78).

3 The Law of the Community Courts is currently (2005) being reformulated, as part of a broader reform of the justice system in Mozambique (see below). It should be pointed out that the new constitutional reforms of 2004 defined the existence of several categories of courts, including community courts (Article 223).

4 This chapter refers mainly to the study carried out during the first research project, from 1996 to 2000.

5 Law no. 4/92 defines the institutional framework of the community courts. For example, it clearly states that the provincial governments are responsible for establishing these courts (Article 12). However, throughout the first research project little was known at provincial court level about the activities carried out by these courts.

6 See note 34 in chapter 1.

7 When communicating in Portuguese, community courts tend to use the word 'accused' instead of 'defendant', the word in use in the judicial courts.

8 Law 4/92 states that the provincial governments should establish the mechanisms and time frames for the election of community court members (Article 13) and that the district judicial courts are responsible for controlling the process.

9 The party in power since Mozambique became independent. After the introduction of a multi-party system in the early 1990s, Frelimo has won both the presidential and the legislative elections.

10 The subject of traditional authorities is analyzed in more detail in chapter 11.

11 Of the 34 community courts studied during the first project, less than half of them had five or more judges. The data available since 2003 indicates a clear deterioration in this situation.

12 In some community courts, in addition to judges, there were also other counsellors, treasurers, etc.

13 By law, the minimum age for a judge in a community court is 25.

14 AMETRAMO – Mozambican Association of Traditional Healers. On the role of traditional healers in conflicts involving accusations of witchcraft, see chapter 3.

15 *Organização da Mulher Moçambicana* (Organization of Mozambican Women), an organization which is part of Frelimo.

16 Renamo is the main opposition party in Mozambique.

17 *Bairro* corresponds to a large neighborhood. See note 18 in chapter 1.

18 In the cases analysed up to 2000, 195 of the plaintiffs were male and 202 female.

19 According to the last census, the rural population accounts for the vast majority of the population in Mozambique (77%).

11

Traditional Authorities

**Maria Paula Meneses, Joaquim Fumo,
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Introduction

As argued earlier in this book, the landscape of justices in Mozambique is heavily defined by legal plurality. In addition to the community courts, our study also analyzed, although in less detail, traditional authorities as entities involved in the resolution of conflicts.[1] The subject of tradition and traditional authorities, widely discussed today within the context of the social sciences and politics in Africa, is extremely complex and diverse (Ranger, 1988). Although the practices and content of these concepts vary from one setting to another, in Mozambique they are both, in general, meant to connote autochthony and authenticity. By invoking local/regional cultural practices vis-à-vis the modern state, groups create and reinforce legitimacy and authority through their own cultural constructs. However, the transformations that these entities have experienced and been subject to have imbued the content and nature of both with ambivalence.

The Mozambican state is not strongly established and has a weak ability to intervene in large parts of the country, especially rural areas. This power vacuum was filled in the colonial era by co-opting the local authorities through a system of 'indirect rule' (Mamdani, 1996a). This explains the presence of traditional authorities (tribal leaders, chieftains, *régulos*, etc.) and their subordinates,[2] whose authority, in the countryside and often in periurban areas, is legitimately recognized. Since the colonial period, therefore, traditional authorities have been a subaltern power, a form of subordinate power by which a subordinated people were ruled. Being a subordinate power, their ability to resist the interference of the dominant powers was limited.

1. The Traditional Authorities in a Postcolonial Context

In the post-independence era, the attempt by the Frelimo government to institute a modern state free from any ties to the colonial state led to the distancing of the traditional authorities as local administrative bodies. Their formal ban resulted in the need to create new local organizations, such as the *grupos dinamizadores*.[3] However, as some of the case studies show, the hostile politics of Frelimo were felt more strongly in the urban areas or areas close to the centers of power, where the state was more firmly established. This explains the fact that traditional authorities (and the other bodies of local power)[4] managed to keep functioning on the margins of official discourses and practices, by developing their own mechanisms for social reproduction. If the opposition of the Frelimo government toward traditional authorities had already weakened the penetration of the state into the rural communities, the civil war made its presence militarily unviable. Another structuring factor of the armed conflict was the party affiliations of the traditional authorities (Geffray and Pederson, 1986: 316-318; Clarence-Smith, 1989).[5]

The non-acceptance, from below, of a state structure mirroring the colonial one, together with the ongoing persistence of traditional authorities in the political landscape, led to increased resistance and opposition – on the part of community members – to the excesses of power demonstrated by the new 'modern' leadership in the country (Geffray, 1990; Lundin, 1998; Dinerman, 1999). This fact, 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.

