

# THE DYNAMICS OF LEGAL PLURALISM IN MOZAMBIQUE

Edited by

HELENE MARIA KYED  
JOÃO PAULO BORGES COELHO  
AMÉLIA NEVES DE SOUTO  
SARA ARAÚJO



CESAB

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**CESAB**

Centro de Estudos Sociais  
Aquino de Bragança

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Editors:

Helene Maria Kyed  
João Paulo Borges Coelho  
Amélia Neves de Souto  
Sara Araújo

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## PREFACE

This book project emerged from a series of papers that were presented and discussed at a three-day international conference held in Maputo from 28-30 April 2010, with the title *State and Non-State Public Safety and Justice Provision – The Dynamics of Legal Pluralism in Mozambique*. The conference was co-organised by the Aquino de Braganca Social Studies Centre (CESAB) and the Danish Institute for International Studies (DIIS), with support from and in collaboration with the Royal Danish Embassy (Danida), the Friedrich Ebert Stiftung and IPAD-Portugal. It represented the first attempt to both invigorate a comprehensive policy-debate on legal pluralism and to bring together empirical research done on the topic since legal pluralism was recognised in the 2004 Mozambican constitution.

A key aim of the conference was therefore to fill a void in accumulated knowledge on (a) how legal pluralism is actually practiced on the ground in different regions of Mozambique; and (b) what implications the constitutional recognition of legal pluralism has had for the interactions between different state and non-state providers at the local level (e.g. the state police, the formal courts, community courts, traditional leaders, traditional healers, and community policing forums). Another core aim was to discuss potential future legislation on legal pluralism and the different pros, cons and challenges of such legislation for different kinds of providers and for citizens' access to justice and public safety. In doing so, the conference also aimed to contribute with knowledge to the different international development partners supporting justice and police reform in Mozambique. To achieve these aims, the conference organisers brought together academics, policy-makers and practitioners such as representatives from relevant ministries, courts and organisations as well as from various international development organisations (such as the UNDP, EC, Danida, and Sida).

Although the conference did not result in any definitive answers to future policy developments or programming, it did certainly deepen the knowledge of legal pluralism and highlight the need for the Mozambican state and its international development partners to take the legal pluralistic reality seriously when considering policies and programs on justice and security. It also contributed to identifying a set of core dilemmas and challenges that can lay the grounds for further discussions in smaller policy and academic circles. Some of these included:

- ◆ Legal pluralism – the plurality of norms, procedures and institutions that provide social ordering – is a reality that cannot be ignored in legal reform processes and in efforts to improve citizens' access to justice and public safety. However, it should be realised that state recognition of legal pluralism may not only be inclusive of socio-legal diversity, but can also be used by local and national elites to enhance control and exclude some groups of citizens.

♦ It is important to bring together the justice and public safety, or policing, aspects of legal pluralism, rather than treating these as separate sectors. In practice, the provision of justice and policing are highly interlinked.

♦ In supporting non-state alternatives, it is important to discuss the overriding role of the state. Should the state be minimalist and allow for a wide jurisdiction to non-state actors? Can the state's formal sovereign authority – its responsibility to define the overriding order and its monopoly on force – be *de jure* shared with non-state authorities? And is it possible to develop a set of common principles that are shared across the plurality of legal orders, state and non-state?

♦ The dichotomy between state and non-state legal orders fails to capture the complexity of legal pluralism on the ground. There are multiple inter-linkages and overlaps between different providers of justice and public safety, whether formally defined as state or as non-state. Reform should build on these inter-linkages, rather than on typical ideal distinctions.

We express our gratitude to the participants who, in discussing these and other issues, contributed greatly to the body of the present volume. We are also grateful to Helena Azevedo, Dulce Zavale and Onézio Paulo Gomes for assuring the logistical aspects of the conference, and to the Danish Institute for International Studies (DIIS) and the Friedrich Ebert Foundation for assisting with the costs of translation services. Finally, the publication of this volume would not have been possible without the support of the Friedrich Ebert Foundation.

Maputo, February 2012

## The Dynamics of Legal Pluralism in Mozambique

*Helene Maria Kyed and João Carlos Trindade*

Access to justice and security are of core concern to the majority of Mozambicans, not least to those who inhabit the country's poor areas. Since the end of the 16-year civil war, in 1992, the state police and the judiciary have undergone comprehensive reform efforts as part of the country's democratic transition. Through such efforts, international development partners and the Government of Mozambique have placed much emphasis on professionalising formal state institutions, in accordance with the rule of law and human rights. However, despite some improvements, the police and the judiciary face many challenges in providing adequate justice and public safety, especially to the rural and urban poor. Many Mozambicans view the official courts as hard to access due to their high costs, and as providing forms of justice that do not correspond well with local socio-cultural norms and practices of justice. Support to paralegals and other kinds of civil society-based legal aid providers has gone some way towards improving people's access to formal justice, but efforts have been unevenly distributed across the country. The police are often accused of being partisan, ineffective, indifferent to the public safety needs of the poor, violent, corrupt and lacking the capacity to prevent crime. While efforts to establish forms of collaboration between local citizens and the police (for example through community policing councils) have had some effect, lack of popular confidence in the police prevails.

In many situations, the majority of Mozambicans rather turn to customary and community-based institutions to have their disputes and crimes resolved. Justice is frequently dispensed by traditional authorities, community courts, village secretaries, community policing actors, civil society organisations and/or traditional healers. These actors are not fully integrated into the formal state system and can

therefore be defined as non-state mechanisms of justice and public safety.<sup>1</sup> During recent years there has also been an increase in mob-justice, especially in poor urban areas, exemplified by excessive punishments and lynching of criminals and suspects by ordinary citizens. Such incidents have been interpreted as symptoms of a dysfunctional formal justice sector and of popular dissatisfaction with the police (Serra 2008, 2009; see also Vitalina do Carmo Papadaki's contribution to this volume).

The significant role played by non-state mechanisms of justice and public safety is today officially recognised in Mozambique under the heading of *legal pluralism* in article 4 of the 2004 Constitution. This recognition marks a clear change from the almost exclusive focus on reforming the formal state institutions during the 1990s post-war period. It reflects a realisation that state courts and police are not alone in providing justice and public safety, and that they can only do so efficiently if they collaborate with other kinds of providers.

Globally speaking, the 2004 Constitution also places Mozambique as a rather unique case, which is only paralleled by formal legislation in some Latin American countries (see ICHRP 2009). Nevertheless, the mandates of the non-state providers remain unclear from a legal perspective. There is no coherent legal framework for the articulation between these and the formal state institutions.

While there seems to be a desire in policy circles for improved formal justice and state policing, much of what goes on in practice remains highly informal. For example, an increasing number of community courts regularly pass judgements despite the lack of legal regulations for their roles and jurisdictions. The same can be said of traditional leaders, who operate at times independently of and at times in coordination with the local tiers of the state. Within policing, citizen involvement through community policing councils is now widespread across the country, but it takes a wide variety of forms. Furthermore, it is widely known that formal law-enforcers, such as police officers and state administrative personnel, frequently engage in informal solutions. Outside of official legal procedures they act as judges in civil or social as well as criminal cases (see Sara Araújo and Carolien Jacob's contributions to this volume). Sometimes they do so in collaboration with non-state institutions and at other times in competition with them. In fact, a variety of forms of articulation between state and non-state mechanisms exist in practice. This state of affairs points to the dynamics of legal pluralism 'on the ground'. Such dynamics have long historical roots in Mozambique. They are the result of shifting state-building processes, contested periods of conquest and armed conflict, and changing forms of interaction between

<sup>1</sup> We recognise the debate on the appropriate terminology as between 'informal', 'customary', 'community-based' and 'non-state'. For purposes of this Introduction we use 'non-state', but in the volume itself the terms are used interchangeably to refer to a broad range of community-based social regulation and dispute resolution practices that are distinct from, even if influenced by and intertwined with, the state-sponsored formal justice system. See for instance Sara Araújo, in this volume, on using the concept of 'community justice' instead of the concept of non-state.

different legal traditions (e.g. African and Islamic traditions, colonial legal rule, and post-colonial rule) (see especially Paula Meneses' contribution to this volume).

This book is about the dynamics of legal pluralism in Mozambique. Its point of departure is the 2004 constitutional recognition of legal pluralism, which provides the overall context for discussing what legal pluralism means in today's Mozambique from both a policy and an empirical perspective. The book also looks at how legal pluralism has evolved historically, including how it was inscribed into colonial and pre-colonial forms of governance and periods of armed conflict (see especially the contributions by Paula Meneses and Fernando Florêncio to this volume). It therefore goes beyond a discussion of current policies and the Constitution (on this aspect see Markus Böckenförde's contribution to this volume).

A key aim of the book is to improve the empirical understanding of the varied political, social and historical dynamics of legal pluralism that exist across the country, and to allow these insights to better inform policies and their implementation. Many of the individual contributions to the book are therefore empirically grounded. It is hoped that this empirical focus will also disclose at least some of those perspectives, practices and memories that are commonly absent in official discourse and history writing, as Meneses so eloquently points out in this volume. Thus the book includes chapters which explore how legal pluralism is manifested in practice, in relation to, as well as independently of, specific policies and the wider legal framework. While some authors focus on how specific institutions – state as well as non-state – provide justice and public safety, others address the plurality of institutions within specific localities and the relationships between such institutions (see Sara Araújo, Carolien Jacobs, Paulo Granjo, Fernando Florêncio, and Victor Igreja's contributions). Yet others explore how specific policies or strategies, such as the strategic plan for the police and the community policing initiative, are appropriated in practice (see Francisco Alar and Helene Maria Kyed's contributions). Some chapters are also devoted to the role of violence in popular, traditional, and state reactions to disorder and violence: one chapter focuses on mob-justice (Vitalina do Carmo Papadakis) and one on the role of spirits in addressing different historical periods of armed conflict (Paula Meneses). Through these contributions, the book explores the plurality of norms, institutions and practices that prevail in Mozambique. Importantly, the book not only looks at how justice and public safety are provided, but also addresses how justice and safety are perceived by ordinary citizens.

Questions about legal pluralism are far from being confined to Mozambique. The book therefore includes one chapter that discusses different approaches to legal pluralism more generally as well as three chapters that attend to the dynamics of legal pluralism in other African countries (Sierra Leone, Cabo Verde, and Angola).<sup>2</sup> The

<sup>2</sup> At the Maputo Conference, on 28-30 April 2010, which has informed this book, there were also papers on Malawi, Namibia and South Africa, which added further insights to the overall discus-

insights from these chapters will help situate the discussion of legal pluralism in Mozambique within a wider global and regional context.

A key position of this book is that national policies and internationally supported programmes ought to be driven by the aim to improve poor and marginalised groups' access to justice and public safety. This can only be achieved through an in-depth understanding of the practices on the ground and by explicitly including the justice needs and views of ordinary citizens, including those that are oftentimes excluded or marginalised from defining national policies. This position may seem self-evident. However, even when official policy discourses about legal pluralism highlight access to justice as a primary goal, there is often a tendency for policy implementation to undermine local needs and instead focus on state-building. This may rather result in the consolidation of particular power relations, local as well as national. Consequently, it is important to explore the policies on legal pluralism from the perspective of political interests, and to thoroughly understand their deeper, and indeed contested, histories. These aspects add further complexity to the dynamics of legal pluralism.

The task of this introduction is threefold. First, we seek to map out the overall terrain within which the contributions to this anthology are situated, by discussing the concept of legal pluralism and its historical and political dimensions. Secondly, we provide a brief mapping of the empirical landscape of legal pluralism in Mozambique, where we focus on the different kinds of providers that exist and how they relate to each other. This is followed by an overview of the legal framework on legal pluralism in Mozambique. Finally, we discuss some of the challenges and dilemmas associated with different kinds of policies that support legal pluralism. While the book does not seek to provide any readymade answers to policy makers and practitioners, it does highlight some significant issues to consider which will hopefully lay the seeds for further debate.

## Legal Pluralism – Empirical and Analytical Perspectives

Legal pluralism can broadly be defined as the plurality of norms, institutions and practices of social ordering within a political organisation.<sup>3</sup> However, as Anne Griffiths argues in this volume, there is a great deal of disagreement – normative as well as

sion of legal pluralism in the Southern African region. The editors wish to thank Brenda Branch, Clever Mapaire and Monique Marks for these specific contributions, which enriched the debate on Mozambique as well.

<sup>3</sup> On the definitions of legal pluralism, see Griffiths (1986); Tamanaha (2000, 2008); Woodman (1998); Benda-Beckmann et al. (2009). For example, von Benda-Beckmann defines legal pluralism as “the *theoretical possibility* of more than one legal order, based on different sources of ultimate

academic – on how to approach legal pluralism (see also Araújo in this volume on the development of the concept of legal pluralism). These can roughly be divided into two positions. One is state-centric, and while it may recognise pluralism, it argues for the superiority of state law over other sources of law, such as religious and customary. The second position views legal orders in principle as being of equal significance, depending on empirical assessments in given contexts. The point of departure is therefore that the state is but one possible source of law among others. State law and its institutions do not have – or ought not necessarily have – a monopoly on ordering society, but co-exist with other institutions, norms and practices of social ordering, whether referred to as ‘informal’, ‘customary’, ‘religious’ or ‘non-state’. Added to these, there is an increasing range of international laws and regulations, including human rights conventions. The majority of the contributions to this anthology adhere to the second, empirically-oriented, position. This means that the case-studies do not fix the analysis on which institutions *ought* to provide justice and public safety, but focus on how disputes are actually solved and by whom.

As argued by a number of socio-legal scholars, legal pluralism has become much more complex with globalisation and the intensification of transnational flows (see Griffiths, this volume; von Benda-Beckmann et al. 2009; Santos 2006). An increasing number of local, national and global legal orders co-exist, interact, merge and confront each other in dynamic combinations that make plurality ever more complex. This can be contrasted with the period of colonial rule, where a clearer distinction could be made between European colonial law and African customary laws (Santos 2006: 44). Within each country, legal pluralism can today be seen as a complex and dynamic network, including state law, international regulations, and various local norms and values. In this network there are elements of competition and overlap, and the potential for conflicts over values and standards in concrete situations.

From an empirical perspective, legal pluralism is not simply expressive of a co-existence of different kinds of laws and institutions representing different legal orders – state and non-state, local, national and international. Plurality also exists *within* legal orders. The state is heterogeneous and, in practice, there is no clear unity of its legal operations. Much the same can be said of customary or religious legal orders, which may derive their legitimacy from adjudicating conflicts according to traditional or religious norms, but which may also draw on state or international law. Consequently, the boundaries of different legal orders are often porous. There is a great deal of legal hybridisation going on. Institutions mix different and often contradictory political-legal cultures. In the process, new forms of legal meaning and action are created (Santos 2006: 26). Legal hybridisation challenges conventional dichotomies between formal/informal, state/non-state and modern/traditional. In understanding

validity and maintained by forms of organization other than the state, within one political organization” (Benda-Beckmann 1997: 9 – emphasis in original).

these dynamics it is important to facture in the influence of historical and political processes.

### The significance of history and politics

As argued by Meneses (this volume), historical processes and dealings with the past are very significant for understanding present dynamics of legal pluralism. Her own paper particularly focuses on significant moments of contestation and armed conflict in Mozambique since the time of the Gaza state, and how non-state mechanisms of justice have formed part of addressing such violent ruptures (see also Victor Igreja's contribution to this volume with respect to the most recent civil war). In focusing on the role of spirit possessions and witchcraft suspicions, she also discloses those voices that are commonly silenced in official history and universal discourse on justice. In this way she highlights the need to engage with multiple historical narratives or plural memories, rooted in the pre-colonial past, not only to understand the present dynamics of legal pluralism, but also to find inspiration for contemporary societal renewal and resolutions of conflicts along more plural lines.

Florêncio's contribution to this volume also shows how important it is not to trace the changes and continuities of the colonial past and of the shifting post-colonial engagements between the state and traditional authorities, in order to critically address current debates about legal pluralism. The result of the different forms of engagements are different configurations of power relations and alliances. In this light it is important, as Santos (2006) holds, to take into consideration how different political-legal cultures, deriving from shifting historical periods, continue – in sometimes unspoken and implicit ways – to interact, merge and confront each other, despite officially proclaimed breaks with the past. This includes pre-colonial, colonial, and shifting post-colonial political-legal cultures (Santos 2006: 48-50). The merger of different historical layers and interactions between different legal orders result in complex forms of hybridisation.

Political struggles and power relations also inform the dynamics of legal pluralism. As asserted by Starr and Collier (1989: 9), it is important to be aware of "the asymmetrical power relations that inhere in the coexistence of multiple legal orders". Such power relations are the result of more or less explicit political actions. They may result from attempts by the state to subordinate other legal orders to the overriding authority of state law through different kinds of control mechanisms. Asymmetrical power relations can also be the result of local competition over authority between different justice and public safety providers.

However, efforts to establish particular power relations are often precarious and remain contested in practice. For example, while state representatives may succeed in enforcing laws that subordinate other providers of justice and public safety to state regulation, this may be compromised in everyday practice, as Florêncio (this volume) shows for both colonial and post-colonial laws on traditional authorities in Mozam-

bique and Angola. Often, the relative power of state and other providers is therefore situation-specific.

Power relations – among and within the different socio-legal arenas – is one of the main aspects of interlegality, as Meneses (this volume) points out. More broadly, she also highlights how justice, in its multiple shades, works to consolidate power relations, even when it demands reconciliation. Different legal orders, and the actors that represent them, seldom coexist peacefully or interact without some competition. The diversity amongst them underpins the potential for conflict, not least because they often make competing claims to authority and/or impose conflicting demands and norms (Tamanaha 2008: 375). As Tamanaha (2008) has pointed out, the politics inherent to legal pluralism emerges because the actors and groups who benefit from the institutional structures of competing legal orders (i.e. state officials, tribal leaders, clergy and businessmen) will defend and exert the power of their particular order. They do so not only "because of their genuine commitment to and belief in the system, but also because their interests, identities, status and livelihoods are linked to it" (ibid: 400).

At the heart of such political struggles is that justice and public safety provision are not neutral, apolitical activities, but inherently political ones: they provide a route to authority and also often to an income (Kyed 2009b). Therefore, in some contexts, the situation of legal pluralism is appropriated by politicians, local elites or the governing regime to boost their power position. This is done, for instance, by creating alliances with state and non-state providers as a means to gain access to resources, followers and status. For example, in many African countries party politicians have aligned themselves with traditional authorities as well as with the police as a means to mobilise votes and/or to use these actors to oppress the political opposition. Florêncio (this volume) similarly argues that not only colonial, but also post-colonial policies on traditional authorities in Mozambique and Angola have essentially been driven by efforts to consolidate state authority.

As addressed by Tamanaha (2008) and von Benda-Beckmann (1997) the political struggles inherent to contexts of legal pluralism are not alone the purview of those who hold authoritative positions. Individuals and groups in society at large may also actively exploit situations of legal pluralism in the furtherance of group and individual interests. Examples are when women's groups seek redress from official legal norms as a way to escape gender-biased customary institutions, or when victims of war-related crimes seek redress from community-based courts because the state amnesty law prohibits the resolution of such cases, as addressed by Victor Igreja (this volume).

Such strategies may in their turn affect the practices of different providers as they adjust to shifting popular demands (see for instance Araújo and Jacobs' contributions to this volume). Meneses (this volume) in turn illustrates how spirit possessions and witchcraft may be elements of resistance to wider policies and changes of power relations.



## The Empirical Dynamics in Mozambique

Mozambique is a good example of the complexity and dynamics of legal pluralism described above. Today there is a multiplicity of actors who, in different ways, influence and take part in regulating society. These range from local customary institutions to international development agencies and multinational organisations. When we look specifically at *who* resolves disputes and polices society at the local level, which is the primary focus of this book, we find a great richness of state, community-based, customary or traditional, religious, private, and non-governmental actors. Some of these are relatively new types of actors, others have been around for a very long time, and yet others have their origin in the early post-colonial period. Importantly, such plurality is not confined to the rural areas or to the so-called 'margins' of the state – i.e. the spaces where the presence of state institutions is meagre. It is also very much present in urban areas, even in the city centre of Maputo, as Araújo (this volume) shows. Below we briefly map the landscape of multiple providers, and the varied relations between them.

### The multiplicity of justice and public safety providers

Among the formal state institutions we find the three-tiered system of formal courts (district, province and Supreme Court) and the state police, represented down to locality level. The challenges facing the formal courts are especially addressed by Papadakis in this volume, whereas Alar (this volume) specifically attends to those faced by the state police. Aside from these institutions there are also a number of governmental departments that deal with specific issues, such as land and labour.

Another important state institution is the *secretários dos bairros* (neighbourhood secretaries). In urban areas, they are today the lowest-level administrative structure, yet elected by the community. They report to the administration of the Municipal District they belong to. Besides having a range of bureaucratic functions (taxation, licensing, etc.) they also tend to resolve a range of disputes and social conflicts, including at times criminal cases (see Araújo and Kyed, this volume). They do so often in a highly informal manner. However, in national law their role in dispute resolution is not recognised as an element of the wider justice system. According to the *Regulation of the Administrative Structures of the Municipal Neighbourhoods* of 2006, this task is today assigned to the *chefes de quarteirão*, a local structure hierarchically below the neighbourhood secretaries that originates from the state enforced socialist-revolutionary system of the 1970s and 80s. In practice, it is common that the *chefes de quarteirão*, each representing a sub-section (*quarteirão*) of the neighbourhood (*bairro*), forward disputes they cannot handle to the *secretário do bairro*. In some

urban areas we also find that the *secretários dos bairros* are still said to represent the so-called 'dynamizing groups' (*grupos dinamizadores*), which are a remnant of the socialist-revolutionary period no longer recognised by law. In some rural villages and district capitals, *secretários dos bairros* or *secretários de aldeias* (neighbourhood or village secretaries) also resolve disputes. However, here they are recognised by the state as 'community authorities' at par with traditional leaders.