During our fieldwork[6] we identified the presence of a complex blend of local ancestral authorities and those imposed by the colonial state (tribal headmen, 'elders', *régulos*), which has produced an intricate fabric with distinct cross-threads in terms of actors, functions, etc. In terms of cooperation with the political-administrative local state, the present situation is extraordinarily heterogeneous. Some authorities collaborate constructively with local state administrative structures, as is the case with the Luís and Mafambisse *régulados* (both in the Sofala province) and the Cumbana *régulado*, in the Inhambane province.[7]

At the same time, there are *régulos* who have stopped working and await institutional 'integration', *i.e.* from above. This was the case of the *régulo* Salgado (Tete city) and *cabo de terra* Jorge in the Zavala district of Inhambane. Others functioned almost 'independently' of the official administrative structures, either because they did not exist or because they felt themselves in competition with them (as was the case with some of the *régulados* in the district of Matutuíne, in the extreme south of Mozambique, or the *régulo* Zintambila in the province of Tete).

Since the early 1990s, the Frelimo government has been trying to neutralize the hostility of traditional authorities,[8] co-opting them by granting them some kind of subordinate recognition and participation in local administration, both in rural and

periurban areas.[9] This process was most evident in Decree no. 15/2000, which recognized local community authorities.

The same political party that once banned all traditional authorities, rituals and beliefs under the auspices of 'anti obscurantist' socialist modernization reintroduced the possibility of incorporating – as legitimate, decentralized local government – those same 'traditional' chiefs once held to be the instruments of the colonial State. In fact, according to Article 1 of this Decree, "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 or social groups". At the same time, this prepared the way for a broader understanding of the figure of the local, community leader.[10] Prompted by the Mozambican Ministry of State Administration, a two-stage process has taken place: initial recognition – by local communities – of their local leaders, followed by official recognition – by the state – of these leaders. By mid-2003 this process had resulted in more than 13,500 legitimately identified leaders from rural and urban communities. Of these, about one and a half thousand (roughly 10.7%) had by then been recognized by the state as official community leaders.[11]

2. The Traditional Authorities in Action

In the cases analyzed it can be seen that, in terms of customary law, traditional authorities act mainly to prevent conflicts from emerging, whilst the object of modern state law is to resolve situations of open dispute.

As dispute resolution mechanisms, traditional authorities are particularly important in issues involving access to land, the family (including adultery and, in some cases, divorce), debt, bodily harm, damage to property, health/sickness, witchcraft and petty theft – in fact, a very broad range of issues (Alexander, 1994; Carrilho, 1995; Cuahela, 1996; Dinerman, 1999). In all these matters the traditional authorities are the key node in a network of institutions that may include the district or even the provincial courts, the police and the local political and administrative agencies. Sometimes they are the first ones sought out by the parties, at other times they function as appeal institutions, and in yet other cases they provide advice or evidence in cases being dealt with by other institutions.

As mentioned above, the sample we used shows the extreme heterogeneity of current proceedings, although it is possible to detect some common aspects (Meneses *et al.*, 2003).

In terms of 'traditional justice', it can be seen that the *régulo* does not function as the lower instance in the resolution of conflicts.[12] Cases are normally brought before subordinates (*cabos de terra*, *tinduna*, etc.) and are only sent to the *régulo* if the latter are incapable of dealing with them.

From the cases studied, we observed that one of the great strengths of the justice provided by traditional authorities is its immediate, public, collective, face-to-face, and relatively transparent character.

The hearings normally take place in the house of the traditional authority[13] or near it, on the porch or in the garden. The frequency of these hearings varies. Certain days might be selected for the hearing, or hearings might occur when people solicit the help of the *régulo* to solve a difficult and unexpected situation. In the cases we observed, most of the *régulos* tended to hold the hearings on the weekends, particularly on Sundays. Conflict resolution is dominated by rhetoric and orality, as in the community courts. Additionally, like the community courts, the language used is, by and large, the local language of the parties involved and there is no need for interpreters. The participation of the *régulo* and his associates is essential. The *régulo* (and occasionally the *madoda* – his counselors) sit at a raised table. The parties are seated below, either in front or to the side of them. The audience sits on benches or mats. The *régulo* leads the hearing. After the session has been opened, the person leveling the complaint and the person accused normally make their case. Because the sessions are open to the public, members of the audience are usually invited to participate by presenting their explanations of the problem. This is a very important part of the process of conflict resolution and adults are, in fact, allowed to question witnesses and give their opinion on the case.