In the community-based and customary category we therefore also find the traditional leaders or chiefs (often referred to as *régulos*, which is a label derived from Portuguese colonial rule), whose roles predate colonial rule. They resolve disputes in different ways, including at times criminal cases. Their disputing forums are organised in a variety of ways across the country. In some places they comprise a council of elders and in others the chiefs collaborate with spirit mediums and customary land chiefs. Some chiefs also have a group of younger persons who perform police-like functions. Florêncio's contribution to this volume deals extensively with this theme, focusing particularly on the Ndau areas of central Mozambique, and comparing this with Angola. He traces the important historical continuities and changes of traditional leaders' role in dispute resolution, not least in dealing with witchcraft cases. He also details how shifting colonial and post-colonial states have engaged in (largely unsuccessful) efforts to control this domain of authority, either by incorporating them or by excluding them.

A second important type of actor within the customary category are the traditional healers (*curandeiros*), who also have pre-colonial roots. Today, many of the traditional healers are members of AMETRAMO (*Associação dos Médicos Tradicionais de Moçambique*, the Mozambican Association of Traditional Healers), which has been recognised by the state since the early 1990s. They are regulated by the state for instance with regards to client fees, and are subject to taxation.<sup>4</sup> In some places, AMETRAMO members have a fixed venue where they receive disputants or to where cases are forwarded from other disputing forums. However, as Granjo (this volume) details, healers certainly also operate outside of the purview of the state, resolving issues that are not officially recognised but are very significant in the lives of most Mozambicans, including in dealings with the conflicts of the past as showed by Meneses (this volume): suspicions of witchcraft and spirit possessions.

The community courts (*tribunais comunitários*) are another example of a state recognised, community-based disputing forum. They comprise lay judges selected from among the local population, and they too solve minor disputes and social conflicts. The origin of these courts officially goes back to the passing of Law 4 of 1992, but in some areas they were created much later. For example in the *bairro* of Chamanulo B, in Maputo, such a court was established only in 2009. Yet in other areas they

<sup>4</sup> For a comprehensive analysis of the recognition of traditional healers and AMETRAMO, see West (2005) and Meneses (2004).

are *de facto* a continuation of the popular courts (*tribunais populares*) which were established during the socialist-revolutionary period. Compared to the disputing forums of traditional leaders, who have their roots in the pre-colonial period, the community courts can however be seen as relatively new actors (see Araújo, this volume).

Even more recent are the community policing councils (*conselhos de policiamento comunitário* – CPCs), which were introduced by the Ministry of Interior from 2001, albeit not supported by any law. While the CPCs were not intended as disputing forums, but rather as civilian partners to assist the state police in gathering information about local crime problems, we do find that they settle crimes and disputes in some areas (see Kyed, this volume). They may also provide public safety, such as patrols, but this varies from place to place.

Religious institutions, such as Christianity-based churches and prophets as well as Islamic leaders and groups, are also used by a large number of citizens for counselling, reconciliation and/or divination associated with social disputes and problems. However, they do not as such provide 'court' sessions (i.e. we do not find Sharia courts in any institutionalised sense). Religious norms and values are also frequently used in the other disputing forums, including by police officers and judges, but this depends on individual convictions.

Moreover, there are a whole range of NGOs and civil society organisations which, in one way or another, contribute to justice provision. Some of these are created by community members to respond to emerging issues of concern for its members, including public safety and justice problems. Others are national and often supported by international NGOs or development agencies. These are also among the new actors on the scene, as they emerged only after the civil war and have since then increased in number. Among them is the Mozambican League for Human Rights, a national NGO that provides legal aid through its various representations across the country. Another example, provided by Araújo (this volume), is the national NGO MULEIDE (*Mulher Lei e Desenvolvimento*), which is composed of community members at the local level who hold regular dispute resolution sessions with a specific emphasis on the rights of women according to both local norms and human rights principles. A number of other organisations – private as well as public – comprising lawyers or paralegals have also been established to provide legal advice and representation so as to improve citizens' access to formal judicial processes. However, as Araújo (this volume) points out, many of these organisations also resolve conflicts according to extra-judicial procedures and attend to non-judicial conflicts.

Within the area of policing and security we find an increasing number of private security companies. Some are multinational and employ thousands of security guards to protect the property of private businesses and the elite. There are also a large number of private guards hired directly by clients on an informal basis to protect private property. In addition, many young men engage in the protection of private cars in public spaces in exchange for small contributions. This is done on an entirely informal

basis. In and around larger informal and formal market places we also find 'security committees', which are organised by market vendors. They handle crimes occurring in the market places, at times in collaboration with local municipalities or with the state police. Although neither of these security actors resolve disputes akin to the other disputing forums, they do form part of a wider network that polices the boundaries between the legal and the illegal. Here we can also add the recently established Municipal Police, which fall under the local governments established in 1998 in urban areas. As addressed by Alar (this volume), they enforce municipal laws, such as licences of public urban transportation, and informal and formal market rules.

What emerges from this brief outline is a multifaceted landscape of different types of justice and security providers, with distinct histories and origins. Added to this complexity, we find that even the same type of provider may operate in distinct ways. It also varies from locality to locality what types of providers are present and most significant. This geographical diversity becomes clear in the empirical case studies in this volume. For example, Araújo (this volume) shows that in the rural district of Macossa it is the state police and the chiefs that resolve most of the disputes, whereas the community courts are not recognised by the population. She also compares the justice landscape in two suburban *bairros* of Maputo which vary greatly in terms of what types of providers are most prominent: in the first, it is the *secretário do bairro* and the community court; in the second, it is the NGO MULEIDE. This can be contrasted with the Maputo *bairro* dealt with by Kyed (this volume), where the community policing group handles much of the case-load, at times in collaboration with the *secretário do bairro* or the police. In the Gorongosa District capital, Jacobs (this volume) argues that it is the state police that attends to most of the cases, including social disputes, whereas Igreja (this volume) shows that in the same district it is the community courts that litigants address with war-related crimes. Importantly, citizens address different providers with different kinds of problems, or they 'forum shop' between the providers in pursuit of the best outcome. This aspect of forum shopping is discussed extensively by Araújo (this volume). Interestingly, Florêncio (this volume) also observes how young people in rural Mozambique and Angola have begun to forum shop strategically between the state providers and the traditional authorities in accordance with self-interest, rather than according to cultural meanings or laws. This marks a clear change from pre-colonial and colonial periods, and also reflects that the legitimacy of traditional authorities is becoming more contested, Florêncio argues.

### Multiple political-legal cultures and forms of hybridisation

Added to the richness of providers, today we find a range of different political-legal cultures in Mozambique which, deriving from shifting historical periods, interact, merge and confront each other with different sets of norms and practices. They in-

clude the traditional, colonial, socialist-revolutionary and the democratic-capitalist political-legal cultures. Continuities and overlaps between these cultures are present in legislation, administrative structure, habits and mentalities, styles of behaviour, and modes of representing the other (Santos 2006: 48-50). Colonial legal rule, for instance, which attempted to create a modern nation-state, was transposed on top of existing traditions, such as the pre-colonial African and Islamic traditions in Mozambique. While these traditions did not disappear, they were influenced and reshaped by colonial rule and vice versa. This process has since been repeated with shifting post-colonial political-legal cultures, notably the socialist-revolutionary of the 1970s-80s and the democratic-capitalist since the 1990s.

In this volume, the historical continuities and changes are dealt with in greater detail in Araújo, Florêncio and Meneses' chapters. Florêncio's chapter, for instance, which focuses specifically on the relationship between traditional leaders and shifting state policies, shows that the principles according to which traditional leaders resolve cases in the rural areas are in fact the same as during colonial rule, despite a range of formal legal changes. Meneses' chapter also points to important continuities, showing how spirit possessions is a contemporary reality that allows individuals and groups to rebuild their identities by curing misfortunes and promoting well-being, not dissimilar from pre-colonial times.

Despite such continuities, the merger and interaction of different political-legal cultures have also resulted in complex forms of hybridisation within the fields of justice and public safety provision (Santos 2006). One example is the community courts. These were created by law during the democratic-capitalist transition to resolve conflicts according to local customs and common sense, but within an overall constitutional framework that adheres to international human rights principles and the rule of law. The community courts were *de facto* built on top of the local-level popular courts established by the socialist-revolutionary regime. Its members often persist with the habit of serving party-state interests. The role of the ruling party can also be seen in the way members of the courts are selected. Simultaneously, many of the judges draw on the same procedural and substantive norms as the traditional authorities, who are also often influenced by colonial experiences, as Florêncio (this volume) discusses. Igreja (this volume), for example, shows how, in Gorongosa District, the community courts and the courts of traditional leaders are so alike that it does not make sense to distinguish between them. Araújo (this volume), by contrast, shows that the community court in a Maputo neighbourhood operates in a quite formalised way, which is more akin to the state courts than, for instance, to the informal procedures of the *secretário do bairro*.

The NGO MULEIDE is another legal hybrid. Its members draw on both local norms and international human rights principles, which may at times conflict and are therefore used selectively in different situations (see Araújo, this volume). The community policing councils, (see Kyed, this volume) were also created within a hu-

man rights and liberal-democratic framework. Yet, in practice, there are considerable continuities with the popular vigilantes (*vigilantes populares*) of the socialist-revolutionary period. The community police also copy state police styles and language when they hear cases, but this is often mixed with the use of local norms related to family, gender, and justice procedures. Likewise the traditional leaders in the central part of Mozambique oftentimes refer to state law when they resolve disputes, which can be a way for them to give extra weight to enforce their solutions, even when these are claimed to be in accordance to 'traditional' norms (Kyed 2007, Florêncio, this volume).

Jacobs and Araújo (this volume) show that hybridisation can also occur within state spaces of dispute resolution. Araújo, for instance, shows how the police in Maputo city in fact handle the vast majority of social disputes and, when doing so, apply 'community justice' principles – although both are outside the police's official jurisdiction. Jacobs illustrates how police officers, during their hearings in Gorongosa, recognise arguments that are otherwise confined to the 'traditional realm' of spirit mediums. The police officers do so in response to the spiritual claims made by litigants, but also because they are themselves part of the socio-cultural context in which they operate. However, the police officers are often caught in a position of ambivalence between conflicting legal orders, namely, the state-legal and the traditional-spiritual forms of reasoning. Igreja (this volume) points to a similar conflict between local norms and state law with regards to the community courts. The state amnesty law strictly prohibits these courts from adjudicating war-related crimes, but when litigants insist that such crimes are resolved because it matters to their sense of justice and well-being, the community courts at times decide to subtly oppose the amnesty law (see also Granjo and Meneses' contributions to this volume on how official law ignores the range of practices of traditional healers that deal with the domains of ancestral spirits and witchcraft).

These dynamics of legal pluralism make it a difficult task to neatly separate the different types of providers into either state/non-state, modern/traditional, formal/informal and local/international. Importantly, legal hybridisation can be more or less permanent, as when procedures and norms become so merged that the exact origin of each is hard to identify. It can also be highly situation-specific, and depend on the case in question and the individuals involved. Thus, as Jacobs (this volume) shows, individual police officers within the same police station may differ considerably in terms of whether they accept or ignore the spiritual arguments of litigants.

### Networks of collaboration and competition

In Mozambique there are no generalised patterns for describing how the different providers – state and non-state – articulate with each other in practice. How they do so depends on a broad array of local contingencies, including the attitudes and habits

of the individual actors involved. There are many unwritten rules and procedures for how the providers interact.

For example, a large study of the administration of justice in Mozambique (see Trindade and Santos 2003) found that in some districts the judges of the state courts had a close relationship with the community courts, in terms of regular consultations and referral of cases, while in other districts such consultation was absent. Conversely, in some localities traditional leaders tended to systematically refer certain types of cases to the community courts, whereas in others these two types of providers bitterly contested each other's local authority by providing counter-rulings to each other, and appealing to the district administrator to legitimise their rulings over those of the other. In yet other districts, the traditional leaders had much closer collaborative relationships with district administrators and district courts (than the community courts), to the point of these officials and courts refusing to hear disputes that had not been first referred to the local traditional leader. This could be contrasted with other localities where district courts systematically ignored the decisions of traditional leaders and worked to undermine their authority by referring cases to community courts.

In this volume, the case studies also illustrate different kinds of collaboration between police, state courts, traditional leaders, *secretários dos bairros*, community courts, community policing councils, NGOs, and private security guards. However, their areas of jurisdiction are not always clear, as many of the providers resolve the same kinds of cases. Often collaboration co-exists with different kinds of competition and ambivalence. Florêncio (this volume) eloquently shows this by tracing the long history of what is indeed an ambiguous relationship between shifting states and traditional leaders: the state has relied on the latter to assert authority, but also constantly struggled to control their scope of action so as not to undermine state authority. Alar (this volume) points to the ambivalent relationship between private security companies and the police. While the state has made it clear that there is a need to better regulate the activities of private security guards, who at times operate illegally, this has not been carried out, partly because some private security companies are owned by police officers.

In the urban neighbourhood dealt with by Kyed (this volume) there is a tense relationship between the police on the one hand and the community policing group and the *secretário do bairro* on the other: while the police depend on collaborating with the local structures to effectively deal with crime, there are also frequently conflicts over who should solve what types of cases. Such ambivalent relations reflect the political dynamics of legal pluralism, as each of the actors strive to consolidate their power position in the network of providers. In this network, access to prestige, clients and resources are at stake.

As we will discuss next, the current legislation in Mozambique provides no clear framework for how the various providers should relate to each other or for what their precise mandates are.

## The Ambiguous Legal Framework in Mozambique

Since the end of the 1990s, increased formal-legal efforts have been made to embrace those dynamics of legal pluralism that we have briefly described above. This includes the 1998 state recognition of associations of traditional healers, such as AMETRAMO<sup>5</sup>, and Decree 15 of 2000, which gave way to state recognition of traditional leaders and the village secretaries as 'community authorities'. These authorities should engage in a range of state administrative tasks, and are also obligated to assist the police and courts in public order enforcement and conflict resolution. In return they have received uniforms and are given a monthly subsidy from the state. In the new Millennium the Frelimo government also committed itself to strengthen the role of the community courts by drafting a *regulamento* (by-law) to support Law 4/1992. This would include improving the election procedures and the links to the formal courts. The introduction of community policing councils in 2001 was also a move towards including citizens in preventing and solving crimes within neighbourhoods and villages.

The trend toward formal recognition of customary and community-based justice culminated in explicit recognition of legal pluralism in the 2004 Constitution, implying state recognition of the "various normative systems and the resolution of conflicts" that go beyond the formal legal system (República de Moçambique 2004: article 4). The Constitution further calls for the development of institutional and procedural mechanisms that link formal courts with other mechanisms of justice (*ibid*: article 212). This official commitment to legal pluralism has been further reiterated in the Government's Integrated Strategic Plan for the Justice Sector (PEI II, 2008-2012).

Generally speaking, the PEI II is explicitly committed to the decentralisation of the justice sector by taking as its point of departure the functions of the justice system from the perspective of the end users. Decentralisation is supposed to improve access to justice for the poor by increasing jurisdiction to district level courts, building Justice Houses at the district-level to better integrate justice sector institutions, and revising the Penal Code that stipulates the settlement of petty crimes at lower levels. This suggests that district courts should be strengthened in the future, and that their relationship to other providers at the local level will be further specified.

However, this general commitment to legal pluralism remains ambiguous and unclear. It is still not supported by any substantial or specific legislation, nor does the

<sup>5</sup> It bears noting that, because official law denies the existence of sorcery or witchcraft, recognition of the authority and scope of action of healers only extends to traditional medical treatment of illnesses, and not to any role of healers in dispute resolution (West 2005).

PEI provide any clear operational strategy. Thus, while their relevance is generally acknowledged, no specific laws clarify the jurisdiction of the various customary and community-based mechanisms. Neither has any specific legal guidance been provided about how these should interact with the formal justice system. Whereas the 2005 draft legislation on judicial reform envisioned an integrated judicial system with legal and functional interaction between the formal courts and community justice mechanisms, the actual legislation passed in 2007, the Organic Law of the Judicial Courts (Law 24/2007), merely notes that judicial courts “may articulate with other existing conflict resolution instances” (Boletim da República, Law 24/2007: article 6). There is, however, no mention of what kinds of instances this may include or how such articulation may be put into effect. Also there is still no *regulamento* for the community courts.

The situation is further complicated by the fact that different state recognised community-based and customary institutions are regulated by different ministries. Community authorities fall under the Ministry of State Administration; community courts are regulated by the Ministry of Justice; traditional healers fall under the Ministry of Health; and the community policing councils were introduced by and consult with the Ministry of Interior (MINT), although they are not part of the formal police hierarchy. Moreover, there is neither a legal nor a policy framework that specifies what role the growing number of NGOs and paralegals within the area of justice might play in the overall justice system. Finally, as addressed by Alar (this volume), much remains to be seen in terms of legally clarifying the relationship between the state police, the municipal police and the private security companies.

The lack of a legal framework has also had an impact on donor support. While donors such as Danida, the European Commission, UNDP and the World Bank have explicitly recognised the important role of ‘informal’ and ‘semi-formal’ institutions, the vast majority of their resources continue to be allocated to formal state institutions.<sup>6</sup> At the operational level, engagement by donor-funded programmes with ‘informal justice systems’ is still very weak and lacks a coherent strategy. It is also highly selective, reflecting a greater interest in newer institutions, such as the community courts and paralegals, than in those institutions that have a much longer history, such as traditional leaders. Finally, with respect to community policing, there is currently no financial support, from donors or the government. Support terminated with the end of the pilot project in 2004, which was supported by the German bilateral donor,

GTZ. This may change if the draft decree on community security, produced in 2010, is approved.

The constitutional recognition of legal pluralism in 2004 is therefore surrounded by unclear elements, including in the Constitution itself, as Böckenförde discusses (this volume). This state of affairs raises the question of whether the current government is actually politically committed to follow up on the constitutional provision for legal pluralism as a core principle for defining the justice system in the country. At the same time, it must be realised that the complexity of legal pluralism ‘on the ground’ makes it difficult to develop a coherent legal framework. Developing such a framework takes time. It must also be remembered that the process preceding the recognition of legal pluralism in 2004 emerged from a contested history of conflicting interests.

### Background and wider political interests

The constitutional recognition of legal pluralism in 2004 marks a clear break with the state-legal centralism that had dominated reform efforts since the 16-year civil war ended in 1992 and the country embarked on a democratic transition. Until 2000, donor-supported justice sector reform focused exclusively on reforming and strengthening formal state institutions in accordance with ‘the rule of law’ and ‘human rights’. This was combined with support to the creation of new civil society organisations to promote human rights. Consequently, the village-level People’s Courts (*Tribunais Populares*), established by the socialist-revolutionary regime to substitute ‘traditional’ structures, were delinked from the formal court system, renamed ‘community courts’ and ‘downgraded’ to informal conflict resolution bodies (on the history and meaning of the *Tribunais Populares*, see Araújo, this volume). Village secretaries and popular vigilantes, who formed part of the Frelimo-state structures to resolve conflicts and maintain order at the local level, were also excluded from post-war legislation. This was informed by a wider effort to break with the socialist-revolutionary political-legal culture of the 1970s and 1980s, where party and state were merged and where unprofessional, lay judges were an integrated element of the People’s Court model (Trindade and Santos 2003).

Reform of the justice sector in the 1990s further ignored the chiefs, traditional healers and religious leaders who, outside state law, played a significant role in justice enforcement on the ground, even though they had been formally excluded by the Frelimo government after Independence in 1975 (Kyed 2009a). As discussed in detail in the contributions by Florêncio, Meneses and Granjo (this volume), such traditional structures had been banned by Frelimo, as they were seen as reflecting ‘obscurantism’ and as being against the modernisation and unification of the new independent society. Nonetheless, traditional chiefs did not disappear and spiritual beliefs and practices persisted. Rituals were even performed by some state administrators, as Meneses (this volume) notes for southern Mozambique.

<sup>6</sup> Italy, the Netherlands, Portugal, Sweden, and UNICEF have also engaged in mainly stand-alone justice sector projects. While all the donors supporting the sector are members of a Donor Justice Working Group, there is still lack of wider coordination and harmonisation of efforts (Danida 2008). Since the mid-1990s, Danida has been the most significant bilateral donor engaging in support to justice sector reform.

Such continuities were debated during the 1990s (see Kyed 2007; West and Kloeck-Jenson 1999), but overall reform efforts focused on making the formal system more effective and on re-extending it to the vast territories of the country where it had weakened or disappeared due to the war. Non-state institutions were seen as an impediment to this kind of state-building. Implicitly, it was assumed that traditional and community-based providers would become irrelevant once the state legal system was in place. This, as we have seen, did not happen. In fact, the number of non-state providers has increased.

Much the same kind of development occurred within police reform. Until 2001, the focus was on ensuring that the provision of public safety was solely taken care of by professionally trained law enforcers – i.e. the Police of the Republic of Mozambique (PRM) and other departments under the Ministry of Interior. Reform included efforts to demilitarise and depoliticise the police force, which had become paramilitary during the war, exemplified by direct collaboration with the government army and by regular use of physical force. The police was also highly partisan. They operated according to an enemy-versus-friend ethos, which legitimised acts of brutality against enemies of the state (Baker 2002). Post-war democratic reform sought to change these legacies of the past and to turn the police into a force that would adhere to human rights, serve the public rather than the power-holders, and defend individual rights and liberties rather than focusing on the defence of state security (Seleit 2000). These principles were enshrined in Law 19 of 1992, which created the PRM. At the same time, however, a major challenge was that the police were understaffed, under-resourced and lacked strong representation as well as legitimacy in many areas. Thus an aim was also to expand its operations to the hinterland – not least to the Renamo-dominated rural areas where the police had a very weak presence, if any at all (Kyed 2007). The focus on professionalism meant the abolishment of those popular vigilantes and militias that had supported the police during the socialist period, as these were seen as highly partisan.