The *régulo*'s counselors also offer their appraisal of the conflict. In the regions surveyed, no example was found of a woman being a *régulo*. However, among the counselors of the *régulo* there are normally one or two women and a significant number of women are also traditional healers.

When the case involves accusations of witchcraft, the opinions of the *madodas* pertaining to the decision to appeal to healers or to Ametramo,[14] the Mozambican Association of Traditional Healers, are important.[15] At times the healers intervene and give a deposition.

After hearing and considering the problem, the *régulo* deliberates. In most cases, he attempts to obtain acceptance of the sentence from both sides in order to maintain the social equilibrium.

The main forms of sentencing, when that is the case, translate into fines, community service or physical punishment (for example, head shaving and *chambocadas* – a beating with a wooden stick). Despite being forbidden by law, corporal punishment still seems to be practiced. Several *régulos* expressed a nostalgia for these sanctions: "in the old days the authority could take action. The person was tied up and beaten. Now the authority can't beat people any more".[16] In the case of the régulado Luís (Sofala province), there was a cell in his headquarters. In Inhambane we also saw that sentencing involving physical punishment still exists, although usually the sentence also mentions the fact that the punishment can be replaced by a fine.

Case records are also variable. As this is an environment in which rhetoric predominates, we only observed one case where the sentences and the agreements reached were recorded in writing (*régulo* Luís, in Beira city). Although some *régulos* claimed that they lacked utensils (as in the community courts), it was clear that many did not know how to read or write. In some cases the notifications were written.

When the chieftains handed them out, they also explained the contents orally to the parties concerned; in other cases notification was only given orally.

All the traditional authorities levied taxes for their services. However, the amounts were extremely variable, a fact which was confirmed by some *régulos*.

The language of the hearings is vernacular and the national languages are mainly used. Portuguese seems to be used only rarely, although it is the official language of the country.

Throughout our research we found evidence that relations between the community courts and the traditional authorities in the same geographical location were sometimes conflictual and sometimes collaborative. The *social division of labor* usually ends up determining a certain 'specialization' for each of the entities, with traditional chiefs solely responsible for accusations of witchcraft and complex extended family issues and community courts solely left in charge of petty crime, whilst both share litigation linked to the demarcation of land and family conflicts.

The typology of these cases and the process of reaching a decision, based mainly on mediation and the reconciliation of the parties, are very similar. From what we could observe there seems to be a tendency toward compensation. Although in neighboring countries 'traditional justice' is normally described as being very 'cheap', this is not the case in Mozambique. Fines and the justice tax applied by traditional authorities tended to be higher than those in the community courts.

Relationships with other Institutions

In the field of conflict resolution, the relationships between traditional authorities and other local authorities are quite complex and not always free from conflicts or tensions. Forms of cooperation also exist: many *régulos* send divorce cases to the community courts and serious crimes – such as homicide – are sent to the police. In other situations, cases are presented to the *grupos dinamizadores* and the other community structures which compete and collaborate both with the community courts and the traditional bodies whenever conflicts break out.[17]

Although they have not been studied in detail in this research, mention should be made of the role of traditional medical practitioners as entities for resolving conflicts. In fact, countless cases are sent, both by the traditional authorities and the community courts, to Ametramo, especially those involving the identification of the guilty parties in cases of witchcraft. The *tinyàngà* (traditional healers) play a key role in producing proof in these cases, as they are central to the identification of the guilty party. They therefore constitute another entity within the set of traditional authorities which should be studied more closely in future.[18]

The power discourse relating to traditional authorities is currently extremely controversial in the country. Many of the *régulos* complain that there is no consultation on who should become the *régulo* of a particular area, or if there is, this often involves people who do not represent the community (although this is covered by the above-mentioned Decree no. 15/2000). It is essential that conditions be granted to the

traditional authorities to enable them to decide on these issues as they see fit and be able to do this independently of any political, or any other, tuletage.

Political Parties and Traditional Authorities

Within the main political parties, positions on the traditional authorities are also unclear. Opinions waver between a minimalist concept (which sees traditional authorities as a reactionary institution, enclosed within anti-democratic practices and barely represented in the local community) and a maximalist concept (which recognizes the specific nature of the traditional authorities as an expression of a social and religious power that transmits ancestral protection and rightly favors them over other local organizations).

This brings us back to the discussion on the party affiliations of the traditional authorities. Although they are normally identified with Renamo, this is not always the case, as with the *régulo* Phata, in Inhambane province, for example.