The gradual shift towards recognition of legal pluralism can be seen as the result of a mixture of influences, including pragmatic reactions to the low level of success of the reform efforts towards formal state institutions in the 1990s; changes in international donor policies; and political interests and divisions within Mozambique over the issue of legal pluralism.

Formal state institutions were still unable to provide adequate justice and security, were often deemed corrupt in the media and lacked popular legitimacy, as the instances of vigilante and mob-justice also attested to (see Papadakis, this volume). Moreover, a number of studies in the 1990s provided evidence of the continued significance of traditional authority and of other forms of non-state justice providers. One particularly influential donor-funded study, coordinated by the Mozambican *Centro de Formação Jurídica e Judiciária* (CFJJ), accounted for the richness of community-based justice mechanisms and argued that the formal system ignored the needs of the

poor, who preferred restorative to punitive justice (Trindade and Santos 2003). It held that the judicial system ought to be adjusted to this reality through legal and functional linkages between the formal courts, community justice and traditional authorities, thus establishing a *de jure* system of legal pluralism. This would make the justice system more adjusted to local socio-cultural notions of justice (ibid.: 581-582). It was also a team at the CFJJ who, on the basis of strong empirical evidence, drafted the legislation on judicial reform in 2005 (referred to earlier) which was not approved. The research laying the grounds for this draft legislation was financed by international donors, notably Danida and the Portuguese development cooperation. This reflected a wider international trend to increasingly move beyond a strictly state-centric approach to justice and security sector reform (UNDP 2006; DFID 2004; OECD/DAC 2007).

There were also domestic political interests behind the recognition of legal pluralism. Studies arguing for the role of traditional authority in administration, conflict resolution and national identity formation instigated intensive media and parliamentary debates between the ruling party, Frelimo, and the opposition, Renamo. While Frelimo was internally split on the issue, Renamo wanted full recognition of traditional authority. Such political battles over the domain of 'tradition' have a long history in Mozambique, as Meneses (this volume) shows. In the case of Renamo and Frelimo, the post-war debate replayed a key area of contestation during the civil war, where Renamo was especially associated with the use of spirits and witchcraft. Notably after the 1999 elections, a number of influential members of the Frelimo government also became convinced that Renamo had a strong voter base in many rural areas, because it had aligned itself with traditional chiefs and healers during the war.

On the ground, this national debate was matched by conflicts between traditional authorities and the former Frelimo village secretaries, as well as by pockets of resistance by traditional chiefs to the state police and administrations. Simultaneously, local state officials depended on informal collaboration with traditional authorities to re-establish state institutional outreach in those rural areas over which they had lost control during the war. The Frelimo party structures also benefitted from such alliances (Kyed 2007).

Against this background, the passing of Decree 15/2000 in 2000 should not only be seen as a move towards recognising 'traditional culture' – although this claim was strong in the official debate. It was also viewed by many state officials as a way to ensure alliances that would boost the state administration. The police also saw the recognition of traditional leaders as a legal mandate to more thoroughly collaborate with local authorities (Kyed 2009a). Conversely, the recognition of village secretaries was seen, by Renamo in particular, as a means by which the Frelimo government could ensure that some 'community authorities' came from Frelimo ranks.

These political interests behind state recognition of non-state institutions, merging party politics with state administrative gains, have nonetheless been masked in

the official policy discourse on legal pluralism. Officially, legal pluralism has been cast as the recognition of 'what already exists,' namely traditional and community-based forms of justice that draw on the socio-cultural norms of the various local communities across the country. The 1992 law on community courts and Decree 15 of 2000 also posit an unproblematic co-existence of state and non-state institutions. They are represented as distinct domains of justice enforcement which handle different issues and can mutually benefit from collaboration with each other.

The layers of competition and overlapping jurisdictions that often exist in practice between state and non-state providers are thus ignored in official policy discourse. Could this explain why there has been no development so far of a clear legal framework that outlines their respective jurisdictions? If the understanding is that the different 'systems' cover different jurisdictions, then why bother outlining these in laws?

While these questions are difficult to answer, it does seem that there might be other, more political reasons for the lack of a clear legal framework. Firstly, the lack of clear mandates and of legal mechanisms for monitoring non-state institutions leaves ample room for political manipulation. This has been noted during election campaigns, where traditional leaders, village secretaries and community policing members have been enrolled by the ruling party to mobilise votes. Secondly, passing laws that give clear mandates to non-state providers may also increase these providers' expectations of government subsidies or other kinds of benefits that will affect the state budget. Thirdly, it is also worth noting that, since the current government came into power, in 2005, there has been somewhat of a standoff in the legal reform process that drove the movement towards legal pluralism under the previous government. This may reflect a change in attitude towards non-state providers in the government leadership. Finally, it is important to note that there have also been large disagreements on the issue of legal pluralism within the state apparatus and within the Frelimo party. This is illustrative of the heterogeneity of the state itself. For some policymakers, the recognition of community-based and traditional authorities had to do with the deepening of democracy, marked by citizen participation in conflict management and public life. For others, it has merely been an important instrument with political advantages, following the logic of maintaining power, much like during colonial rule (see Florêncio, this volume). The constitutional recognition of legal pluralism may itself, we suggest, reflect this internal contradiction and the deeper history that informs it, more than being the result of external pressure.

Based on the above considerations, it is important to acknowledge that legal pluralism as a policy concept will not be free of political considerations and interests. The question of how power is distributed within a legal plural context can however be influenced by the kind of legal pluralism model that is employed in law and practice. Learning from history is very important in this context. Next we address some different options of legal pluralism as a policy field.

## The Challenges and Possibilities of Legal Pluralism as a Policy Field

While legal pluralism has long been used as an analytical concept by socio-legal scholars, it has only more recently become an explicit policy concept, inscribed for example in state legislation, such as the 2004 Mozambican Constitution. Today the concept is also used in international donor policies (OECD/DAC 2007; World Bank 2008; Danida 2009; UNDP/Wojkowska 2006; DFID 2004) as well as in international human rights documents (see ICHRP 2009). This reflects a broader trend towards the official recognition of non-state legal orders by international agencies, although this may be fraught with ambiguities for instance towards traditional chiefs, as Peter Albrecht (this volume) shows for Sierra Leone.

Within states, as is the focus of this book, legal pluralism as a policy concept commonly denotes some form of state recognition of the norms, procedures and/or adjudicating forums that go beyond state law and its formal courts. However, there are many different models for how this is, or can be done. Recognition can vary in its scope and depth, ranging from simple state recognition of the existence of a plurality of norms and/or institutions beyond the state, to substantial incorporation of normative plurality into the state legal system (see ICHRP 2009: 90-97; Forsyth 2007). In the first case, the state formally recognises the adjudicative power of already existing non-state providers, but does not necessarily develop explicit national regulations which outline and monitor their areas of jurisdiction or which establish referral mechanisms between them and state institutions. In the second case the state may, to varying degrees, incorporate into the state legal system the substantive principles or normative practices of a non-state legal order, occasionally or in specific subject areas (such as family and property laws) (ICHRP 2009: 91). One example is the 1997 Mozambican land law, which includes the principle of community consultation, where local norms and customs are taken into consideration in land allocation. In some Latin American countries this has translated into a high degree of normative and institutional integration of indigenous justice into the formal legal system (ibid.: 92). A third form of recognition of legal pluralism is when state policies establish new non-state adjudicating forums that are envisioned to draw on local norms and customs such as the community courts in Mozambique.

Whatever model is applied, however, legal pluralism as a 'policy field' seldom implies a pure recognition of the empirical manifestations of socio-cultural diversity. It also implies a framework for state intervention, regulation and reform (Kyed 2009b). This framework may be more or less inclusive of the norms and customs that are applied by non-state actors. It also varies with the extent to which the recognition of

legal pluralism includes a wider representation of groups and their claims. In fact, recognition can also work to silence or oppress certain claims while consolidating particular power relations – local as well as national. As addressed by Griffiths (this volume), legal pluralism may be endorsed in national policies in a ‘weak’ or exclusionary sense, and in a ‘strong’ or inclusionary sense, or somewhere in between these two extremes.

### Weak or strong legal pluralism policies?

In the ‘weak’ sense, state recognition of legal pluralism implies increased state control of non-state legal orders, because the state assumes the authority to define the limits of how non-state legal orders can be applied – including their areas of jurisdiction regarding, for instance, what types of cases they can solve and what procedures they can use. In this sense, legal pluralism can in fact be applied to assert state monopoly on the production of legal norms and the taming of non-state legal orders by incorporating them into the state legal order (ICHRP 2009: 93). Weak legal pluralism is informed by what Griffiths (this volume) also refers to as the state-centric or legalistic approach, where state law and institutions are seen as superior to other legal orders.

An example of weak legal pluralism are colonial forms of indirect rule in Africa. As discussed in more detail in Florêncio and Araújo’s chapters (this volume), the Portuguese colonial administration recognised the judicial power of traditional leaders in Mozambique and its other colonies. They were renamed *régulos* and were allowed to adjudicate minor crimes and social conflicts within their native jurisdictions. Such recognition was however accompanied by restrictions and increased colonial control. *Régulos* were punished if they were caught adjudicating severe crimes (Alves 1995). In short, as part of their recognition, existing non-state or traditional legal orders were subjected to the overriding authority of colonial law within a state-enforced dualist system or bifurcated state (Mamdani 1996).

With the ban on ‘traditional structures’ at independence in 1975, legal pluralism in the weak sense was substituted with a socialist-revolutionary kind of state centralism (O’Laughling 2000; Hall and Young 1997). However, this came to coexist with a more moderate approach that nonetheless had clear political purposes in terms of strengthening state power. For example, the creation of the People’s Courts, a few years after independence, could be seen as a way to selectively co-opt ‘traditional cultures’, in order to make them serve the socialist-revolutionary goals of the Frelimo government (Santos 2006: 49).

In other African countries, post-colonial policies towards customary legal orders were less radical, and a number of countries even continued the dualist legal system created during colonial rule (see for example Albrecht on Sierra Leone and Florêncio on Angola, this volume). Irrespectively, shifting state policies of containment and recognition of customary institutions in the past were predominantly driven by political and administrative concerns so as to strengthen central state power, as Florêncio ar-

gues strongly in this volume. They were not driven by a benign concern to recognise socio-cultural diversity or, for that matter, to enhance ordinary people’s ability to access the kinds of justice that they found most legitimate. It was legal pluralism in the weak sense.

By contrast, legal pluralism policies in the ‘strong’ sense tend to be more recent, and indeed rare. They are inclusive of the diversity of already existing norms and practices that are not part of the state system, but are seen as locally legitimate. Strong legal pluralism is based on principles of equality and the right of particular groups to define and live according to their customs and norms. Thus, policies that adhere to strong legal pluralism allow for greater freedom and space for different non-state legal orders to apply the norms and practices that they themselves define. Here the state will assume the authority to delimit and redefine how non-state disputing forums operate (Griffiths 1986; Woodman 1999).

One example of strong legal pluralism can be found today in Bolivia. Here different indigenous legal orders are granted the same status as state law, and a high degree of independence, corresponding to the range of ethnic groups and their particular legal frameworks. This is also reflected at the national level, where different ethnic groups are represented in the Constitutional Court (Albrecht and Kyed 2010).

In Mozambique, the current official discourse on the state recognition of non-state legal orders is cast in an inclusionary language which denotes a high degree of official endorsement of the socio-cultural diversity within the country. This seems to reflect a ‘strong’ model of legal pluralism, implying a turn away from the state-centric approach that dominated in the past. Moreover, the fact that there is no detailed legislation that clearly spells out the jurisdictions and customs of traditional leaders could indicate that the Mozambican state allows this domain of customary law to define and apply its own norms with a high degree of independence. At the same time, legal pluralism is subject to constitutional restrictions: non-state normative systems and conflict resolution mechanisms are only recognised in as such as they do not contradict the fundamental principles and values of the Constitution.<sup>7</sup> As discussed by Böckenförde (this volume), it is difficult to interpret what exactly this restriction implies. What it seems to indicate, however, is that non-state legal orders will be subject to restrictions once they are state recognised – i.e. if their practices and norms contradict the Constitution they will not be tolerated by the state. Thus in the actual application of laws and policies we may see a weaker form of legal pluralism.

As noted by Forsyth (2007: 70), despite an official discourse of inclusion, state recognition may lead to “[...] far more regulation by the state of non-state justice systems and a fundamental change for the non-state justice system of the basis of its authority.” The degree of autonomy that state policies actually grant non-state institutions

<sup>7</sup> A similar kind of ‘repugnancy clause’ prevails in the 1996 South African Constitution with respect to customary law (ICHRP 2009: 92-3).



to implement their own procedures and substantive norms can therefore vary greatly in practice. When discussing different kinds of legal pluralism policies, it is therefore important to go beyond official policy discourse and also look at how such policies are actually employed in practice. This also includes looking at the political interests and goals that drive the implementation of such policies.

First of all, it is important to ask: is the goal behind legal pluralism policies to enhance and improve ordinary citizens' access to justice and public safety, according to what they find legitimate and relevant to their notions of justice and life-situation? Or are we rather seeing that the policy goals and the way they are being implemented are *de facto* driven by specific political interests to control non-state institutions and/or to consolidate the power of the national government? The answer to these questions may not always be mutually exclusive, as there may be different drivers and interests in play. The point is that we need to be alert to the fact that the implementation of legal pluralism policies can work in both directions – towards more inclusion and towards increased control of non-state legal orders.

Secondly, it is significant to ask: how and by whom is a non-state legal order defined and claimed, and thus where does the power of definition lie? Is it, for instance, actors within the state apparatus that ultimately assume the power of defining what counts as a legitimate non-state legal order, or does this power rest with local groups and/or individuals? Thus, the extent to which local citizens are part of defining non-state legal orders is also an important issue of concern. For example, in Mozambique the concept of community is employed consistently in state laws and decrees to delineate the constituency that legitimises non-state authorities and adjudicating forums. The question is: who is in fact this community in practice, and who actually speaks on behalf of the community? Is it a broader representation of a given population or is it rather a small and exclusive group of local powerful actors? Some empirical evidence suggest that at least in some areas of Mozambique the 'community' has been enacted through a small group of powerful actors when it comes to defining the way community courts, community policing forums and the courts of traditional leaders operate and are organised (Kyed 2007; 2009a). Broad-based participation and inclusion of different voices and claims may thereby be compromised. This is not only due to how the constituencies are defined in state law, but also because of the ways in which legal pluralism policies are appropriated by locally positioned actors. The crux of the matter is that state recognition can also be used for political purposes by the non-state providers themselves and the immediate group of persons organised around them. This may result in the further consolidation of the power of local elites. It can also work to further exclude certain groups of people (e.g. along the lines of gender, generation, and political affiliation), not only from taking part in defining a given legal order, but from gaining access to justice, property and resources. These aspects point to the way policies on legal pluralism can easily become subject to political manipulation and/or be political tools to assert authority and manifest power by state as well as non-state actors.

Against this background it is pertinent to discuss how the constitutional recognition of legal pluralism can be translated into policies that can be implemented in such a way as to ensure that they actually benefit and include the end-recipients of justice and public safety provision, including the poor and vulnerable. These are questions that are still being grappled with in Mozambique. While this book does not provide any final answers to how these issues can be tackled, we attempt to highlight below three significant areas to consider: the role of the state; the accommodation of different notions of justice and rights; and the question of how to link different providers and ensure local ownership of policy initiatives.

### What role for the state?

The empirical dynamics of legal pluralism that exist in Mozambique challenges the state-centric, or 'weak' perspective on legal pluralism. It raises the question of whether the state is able to – from a pragmatic perspective – or indeed ought to – from a normative perspective – be the primary provider of justice and public safety, and in so doing, subordinate other legal orders to the overriding authority of the state. If we are to take seriously the argument that the state in Africa is de-centring at an infra- and supra-state level (Santos 2006: 44), then it is worth reconsidering the claim that the state ought to be capable of dominating or regulating other legal orders. Certainly, a more democratic state ought to be characterised by allowing the plurality of voices and positions that exist within Mozambique to be part of defining what the society should look like, as Meneses points out in her chapter (this volume).

It is important to recognise that it is the non-state providers of justice and security who adjudicate the vast majority of cases in Mozambique and elsewhere in Africa, and that they do so according to norms and values that may be very different from those enforced by the formal state system. Granting equal status to such norms and values, rather than trying to subordinate them to state law or even banning them, is an option that not only is more inclusive of socio-cultural diversity, but may also be more effective in terms of assuring people's access to justice according to their needs. Doing so would have implications for the role of the state. It would mean rethinking the dominant Euro-American state model, where the state is conceptualised as *the* overriding sovereign authority and *the* framework for law, order and justice.

In Mozambique, there are currently divergent views of the ideal role that the state should play in contexts of legal pluralism. Some argue for a maximalist state, with not only a monopoly on the legitimate use of force, but also with the overriding authority to provide justice and public safety. Non-state actors should support the state in living up to this responsibility, but not substitute the role of state institutions. They should therefore have limited jurisdictions and also be closely regulated by the state.

Others, by contrast, hold that in Africa, where state institutions are weak, it is more realistic to have a minimalistic state that allows for locally owned and defined solutions to justice provision and policing. In a minimalist state, the state police will

also collaborate with community-based actors, but it will be the community actors who are the most active in providing public safety and solving conflicts in their communities. They will merely call upon the police when they need their assistance to deal with more serious offences at a larger scale. This minimalist role of the state police therefore calls for a state that is responsive to local community needs when these are required. It thus implies that state authorities become harmonised with local systems (Marks and Bonnin 2010).

Moreover, the state could play a role in providing the framework for a set of common principles that draw on and are shared across the plurality of legal orders within the nation-state. However, these principles should be developed and monitored through the collaboration between state institutions and local constituencies. They should not be defined by the central state. Local governments could be the focal point for the coordination of such collaboration. One shared principle could be a condemnation of the use of physical force in justice provision, which would also adhere to international human rights principles. A minimalistic state would also imply that the power to define and enforce order is shared by the state and different community-based institutions. This would require a rethinking of the traditional, largely Western conception of state sovereignty.

In proposing a minimalist state, it is important to take seriously the view that ordinary citizens have of the state's role. While it is common that many citizens do not seek redress with state institutions – at times because these are seen as inadequate or ineffective – many do hold an ideal view of a state as the main provider of justice and public safety. It is important that these views are taken into consideration through thorough assessments of the needs and aspirations of ordinary citizens.

Another challenge with a minimalist state is how to nurture a situation where the national government and officials in the state bureaucracy will agree to support a system whereby the state's formal sovereign authority – its responsibility to define the overriding order and its monopoly on force – can be *de jure* shared with non-state authorities. It is here that issues of power and political conflicts need to be addressed the most. A minimalist state would imply more autonomy and power to non-state legal orders, and this could likely be seen as a threat to the power of the central state and government. The challenge is to develop a system that benefits ordinary citizens, rather than the power of specific authorities. This would require check and balance mechanisms that include broad-based participation of wider constituencies in holding state as well as non-state providers accountable to the needs of different groups.

### How to accommodate different notions of justice and human rights?

As several of the contributions to this volume clearly show, the kinds of justice provided by non-state legal orders may be more meaningful to the socio-cultural views and livelihood needs of ordinary citizens than those provided by the formal state system (see especially Meneses, Granjo, and Florêncio). This includes their emphasis

on reconciliation and restorative justice, rather than punitive justice. It also includes their focus on the spiritual dimensions of conflicts, which are not catered for in formal judicial processes, but which are extremely significant in the lives of most Mozambicans, as discussed extensively by both Granjo and Meneses (this volume).

However, Igreja (this volume) warns against preconceived ideas about non-state justice being based on reconciliation and forgiveness alone, as these may run counter to local citizens' ideas about the need for compensation and reciprocity, which are widely practiced in many non-state court forums. Such justice needs are also closely related to notions of health and reproduction, and in broader terms to the very survival of the group. The formal system punishes crimes based on an individualist conception of justice, which does not take into consideration local notions of collective suffering. This reality of local notions of justice supports the argument for legal pluralism policies in the 'strong' sense and could also support a minimalist state model, which allows for greater autonomy to define justice needs by local constituencies. Jacobs (this volume) goes as far as to suggest that formal state bodies, such as the police and the courts, ought to formally incorporate spiritual notions of justice so as to accommodate local needs.

At the same time, it is important to consider that within a country like Mozambique there are many conflicting notions of what is appropriate justice. This can include generational differences, as Florêncio (this volume) shows, and differences may also be more geographical, as shown by Araújo (this volume). The question is how a wider national legal framework can best accommodate the diverse local conceptions of appropriate justice that prevail within contexts of complex legal pluralism. A first step is to thoroughly assess – from an empirical rather than a state-centric or purely juristic perspective – what types of justice actually matter, and to whom. This includes not only posing such questions to local power holders and providers, but also engaging in dialogue with ordinary citizens belonging to different groups of people, including women, youth, vulnerable groups, etc. So far this kind of dialogue has been lacking in Mozambique.

To date, programmes on justice sector reform supported by international donors have focused on the training of community judges and traditional authorities in state law and human rights. Few considerations have been made of local beliefs and conceptions of justice, such as the significance of spirits and witchcraft. These are exactly the areas that often underpin the authority of non-state providers and which tend to make them an alternative choice to the state-legal system. Policies on legal pluralism should therefore be based on empirical experiences and realise that, even within one region of a country, there is great variety of justice options and preferences. This requires flexibility in the definitions of informal or non-state justice. Above all, it means that any effort to 'import' foreign models that draw on stereotypical definitions of the state and non-state justice should be avoided.

Simultaneously, it is important not to romanticise 'the local,' 'the community' or 'the traditional' sphere of justice provision. Witchcraft, for instance, which is resolved

y non-state providers, is an instrument of social control that reproduces unequal relations, as Granjo (this volume) argues. Culturally-embedded views and practices of social ordering can underpin power relations and be highly discriminatory. Instead of ideal or romantic descriptions, there is a need to understand actual providers from the point of view of the extent to which and how they actually provide people with access to quality justice. This can be done by a thorough mapping of the institutions people actually turn to with different kinds of cases. For example, people may at times refer to take their social problems and family disputes to the police, contrary to the view that the police only deal with crime (see Araújo and Jacobs, this volume).