During the presidential and parliamentary election campaigns of 1999, both Renamo and Frelimo attempted to invoke the 'traditional authorities' and traditional values in their campaigns. A case in point was the political struggle between Frelimo and Renamo for control of the influential *régulo* Luís in Beira city. Both parties attempted to convince him to support their campaigns, but *régulo* Luís himself wavered to and fro. Nevertheless, the struggle triggered a dispute for the succession in which his nephew proclaimed himself the new *régulo*, and a clear supporter of Renamo, after his uncle finally refused to take sides. The struggle for the succession was only settled after the elections were over and *régulo* Luis is still in power in Bairro Manga-Loforte, in the city of Beira (2004). The current trend in politics at the national level of involving local and regional traditional authorities such as *régulo* Luis imbues tradition locally with a renewed ambivalence derived from (or at least strengthened by) national political practices. The move by both Renamo and Frelimo into the domains of tradition creates a tension between, on the one hand, the political reframing of and call to tradition, and the local situation in relation to development practices on the other.

In terms of the resolution of conflicts, however, and faced with the complexity of the structures surrounding the struggle for power, it is worth emphasizing that fieldwork observations showed that positions can nevertheless be broken down, with traditional authorities being more inclined toward Renamo and the community courts while leading local groups are the favored arenas for Frelimo activity. In any case, the competition for power and the superimposition of the spheres of intervention of the different structures involved in the resolution of litigation are well known, since "*people don't know how to resolve conflicts. Nobody's role is clearly defined*", as many of the interviewees affirmed.

The struggle for recognition of the multicultural political and legal landscape that exists in Mozambique has led to recognition, in the new Constitution (2004), of the various normative and conflict resolution systems that coexist in Mozambique (as long as they do not contradict its values and fundamental principles – Article 4).

Together with recognition of traditional authorities (Article 118), this represents a significant departure from earlier ideas on the nature of the Mozambican state.

Conclusion

The framework of justices in Mozambique consists of a series of institutions whose work depends on the fluidity of the interaction between them. The better defined their respective roles are, the better they can carry out the functions attributed to them by society in general and by local communities in particular, the more efficient their performance will be and the more fully citizens' rights will materialize and the state's interests be realized. In fact, although official discourse does not recognize them, the *régulos* and other instances of traditional leadership very often operate in close cooperation with the state. Many *régulos* are called upon to intervene in vaccination campaigns, civic education, etc.

The path of the various cases analyzed in our research demonstrates a simultaneous recourse to diverse mechanisms for the resolution of litigation, forming a complex network. This means that all are necessary, since their common denominator is offering perspectives for solving and/or preventing problems. They are proof that legal hybridization has been developing in Mozambique for a long time. It is a hybridization that accepts, inclusively, the official, modern, legal model and even makes room for its work. Seen from this perspective, the vitality of the types of justice into which traditional authorities are integrated is the mirror image of the difficulties of official justice, which seems unable to achieve its objectives.

Traditional authorities manipulate certain 'traditional' aspects as legitimizing marks of their authority while also using 'modern' elements – such as the political parties – to consolidate their power. It is this subtle dialectical relationship between tradition and modernity that animates traditional authorities and allows them to develop. Rather than personifying the fixedness of an imagined past rewritten in the present, this landscape of justices is the symbol of another modernity which is eminently complex and calls for further study.

Extending the community's participation in the resolution of its problems is one of the requirements of the process of democratization taking place in the country. It is vital to make the constitutional principles and administrative organization of the state compatible with the models of action, cultural presuppositions and normative structures of the traditional authorities.

Today, an ongoing legal reform is taking place in this complex, and even conflicting context. It recognizes a myriad of ways of settling informal disputes encompassing a large percentage of the country's population. Legal projects should seek to provide an integrating framework for these conflict resolution mechanisms, given that the absence of rules has negative implications, as this chapter has aimed to show.

Notes

1 The issue of traditional authorities is also analysed in chapters 1 and 3.

2 Although the most common term is *régulo* (chieftain), the local expressions are extremely varied: for example, *mwene* in the Amakhuwa regions, *nyakwawa* in the provinces of Manica and Sofala, *samasuwa* in Zambézia, *hosi* for the Machangana, etc.

3 See note 34 in chapter 1.

4 In this research, local notables, such as traditional healers, local religious authorities, heads of lineages or heads of production, are understood as part of the concept of 'local, traditional authorities', despite the fact that their political importance seems to be less visible.

5 In this regard, the plasticity of the traditional authorities is eloquently illustrated by the institutional innovation of the *régulo* of Mafambisse (Sofala province) during the civil war. During the course of the war, the *régulo*'s territory was torn apart by the conflict between Frelimo and Renamo. In order to preserve the traditional leadership in the zone, the territory was divided into two zones. The zone under the control of Renamo continued to ruled by the titular *régulo*, Manuel Dique Mafambisse, who came from a prestigious family. In the zone under government control, traditional authority was represented by the then local political leader, José Dique Mafambisse, the younger brother of the titular *régulo*.