Conversely, many crimes are handled outside the formal systems, which challenges the stereotype that informal justice providers can better cater for social problems and family disputes (see Kyed and Florêncio, this volume). Moreover, legal pluralism policies must consider that non-state or customary providers may discriminate against some groups of people, such as women, and may also violate other human rights, for instance by using different kinds of physically harmful ordeals or punishments, as discussed by Florêncio (this volume).

International human rights frameworks have much to offer in terms of improving the quality and procedural aspects of justice provision, including ensuring equal treatment of men and women. However, the human rights focus should not undermine, but take seriously, the justice needs and views of local citizens. In fact, as suggested by Papadakis (this volume), the reform of the formal justice institutions and the police in Mozambique in accordance with the rule of law and human rights has implicitly contributed to extremely violent forms of vigilante or mob-justice in urban centres. This seems contradictory, because human rights are clearly against the use of any form of violence. However, in practice, the human rights principles that provide legal protection to criminal suspects and that require evidence of guilt are experienced by citizens as a failure by the formal system to adequately punish criminals – or worse, as granting more rights to criminals than to victims. This is coupled with ideas about state corruption and alignment between criminals and the police. Consequently, citizens may take the law into their own hands so as to make sure that the criminals are punished. This points to a failure to translate human rights into a vocabulary that is understood by and adjusted to local citizens' needs and perceptions.

Experiences around the world have shown that the promotion of human rights principles to address issues of abuse and discrimination, by criminalising certain practices and/or by imposing strict rules and norms on non-state providers 'from the outside', is unlikely to be successful (Albrecht and Kyed 2010). Much more viable is the provision of guidelines and the development of shared principles that are broad and easily adaptable to different contexts, so as to nurture local ownership. Such guidelines should be made in collaboration with local stakeholders, through interactive processes of dialogue across a broad representation of groups and individuals. This is very much in line with the minimalist state model's perspective on shared principles.

Moreover, to address issues of discrimination it is important to support more general empowerment strategies that can strengthen the voice and capacities of vulnerable groups to access justice. Here civil society organisations, local activists and social movements that already promote the rights of vulnerable groups can play a key role. They can also help monitor actual adherence to shared principles and rights. The state, and more specifically the judicial courts, could also oversee the compliance of non-state justice providers to human rights, but in many contexts this is unrealistic due to the lack of human and financial resources within the existing state budget.

### How to link different providers and ensure local ownership?

As we have addressed earlier, there are currently a range of different kinds of linkages and forms of collaboration between various providers – state and non-state – in Mozambique. However, these are not supported by legislation, and this often underpins confusion and competition. There seems to be widespread agreement at present that the government ought to provide a legal framework for the way different providers should relate to each other. In doing so, we suggest, it is relevant to support and build legislation on already existing links, rather than invent new ones. This will require an in-depth mapping of experiences on the ground in different localities. Presently there has been a tendency for governments in the South and for their international development partners to support new hybrid solutions, such as community mediation schemes or local paralegals, to allow for improved links between state and non-state legal orders. However, the sustainability of such new schemes needs to be addressed, as these often operate only as long as they receive international funding. Instead, sustainability can be ensured if legislation instead builds on already existing forms of collaboration among local providers. In doing so, legislation should however be sensitive to the contestations over power and positions that may prevail between such providers, including how these feed into national level politics.

Moreover, legislation could build on the kinds of hybrid mixtures of norms and practices that already characterise many state and non-state providers 'on the ground', and which have emerged largely in response to local justice needs. Thus, rather than recognising separate, distinct 'systems', it is worth considering, for example, how judicial procedures could formally include aspects of customary justice.

Finally, it is important to consider how policies can be implemented so as to ensure local ownership. Here it is important that initiatives are not seen as being 'owned' by the state or by international development partners. This implies a broader and more inclusive process of implementation where it is not only the state – such as the local tiers of the police or the courts – that drive the initiatives. Non-governmental or civil society organisations (CSOs) at local and national level could, for instance, play a role in stimulating and facilitating the organisation of community-based forums, so as to allow these to be locally anchored and not 'owned' or controlled by the state. However, the role of CSOs is an area that needs to be discussed in more depth. For example,

national and provincial community policing committees already exist that consist of the members of councils in different areas of the country. These have been active in giving inputs to a Decree on community policing, thereby ensuring non-state ownership. They could also play a role in implementing the Decree once approved. Perhaps this model can be used as an inspiration for the community courts too.

With regards to the sustainability and local ownership of the community courts, it is important to note that the official justification for not approving the Organic Law on Community Courts has been a lack of financial resources to sustain these structures by the state. This seems ironic, given that these courts should be 'owned' by the communities. However, this issue of financial sustainability has actually never been debated with the community court judges themselves or with any members of civil society. There has been no space for dialogue. Increased civil society involvement is crucial, rather than merely relying on the assumptions of central state agencies, which may in fact use 'the lack of state funds' as an excuse not to move forward with legislation recognising non-state mechanisms.

When formulating and implementing legal pluralism policies, a core issue to keep in mind is that they should take their point of departure in 'what already works' on the ground, based on thorough empirical assessments, which include the perspectives and needs of ordinary citizens. Key here is to facilitate spaces of dialogue, where a range of different groups in society are invited to participate and debate different notions of justice and preferred options for seeking redress. This is a long-term process that requires patience and flexibility so as to accommodate legal pluralism in the strong sense. In this process, there will be areas of conflict and disagreements as different actors will strive to secure their position and status, while trying to silence alternative voices.

## Outline of the Book

This book is divided into four main parts, comprising a grouping of the different chapters. Chapters 1 and 2, by Anne Griffiths and Markus Böckenförde respectively, engage with overall discussions of legal pluralism from a social science view point (Griffiths) as well as from a legal perspective (Böckenförde). Chapter 2 also discusses the Mozambican Constitution's article on legal pluralism.

The second part of the book moves onto those empirical chapters that engage with notions and practices of justice in a plural legal context, both tracing their histories (Paula Meneses, Fernando Florêncio) and their contemporary manifestations in urban as well as rural areas (Sara Araújo, Paulo Granjo, Victor Igreja). It is also in this part that the volume elaborates on the very significant role of the invisible sources of conflict and justice, with three of the chapters focusing in great detail on witchcraft

and on the role of spirits in making sense of the past. The contested relationship between the domain of 'tradition' and the domain of the 'modern' state is also extensively discussed, including its historical roots.

In the third part of the book, the five chapters focus on policing, violence and crime. One chapter deals with the largely unsuccessful reform of the police during the democratic transition (Francisco Alar). This is complemented by the next chapter's focus on vigilante justice and lynchings in urban spaces, which occur largely as a result of the failure of formal state institutions to punish criminals in the eyes of ordinary citizens (Vitalina do Carmo Papadakis). The next two chapters in this part of the book explore how policing actors – state as well as community police – resolve both social disputes and crimes in highly hybrid ways at the local level (Carolien Jacobs, Helene Maria Kyed).

Finally, the fourth part comprises two case studies from outside Mozambique, including a chapter on the role of chiefs in post-war reconstruction efforts in Sierra Leone (Peter Albrecht) and a chapter on community justice and its historical development in Cabo Verde (Odair Varela).

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# Legal Pluralism, Justice and Human Rights: Reappraising Law in a Transnational Age

Anne Griffiths

## Introduction

The concept of legal pluralism has generated a great deal of debate over the years.<sup>1</sup> It encompasses diverse and often contested perspectives ranging from what John Griffiths (1986) has termed 'juristic', 'weak' or 'classic' legal pluralism, associated with a lawyer's view of legal pluralism, to what he has termed the 'strong', 'deep', or 'new' form of legal pluralism that is associated with a social-science approach to law. The former is characterised as representing a state-centred view of pluralism that focuses on the recognition of differing legal orders within the state, where state law defines the conditions under which pluralism is said to exist. This form of pluralism has its roots in the context of Empire and colonisation, where local, customary, indigenous or religious law became incorporated within the framework of the colonial state. In this chapter I will firstly provide an overview of the 'weak' and 'strong' models of legal pluralism and discuss the current preoccupations of legal pluralism in a transnational world. Secondly, I will suggest ways to deal with the study of legal pluralism taking into consideration the complexities of law, culture and rights.

<sup>1</sup> For a detailed list of references, see A. Griffiths (2009):167. Key texts include Vanderlinden (1970); Galanter, (1981); J. Griffiths (1986); A. Griffiths (2002); Merry (1988); von Benda-Beckmann (1988); Woodman (1998); Greenhouse (1998).

## Weak, Juristic or Classical Legal Pluralism

Much of the earlier work associated with the weak, juristic or classic legal pluralism deals with indigenous law represented as a counterpoint to European or western-style law.<sup>2</sup> This came about through Western countries engagement with colonialism or Empire and the acquisition of territories and subjects that required to be governed. Whether under direct or indirect rule, regulation took the form of law which, as Chanock (1985: 4), among others, has noted, was the cutting edge of colonialism in its attempt to control and govern its colonial subjects while bringing about their transformation and that of the societies in which they lived. In this context, while European or western law was imposed on colonial subjects, it was also recognised that such law was inappropriate in certain cases – for example, in governing the family life of subrogated persons – and that regulation of such matters should be left to the local, customary, or indigenous law of that group. It therefore became necessary to make a study of these forms of law to provide for its incorporation within the framework of the colonial state. In this way local, customary, or indigenous law was viewed as something 'other' than western law, as a separate and distinct form of law.

Under this model of legal pluralism, the state defines the parameters that mark the territories of legal systems within its domain, such as customary and Islamic law, in ways that depict them as separate and autonomous spheres. This gave rise to a dual system of law theory – one in which, in many colonial countries, gave the Western or European-style law dominance over the 'customary' or 'indigenous' unwritten law through mechanisms such as the repugnancy clause that was widely in use in the colonies. This clause provided recognition for customary law only in so far that it was not "incompatible with the provisions of written law or contrary to morality, humanity or natural justice." I am quoting here from the current law of Botswana. This clause in the Customary Law (Customary Law Act. Application and Ascertainment, Act no.51, 1969: 2) derives from the days when Botswana was the Bechuanaland Protectorate, under indirect British Rule. When the Protectorate acquired independence, in 1966, and became Botswana this clause was retained as part of the post-colonial legal system, as is the case with a number of postcolonial African countries. Thus, systems of law, as they were perceived under this 'weak' model of legal pluralism, stood in an unequal relationship to one another. The customary or indigenous systems are

<sup>2</sup> What to call law other than state law has generated a great deal of discussion. Terms such as local, folk, customary, informal, people's law and indigenous law have all been mooted, but the point has been made that there is no characterisation which consistently follows any supposed distinction between state and folk law. For discussion of this issue, refer to Allott and Woodman (1985: 13-20).

subordinated to the Western or European laws – now state laws – when conflicts of interest arise.

### Examples of the weak model and of state pluralism

One example of weak legal pluralism is the Botswana repugnancy clause, mentioned earlier, where customary law is only acknowledged as existing provided it meets the criteria set by state law. In general, where pluralism is recognised by the state it is often framed in a way that sets out the differing legal systems in separation from one another. For example, in Botswana a distinction is drawn between customary and common law. Customary law is defined as being “in relation to any particular tribe or tribal community, the customary law of that tribe or tribal community in so far as not incompatible with morality, humanity or natural justice” (Customary Law. Application and Ascertainment. Act no 51, 1969: 2). Common law is distinguished on the bases of being “any law, whether written or unwritten in force in Botswana, other than customary law” (ibid.).

State legal pluralism is most clearly evident when dealing with personal status and family issues where plural laws, such as customary, Islamic and state or national law, have jurisdiction over citizens that are classified as belonging within their particular domain. Under this model of legal pluralism, the state defines the parameters within its jurisdiction that distinguish legal systems from one another, creating parallel spheres of operation. A prime example of this type of pluralism is provided by Hooker (1975), who surveys plural legal systems in Asia, Africa and the Middle East. He defines legal pluralism as circumstances “in the contemporary world which have resulted from the transfer of whole legal systems across cultural boundaries” (Hooker 1975:1). While reality may be very different, as highlighted by my own work in Botswana, this type of legal model has implications for the ascription of ‘identity’ and for how it is managed within states. Consequences also flow from the differing legal systems that are applied to the cases before them. Law is a powerful tool with regard to political rhetoric about ‘law and order’. We have seen how states have used this rhetoric with regard to the Iraq war and the war on terror. Law is equally powerful because its’ application has concrete consequences for individuals and groups, most notably with regard to its exclusionary powers.

State pluralism varies widely and can take at least six different forms. First, the recognition and even creation of institutions or authorities outside the formal legal system to mediate and settle disputes (such as in India, Pakistan and Niger). Secondly, the application of different laws, especially those that affect personal status (such as marriage, adoption, and divorce laws) to different people depending on their religious identity (as in Israel, Indonesia or Malaysia). Similarly, in many states indigenous people are subject, to varying degrees, to their own customary legal orders (as in the USA, Canada, and many parts of Africa, Asia and Latin America). Thirdly, the application of different personal status law regimes, while providing a common

civil law (such as a civil law of marriage) that allows people to *cross-over* (as in India or Botswana). Fourthly, the exemption of certain legal orders from its remit (as provisions in the Zambian, Kenyan and Zimbabwean constitutions exempt customary law from conformity with constitutional standards). Fifthly, recognition of the special status of customary legal orders but only in so far as they are not contrary to constitutional standards (as, for example, in South Africa and Mozambique). Finally, states may also exempt certain geographical areas from their formal legal regime and recognise normative orders prevailing therein as law (as, for example, in Native American Reserves in the USA or areas of Special Jurisdiction in many Andean countries). In those regions, there are some constitutional exceptions with respect to indigenous legal orders.

### Problems with the weak or juristic model of legal pluralism

The weak model of legal pluralism provides a very limited definition of what constitutes law. For under this system, ‘legal’ rules are created and set apart from those rules created from other sources – for example moral or religious rules – which may be drawn from society at large. As a result, under this model legal norms are set apart from, and privileged over, social norms and used to determine outcomes where conflict arises (Roberts 1979: 20; Galanter 1981: 20; Comaroff and Roberts 1981:5). Thus, ‘law’ is confined to a particular framework, defined in terms of a particular set of sources involving statutes and common law interpreted by legal experts who have the power to define what law is, and so to exclude those norms and values that fall outside their narrowly construed paradigm – in other words, the power to accord authority, legitimacy, and validity to some claims while invalidating or refusing to recognise others. This particular framework of ‘law’ sets ‘law’ apart from social life and promotes an image of autonomy that is used to maintain its power and authority over social relations in general. This sustains a notion of hierarchy, while at the same time maintaining an image of neutrality and equality within the ‘law’s’ own domain. The power of this legal model, often referred to as a centralist or formalist model of law, is so pervasive that it may be said that all legal studies stand in its shadow (Galanter 1981; Griffiths 1986). I turn now to another model of legal pluralism, the strong form of legal pluralism.

### Strong, Deep or New Legal Pluralism

The new or strong form of pluralism is grounded in an empirical perspective. This perspective is one that defines pluralism as “that state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs (Griffiths 1986:2).” This approach to law provides for a more far reaching and open-ended concept of

law that does not necessarily depend on state recognition for its validity. Under this model, state law is still recognised but cannot act in an exclusionary way. In other words, state law may be viewed as only one of a number of elements that give rise to a situation of legal pluralism. For some scholars, it has come to represent a more encompassing view of law that provides a broader, more inclusive platform for participation and recognition. This type of model is often used to challenge conventional legal paradigms with a view to forcing them to be more inclusive.

For example, given transnational migration and displacement due to conflict and economic vulnerability, one area that has been in the spotlight in recent years is citizenship. This has raised questions about who is to be included and who is to be excluded from being a citizen within a state. Policies implemented in formal laws lead to a set of criteria that are applied in making this decision. Those that fail to meet these criteria and who remain in the state in question acquire an 'illegal' status in law, rendering them liable to deportation and expulsion. The formal criteria for citizenship tend to be somewhat limited, based on country of birth, marriage, official residence, etc. These criteria tend to be fairly narrowly based and have been subject to critique. Attempts have been made to displace the status quo by framing a category of 'social citizenship' as a step towards challenging and broadening formal legal definitions of citizenship when it comes to dealing with undocumented persons within a nation state. Such new criteria include the period of de facto residence, contributions to and engagement with the local community, and birth of children within the country, among other factors. It comes as no surprise that many of those constructing categories of social citizenship tend to be anthropologists, sociologists and socio-legal scholars, who have a more social-scientific perspective on law and its relationship with society and who seek to apply this perspective to create more inclusive definitions of law.

Other examples include regulatory frameworks that are not formally recognised by state law but that have legitimacy and authority in the eyes of those communities that apply them. This includes, for example, the *favelas* in Brazil or the *barrios* of Colombia, which were viewed until recently as illegal, squatter settlements by state law. I gather there have been recent attempts made in Colombia to recognise and regularise some of these settlements under certain conditions. Another example is that of People's Courts in South Africa that sprung up under the old apartheid regime and that were used by local groups to control and regulate life in the townships.

## Legal Pluralism in a Global and Transnational World

As I have noted elsewhere, the weak and strong legal models that have historically dominated discussions on pluralism "represent the product of differing historical, economic and political factors that have conjoined to create different sites for study

over time and space" (A. Griffiths 2002: 289). They stand for points at differing ends of a scale that may vary along a continuum, depending upon the extent to which state law or other normative orders govern particular situations on the ground. Today it is clear that law is enmeshed in current processes of globalisation and transnationalism. These processes that involve "social, political and economic activities [...] stretching across the globe" (Franz and Keebet von Benda-Beckmann and Griffiths 2005: 1) derive from "the accelerated flows of various commodities, people, capital, technologies, communications, images, and knowledge across national frontiers" (Long 1996: 37). This flow may encompass economic migration involving a whole range of actors, from transnational corporations, corporate executives or non-governmental organisations, at one end of the scale, to undocumented migrants whose existence is often precarious due to their 'illegal' status in the host country. Or it may involve the displacement of large numbers of the population due to war or conflict, resulting in streams of refugees or asylum seekers who bring their way of life and laws with them to their new countries of residence. It may also embrace religious or other transnational networks that stretch beyond the territory of the nation-state, whose members may or may not form minorities within the state, but in any event find themselves caught up within a broader system of governance and allegiance.

At the same time, there has been an increasing focus on and engagement with international human rights – whether at the transnational, national or local level – as varying social actors seek to negotiate, contest or appropriate a whole range of concepts, including good governance, transparency, accountability, gender equality and non-discrimination. Such actors include not only national states, acting as sovereign lawmakers or in concert with other states in the construction of international law, but also national or transnational non-governmental organisations and so-called 'law merchants'. The latter are lawyers who travel the world, usually on behalf of governments, development organisations or multinational law firms, to introduce their law to countries that are in the process of legal reform (see Dezalay and Garth 1995). Other actors include epistemic communities.<sup>3</sup> They represent teams of experts that set the agenda for legal blueprints that are imposed on governments and local populations, for example with regard to the management of resource rights, such as fisheries. They also include self-regulatory networks, traditional and religious authorities and local communities.

In these contexts, non-state actors such as NGOs can exert enormous influence that remains 'hidden from view' in terms of formal legal regulation. Weilenmann (2005; 2009a; 2009b), for example, explores the law-making capacities of development projects and of international and national development agencies, such as GTZ

<sup>3</sup> See M. Wiber (2005: 131), who uses this term to refer to a network of persons spread across the globe who share and promote a particular form of knowledge. See also Haas (1992).



(the German agency for technical cooperation). Through a case study of a project in Ghana aimed at promoting women through reforms dealing with law, state and civil society, he shows how organisations involving development cooperation create 'project law', during the early stages of project design, that is largely structured by the legal requirements of the donor country. Thus he demonstrates how, in some developing countries, the rule of law and territorial control is often contested by powerful development agencies and NGOs who could be said to achieve a 'quasi-state status' in their sponsorship of programmes aimed at promoting good governance, justice, and human rights.

This is achieved through the bureaucratic mechanism of what he terms 'project law' that governs international aid. Such law comes into being at two levels. The first concerns those legal rules that guide the planning and the conceptualisation phase of development projects and that monitor and transfer project responsibilities to local implementing organisations. At this stage, regulation is often based on procedures developed by bilateral or multilateral development agencies that are frequently derived from those agencies' own national legal systems. This sets the framework for the second stage, where project law represents those rules that are formed by project personnel during the implementation process and interaction with target groups. While there is a considerable amount of literature on the operation of international development agencies, Weilenmann observes in a study on Senegal that "little attention has been paid to the societal impact of normative orders regulating the conceptualisation and implementation of development projects, and to the socio-political structure that generates such regulations" (Weilenmann 2009b: 2).

As Weilenmann points out, development projects have had a considerable political impact on the social life of developing countries. This gives cause for concern, given the constraints under which project law operates, with a limited spatial, temporal and institutional validity that is built into each individual project. In addition, project law has 'the potential to fragment the prevailing legal and political orders in recipient countries in such a way as to weaken their rule of law'. For the cumulative, fragmented field of competing normative systems to which project law of the various development agencies gives rise may have a destabilizing effect in the country in which they are implemented.

Under these circumstances it is clear that processes of translocation are taking place at different levels of socio-political and legal organisation. These underline the extent to which "nation-states can no longer be treated as discrete legal entities that can be studied in isolation either internally or externally (A. Griffiths 2002: 229). For, as Sassen (1999:1) has observed, "today's global economy poses a challenge because it simultaneously transcends the authority of the national state, yet is at least partly implanted in national territories and institutions". As a result, transnational law becomes part of social settings in which it not only competes with but may shape existing state law. Indeed, the complexities of state legal pluralism provide an area that

Merry (1988) and Woodman (1998) have long identified as requiring more in-depth study. Moreover, transnational law may also compete with self regulatory mechanisms, customary and sometimes religious law at different levels within and beyond the nation-state. The way such law is embedded at local levels occurs in different processes which have different outcomes. Thus, 'incoming' law may be locally reproduced as a recognisably distinct and 'foreign' body of law; it may remain somewhat distinct but become hybridised, creolised with local legal forms or vernacularised; or it may be absorbed and become an inseparable part of the existing legal structures. This may give rise to a revitalisation, or even reinvention, of customary or indigenous law under certain conditions (Oomen 2005).

One example of the revitalisation of customary or indigenous law can be drawn from contemporary Botswana. The newly appointed Chief (or Kgosi) of the Bakgatla, who replaced his father and is a lawyer in his early 30s, has made the national news because he has reintroduced the concept of initiation and age regiments. Members of these regiments have been scouring Mochudi, the central village, for the polity and flogging those that they find to be unruly. There is provision for corporal punishment under the formal legal system of Botswana, but this can only be applied after certain legal processes have been adhered to, e.g. a hearing at the Chief's kgotla where the accused is permitted to speak in his or her own defence, a finding of guilt, etc. None of this has been followed in Mochudi. When the Attorney-General raised the matter with Kgosi Kgafela she was told that flogging is done, not as part of a judicial process, but of long established Kgatla culture that is not under the jurisdiction of the Attorney-General. Headlines in a national newspaper, the Echo (15 April, 2010, issue no 238), stated that the Kgosi Kgafela regiment flogs church elders for "making a noise" because of the instruments they were using to make music and because they had been barred from holding services in the village. It should be pointed out that not only is Kgosi Kgafela a lawyer, but he specialises as a human rights lawyer and is a member of the Board for Ditswanelo, a prominent human rights NGO in Botswana.

The manipulation of culture and identity is also something that can be imposed from outside a community. With regard to indigenous groups, Merry has observed that they "often define themselves in terms being developed by the global movement of indigenous peoples' human rights and the provisions of state law" (Merry 2000: 127). The effect of this is that such groups, in making claims to retain their land and/or water rights, are forced by law to assert their cultural distinctiveness (regardless of whether that is a dominant feature for the group itself) if such claims are to be successful. In this way "the legal provisions of the nation in which an indigenous community lives as well as those of the international order affect how a particular indigenous community presents itself and the kinds of identities it assumes" (ibid.). This perspective is important, for it belies one that would simply treat such groups as 'traditional', in favour of acknowledging "recent accommodations to the shifting global and national frameworks of power and meaning in which the community lives" (ibid.).

## Coming to Terms with Legal Pluralism: Social Scientific and Anthropological Perspectives

Given the complexities of law, culture and rights discussed above, how then are we to deal with the study of legal pluralism? There is no clear answer to this question, I suggest, because there can be no *one way* or *method* of encapsulating or pinning down what legal pluralism entails. I argue for a more rigorous questioning of what lies behind our pursuit of studies in legal pluralism, because each study has its own parameters. In other words, it is significant to address the following questions: (1) What are the underlying assumptions that underpin our investigations of legal pluralism in particular contexts? (2) For what ends are these investigations taking place, including assumptions about outcomes? (3) What are the sources of data that we are drawing on to inform our analysis, and why are we using them? (4) What are the constraints/limitations and biases of our approaches (and, conversely, what are their strengths)?

In adopting this approach, I want to make the case for engaging with a social scientific or anthropological form of enquiry with regard to law which underpins this kind of inquiry. This is one that seeks to flesh out the concept of power in concrete terms, by examining where it is located, how it is constituted and what forms it takes. It examines to what end are claims being made and by whom. It is very important to know who these persons are who form the subject of investigation, in terms of their status and the constituency they represent.

An example from Mozambique, based on the work of Buur and Kyed (2006), highlights the relevance of addressing these aspects. Mozambique's decentralisation Decree 15/2000 provides no formal guidelines concerning the consultative and representational role of 'community authorities'. It appears to presume that traditional leaders represent the rural populations' interests. In fact, Oloka-Onyang'o's field research revealed that most disputes over leadership took place within, and were resolved by, small and exclusive circles of people, composed mainly of members of the chief's family, the council of elders (men), the traditional police and local NGO workers, thus reflecting a rather narrow understanding of 'community consultation'. The approach that I am proposing would not only break down the composition of community, but would also explore what lies behind any claims that are being made by the various bodies or persons under investigation to reveal the implications of their rhetorical, ideological or pragmatic concerns.

In teasing out the relationship between laws and/or normative orders, it is essential to have an understanding of the constituency that gives rise to them and the basis upon which they are accorded authority and legitimacy in specific contexts. This includes having knowledge of who has the power to speak under certain circumstances, and for whom. In other words, it is necessary to have a firm grasp of the sources of

power that give rise to these orders, regardless of whether they represent 'formal' or 'informal' law. It is therefore important not to pre-judge their status within a pre-determined analytical framework of the kind promoted by formalist models of law.

Formalistic models of law, encapsulated under my account of weak, juristic or classic legal pluralism (that represents much of conventional legal discourse), fail to account for the following aspects: (1) the conditions that facilitate or impede access to legal forums; (2) the factors that underpin the power and authority of narratives in social and legal settings, including the role of gender or culture, that lead to the empowerment of some individuals while silencing others; (3) alternative strategies for those who are excluded or silenced by the formal legal system in seeking redress; (4) the gap between law in theory and in practice; and (5) the broader question of how law is constituted and reconfigured through social processes that frame both its continuity and transformation over time. These five aspects comprise important information and cannot be pre-judged in advance. It is only after such information has been acquired that the next step can begin, that is, the process of evaluation in reaching decisions about the authority and weight that is to be accorded to the different legal or normative orders in relation to one another.

This point is especially important to consider where assumptions are made about how systems work without reference to any empirical investigation. International agencies dealing with human rights have now, for example, discovered 'informal justice' and are busy trying to bring this within their remit. One project call, issued by the United Nations in 2008, consistently associates 'informal justice' (which for them includes customary law) with what it refers to as 'deficits' in the democratic process, without ever clearly identifying what they mean by the following concepts: (1) *Justice*. There are many different ways of defining this term, and indeed lawyers have spent years in contestations over what it means. (2) *Informal* as opposed to *formal justice*. Are we talking in procedural or substantive terms? Why is it assumed that formal justice is somehow better and more accountable when the African experience has shown how weak and fragile such justice, that is associated with states, may prove in practice? (3) *The democratic process*. What are the elements that make a process democratic? Is it sufficient to talk about laws passed by an elected assembly when claims of corruption overshadow the electoral process? Even where corruption is not the case, there are those who argue that democracy in relation to participation constitutes more than this narrowly, and legally, focused interpretation of the concept of democracy.

The loose and vague way in which the terms 'justice', 'informal/formal' and 'democratic process' are used and taken for granted is disturbing. There is an assumption that formal justice is equal to good governance, transparency and accountability, aspects that its counterpart, informal justice, is assumed to lack. It may well be the case that informal justice can be said to account for dealing with 80% of disputes that arise not only worldwide but within sub-Saharan Africa, and that women and children feature disproportionately among the most vulnerable in this process. However, this claim must be documented, along with the reasons giving rise to this situation. It cannot just

be assumed and glossed over. It is true that gender may well have a bearing on how women are treated under customary law. Indeed, my own work (A. Griffiths 1997) in Botswana highlights the gendered dimensions of law, both 'formal' and 'informal'. To automatically assume, however, that informal justice always equates with customary law that *always* operates in a way that is detrimental to women is a fallacious assumption. To be sure, abuses exist, but my own work and that of scholars such as Hellum (1999); Hellum, Stewart, Ali and Tsanga (2006); and Nyamu-Musembi (2002) demonstrate the need for careful scrutiny of the conditions under which customary law operates to the detriment as well as for the benefit of both women and men.

In dealing with intervention in connection with what the Department of International Development (DFID) term *Non-State Systems of Justice* in a 2004 report, DFID (2004: 8) note the need for research to cover:

[...] the historical context; the role of the non-state legal order; its linkages to the state; the non-state legal order's features (values, users, authority, standards, human rights compliance, funding and enforcement processes); key stakeholders; incentives and disincentives for reform; and myths held about non-state legal orders.

These are all aspects of what good social-scientific or anthropological approaches to research already encompass.<sup>4</sup> My own current research on women's access to and control over land in Botswana, which I have been conducting since October 2009 with funding from the Leverhulme Trust, has three main aims: (1) to assess women's access to and control ('ownership') over land in contemporary Botswana; (2) to measure impact of social networks on women's and men's access to resources, in order to analyse the role of gender in the construction of networks and whether women and men are differentially located in relation to land claims in terms of their own sex (plus age, status, generation) as well as among the sexes; and (3) to contribute to international debate on poverty reduction and access to justice by documenting the extent to which women are disproportionately among the poor in Botswana and weighing the extent to which this is determined by access to family and social networks. It also involves scrutinising the extent to which formal and informal legal systems act to the detriment of women with regard to land claims.

In conducting the study I use a number of research methods, including conventional legal analysis of statutes and cases; historical analysis of archival records; social scientific analysis of participant observation; interviews; and oral life history notes.

<sup>4</sup> International aid agencies have indeed come a long way in their approach to law. When I was working on customary law or informal justice, over 25 years ago, British agencies viewed law and legal research in terms of what state courts and judges did and had no conception of, and thus ignored informal justice.

Building on earlier research carried out in the 1980s and detailed in my book *In the Shadow of Marriage: Gender and Justice in an African Community* (1997), the data provide a quarter-century perspective on transformations in land distribution in the country over a time of rapid transition to urban industrialisation. Oral histories extend this perspective into pre-colonial times, when Botswana had a rural subsistence economy. This earlier research in the 1980s pointed to the need to move beyond abstract assertions about law and the properties of 'common' and 'customary' law, in order to acquire a detailed understanding of the concrete ways in which individuals and families use law and other means to acquire access to and control over land in all its forms in practice. It also highlighted the difficulties women face in gaining access to or control over property, including land, under customary law that derived from the gendered position they occupy in kinship networks and from the economic, political, ideological and social domains that shape the world in which they live. In doing so, it also underscored the need to recognise the social context of law as well as the degree to which customary and Western-style law are mutually constitutive and underpinned by the gendered norms and values that operate in daily life. While Nyamu-Musembi (2002) demonstrates changes in local attitudes towards daughters acquiring land in Kenya, she also notes how the government policy of formalising and individualising property rights in land through certification has led to a situation where women account for less than 5% of the registered landholders nationally.

My own assumptions, based on my earlier research findings, were that women would find themselves in a minority when it came to having control over customary land (which represents 70% of the land in Botswana) through a customary land certificate. This is proving not to be the case. I am finding that women represent 50% of those with certificates and that they feature in a quarter of appeals to the land tribunal. Consequently, I now have to review the data on which my assumptions were based and explore in detail what accounts for the changes that have taken place by using a range of sources and interviews.

## Conclusion: A Framework for Analysing Plural Legal Orders

Part of the difficulty in dealing with legal pluralism that I alluded to in this chapter is the problem of distinguishing rhetoric from reality, and ideological assertions from empirical facts. Franz von Benda-Beckmann (2009) points to the dangers of treating untested assertions – which operate as ideological assumptions – as facts. He argues that in the field of human rights the representation of tensions between universalism and relativism is often presented as an international or intercultural problem between 'our' Western rights and 'their' Third World culture, or 'our culture' and 'their rights'. As a consequence, little attention has been given to the fact that both human rights

and culture in most parts of the world co-exist with a variety of legal forms, and that the major contemporary struggles that really concern people are not so much between 'Western human rights' and 'Third World cultures' but between different laws and cultures within states. In his view, debates setting rights against culture and treating them as being distinct from one another have remained pervasive. This is even the case after the deconstruction of culture as a homogeneous whole and the development of more refined analytical understandings of the concept as put forward in Cowan, Dembour and Wilson (2001). For this reason, Franz von Benda-Beckmann (2009) exhorts anthropologists and social scientists to make a clear distinction between empirical and normative assertions about the universality/relativism of human rights as a precondition for systematic and comparative research. Such an approach, with its close attention to specification and analysis of the variability of social and cultural organisation, will provide more nuanced attitudes towards the tensions between analytical description and moral evaluation that will provide for more informed debate on the issue.

When invited to the international Conference in Maputo, on 28-30 April, 2010, I was asked to address a few words about how to deal with vague assertions about legal pluralism of the type put forward in the 2004 Constitution of Mozambique – in particular, the part that reads, "the state recognises the various normative systems and the resolution of conflicts that co-exist in Mozambican society, as long as they do not contradict the fundamental values and principles of the Constitution". This article of the Constitution seems to be reminiscent of the old repugnancy clause that I mentioned earlier in this chapter. To unravel what this provision in the Mozambican Constitution means, I suggest considering the application of a framework that comes out of a project coordinated by the International Council on Human Rights Policy (ICHRP) in which I was an adviser (see ICHRP 2009: 165). The framework was proposed for human rights advocates to bear in mind when engaging with plural legal orders.

The framework comprises two stages. The first involves "assessing policies and demands for the preservation of plural legal orders" (ibid.:149) and the second calls for "evaluating a plural legal order in operation" (ibid.:153). The first stage examines contexts which give rise to claims for or against the introduction and/or reform or preservation of plural legal orders. It seeks to clarify the basis upon which policies engaging with legal pluralism are formulated. Who promotes such policies and what motivates them? An important component here is the identification of factors that are driving support for or rejection of legally plural orders. These should be assessed in the context of how these policies relate to a national framework that endorses rights-protecting laws, including human rights, and their capacity to take account of the broader dimensions of historical and social inequalities and structural discrimination that may exist. After analysing the contexts in which policies are proposed, the second stage of the framework focuses on how legal pluralism is implemented in substantive, procedural and/or institutional terms. In particular, it addresses the

question of resources available for implementation, and the extent to which the processes set in motion include or exclude sections of the population affected by their jurisdiction, taking account of the ways in which they enhance or undermine existing or proposed human rights agendas. In undertaking such an analysis, it is important to note that plural legal orders are not only diverse, but cut across and influence a number of human rights concerns. Given the complex constellation of factors that are in operation, there can be no single paradigm for action, for, as the report concludes, "there are no straightforward prescriptions" (ibid.: 156). Nonetheless, "there is a lot to be learned from the experience and analysis of human rights advocates, policy-makers and scholars across the world" (ibid.).

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# Legal Pluralism and Constitutional Reform Processes

*Markus Böckenförde*

## Introduction

For quite some time, legal pluralism was a special interest within the disciplines of legal anthropology and sociology. Only recently did the concept move into mainstream legal discourse and become a topic in comparative law, international law, political science and socio-legal studies. Gaining popularity across a range of academic disciplines, legal pluralism has to struggle with different paradigms and knowledge bases adding more perspectives and approaches. In addition, different disciplines use the concept of legal pluralism for different motivations and purposes.

This chapter addresses the concept of legal pluralism from the technical perspective of a constitutional and international lawyer. Following a short introduction to how the term 'legal pluralism' is understood and applied, the chapter explores the multiple scenarios in which legal pluralism can be relevant for a country. Where feasible, such scenarios are exemplified with the case of Mozambique. The chapter goes on to analyse what kind of legal pluralism the Constitution of Mozambique envisages. It highlights the political dilemmas and legal constraints of a generous commitment to legal pluralism on the one hand, and the concept of constitutional supremacy on the other. Acknowledging the challenge of serving two masters, the concern is whether and how far the various sets of law prevalent in Mozambique indeed match with a twofold commitment, and what options might be available to consider further. The chapter concludes by arguing that the strength of 'informal justice systems' in Mozambique is not easily compatible with the narrow constitutional framework.

## Scenarios of Legal Pluralism and their Relevance for Mozambique

A comparative or international lawyer who invokes legal pluralism probably has something very different in mind than a legal anthropologist (Tamanaha 2008: 375, 390). Nevertheless, despite the many and diverging definitions of legal pluralism, there is wide consensus that legal pluralism describes a situation in which two or more bodies of law or legal systems co-exist in one country (Michels 2009: 243, 245; see also the Introduction to this volume).

One might further distinguish two sorts of legal pluralism, depending on how the different bodies of law or legal systems relate to one another. In the first category, the various bodies of law are dependent on the state legal or constitutional order (Merry 1988:869, 871). The various bodies of law or legal systems are incorporated into one hierarchical legal order, and this might therefore best be described as 'internal legal pluralism'. Such a situation creates a range of complex legal challenges. For example, one body of law may apply to a particular case or conflict, and questions may arise as to which body of law particular individuals qualify, how a person can change the law applicable to him/her, and so forth. Nonetheless, these challenges are of a type that lawyers are used to and feel comfortable with. This first category is often labelled 'weak legal pluralism' (Reiss 2009: 739, 762) or 'classical legal pluralism' (Michels 2009; see also Anne Griffiths' contribution to this volume). Such labels often refer to the interplay of Western and non-Western laws in colonial and postcolonial settings in which pre-existing laws continued to be applied next to 'official' colonial law, but were subordinated to the latter in the case of a conflict of laws.

In the second category, often referred to as 'strong legal pluralism', legal orders coexist partly in harmony, partly in contest with each other (Michels 2009). They have their own, often different and sometimes irreconcilable approaches. Subjugating one legal order under another might lead to the deformation or even elimination of that very order. The mere fact that different legal systems are producing different and even contradicting results for one and the same situation is not uncommon. Sovereign countries have chosen their specific context related approach to regulate issues differently. But if one citizen is subject to two different orders that do not complement but potentially contradict one another in a country, lawyers might feel uncomfortable.

The search for a coherent legal system is at stake. Legal pluralism of the one and/or the other category is a given in almost all countries. Various scenarios of legal pluralism involve various sets of laws at different levels, including international, national and local or informal laws. Below I explore five such scenarios and make specific references to Mozambique.

## Legal pluralism through the fragmentation of International Law

The first scenario of legal pluralism is that involving different sets of international law. With the proliferation of treaties and institutions, international law is becoming decentralised into semiautonomous regimes. Several global treaty regimes exist, with different perspectives on partly overlapping issues. An example is the coexistence of the regulations of the World Trade Organization (WTO) and the Law of the Sea Convention (UNCLOS). Whereas the former takes a trade perspective, the latter focuses on the preservation of the oceans, including conservation measures ensuring sustainable fisheries. Mozambique is a member of both treaty regimes and therefore might be caught in a collision between the two. One example of such a collision may be illustrated by the following challenge:

Suppose there is a highly migratory species that roams the waters of Mozambique's exclusive economic zone (EEZ) and the adjacent high seas. Another country fishes extensively for that species on the high seas near Mozambique's EEZ. Mozambique fears an over-harvest of the species to such an extent that the stock in its EEZ may be diminished and its preservation endangered. In order to reduce over-fishing for the species, Mozambique enacts conservation rules and prohibits the species' unloading or transit at Mozambique's ports when catches are made in contradiction with these rules. The same rules affect the other country's trade in the species, since it relies on the ports of Mozambique for the transit of the catches. The controversy increases and no agreements are found. Mozambique requests the International Tribunal of the Law of the Seas to adjudicate the issue from a law of the sea perspective, whereas the other country initiates a WTO procedure claiming that Mozambique's decision hampers its trade (Stoll and Vöneky 2002: 21, 21-22).

One may ask whether it is simply a theoretical exercise for legal scholars to discuss the challenge of legal pluralism in international law. Certainly not. The above scenario occurred between Chile and the European Union in 2000. The species at stake was the swordfish. Both proceedings were suspended and potentially diverging decisions on the issue were avoided by an agreement between both actors in 2001. But the challenge remains valid. The constellation might be considered as a case of strong legal pluralism: there is no hierarchy between the two legal regimes, and general rules of international law in the respective dispute settlement bodies are predominantly applied complementary to the treaty norms. The challenge is caused by the idealistic perception that states are explicitly aware of all their existing international obligations and commitments, and only enter into new agreements that are, in one way or the other, neatly accommodated into the existing ones. So far, there have been many suggestions and discussions about how to address this challenge of potentially contradictory international legal orders. However, there have been no concrete results. Until now, actors either have to rely on an amicable settlement before or during the dispute, or they have to await one tribunal's decision to refrain from taking the case further in order to avoid overlapping judgments between two international bodies,

both of which have prima facie jurisdiction. The latter was the case in a dispute between Ireland and the United Kingdom concerning the operation of the Sellafield nuclear enrichment plant in Britain. Two legal orders, the law of the European Union (adjudicated by the European Court of Justice) and the provisions of UNCLOS (adjudicated by a tribunal according to Annex VII to UNCLOS) potentially overlapped. The President of the Tribunal stated:

The Tribunal considers that a situation in which there might be two conflicting decisions on the same issues would not be helpful to the resolution of this international dispute. Nor would such a situation be in accord with the dictates of mutual respect and comity that should exist between judicial institutions deciding on rights and obligations as between States, and entrusted with the function of assisting States in the peaceful settlement of disputes that arise between them.<sup>1</sup>

## Legal pluralism between International Law and National Law

A second scenario of legal pluralism is the relation between international and national law. In theory, there is the possibility of an action being legal in national law but illegal in international law. In order to avoid such a scenario, most constitutions provide a mechanism that makes international treaty law valid only if it also takes effect in the national legal order, either directly or through transposition into the domestic order. However, in many national legal orders, ratified international treaties only have the rank of an ordinary law or infra constitutional acts, subject to the constitution, which is regarded as the supreme law. When the constitution is not amended to conform to the content of the international treaty, the constitution will prevail and national courts have to apply constitutional law at the expense of both the national norm that incorporated the international obligation and the international law itself. This scenario generally reflects a type of weak legal pluralism: a legal order with a clear legal hierarchy exists which also affects another legal system, in this case international law.<sup>2</sup> To avoid the violation of international law, many constitutions require the highest

<sup>1</sup> MOX Plant, Statement of the President, June 13 2003, available at: <http://www.pca-cpa.org/upload/files/STATEMENT%20BY%20THE%20PRESIDENT.pdf> (accessed 13 April 2010).