6 Field work for the first research project took place from 1997 to 2000. Complementary information from the second research project (since 2003) is also provided.

7 This climate of cooperation amoug the members of this web of legal and administrative entities does not prevent those intervening from remembering past grievances and from voicing them when deemed appropriate. *Régulos* and other notables were intimidated and humiliated by former subjects who came to occupy party secretary positions within Frelimo, or by other higher level state and party authorities (Geffray, 1990). During interviews several traditional authorities (*régulos*, healers, etc.) referred to the persecution they had suffered for political reasons and the climate of animosity towards them. As a result, many were arrested or even deported to the northern provinces during the infamous *Operação Produção* in the early 1980s, to be 're-educated through labor action' in order to become 'new human beings' (Meneses *et al.*, 2003).

8 See chapter 1. One must also be aware of the fact that the position of the main political parties toward the customary remains undefined. While traditional institutions were normally identified with the Renamo, nowadays this is not the case. For example, Frelimo and Renamo seem to share a common perspective of fear in relation to witchcraft, which results in non-recognition as part of the state system. Both parties resent the role of this leadership, since traditional authorities may stand in the way of their plan to enhance centralized political action.

9 What is particular to Mozambique is that these authorities are present both in rural and periurban contexts. In some areas covered by our field work, even in areas close to the urban centres – such as Jangamo and Inhambane (*régulos* Patha and

Nhampossa), Beira city (*régulo* Luís) and Dondo in Sofala province (*régulo* Mafambisse) – the traditional chiefs contacted were extremely active, either in collaboration with the political-administrative authorities or with their knowledge and agreement. See also note 18 in chapter 1.

10 Because they are not recognized as part of the state, however, these community authorities are not entitled to salaries paid by the state. Instead, the state allows them to retain up to 5% of the taxes collected by them from members of the community, as a means of supporting their activities.

11 The local authorities elected/chosen by communities include not only *régulos* and other *traditional* structures, but also neighborhood or village secretaries (*i.e.*, the former *grupo dinamizador* secretaries, the remains of a power structure introduced by Frelimo after independence to replace the customary institutions – Chichava, 1999). Today, due to their reputation for wise counsel, they are elected through a process whereby they compete with other local institutions. A very small proportion of these recognized leaders are women. After returning to the field in mid 2004, we observed that in several districts the process of recognition of these authorities had been fully implemented. Before then, however, no leaders from urban or periurban settings had been officially recognized. The leaders – upon formal recognition – have received national flags and personal badges.

12 Although the *régulo* and his counselors stand at the apex, various other assistants help him on a daily basis. In southern Mozambique, for example, in each area of the chiefdom there is usually a *cabo de terra* (*nduna*). He hears cases, solves problems, etc. and reports directly to the *régulo.* Several *tinduna* are also part of the *régulo*'s council. Some people bring their problems directly to traditional counselors, who may intervene initially in a conflict in order to solve community problems.

13 I.e. the *régulo, cabo de terra*, etc.

14 *Associação Moçambicana de Médicos Tradicionais*, in Portuguese.

15 The power of the *nyángà* (traditional healer) lies in his or her ability to identify existing social tensions, contradictions, and areas of distrust, as well as possible anti-social hostilities that may manifest themselves as sickness, bad luck, or even death in the community (Meneses, 2004). The process of identifying the witchdoctor, locating the agent of evil and making him or her confess to their actions, is also the process by which the witchdoctors are cleansed of the burden of evil, thereby paving the way for the restoration of stability and good health in the community. Even in the revolutionary period the popular courts would often turn to traditional healers to solve cases involving accusations of witchcraft.

16 Interview with the *régulo* Phata, Inhambane province.

17 Ministerial Decree no. 107-A/2000 defines the interaction between community courts and the community chiefs. Article 5(b) outlines one of the tasks of these authorities as "interaction with the community courts, wherever they exist, in the resolution of minor conflicts of a civil nature, based upon local habits and

costumes, within the limits established by law", clearly recognizing the existence of a complex network of interaction in local administrative areas.

18 Ametramo also has a fairly hierarchical structure, mirroring the pyramid of formal justice. Cases addressed to Ametramo can go to appeal from a 'local' to a 'higher' level (the district or provincial structure of the association), by requesting other more experienced and knowledgeable *tinyàngà* to 're-evaluate' the case.

12

Solidarity Networks as Entities for Resolving Conflicts

Teresa Cruz e Silva

Introduction: Neighborhood Networks at Mafala (Maputo City)

The successive crises and transitions which marked the 1980s and 1990s in Mozambique played a significant role in the process that brought about the weakening of the state. The state's inability to supply basic services to the population (Santos, 1998b: 11) meant that part of this social management was transferred to "civil society," which has begun to exercise many functions linked to the production of economic and social well-being – through non-governmental organizations (NGOs), associations and a variety of solidarity networks originating out of the networks of primary relationships (family and neighbors, professional, ethnic and friendship groups, etc.) existing in society (Nunes, 1995: 10-11). It was the weakness of the state, rather than its authoritarian power, that undermined its authority, and it was its absence and inability to produce basic services that led to an increase in alternative forms of social management.

The 'network approach' was used successfully for several decades to analyze urban social phenomena. Nowadays it is applied to the study of wider phenomena, such as situations of conflict, political power or even the analysis of problems such as hunger, vulnerability and poverty, as it improves understanding of the different types of existing strategies, particularly the aid networks developed to deal with these problems (Loforte, 1996; Andrade *et al.*, 1998; Ministry of Planning and Finance, 1998).

In Mozambique, where a process of urbanization marked by a large country-to-city migratory flow can be witnessed, the social relations created within society are vital, since they generate mechanisms that can deal with daily life and develop strategies over a longer period of time. The impact of social urban space on the structuring of

social bonds between people in relation to the economic, social and political situation that has characterized Mozambique during recent decades is not easy to measure. If, on the one hand, it is not possible to ignore the fact that many of the norms relating to a rural environment have been transferred and adapted to an urban context (and are relevant for an understanding of the systems of rights and obligations which are part of many of these urban groups, in which 'customary norms' continue to offer a certain security in the process of social relations), on the other hand we can also encounter cases in which these various survival strategies have been redefined. This not only reinforces 'customary norms', but also recreates new relationships based on solidarity, in which, for example, neighborhood relationships begin to play an essential role in developing bonds of solidarity and mutual help.

The networks constitute a social capital which may be defined in terms of the reciprocal relationships existing in society, based on social bonds in which factors such as the sex, age, religion and social position of their members define hierarchies and power relationships, and in which existing norms and relationships of trust, aid, cooperation and coordination work to the benefit of all (Loforte, 1996; Andrade *et al.*, 1998).

The study of alternative forms of social management involving the use of the network approach, in the context in which we propose to analyze such forms, necessarily entails using and working with concepts such as family and parenthood,[1] due to the essential role which cooperative relations established through the family represent in the construction and reconstruction of solidarity networks. Thus, while it is not our intention to analyze the various forms of theoretical approach which can be applied to the concept of family, we cannot ignore the fact that it represents a privileged space for the social construction of reality, in which, through the relationship between its members, socialization is produced (Saraceno, 1997), and in which relational dimensions (relationships of a family nature, affectivity or affinity), spatial dimensions (expressed as cohabitation) and economic dimensions (the common budget) all play an essential role in defining the strategies of the *amakhuwa*[2] in the Bairro da Mafalala (Mafalala neighborhood),[3] even if we consider that the applicability of these relationships may vary, according to the complexities that characterize the country (Andrade *et al.,* 1998).

1. Social Management and Its Alternatives in an Urban Context

Using the case study of the Mafalala neighborhood in the city of Maputo, we proposed to identify the role played by solidarity networks in the resolution of litigation, within a situation of legal plurality such as the existence of community courts and traditional authorities. It is necessary to extend the vision of the administration of justice in Mozambique, in this case with specific reference to the urban forms of informal conflict management.

Actors and Networks

Starting with the option of working in an urban environment, the study of Mafalala, a community mainly composed of a Muslim population of *makhuwa* origin, enabled us to identify a privileged socio-cultural space in which the dynamics of solidarity networks could be understood. Since in the analysis of networks we are always confronted with contexts and social processes which can change at any moment, this case study makes visible the effects of the economic and social policies introduced in the country over the last two decades, as well as the alternatives used by this community to face situations of need produced by the fact that the state is not able to offer a number of basic services. In the process of establishing alternative strategies to deal with existing needs and access to basic services, the study identified: i) a set of primary solidarity networks (parenthood, co-residence, neighborhood and religion) that members appealed to in order to receive material or extra-economic support in situations of crisis; ii) societies and mutual aid groups of an informal nature (funeral societies, savings and mutual aid groups as well as women's committees); iii) formal associations with recreational and supportive aims, which functioned as resources in cases of need.