<sup>2</sup> The Constitution of East Timor decided to rank provisions of international conventions duly ratified by the state on the very top of the hierarchy. Once incorporated, they even seem to prevail over the constitutional law. This change within a norm hierarchy does not alter the classification as 'weak pluralism'. Article 9 of the Constitution of Timor stipulates: Reception of International Law. (1) The legal system of East Timor shall adopt the general or common principles of international law. (2) Norms provided for in international conventions, treaties and agreements shall apply in the internal legal system of East Timor following their approval, ratification or accession by the respective competent organs and after publication in the official gazette. 3) All norms that are contrary to the

court of the country to approve that the international treaty conforms to the constitution before any ratification is authorised.<sup>3</sup>

The legal setting in Mozambique reflects the situation characterised above. Art. 18 of the Constitution of Mozambique assigns to international norms, validly approved, the legal force of infra-constitutional legislative acts.<sup>4</sup> Thus international treaties, once ratified, are below the Constitution and have to comply with it. This may lead to conflict, if an international treaty's conformity to the Constitution is not carefully assessed prior to its ratification.<sup>5</sup> One example clarifies this challenge: On 28 December 2000, Mozambique signed the Rome Statute establishing the International Criminal Court, thereby intending to become a Party to it.<sup>6</sup> Once the Rome Statute is ratified, it might require Mozambique to surrender one of its nationals upon the request of the ICC (Art. 89 Rome Statute), if the conditions are met. This obligation would run counter to Art. 67 (4) of the Constitution of Mozambique, which stipulates that "[n]o Mozambican citizen may be expelled or extradited from the national territory." Thus, the supreme constitutional law would override the application of infra-constitutional acts and Mozambique would violate its international obligation. In order to avoid such an outcome and to harmonise international obligations with national constitutional law, Art. 67 (4) of the Constitution needs to be amended before ratifying the Rome Statute.<sup>7</sup>

provisions of international conventions, treaties and agreements applied in the internal legal system of East Timor are invalid.

<sup>3</sup> See, for example, the Constitution of Benin, Art. 146: "If the Constitutional Court, upon a submission by the President of the Republic or by the President of the National Assembly, shall have decided that an international obligation allows a clause contrary to the Constitution, the authorisation to ratify it may occur only after the revision of the Constitution."

<sup>4</sup> Art. 18 of the Constitution states: (1) Validly approved and ratified international treaties and agreements shall enter into force in the Mozambican legal order once they have been officially published and while they are internationally binding on the Mozambican State. (2) Norms of international law shall have the same force in the Mozambican legal order as have infra-constitutional legislative acts of the Assembly of the Republic and the Government, according to the respective manner in which they are received.

<sup>5</sup> Mozambique also provides for the opportunity to have a constitutional 'conformity check' by the Constitutional Council. Art. 246 (1) and (5) provide: (1) The President of the Republic may request the Constitutional Council to carry out an anticipatory evaluation of the constitutionality of any legal instrument sent to him for enactment. [...] (5) If the Constitutional Council makes a finding of unconstitutionality, the President of the Republic shall veto the bill and return it to the Assembly of the Republic.

<sup>6</sup> See Art. 18 Vienna Convention on the Law of Treaties 1969, United Nations, *Treaty Series*, vol. 1155, p. 331.

<sup>7</sup> Germany, for example, added a second paragraph to the pertinent provision (Art. 16 of the German Constitution), stipulating: "No German may be extradited to a foreign country. A different

## Legal pluralism between different sets of state law in a national system

A third scenario of legal pluralism is that between co-existing laws with a vertical dimension. Some countries, especially those with a federal system, provide several sets of formal state law. For example, national law is enacted by the national legislature according to the authorities assigned to it, and legislatures in the sub-units enact laws in line with their constitutional competences. In some countries, like the USA, there is even a separate court hierarchy established to adjudicate on each set of laws independently. Competences are assigned to each level of government according to a formula that either avoids an overlapping of authorities and/or organises a complementary concurrent solution. For the avoidance of doubt, the constitution generally determines which set of laws prevails in the case of a legal overlap. Such a structure is set up by the national constitution, which is supreme to both sets of law, at the national level and at the sub-units level. An institution (often the national Supreme Court or the Constitutional Court) is mandated to settle disputes between the levels of government if one level claims that the other violated the constitutional assignment of powers. One might consider this arrangement, with a clearly defined set of shared rules under the constitutional umbrella, as one of the weakest forms of legal pluralism.

As the case of Sudan demonstrates, this vertical dimension of legal pluralism might also have an impact on religious law, especially in countries where different religions are adhered to in different regions. In Sudan, similar to the USA, penal law is generally within the competence of the sub-units or states. Whereas the fifteen Muslim-dominated states in the North of Sudan were opting to establish Sharia related state criminal law, the ten states in the South preferred to draft a secular penal law.<sup>8</sup> Non-Muslims living in a northern state might be confronted with Sharia law although they do not adhere to that religion. Mozambique, neither being a federal country nor having a formal legal affiliation to a specific religion, does not face the challenges of this scenario. Parts of the country are dominated by pertinent religious communities and some informal laws are thus informed by legal religious traditions, but this challenge rather falls under the fifth scenario.

regulation providing for the extradition to [...] an international court of law may be made as long as the fundamental principles of a state governed by law are observed."

<sup>8</sup> In addition, as part of the deal in the Comprehensive Peace Agreement (CPA), there is an opt out provision for states with regard to existing national laws with religious sources. Art. 5 (3) of the Interim Constitution stipulates: "Where national legislation is currently in operation or is to be enacted and its source is religion or custom, then a state, and subject to Article 26 (1) (a) herein in the case of Southern Sudan, the majority of whose residents do not practice such religion or customs may:- (a) either introduce legislation so as to allow practices or establish institutions in that state consistent with their religion or customs [...]"



## Legal Pluralism between different sets of laws adjudicated by state institutions

The fourth scenario of legal pluralism is that between different sets of laws that are adjudicated by state courts. It thus introduces a horizontal dimension. In various countries, next to state law and its adjudication, an additional set of customary or religious laws are adjudicated within the court system set up by the constitutions.<sup>9</sup> In Kenya and Nigeria, for example, Muslims can decide to resolve their personal matters according to Islamic Law. The new Constitution of Kenya provides for the establishment of *Khadi* Courts by the national legislature and includes provisions for the qualification requirements for the judges. *Khadi* Courts are supervised by High Courts. Hence, non-state law is adjudicated by specific state institutions that are integrated into the secular court hierarchy and governed by the Constitution. From the substantive perspective, the Kenyan model includes a novelty. The Constitution is considered the supreme law of the land and includes a human rights catalogue with the usual anti-discrimination clauses, but it allows, according to Art. 24, for a limitation of rights under specific circumstances. Paragraph 4 of Art. 24 states:

The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

Hence, under specific circumstances, the application of a religious set of law does not need to meet all constitutional requirements as is the case for other sets of law. Aside from this exception, the Kenyan model also presents a weak form of legal pluralism under the common umbrella of one supreme law, i.e. the Constitution. Nigeria combines the two previous models, with Sharia Courts and Customary Law Courts being established at the level of the sub-units. The Constitution provides for those sub-units where it is required to set up Sharia Courts of Appeal, mainly to exercise appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law (Nmehielle 2004: 730, 759).<sup>10</sup> Qualification requirements and

appointment procedures are constitutionally regulated, as are the requirements for appeal to the national Court of Appeal.<sup>11</sup>

The Nigerian Constitution does not include a provision parallel to the Kenyan Constitution, permitting the limitation of fundamental rights in the context of customary and religious law. There are some peculiarities in the Kenyan approach: Art. 24 allows *Khadi* courts, which are courts for specific subject matters within the hierarchy of state courts, to interpret equality provisions from an Islamic perspective. Since judgments of the *Khadi* courts are subject to appeal, but High Courts are not listed in Art. 24, they have to adjudicate the same Muslim case without the caveat of Art. 24.

This scenario is not reflected in the Constitution of Mozambique. Neither has the Constitution a similar provision like Art. 24 of the Kenyan Constitution nor does it provide for special courts in the court hierarchy that adjudicate on a specific set of non-state laws only.

## Legal Pluralism between 'formal law' and 'informal law'

A fifth scenario of legal pluralism is much broader, as it includes the wider context of co-existing formal/state and informal/non-state sets of laws. Technical lawyers feel particularly uncomfortable with broader notions of law. To agree on a common understanding of 'informal law' and of 'informal legal systems' is difficult, or even impossible. Different disciplines have different ideas about the exact criteria of those terms. This part of the chapter applies the terms as described below, without claiming to provide a universal definition of them.

In one respect, an informal system can be defined as legally detached from the formal system. 'Detached' might be viewed from two different perspectives – a substantive and an institutional one. Substantively, 'informal law' is not part of the formal state law, in the sense that it is not drafted by the state legislative bodies. However, this does not exclude the possibility that informal law may have some elements of formality in itself. For example, in recognition of all its diverse aspects, Islamic Sharia law is to a certain extent formalised, including distinct principles derived from different, clearly defined sources. Nevertheless, it is detached from state law as long as state law only refers to it as a different set of law, such as in Kenya. In contrast, if Sharia law is considered a source of state legislation, as in the constitutions of Egypt and Sudan<sup>12</sup>, it merely informs formal state law with its principles and contents.<sup>13</sup> Institutionally, an adjudicating body is formalised if it is included in the state system and formal state law provides for its institutional structure, qualification criteria for the members, ap-

<sup>11</sup> Art. 244 of the Constitution of Nigeria.

<sup>12</sup> Constitution of Sudan; Constitution of Egypt.

<sup>13</sup> Sudanese Penal Code of 1991.

pointment procedures, etc.<sup>14</sup> Substantive informal law might therefore be formally adjudicated.

It is, furthermore, worth asking why informal law and informal justice systems have persisted in so many contexts, such as Mozambique, despite efforts to formalise or do away with them. There may be two dominant reasons for the persistence of informal law: structural deficits of and lack of familiarity with the formal legal system. Structural deficits of the formal system are predominantly caused by physical and financial inaccessibility, insufficient capacity (e.g. lack of sufficient translation facilities and of judges to proceed cases in a timely manner), and corruption preventing the system from operating according to its own standards. Predominately, the structural deficits are caused by lack of will and/or of means to implement the existing constitutional and legal provisions. Addressing these challenges requires a stronger commitment to implementation on the side of national actors and the will of the international community to support these commitments. However, overcoming these structural deficits might not prevent informal systems to prevail, since the formal state system – even if operating according to its own standards and easily accessible in physical and financial terms – is often perceived as socially uncomfortable and illegitimate. Informal justice systems are rooted in the culture and history of a region or population, and mirror the existing social realities and complex networks on the ground. They gain authority and legitimacy as they reflect social norms and values. Relevant characteristics of informal justice systems as understood in this chapter are:

- ◆ Emphasis is given to reconciliation and restoration of social harmony;
- ◆ Arbitrators are appointed from within the community on the basis of status or lineage;
- ◆ The problem is viewed as relating to the whole community as a group – there is strong consideration for the collective interests at stake in disputes;
- ◆ Enforcement of decisions is secured not by state coercion but through social pressure;
- ◆ Decisions are based on a process of consultation, with flexible rules of evidence and procedure;
- ◆ ‘Like’ cases need not to be treated alike, since a different perception of likeness exists considering an overall context beyond the single individual person being ‘trailed’;

<sup>14</sup> See Kenya and Nigeria with regard to the Khadi Courts and the State Sharia Court of Appeal or the Customary Court of Appeal in Nigeria. With regard to the latter, the Nigerian Constitution anticipates the existence of ordinary customary courts without especially addressing them in any further detail.

- ◆ Often no distinction between criminal and civil cases exists, but a holistic approach dealing with both elements is applied; and
- ◆ No professional legal representation exists.

As reflected in these characteristics, informal systems emphasise a different, less individual and more community-based concept of justice. Especially from a more individually-centred and ‘modern’<sup>15</sup> perspective, this concept includes also various weaknesses, such as:

- ◆ If power imbalances exist between disputing parties, the weaker party is vulnerable to exploitation;
- ◆ Informal justice systems are often dominated by men of high status and tend to disfavour women, minorities, young people and disadvantaged groups;
- ◆ The preservation of social harmony might take preference over the protection of individual rights; and
- ◆ Accountability of a justice system, reflected in a right to appeal, is not always present in informal systems.

There is an ongoing debate about how to harmonise the informal, community-based and the modern, individual-based approaches to justice. Various countries have undertaken attempts to reconcile them in their constitutions. The following paragraphs highlight the way the Constitution of Mozambique attempts to meet this challenge.

### The Constitution, Legal Pluralism and Informal Legal Systems in Mozambique

As already discussed in the Introduction to this volume, the Mozambican Constitution of 2004 provides, in principle, for legal pluralism. This is captured by Article 4 as well as by other potentially relevant provisions scattered throughout the Constitution.

However, the constitutional drafters’ intent to provide some space for traditional elements to unfold is only visible, not operational. Guidance on how to implement legal pluralism is insufficiently provided for. The few provisions addressing legal

<sup>15</sup> The term ‘modern’, instead of ‘western’, is applied in this context in order to avoid the discussion as to how far present human rights standards are indeed a western or a universal concept.

pluralism rather highlight the challenges of integrating an informal system into a formal legal order without eliminating the characteristics of the former. Three examples taken from the Constitution underscore the need for a clearer political vision about the degree of integration as well as autonomy of traditional concepts of justice. The first example deals with the challenge of the degree of legal autonomy of traditional concepts within the legal order; the second deals with the challenge of institutional integration of traditional structures; and the third addresses the challenge of acknowledging the roots of legitimacy of traditional authorities in a formal structure. By analysing the few constitutional provisions that indicate a structure for legal pluralism, one identifies some constitutional incongruities that raise questions for further consideration.<sup>16</sup>

### The legal autonomy of traditional elements?

Whereas Art. 4 of the 2004 Constitution recognises different normative systems as long as they are not contrary to “the fundamental principles and values” of the Constitution, Art. 2 (4) determines that constitutional rules, in general, shall prevail over all other rules of the legal order.<sup>17</sup> Several questions seem to need clarification by comparing both provisions: Are the “normative systems” referred to in Art. 4 also considered “rules of the legal order”? If so, how does Art. 2 (4) relate to Art. 4? Is Art. 4 considered to be the more specific provision that limits the application of Art. 2 (4), as far as legal pluralism is concerned? Thus, does legal pluralism only need to comply with the fundamental constitutional principles and values, but not with all constitutional rules, thereby providing a different standard similar to Art. 33 of the Kenyan draft Constitution? If this is the case, what are the “fundamental principles and values” of the Constitution?

The text of the Constitution refers in four places to “fundamental principles”. Besides Art. 4, “fundamental principles” are mentioned in the fourth paragraph of the preamble, in Art. 97 (addressing the economic and social order), in Art. 249 (on public administration), and in Art. 265 (on national defence). A contextual reading indicates, however, that the drafters of the Constitution did not intend to refer to these provisions while addressing fundamental principles in Art. 4. Such a prioritisation of issues not directly related to legal matters does not support a solid base for framing legal pluralism. Even the fourth paragraph of the preamble offers no further insight. It only indicates that the fundamental principles of the State of Mozambique are to be reaffirmed by the Constitution. Alternatively, one might consider the “fun-

<sup>16</sup> The analysis relies on the English translation of the Constitution and not the Portuguese original text.

<sup>17</sup> Art. 2 (4) stipulates: “Constitutional rule shall prevail over all other rules of the legal order”.

damental objectives” listed in Art. 11<sup>18</sup> or the “general principles” stated at the beginning of various (sub-)chapters<sup>19</sup> as reflecting fundamental principles, but they are phrased too broadly, encompassing most substantive elements of the Constitution. This hardly allows for a meaningful identification of what might be considered “fundamental principles”. Art. 43 indicates that “the constitutional principles in respect of fundamental rights shall be interpreted in harmony with the Universal Declaration of Human Rights and with the African Charter of Human and Peoples Rights”. This still leaves unanswered the question of what those principles actually are. Consequently, the distinction between “fundamental principles” and “constitutional rules” cannot be detected by reading the constitutional text, but might offer an opportunity for an authoritative interpretation by the Constitutional Council.<sup>20</sup> Thus, the Constitution does not offer sufficient guidance on what exactly is meant by “fundamental principles” in the application of Art. 4.

### The Court system and institutional integration of traditional structures

Another avenue for a better understanding of the relation between formal and informal legal arrangements in the Constitution might be provided for in the court system. Title IX of the Constitution sets out the structure of the court system; the organisation of courts and, in part, their composition and functioning; and some general principles applicable to all courts. Customs courts, arbitration courts and community courts are explicitly listed in Art. 223 and are thereby subject to the relevant provisions under Title IX. Only customs courts are explicitly addressed further in Arts 228 and 230 as being integrated within the hierarchy of administrative courts. Title IX provides no

<sup>18</sup> Art. 11 stipulates: “The fundamental objectives of the Republic of Mozambique shall be: a) the defence of independence and sovereignty; b) the consolidation of national unity; c) the building of a society of social justice and the achievement of material and spiritual well being and quality of life for its citizens; d) the promotion of balanced economic, social and regional development in the country; e) the defence and promotion of human rights and of the equality of citizens before the law; f) the strengthening of democracy, freedom, social stability and social and individual harmony; g) the promotion of a society of pluralism, tolerance and a culture of peace; h) the development of the economy and scientific and technological progress; i) the affirmation of the Mozambican identity, of its traditions and other social and cultural values; j) the establishment and development of relations of friendship and cooperation with other peoples and States.”

<sup>19</sup> (Sub-)chapters address rather broadly fundamental and individual rights and freedoms, the economic system, the branches of government, etc.

<sup>20</sup> The President might request the Constitutional Council pursuant to Art. 246 to carry out an anticipatory evaluation on the constitutionality of a bill on structuring legal pluralism. The Council then has to interpret the meaning of “fundamental principles and values” and the relation between Art. 2 (4) and Art. 4 of the Constitution.

further guidance on how to integrate community courts into the legal system, but includes provisions that predetermine their role: pursuant to Art. 212 (2) “[t]he courts shall punish violations of the legal order and shall adjudicate cases in accordance with the law”; and, according to Art. 214, courts “shall not apply laws or principles that are contrary to the Constitution”. Community courts, according to Law 4/92, make their decision in light of the principles of equity, good sense and justice. Those principles seem to be no longer applicable for community courts. Instead, members of community courts are required to apply ‘laws’ and be knowledgeable to test those laws against the Constitution. Implementing Art. 214 and Art. 212 (2) by its letter would probably change the character and the composition of community courts, depriving them of their original role and purpose. Art. 212 (3) seems to confirm this new role of community courts, by stating that “institutional and procedural mechanisms for links between courts and other forums whose purpose is the settlement of interests and the resolution of disputes” might be established by law. Hence, community courts are no longer considered to be one of those forums, but rather a judicial court. Conversely, the Constitution makes no reference at all to the courts of traditional authorities, although these authorities are recognised by Decree 15/2000, and are expected to resolve conflicts and minor disputes. Also, there are no provisions for religion-based adjudicating forums, existing in Islamic communities in Mozambique. Thus the Constitution does not provide any clear operational guidelines for how such courts and forums should be linked to, let alone integrated with, the formal court system.

### Traditional authorities, their legitimacy and constitutional acknowledgement

Art. 118 (1) reflects ostensibly the dilemma of legal pluralism in Mozambique: the Constitution requires the state to recognise and esteem traditional authority as long as it “is legitimate according to the people and to customary law”. Thus, state recognition of traditional authority depends on its local acceptance and the adherence to the concept of justice enshrined in non-codified, customary law.

As illustrated above, this concept deviates in various aspects from the formal and legalistic one. Being constitutionally obliged to depart from the traditional concept of justice by applying a formal concept of legality, including rigid anti-discrimination clauses (Arts 35 and 36), traditional authority might lose its legitimacy, which is the constitutional prerequisite for its state acceptance. Indeed, this situation reflects a classical quandary: either traditional authorities implement all the constitutional rights at the expense of their local legitimacy – which in turn is a prerequisite for constitutional recognition; or traditional authorities reinforce their local legitimacy through the application of traditional rules and informal justice mechanisms – and are thereby constitutionally acknowledged – at the expense of obedience to the Constitution through the potential non-application of certain human rights. It remains to be seen how the state will approach that challenge by defining in more detail “the re-

lationship between traditional authority and other institutions and the part that traditional authority should play in the economic, social and cultural affairs of the country, in accordance with the law” as stipulated in Art. 18 (2). Also, Decree 15/2000, which provided for the first post-colonial state recognition of traditional authorities, does not provide any clear answers to this challenge.

### Conclusion: Towards a Process-Driven Approach

All three examples of unclear constitutional provisions outlined above highlight the challenge of serving two masters simultaneously, i.e. the commitment to implement human rights through a rigid and legalistic approach on the one hand and the intention to allow informal and traditional concepts of justice to continue due to their acceptance and legitimacy on the other. By its letter, the Constitution of Mozambique seems to aim for a framework of weak legal pluralism, where informal and traditional systems are integrated within one legal order and subject to constitutional supremacy. *De facto*, a strong legal pluralism prevails, with two sets of laws operating in two parallel worlds. A legal linkage between the systems has not yet been drafted and a proper integration of traditional dispute settlement mechanisms into the formal court structure is still missing. Importantly, the Constitution does not yet provide the flexibility to strike a balance between a weak legal pluralism under the umbrella of the Constitution and the acceptance of informal legal settings. Instead of initiating a process to converge informal conventions and human rights standards (as it happens in all western countries), it establishes two sets of law, alien to one another. The Constitution thereby overlooks that human rights are not a standard to be set, but an aim to be achieved through a long and tedious process.