Social control and Mechanisms of Conflict Resolution

The informal systems of social control, which normally include mechanisms for the resolution of litigation, are therefore managed within the various networks which we have identified, functioning as first or second instances, according to each individual case. Working as mediators, members of these networks use rhetoric to persuade the different parties involved in disputes, since their authority is restricted to the power to arbitrate conferred upon them by the parties involved. The most frequent types of disputes include marital conflicts, conflicts between parents and children and conflicts between neighbors. Although these may be considered exceptions, the research team also observed that cases such as crime, robbery and commercial types of litigation were also submitted to arbitration through these networks, without the intervention of state justice, and also involved the use of persuasion. The Mafalala study showed that most litigation rarely leaves the community area, where it is settled, and is only rarely resolved by other bodies, such as the police or the courts. Cases involving some types of economic conflict and disputes over property or the custody of children are normally reserved for the latter institutions and only after the parents and the religious community have been consulted. We are looking at a situation in which legal demand is preferentially met through informal mechanisms, not just for economic and social reasons but also due to the cultural weight of Islam.

Notes

1 Seen as relationships based on solidarity and reciprocity.
2 A matriarchal society from northern Mozambique.

3 Because Maputo city holds the statute of a province, it is divided into several municipal districts, mirroring the overall administrative division of the country. Each of the municipal districts (five in all) is divided into neighborhoods. Mafalala is part of Municipal District 3. For further details see also note 18 in chapter 1.

13

Customary Land Systems and the New Land Law (1997): An Epistemological Note

José Guilherme Negrão

Introduction

In Mozambique and else where in Africa, for the poor peasants – who constitute the vast majority of the population – the land is the only certainty of continuity they have at their disposal.[1] It is on the land that they produce the food they eat and the few surpluses or industrial cultures they are able to get, on it they converse with the spirits of their ancestors, on it they find wood and stakes to build their houses, on it they allow the cattle to graze and they look for healing herbs, on it they identify themselves with the origin of life which is carried by the waters of the rivers. The land is the heritage of the family, the lineage and the community; their ability to resist outside intrusions resides in the sustainability of the use of the land in the fight against poverty and for the increase of wealth.

Therefore, the land is inseparable from work, human capacity and capital. Empirical evidence showed that among rural families[2] the land used for various types of consumption could not be perfectly replaced by the land geared for the market; in addition, the market does not work exclusively through the convertibility of assets into capital, but also through the convertibility of the latter and the social obligations networks. In other words, there are social relationships that are based on the land. In this way, the function of distribution on the land is intrinsically connected to the functions of production and consumption, and of these with the rural family. The rural family's function of consumption corresponds to the access to land; the function of production is equivalent to the security of possession; and the distribution function

is related to the division of the land in function of the multiplicity of networks which are established by means of blood ties, marriage and inheritance.[3] Thus, for them, above any other interest group, the maintenance of inter-generational returns in the use of resources is of paramount importance, because it is essential for their reproduction.

1. The Customary Law Systems in Mozambique

In any one of the existing customary law systems relating to land in Mozambique – the system of preferential marriage, entrusted territory, stability of nuclear descendents, security over three generations and group dependency (Negrão, 2003: 230-251) – enormous adaptability can be seen in relation to the social and legal changes that have taken place throughout history, in which communities have no direct decision-making powers but of which they are an integral part. The versatility of these customary law systems can also be seen in relation to the interactions, whether complementary or opposing, established at the heart of communities.

If it is true that diachronic adaptability and synchronic versatility are two characteristics of the customary law system existing in Mozambique, the same cannot be said of the legal practice of written law.[4] With about 80% of all land use managed by customary structures, however, during and since the post-war resettlement period, it made sense to give these systems legitimacy under Mozambican law.

2. The Land Law and the Legal Structures of Mozambique

Not infrequently, judges in the district and provincial courts have been seen refusing to apply the new Land Law in disputed cases (*e.g.* in relation to rights of occupation), while the judges of community courts and traditional and community authorities do so without having received any specific training for that purpose. In addition to personal reasons (ignorance of the law, parallel interests, etc.) in the appointed judicial judges' non-application of the new Land Law, what is at issue is the link between the oral and the written in legal concepts and practice. Written law, as it exists, is based on a philosophy of science wherein deductive logic is the only vehicle for thought worthy of consideration (Sayer, 1992). Just as deductive logic, so too oral law (like all rhetoric) has 'non-logical thinking' as an integral part of its practice. While formal logic deals with the inferences and implications between premises and conclusion as the reasoning behind truth, the 'non-logic' of customary law deals with the establishment of premises, the criteria adopted for their selection, the methods employed for gathering them and the relationship between facts and forms of abstraction on the route toward rationalizing opinion.