Today, constitutions are predominately considered as the supreme and governing law of a country, setting the legal foundation and structure for a society. They are meant to be legally enforceable by courts. As long as such a legal document does not reflect important social realities on the ground, it remains alien and not understood by a large number of citizens. It risks remaining a Constitution on paper, with little real impact. But constitutions ought to be more than mere legal documents. They should also enshrine principles that sets goals to be achieved over time and aspire to a process of change that begins from a level that also recognises the realities on the ground. Identifying the right level of departure between the legalistic and aspirational elements in a constitution is crucial. Customs and habits change over time, and new customs may replace obsolete ones. Legal frameworks might effectively support such a process.

There are many other examples, although not directly related to legal pluralism and Mozambique, which illustrate the limited success of legal imposition and prohibitions alone. Experiences of projects and programmes to end the tradition of female

genital mutilation in many regions in Africa might be telling. In the past, prohibition of female genital mutilation introduced by missionaries and the British in Kenya created violent dynamics of its own without being successful (Natsoulas 1998: 137, 137-158). The Maputo Protocol, adopted by the African Union in July 2003 and ratified by 25 African countries so far, prohibits female genital mutilation in its Article 5.<sup>21</sup> However, mere prohibition by law has hardly been successful, either because the enforcement of the law had low priority, or, if enforced, female genital mutilation continued in secrecy due to its societal status. The most successful ways to overcome a practice that holds much cultural and marital significance have been initiatives that work directly at local level, such as by including the female practitioners as agents of change and by carrying the message out to other villages within a marriage network.

Creating a system of weak legal pluralism in which various sets of law are applied under one constitutional umbrella requires the preparedness to initiate a process from both ends. The flexibility of customary law to adjust to new societal dynamics requires those dynamics to be initiated and promoted within the local setting in the first place. At the other end, the Constitution needs to set a framework and create space for such a process. Europeans easily forget the process they have needed to accept, respect, implement and enforce what is today considered as part of a basic human rights catalogue: e.g., it took Switzerland until 1971 to allow women to vote at a national level, partly because it had to be male voters to decide in a referendum to include women to participate in subsequent elections (Stämpfli 2002).

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# Legal Pluralism and Plural Memories: The Perseverance of Spirits in Mozambique

*Maria Paula Meneses*

## Introduction

The issue of memories is fundamental to the study of the colonial situation and its contemporary continuities. The relationship between colonial archives and social knowledge regarding local conflicts has not yet been explored in detail. There is a need for a deeper analysis of the production and use of the archives, and an analysis of some *aide memoires* – like manuscripts, metaphors, bodies and objects – and of how accumulated knowledge has been appropriated and transformed by colonial subjects and by citizens of the independent state of Mozambique. It is in this way that this chapter seeks to discuss how various ideas of memory are present in legal literature and in regulatory practices, based on a study focusing on southern Mozambique.<sup>1</sup>

Driven by many of the works that raise the problem of the presence of an abyssal line marking the boundaries between the modern colonial perspective of the world and other epistemological outlines, this chapter is an attempt to map the persistence of an epistemology of dominance that has sought to project a particular sense of order, law and knowledge developed upon a western perspective (Santos and Meneses, 2009: 10). To insist on this projection runs the risk of putting up a shield that obscures

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the present complexity of systems of social regulation present in the territory that constitutes contemporary Mozambique.

The situations of violence that Mozambique has experienced since the 19th Century have made it necessary to develop ways of dealing with a reality where the spirits of the dead continue to be restless and where spirit possessions are a central part of another modernity.

Universal concepts of truth, justice and reconciliation differ significantly from local ways of dealing with the past. In Mozambique, like in other countries in the region, the growing presence of other justice and reconciliation mechanisms, in addition to official justice, is evident. This chapter begins with an analysis that focuses on the final stage of the Gaza state and the impact of the modern colonial administration in forging a system of Indirect Rule. The second part of the chapter provides a detailed examination of the tensions involved in reconciliation processes, using the case of spirit possession in southern Mozambique, which represents a reality that does not 'fit' with formal legal discourse. Analysing the suspicions of witchcraft as practices and policies of voice opens an opportunity for a broader discussion based on the relationship between memory, history and justice. Collective memory is neither inert nor passive, but rather a field of activity where forgotten happenings and institutions, or those built as synonyms of the past, are chosen, rebuilt, maintained, modified and given political meaning. By allowing memories – collective and individual – to have their own status and rights as part of a democratic expansion process, opportunity is provided for a broader discussion both of the impacts of the past on the present and of the potential for restoring, in Mozambique, the pluralism of practices and legal institutions required to reunite the social fabric.

## The Gaza State: Memories and Ruptures

At the beginning of the 19<sup>th</sup> Century, southern Mozambique was part of the Nguni expansion.<sup>2</sup> These powerful military movements led to the emergence of new political units which contributed to the renewal of economic structures and helped rebuild the social fabric, which had been destroyed by conflicts and ecological disasters. It is in this context that the Gaza state surfaces, coordinated by a centralised monarchy that enlisted and submitted several chiefdoms and kingdoms (Liesegang 1996; Department of History 2000).

At this point in history, this area of South-East Africa was also an arena of disputes between European colonising powers, who were attempting to physically (i.e. militar-

<sup>2</sup> The Nguni are a dissident group from the Zulu State which migrated in various directions to the north, as far as the more central regions of the African continent, conquering other peoples.

ily) occupy the territories. This happened in addition to the 'internal' conflicts. The description below illustrates how the Gaza state, led by Ngungunyane at the end of the end of the 19<sup>th</sup> Century, was portrayed:<sup>3</sup>

The Gungunhana potentate is the strongest in East Africa, both in terms of the extent of its domain and the populations taxed by it. [...]

The inhabitants of this country are the *Vátuas*<sup>4</sup>, who are among the strongest of African races, large in build and best trained in warfare [...] and armed with modern weapons, in addition to the indigenous assegais or arrows.<sup>5</sup>

Around the same time, reports left by several Portuguese individuals, who came into contact with the Gaza state for political or commercial reasons, depicted its leader as follows:

Gungunhana, who is not more than 42 years old, is energetic, agile and strong, has immense pride and noteworthy acumen and intelligence. [...]

This savage monarch has considerable solid wealth [...]; he spends his mornings administering and dispensing justice to his people, visiting his plantations and herds and, very often, discussing with his favourite *indunas*<sup>6</sup> matters regarding his forces, which interest and captivate him the most.<sup>7</sup>

For the European political powers involved in the 'sharing of Africa', these independent areas, such as the Gaza state, represented an obstacle to the assertion of the colonial administration's presence and control in the region.<sup>8</sup> It is in this context that, in the 1890s, a series of military campaigns were carried out by Portuguese troops in southern Mozambique, which culminated in the defeat of Ngungunyane's army. Defeated, the last 'Lion' of Gaza was forced into exile in the Azores, from where he was never to return.

<sup>3</sup> Although personal and geographic names are currently spelt differently, their original spelling was maintained in this study.

<sup>4</sup> The term *vátua* was used to identify the people of the southern region of Eastern Africa (Junod 1996).

<sup>5</sup> Article published in *Revista Occidente*, in the November 25, 1895 edition, vol. XVIII (609), pp. 259.

<sup>6</sup> *Indunas* is the plural for *Nduna*, which was a position equivalent to minister, referring to dignitaries entrusted with important military and politico-administrative roles.

<sup>7</sup> Article published in the magazine *África Illustrada: arquivo de conhecimentos uteis*, edition of 1892-1893, vol. I, pp. 42.

<sup>8</sup> The 'sharing of Africa' was accomplished during the Berlin Conference (1884-1885). Here the principle was established that demands on colonies were done based on proof of effective military and administrative occupancy of such territories.

Ngungunyane's imprisonment and exile in 1895 must be analysed from different angles. If, for Portugal, it meant the end of military and political opposition to Portuguese presence and the installation of a modern colonial authority in southern Mozambique, for other African political entities in the region it represented the end of the Nguni's excessive abuses (Santos and Meneses 2006). The clashing interpretation of the symbolic meaning of the 1895 colonial military campaign, simultaneously with the misinterpretation of the situation by the Portuguese political and administrative leaders, led the Portuguese colonial administration to understand Ngungunyane's defeat as the end of the Gaza state and the full pacification of the territory. Portugal's civilizing mission was now required to organise the pillars of the colonial state's institutions, including state administration, police, army, courts, prisons and health services.

The culturally and politically diverse Gaza state had been governed by a hierarchical political system where, inclusively, some Portuguese had already earned the position of advisors, as recalled by Raul Honwana (1985:12):

[...] perhaps the first attempt at Portuguese interference here in the South [of Mozambique] was in terms of resolving issues [conflicts]. The Portuguese suggested (and it was accepted) that the military commanders could also proffer their opinion for the more complicated cases resolved by the chiefs, who were known as *régulos*. For this to happen, it was necessary that the same case be submitted to the Portuguese military commander after the chief had resolved it.

In the aftermath of the military campaign against the Gaza state, the colonial administration, lacking detailed knowledge of the conflict mediation systems in use in the territory, opted for a single legal system. However, it defended the need to find out about the local legal codes<sup>9</sup> which continued to be used by the indigenous people (Meneses, 2007).<sup>10</sup> At the time, Gomes da Costa, the then Portuguese military-Governor of the region, described the justice situation as follows:

[In] Gaza, justice is administered by the district governor and by military commanders. The *régulos* also resolve some less important local issues. In addition to resolving indigenous issues – *milandos*<sup>11</sup> – the Governor also has the powers

<sup>9</sup> These legal codes were soon to emerge as local, traditional expressions of justice.

<sup>10</sup> In other words, Portuguese law acted in the restricted space of the non-indigenous. This situation of legal pluralism was imposed by the colonial presence: "Overseas indigenous institutions should be maintained in all that does not go against morale and justice, seeking their evolutionary development according to the aspirations of civilisation and colonial interests" (Marnoco e Sousa 1906: 167-169).

<sup>11</sup> *Milando* is the Portuguese version of the xirhonga term *nándzu*, pl. *milánzju*. Although the word refers to problems or conflicts, it has been translated into Portuguese and used, in the field of con-

and duties of superior Provost of the Army in occupied enemy territory (1899: 133).

However, the gap created with the termination of the centralised power of Gaza's monarchy, along with the repression of multiple local powers, resulted in a total destruction of the social fabric. The violence against local societies by the new colonial agents – manifested, for instance, by the rape of women, confiscation of the local populations' cattle and widespread incidents of brutal repression – was followed by a raging plague of locusts and a period of devastating drought. These factors resulted in widespread food shortage in the region, and they have together been pointed to as the main causes of the revolt that broke out in 1897. The severe drought that hit the territory was interpreted as resulting from Ngungunyane's absence and from the failure to perform ceremonies to the ancestors, appealing for good harvests.<sup>12</sup>

Religious practices guarantee the existence of the necessary forces and protection of the spirits, thereby ensuring successful agricultural seasons and economic and social reproduction (Junod 1996; Feliciano 1998). This presence of 'other knowledges' would be mentioned by several of the military leaders ruling Mozambique. Gomes da Costa (1899: 45) stated that "the *anoi* traditional healers are both respected and feared throughout the region", adding that "they resolve the more intricate *milandos*, offer prayers to placate the spirits, predict the future, cure, prepare drugs and love filters and bring rain". As highlighted by Abner Sansão Muthemba, "it was the actual family that had to perform the ceremonies, not just anybody, because only the family was able to dominate the area."<sup>13</sup>

The period of integration of the Gaza state into the colony of Mozambique was characterised by a huge political and institutional void, giving rise to countless excesses and violent incidents. Attempting to 'pacify and control' Mozambique, the Portuguese military forces focused their attention on the northernmost areas, where other revolts raged against the attempted domination by Portugal. In the Gaza territory, the post-war scenario was chaotic. The Portuguese imposed martial law in order to control the situation. The fragments of memories of those who lived during that tough period described the violence that ensued in the following way: "the Portuguese began to oppress us. They went from home to home. They killed chickens,

flict resolution, to describe the idea of a plea (see Fernando Florêncio's contribution to this volume on a slightly different meaning of the term in Central Mozambique).

<sup>12</sup> Diocesiano das Neves, a Portuguese elephant hunter and ivory trader, left an interesting report on the rain-calling ceremonies: "Queen Majáju [...] in rain is truly admirable. It never fails to rain when she orders it, and if it happens to fail, it is because there is an unknown cause, which makes it move far away" (Rocha 1987: 66-67).

<sup>13</sup> Personal communication, August 1990.

goats, etc. [...] When they passed through the homes, they would take things that belonged to others."<sup>14</sup>

Taking advantage of this climate of widespread dissatisfaction, Maguigwane Kho-sa,<sup>15</sup> the military commander of Ngungunyane's army, urged an active military rebellion against Portuguese occupation. In 1897, a revolt broke out, which became known as the 'Mbuyiseni war' (return the King, i.e., Ngungunyane). The unruliness of these times is stored in local memories:

The whites went to call Angolans [soldiers]. It so happened that when those soldiers reached the villages, they would tell that woman, who was at home: "Catch the chicken", and she would catch the chicken and kill it. [That soldier] would come in with her [into the hut] and would eat that chicken. And so the people would implore for Ngungunyane's return.

They had never seen anything like when Ngungunyane was in power! "Come back, Ngungunyane! Come back!"

And they began to stir things up so that war would break out again. So they went and called Maguigwane to govern the country.<sup>16</sup>

[Which was] when Maguigwane revolted and fought with the whites, because Ngungunyane had been imprisoned.<sup>17</sup>

According to local oral tradition, the reasons for this failed revolt emphasise the issue of betrayal. The environmental disasters had been interpreted by local traditional healers as signs of the ancestors' dissatisfaction. Impiumpekazane – guardian of the tomb of Manikusi<sup>18</sup> and of the Nguni altar, who replaced Yoziyo, mother of Ngungunyane – was held directly responsible for the situation, which was explained to result from the fact that she became involved with the whites, the conquerors.<sup>19</sup> She was accused of being a witch, of having attracted evil spirits and, together with these, of having 'helped' the Portuguese, which earned her the death sentence (Quintinha and Toscano 1935: 300).

<sup>14</sup> Interview by G. Liesegang with Ruben Ngomane, in 1978. Mozambique Historical Archive – Oral History Fact Collection Project, Fundo Gaza - Gz 025.

<sup>15</sup> Himself a vassal, presumably of Thonga origin (Department of History, 2000: 397).

<sup>16</sup> Interview with Musindo Nkomo and Carolina Macamo, held in May 1980 in Manjacaze, by G. Liesegang and A. Rola. Mozambique Historical Archive, Fundo de Gaza, Gz 003.

<sup>17</sup> Interview held in Mapulanguene with a group of elders, by G. Liesegang, in March 1971. Mozambique Historical Archive – Oral History Fact Collection Project, Fundo de Tradição Oral, Caixa 3, MP016 and Department of History, 2000: 397-398.

<sup>18</sup> Ngungunyane's grandfather and founder of the Gaza state.

<sup>19</sup> For the Nguni kingdoms, the figure of the king and his mother were extremely important.



Some interviewees who followed the process closely mentioned that Maguigwane had organised the revolt with all of the local leaders and that he had been assured of their participation, although this did not happen. Several Nguni aristocrats, who had significant political prestige in the Gaza state, had already begun to submit (*pegar o pé*)<sup>20</sup> to the Portuguese authorities in December 1895. They even offered their men to the colonial army, showing their unwillingness to collaborate with Maguigwane (Quintinha and Toscano 1935: 304).

The only thing known of the few leaders who stood by Maguigwane is that they did not have significant political influence and, apparently, only one of Ngungunyane's sons agreed to participate in this revolt (Liesegang 1996: 64). Multiple reports describe how, in August 1897, Maguigwane was killed in Mapulanguene, a locality close to the border with the Transvaal,<sup>21</sup> where he had sought refuge from the Portuguese troops. Thus, the '*vátua* domination' came to an end (Quintinha and Toscano 1935: 11).

According to several interviewees over the past years, Maguigwane's defeat was due to betrayal by his supposed ally, Munyamane. He was Mucavele's *nduna*, head of the land in the area where Maguigwane sought refuge. In the memories of those interviewed, Maguigwane's betrayal also involved romantic elements. According to the reports, Maguigwane supposedly became interested in one of Munyamane's daughters, and attempted to seduce her. This was what supposedly led Munyamane to reveal Maguigwane's hiding place to the Portuguese troops:

As soon as the whites appeared, Munyamane showed them where Maguigwane was. The Munyamane family was inside the huts. The whites went there and Maguigwane shot at a white. They discovered him and began to shoot at him, breaking his leg. He fell.

They took him into the woods, and interrogated him about the reasons for the revolt. He did not answer.

Mouzinho [de Albuquerque]<sup>22</sup> became enraged and slit his throat with a sword. [...]

When they cut off his head, they put it into a basket and gave it to his mother, N'wamacimbila, so that she could carry her son's head.

They took her to Lourenço Marques [now Maputo].<sup>23</sup>

This last aspect, the symbolic presentation of Maguigwane's head, is also documented in Mouzinho de Albuquerque's (1898: 414) memoirs:

So that there would be no doubt in Gaza about his [Maguigwane's] death, I ordered his head cut off and I took it to Magude, where I put it in alcohol.

Shown in several locations in Gaza, this act of violence was intended not only to suppress other revolts, but also to prove to the population that they had lost another great leader. But the campaign of terror did not end here. The wave of repression that hit this region was terrible, with several leaders exiled to Ilha de Moçambique because they were "an inconvenience to the new administration" (Liesegang 1996: 82). As for the people, the use of violence became the main form of managing the population. Munyamane, however, was established as *régulo* of Mapulanguene by the colonial administration, in acknowledgement of his support.<sup>24</sup>

The memories of these military conflicts and of the Nguni defeat had a huge impact on the cosmology in Gaza, through the Nguni and Ndau spirits.<sup>25</sup> A couple of years after Ngungunyane's exile, Gomes da Costa portrayed the importance of the memories of the heroes in local tradition: "The time is marked by important happenings, such as the coming of Manicusse, the death of Muzila, the first war with the whites, the first locust invasion, etc." (1899: 45). Further on, the acid criticism of "beliefs in the ancestors' spirits" was used to justify the importance of colonisation in order to change the "primitive mentalities":

The spirits are much more powerful than they were when simple men.

On this basis, the power and prestige of the chiefs are significant and always come from a great leader, because his spirit will protect him, and woe to those who are against him.

It is what gave Gungunhana such prestige. Who could fight against a *régulo* who was protected by the spirit of the great Manicusse?

And later on, the role of the traditional healers was questioned: "In some cases these men are charlatans, cheap liars who exploit the stupid credulity of the indigenous; but there are also cases in which these men are convinced maniacs and, therefore, are truly terrible" (Gomes da Costa 1899: 45).

<sup>24</sup> Interviews held in the Mapulanguene region in 1995-1996: José A. M.; Samuel M.; Simeão A.; Celina M.; Jeremias M. and Maria M.

<sup>25</sup> The Ndau are part of the Shona-Karanga group, corresponding, in ethno-linguistic terms, to the central region of Mozambique. The term "Ndau" means "those from that place", a name given by the Nguni invaders. The Ndau still today refer to the Nguni invaders as *mabziti*, i.e., warriors. On the Ndau, see also Fernando Florêncio's contribution to this volume.

## Spells and Terrors

One of the arguments presented by Mary Douglas and Aaron Wildasky (1982) is that societies choose their nightmares based on both social and cultural criteria and, in that sense, their nightmares are different. The exploitation of nightmares through witchcraft reveals how societies operate, in several contexts, through power and control, complacency and resistance.

Resistance and violent reactions to the Portuguese colonial presence underwent several metamorphoses. Maguigwane's revolt, a grassroots movement with several political connotations and nuances, resorted to accusations of witchcraft to act violently against their political enemies. This rebellion is an example of a popular form of political action aimed at challenging the new totalitarian order being imposed, namely colonialism, which opposed the cultural ideas and solidarity present in many communities. In this sense, the relationship between the spirits and their hosts needs to be analysed in more detail, and as an element of a broader context of meanings (Lambek 1981: 60). Just because these phenomena do not have a direct equivalent in the Western academic world does not mean that they should be reduced and translated to Western canonical forms of interpretation.

Spirits are social entities that interact with their hosts and their families – not only during public ceremonies, but in their day-to-day life, where their presence enriches and moulds social relationships, contributing to the community's well-being. An analysis of these phenomena will necessarily require a study of the phenomena of possessions, acknowledging the role of the spirits in the lives of their hosts. This approach relates to the suggestion that possession phenomena are practices and politics of voice (Lambek 1980). Since the identities and behaviours of the spirits contrast with the daily activities lived by people, the spirits provide an extremely complex moral reference which includes, but can in no way be subdivided solely into, doctrinal specificities such as religious studies, medicine and justice (Meneses 2007; 2008).

In this chapter, I examine the relationships that people establish with the spirits and analyse how such relationships are marked by the significance ascribed to the spirits – mostly their power to autonomously bring about changes. However, there are limitations to this power imposed by practice. For Steven Feierman (1999: 187, 210), spirits – and contact with them – represent a specific sphere of public authority. Mediation through these spirits provides traditional healers with a distinct moral and religious authority in the socio-political arena. These politico-religious figures deal with spirituality, health, well-being and group safety, and help to strengthen an invisible sharing of identity characteristics. At the same time, the polysemic nature of the relationship with spirits, which includes the public aspect, requires a definition, *a priori*, of the type of situation in which this relationship takes place, since relation-

ships between humans and spirits are extraordinarily dynamic (Lambek 1981: 79). According to several interviewees, Munyamane's family, who betrayed Maguigwane, continued to 'possess' his spirit:

Before the war in which Maguigwane was killed, the family [of Munyamane] had no problems. However, after his death, achieved with their help, Maguigwane went to live with the traitor family.<sup>26</sup> This traditional matter turned Maguigwane into the *xingondo*<sup>27</sup> in the family. And they suffered a great deal because they had a hand in Maguigwane's death [...]