The new Land Law's incorporation of non-codified customary systems into formal law to be applied by any court is the first sign of an epistemological rupture in legal science in Mozambique.[5] The shift from a rupture to an epistemological cut in legal practice depends on each and every one of us in the coming years.[6]

This incorporation of customary law systems has had implications on the production of legal science. Gradually, everywhere, the method of production of knowledge relating to the land problem in Mozambique has been successively questioned. In their analytical as well as their normative and political discourse, conventional theories on the rural world and its development are less and less accurate in their predictions of what will happen when various kinds of options are adopted. Whenever the accuracy of the prediction of a scientific theory (or set of theories) begins to decline, there is nothing more to do but return to empirical evidence to redefine presuppositions and build a new theory. This is what currently can be seen in Mozambique, as this book illustrates.

Analytical and normative discourse were both questioned when the Land Law began to be implemented at a national level. For the first time, professionals and scholars from a wide variety of scientific and technological areas were called upon to take part in seminars, promote debates and write articles on questions such as what a rural community is, which models of community management of resources exist, how women's rights to land can be ensured in the context of customary law systems, which spatial options should be followed and how the emergence of group dynamics should be facilitated within the context of the dissemination of the new Land Law.[7]

Rural sociology questioned the approaches to social space and causality, as it was forced to ponder the notion of local community. The classic search for the internal dynamics of a cohesive social space gave way to the identification of interactions between social areas. The mono-causal explanation of an economic, technological or political nature so much in vogue in African academic circles evolved, out of the Aristotelian dualities taught in the universities, into the multi-causalities of a dialectical nature which orality imposes by not recognizing the primacy of the conceptual definition over the construction of the notion revealed in the self-defining act of the community.

Time and space emerge once again in an analysis of the modernist discourse which presupposes that the traditional is equal to the primitive and that modern equals civilized. Post-modernism re-questions cultural identities in the community management of natural resources, and wavers between renunciation of the traditionalism of local cultures (which, as such, are the object of political and economic bottom-up autonomy) and affirmation of the symbolic nature represented through discourse (which, as such, is the object of decentralization ruled by constitutional principles and party interests).

Conclusion

The options available in planning the use of land confront each other and range from a technical vision of registered law, in the form of a land deed, as the only means of guaranteeing property rights (and, as such, in attracting investment), to the interpretation of the acceptance of current models of use requiring only compliance with the oral clause of the Land Law in order to recognize already acquired property

rights (lowering the costs of the transaction) as a means of preventing conflict and avoiding the rise of the 'landless'.

Finally, the facilitation of the emergence and strengthening of local dynamics at the community level soon comes up against the debate between representative democracy, which the local government project implies, and participative democracy in decision-making processes, in which power is exercised though interest groups and not through urban political parties.

We are far from being able to speak of an epistemological break in the production of science in Mozambique, but, without a doubt, the incorporation of customary law systems into formal law has brought implications which indicate a rupture in the monopoly of deductive logic in theoretical ideas.

Notes

1 The vast majority of the Mozambican population lives in rural areas (77%, according to the 1997 Population Census).
2 By rural family we mean the smallest unit of production, consumption and distribution of the African rural societies.
3 In Mozambique, about 90% of married people are married according to customary law.
4 For a discussion of the fabric of community justices in Mozambique, see chapters 10 and 11.
5 The law that established community courts (Law no. 4/92) was the law no. 19/97. of 1 October first step toward the recognition of local norms and customs in the legal, formal structure. However, it differs from the Land Law in that, it (i) only applies to community courts, and (ii) defends the principles that these norms and customs should be mutually enriched, recognizing state law and the superior form of law.
6 See Mondlane's reflection (1997) on alternative means for resolving conflict, by resorting to common law forms of mediation, conciliation and reconciliation of parties.
7 Among the countless initiatives under way, one movement, called the *Campanha Terra* (Land Campaign), has emerged as a catalyst. It was an initiative of civil society, involving around 200 NGOs, churches of all denominations, associations, cooperatives, public and private research institutions, and other civil society organizations. The Land Campaign reflected civil society's contributions to securing the land tenure of rural populations, acting not only at the level of conceptualization, but also in disseminating information among rural populations, the private sector and state institutions. In less than two years, more than 15,0000 people voluntarily spread the text of the new Land Law through theatre, short courses, cartoons, video cassettes, audio cassettes, music, newspapers, posters and pamphlets, using 20 national languages.