This entire area suffered badly from lack of rain. There was much hunger ... So that family and the *régulo* of the land went to the traditional healers, to try and find out the causes and how to overcome their problems. It was then that the traditional healer caught Maguigwane's spirit and the spirit said all of that, and made demands to resolve their conflict. The demands made were a hut, a '*nsati wa pswikwembo*'<sup>28</sup> and a *timhamba*.<sup>29</sup> On that day things were not resolved. But Munyamane himself died before the house was built and the situation continued around here. And they went to the healers again with the owners of the same land, the Mukhavele. But those who betrayed later met the demands [...] The house built by the Munyamane belongs to the Khosa, Maguigwane himself was Khosa. The woman whom the Munyamane paid the *lovolo*,<sup>30</sup> stayed at that house, and the woman could have children, but they were children of the Khosa family because the woman belonged to the Khosa.

One type of spirit manifestation described in detail in the literature relates to marital relationships between male spirits, female hosts and husbands. In some cases, marital relationships involving spirits are not seen as *de facto* marriages, but rather as connections established by analogy (Boddy 1989; Masquelier 2001), when the "relationship of the spirit toward the wife is fraternal" (Lambek 1981: 327). As this case

<sup>26</sup> The idea of betrayal does not relate only to war, or to the fight against colonialism or against other military guerrilla forces, as happened in Mozambique during the armed conflict. The idea of betrayal is also intimately associated with the oral traditions of families and communities, to secret initiation rites, to guarding special medicines and other forms of knowledge that are very carefully protected (Muthemba 1970). To have and to broaden a body of knowledge, and to use it for malicious purposes, is a characteristic of witches. Just like witches, traitors were seen as a threat to the integrity and safety of the community, of the group (Meneses 2006a).

<sup>27</sup> *Xingondo* is a term used among the ethnic groups of southern Mozambique to refer to foreigners. Today this term is used in a derogatory sense as a synonym for rude or backwards.

<sup>28</sup> The spirit's wife.

<sup>29</sup> Ceremony held in honour of ancestors.

<sup>30</sup> *Lovolo* – normally refers to payment for educating and training the young woman, by the family into which the girl will marry.

illustrates, the relationships between the spirit and the 'host' wife take on the form of a real marriage. In social contexts where identity marks reflect episodes of profound violence and terror, marriage between a girl and a vengeful spirit (*pfhükwa*<sup>31</sup>) is one of the ways of restoring relationships that have been torn apart by debt, violence and/or moral misconduct. Anita M., a traditional healer interviewed in 2001 in Maputo, explains:

I pay the *lovolo* of women, for my daughters. I speak to the men and say 'I ask you to take care of my daughter as your wife, to make children for me.' [...] The *lovolo* of these women is paid with the cattle of the spirits [...] Their sons will use the surname of the spirits I hold, who are the ones that went to pay the *lovolo* for these women.

These references allow for a more in-depth exploration of the meaning of marriage among female traditional healers and of *lovolo*. It also allows us to understand the relationships between spirits, female hosts and their husbands, over a period of time and in a specific context, affected by colonial violence, intense post-independence conflicts (lasting from 1977 to 1992) and severe economic deregulation. In the case study, marriage between a male spirit and a female host actually happens, and the spirit treats its host as a wife. The children he has with her are his and they take his name: "those children of his [Maguigwane's spirit] with the woman are those of the Khosa family!"<sup>32</sup>

At the same time, this case illustrates how the effects of multiple cases of armed violence are expressed through spiritual agency. The activities of the spirits cannot be seen independently from those of the living, since the spirits establish alliances with the living to maintain and strengthen their activity and to ensure their marital obligations and descendants. The obvious conclusion is a profound connection: living people cannot prosper and renew society without their spirits, and the spirits cannot evolve without support from the living.

Over the last two centuries, Mozambique has been marked by episodes of extreme violence. Many of those who died were not buried, or if they were buried, certain traditional rules were not followed. This fact helps to explain the persistence of spirits demanding appeasement in these regions. Today, there are many who still advocate

the presence of restless spirits seeking revenge from the evil they were subjected to during the different wars in the country<sup>33</sup> or that are simply trying to ensure that the necessary ceremonies are performed (Nhancale 1996). After being appeased through rituals, the spirits become patient as opposed to vindictive, and even go so far as to play an important social role: traditional healers resort to these spirits when they need support to remove evil spirits or to detect situations of witchcraft (Meneses 2006b). Luzia M., a traditional healer interviewed in 2000, in the Mapulanguene region, explained the importance of these spirits in her training:

The spirit I have with me is of my grandfather. This grandfather used to walk with a stick and an assegai, with a *tinduku*;<sup>34</sup> he looked like a *matsanga*.<sup>35</sup> He used this assegai to kill a *mandau* [enemy] whose spirit then lodged in his home; the spirit killed many people and did everything that was wrong. So a traditional healer was sought and he said that it was a spirit that was in the home and he told the spirit to show up and to say what it wanted; a large ceremony had to be performed and the drums had to be played, and only then could the spirit be appeased [...]. So all of this was done and the spirit showed up and asked me to go to work. I went to the traditional healer to learn the course and so started to work. That's how it was [...] A person like you, even walking alone, may go across a place where someone died, as happened after the war of the *matsangas* who killed traditional healers; so if you walk, you step on them and that's it, it [the spirit] stays with you, stuck. When you get home and begin to get sick, you go to the hospital and don't get better and finally decide to go to the traditional healer and they find out that the person who stepped on spirits has to be treated, so that the spirit leaves and says its name. They ask: but who brought you to this house? And the spirit answers, nobody brought me, he stepped on me along the way – and the spirit asks for a house to be built; the house is built and then you are trained and begin to work.

The narrations that explain the violent armed conflict in Mozambique after independence illustrate how beliefs in ancestral spirits remained a core element in the identity of the many actors involved, and how this conflict is used and manipulated by

<sup>33</sup> In southern Mozambique, these may be spirits of ancestors, the deceased of each family; they may be the deceased of other families that can adversely affect the living, as spirits; or they could also be restless spirits, of people who suffered violent death.

<sup>34</sup> *Tinduku* – a knobkerrie and assegai, the main weapons of the Nguni.

<sup>35</sup> *Matsanga* – term used to refer to the Renamo guerrillas, and which comes from the name André Matsangaíssa, main commander, killed in action in 1979. Renamo, the resistance movement formed after independence, is currently one of the main political parties in Mozambique.

different forces. The 're'-socialising attempts, whether those proposed by Frelimo<sup>36</sup> or those proposed by Renamo, ended in one way or another by going against traditional beliefs and norms. But as people dig down into their memories, it is revealed that the root causes of these conflicts are significantly deeper and more complex: they are part of a longer history of struggles for power and domination in the region.

The memories and identity processes are both of the past and of the present. This is revealed through the figure of Maguigwane, who is simultaneously part metaphor, part memory and part history, revealing the need for a deeper analysis of the historical macro-narrative. Analysing Latin-American shamanism, Michael Taussig (1987: 4) points to how terror works as a social state "that serves as the mediator par excellence of colonial hegemony". This point clarifies the situation lived in Mozambique: fear and terror imposed by the different agents of violence (Renamo, Frelimo, populations organised into self-defence groups and so forth) generated multiple cultures of violence, taking over significant elements from other cultures, while at the same time adding other meanings. While the Nguni invasion is presented, on the one hand, as the cause of a rupture that is full of difficult memories, on the other it is praised for its fierce opposition to the Portuguese colonial penetration in the region, earning both Ngungunyane and Maguigwane the reputation of anti-colonial heroes. Taken together, these dark histories point to a space between memories and history that allows one to discover how individuals and communities build their relationships with the past.

### Spirits and Policies – Hindrances and Gaps

In the aftermath of Mozambique's independence, many people expressed their discontent of the Frelimo government's homogenising policies, aimed at building "Mozambicaness" based upon the experience of the liberation struggle. The upheaval associated with a religious revival by several sectors of Mozambican society reflects the attempt to find new meanings and build other social orders, different from Frelimo's proposed ideology of unity. Although the central government undertook the censure of 'obscurantism' as a political theme (Meneses 2007), the droughts that hit the region shortly after the adoption of this 'political mantra' forced local administrations to resume spiritual ceremonies.

The Administrator arrived, and he asked us about our problems. [...] We also spoke of the lack of water, that there was no rain, of the problems that made us suffer. He asked what was needed to make it rain. We asked to hold ceremo-

nies. The Administrator himself sent drinks and chickens. They held a mass for the rain ceremony and after this the drought that made us suffer ended.<sup>37</sup>

Again in southern Mozambique, like in time of Ngungunyane, the symbolic value of witchcraft suspicions and of the weight of the spirits re-emerged to address the physical and symbolic violence experienced by citizens. The majority of the population of Mapulanguene is engaged in agro-pastoral activities, with trade playing a marginal role in the local economy. When questioned about their ethnicity, the population in the area identified itself as *Thonga*.<sup>38</sup> Despite attempts of ethno-linguistic classification, the people still identify themselves with their birthplace and their surname, instead of their ethnic reference. The social structure is based on a system of lineages that breaks down into segments and domestic groups (the *muti*), which is patrilineal and follows patrilocal residence. When the *muti* change locations, the social geography is transported, taking with it the name, the symbol of belonging not to an area, but to a system of values, norms and symbols. Hence the constant reference, in the Mapulanguene region, to the *vaka Khosa* area, i.e., the location of the *Khosa* family. Although Maguigwane was not originally from this area, this is the area where his spirit remained. In other words, the spatial unit is created, both physically and symbolically, around the male ancestor and his descendants.<sup>39</sup> All inhabitants, whether physical or spiritual, are known in a landscape filled with symbols that refer to memories. The wealth of knowledge of the landscape is accentuated by existing myths, songs and proverbs, explaining their origin and strengthening their sense of belonging. Interaction between living people and the spirits is a dynamic process, which allows for continued interaction with new spirits and people, 're'-constituting the community.

Symbolic elements – such as giving ancestors a drink – underpin realities and behaviours, which bridge generations. The belief in and interaction with spirits occurs in all sectors of society, with the exception of some groups, such as Christian associations. But even in the groups where acknowledging the presence of spirits is a problem, people sometimes change their point of view: when they are unable to find suitable and effective answers to their problems, they consult traditional healers.

<sup>37</sup> Group interview, Mapulanguene, 2001.

<sup>38</sup> The word '*amathonga*' (i.e., the *thonga*) was used to stress the difference, and to refer to those who are not Zulu, that are not Nguni. The acculturation process in the extreme south of Mozambique under Nguni influence was always very fluid and complex, and cultural heritages resurface frequently.

<sup>39</sup> Identity continues to be indispensable both as a practical category and an analytical category, as is shown by the historical dynamics in southern Mozambique in the 20<sup>th</sup> Century – colonialism, nationalist struggle, independence, armed conflict, peace process. These processes generated different identities in response to internal and external forces, and in opposition to other shared cultural experiences.

<sup>36</sup> Frelimo was the nationalist movement that took up arms to struggle for the independence of Mozambique. It later transformed itself into a political party, and is currently the party in power.

When a *kufemba*<sup>40</sup> takes place, the body of the traditional healer is temporarily taken over by spirits. Since these spirits are very knowledgeable, they reveal valuable information which is used to identify the reasons for the problems affecting a person, and to provide help by proposing solutions.<sup>41</sup> The separation between the personality of the spirits and of their hosts is one of the characteristics of this process. As Florinda M. explains:

When the spirit enters my body, it is the spirit that speaks [...] People say that it has a man's voice, but I don't hear it... it [the spirit] uses my body to explain the problem [...] If that took you over, it is no longer you, you no longer feel, you don't hear... That is why the translator [*nyawuthi* – interpreter of the spirits' words] is needed, to explain what the spirit is saying.<sup>42</sup>

In the case of Mozambique, each spirit is unique and has a name, expressing its personality to such an extent that it is identified both by the host and by whoever translates the information. When the spirit leaves the host, the host experiences a kind of amnesia in relation to the occurrence. It is this characteristic that transforms possession, *kufemba*, into a social activity (Muthemba 1970; Meneses 2006a).

The drawn-out armed conflict that marked Mozambique after its independence was a period of terror that led to the loss of thousands of human lives; the destruction of infrastructure and of the populations' assets; forced recruitment of young men to fight in the war; betrayals within families; destruction of towns and villages; and, *gan-dira*, a strategy used by Renamo which involved forced labour and the rape and sexual enslavement of women (Muianga 1995; Igreja, Dias-Lambranca and Richters 2008).<sup>43</sup> These experiences left deep scars on families and communities.

According to several of the authors who studied the problem of armed violence in independent Mozambique,<sup>44</sup> local forces in several regions of the country resorted to the use of traditional religion to ensure their spiritual support during the conflict. This happened at a time when the authority of the state was severely contested, and when both Renamo guerrillas and the Frelimo army were fighting for control of the country. Importantly, at that time the Frelimo political structure considered 'tradi-

<sup>40</sup> (*Ku)femba* – i.e. to feel, hear, detect and, by association, "smell" the spirits.

<sup>41</sup> Spirits possess both men and women, and both may be trained to become traditional healers. Although most traditional healers are women, many of the female traditional healers interviewed stated that "the male spirit works the most". See Meneses (2008).

<sup>42</sup> On the psychiatric interpretations of this process, see Fernando (1991).

<sup>43</sup> Renamo, believing in a political and ideological programme of opposition to Frelimo, defended the replacement of traditional values (including authorities and religions) as a form of guaranteeing legitimacy and popular support. On this topic, see Meneses (2006a; 2006b; 2008).

<sup>44</sup> See Wilson (1992); Nordstrom (1998); Pereira (1999); Honwana (2003).

tional' spiritual expressions to be obscurantist and reactionary, and opposed to progress and modernisation.

The symbolic reworking of violence arose, in the context of the guerrilla warfare, as a "vernacular expression" of protest and of the search for a solution, through violence, to end the violent conflict. In this context, it is important to analyse the anti-violence cults which (re)emerged in the 1980s. One of the forms assumed by the anti-violence cults was that of accusing the local government structures of not having provided the necessary ceremonies to ensure a good harvest, thereby holding them accountable for the droughts and social failures. The physical, economic and political security crisis experienced in the country at the time was also explained, in the opinion of the populations, by the failure to observe the traditional religious practices that in the past had provided rain, ensuring good harvests and the well-being and safety of the people. Another way to explain the source of this violence was to blame the problems on vengeful spirits – *pfhükwa*. Many people were killed in the armed conflict between Frelimo and Renamo, and their bodies were not buried according to tradition; there were also rumours that body parts of dead soldiers were used to manufacture traditional medicines (*mirhi*), to protect people against the war and against violence (Meneses 2009). According to several of the interviewees, when the dead are 'eaten', people become immune to death and suffering, i.e. immune to problems. In situations of armed conflict, the risk of being abducted or killed is constant. Leaving the protected area of a village or town unarmed was almost unthinkable. The best that people could do was to hide and 'close' the body. This was done by resorting to rituals to close the body against external intrusion, and by resorting to powerful medicines and amulets obtained from powerful traditional healers, which created a shield of invisibility around the person. This invisibility and immortal strength were some of the methods used by troops and civilians during the armed conflict, when they sought to protect themselves and find a sense of order that would enable them to carry on with their life, without having to become lifeless bodies.<sup>45</sup> By using witchcraft, people began to be able to travel freely through areas where death, abductions and disappearances were common. They could also control their own capacity to disappear and equip themselves with the power to fight death.

The locations where military confrontations occurred, during the Ngungunyane war, the colonial resistance or the post-independence armed conflict, are perceived to be landscapes full of violence and death, and inhabited to this day by restless spirits. The spirits of the dead who were trapped and did not receive appeasement through ritual ceremonies have continued to harass the living, seeking a solution to their

<sup>45</sup> The capacity to 'close' the body and protect it from external interference dates way back in the region. For the Zimbabwean case, see Lan (1985); Bhebe and Ranger (1995); Fontein (2006). This comparison is important since Renamo guerrilla training included techniques based on religious languages similar to those used in the Zimbabwean liberation war (Wilson 1992: 541).

problem. Many of the Africans who filled the ranks of the Portuguese army, during the nationalist war against Portuguese colonialism, went to traditional healers to be vaccinated against enemy bullets and to 'close' the body, thus challenging the meaning of war.<sup>46</sup> In the opinion of Zacarias C., the constant obstacles faced by the Portuguese army in the early 1970s, and the success enjoyed by Frelimo's guerrilla struggle, were because the nationalist movement had

"[...] powerful traditional healers working for them. [...] They would protect the guerrillas, closing their bodies against the bullets of the G3 guns and giving them strength. [...] Those techniques used by the traditional healers made the guerrillas see their enemies before being detected. These were very powerful medicines. Everybody knew about this."<sup>47</sup>

Already during the civil war, in the mid-1980s, many peasants and workers travelling frequently from Maputo to their home villages, sought to be vaccinated with a spirit, as a self-defence mechanism. If a person had a strong spirit, it would be difficult for Renamo guerrillas to harm him or her in any way, either physically or materially. Several traditional healers consulted acknowledge that this vaccination was 'routine': "it was necessary to close people with a strong spirit, so that they would be feared." They add that "there were healers who did that"<sup>48</sup> because, if these people who were vaccinated were killed, their spirit would follow their aggressors after their death.

### Conclusion: Multiple Memories, Multiple Solutions to Conflicts

Mozambique's cultural diversity finds expression in several academic fields, revealing the multiple epistemic and methodological challenges associated with the search for solutions to the conflicts that mark the country. Because the norms and conflict mediation processes are so deeply embedded in cultural practices, any attempts to separate the two areas ultimately distort the analysis. Over the last decades of the 20<sup>th</sup> Century, traditional healers continued to use defence rituals similar to those used during the war against the Gaza state. These 'closing' rituals secured bodies, houses and plantations by means of invisible barriers, comparable to barricades. These

<sup>46</sup> Interview with Tomás M., Salomão Z., Zacarias C. and Jeremias G., Maputo, July 1996.

<sup>47</sup> Interview with Tomás M., Mozambican and former soldier in the Portuguese army, Maputo, March 2000.

<sup>48</sup> Interviews with Rogério M. and Salomão M., Maputo, July 1996.

defences were erected against both human intruders and incursions by spirits and witches.

Living in the same spaces, the spirits remain in contact with the world of the living, demanding justice and demanding that ceremonies be held. These ceremonies help to repair the excesses of violence by those who were involved in the deaths, contributing to relieve the suffering of the families who lost members and helping to process their memories of violence. This 'reliving' of violent events in the country, through the spirits, has opened up a safe and legitimate social space where survivors can deal with memories of the past. This step is necessary to achieve positive closure for a conflict, both individually and as a community.

In order to overcome the climate of violence, it is necessary to ensure that the victims of violence are socially re-integrated. As Elisa Muianga (1995) notes, during the most recent war, the unease felt in the southern region of Mozambique was tangible. It was a kind of "public secret": husbands and fathers felt humiliated because they were unable to protect their wives and daughters from the military power; and women felt deeply ashamed and stigmatised because it was known that the soldiers had raped them repeatedly. With the end of the armed conflict, the women and ex-soldiers returned home to their families, but the reintegration processes were lengthy and difficult, and included ritual ceremonies such as *kupahla*<sup>49</sup> and other cleansing rituals (Muianga 1995; Granjo 2007).

As elsewhere in the world, a great variety of expressions of psychological stress and conflict began to emerge in Mozambique. Insisting on a division between the mind, body and spirit – between medicine, magic and religion – is equivalent to encouraging researchers to treat these elements as different entities (madness, witchcraft, possession and, more recently, syncretic Christianity). By contrast, it is more useful to analyse these elements as varieties of culturally and historically dynamic healing systems that reflect a wide range of problems, in the search for appropriate solutions.

Legal plurality is an important recourse when thinking about the interaction between the different institutions involved in conflict resolution: between 'international' forms of justice, based on the universality of human rights, and local mechanisms stored in memory. It also raises awareness of the possibilities for mediating the tensions between the various scales of justice, between the local and the global. A plural response to the latent conflicts in Mozambique that is sensitive to both legality and power issues points to the possibility for negotiation and adaptation between several mediation procedures. As this chapter reveals, power relations – among and within the different socio-legal arenas – constitute one of the main aspects of interlegality (Santos 1995). Apart from institutions, it is important to identify the actors involved,

<sup>49</sup> This concept refers to the participation of ancestors in the return of a family member, which involves thanking the ancestors for their willingness and intervention in the return and reintegration process.

their paths, biographies and experiences, detecting who speaks of tradition and who benefits from the discussion. It is equally important to study the complexity of the relationship between modernity and tradition, and how justice, in its multiple shades, works to consolidate power relations, even when it demands reconciliation. The recreation and reuse of protection corresponds to the modernisation of a ritual process, whose importance and efficacy are inserted in new social and political contexts (Shaw 2002). These rituals guarantee an almost absolute consistency in the interpretation of commonly occurring misfortunes in cultural contexts, thereby strengthening their credibility and consequent efficacy.

Over the years, the flexibility of the modern state's institutions of local power created the conditions for the coexistence of various knowledge sources and experiences. As one interviewee rather philosophically commented, "those ceremonies really needed to be done... people in government also have to eat, they don't live on talk alone. We had to work together."<sup>50</sup> In Mozambique, individual and collective experiences and memories are woven together, reflecting the presence of different forms of 'awareness' in the crossing of different historical paths (First 1983: 329).

Spirits that 'return', the presence of restless ancestors who seek to appease the mistakes and deaths of the past, create spaces for conciliation and opportunities to solve problems, seeking to repair family rifts and warning against the creation of new cycles of injustice. To solve family conflicts, these spirits evoke powerful memories that help break the heavy cultures of silence and denial that still prevail.

The ability of the Khosa spirit to overcome the barriers of individual distress and to act on a group required the elaboration of a notion of 'power' that acts simultaneously as a form of repression and transformation. Facing the spirits – i.e. the 'hidden forces' – the people involved, who insist that social transformation is not limited solely to the living, reproduce and strengthen several aspects of their culture. Since spirits are considered entities, they are also subject to this social transformation. The behaviours shown during *tinholo* and *kufemba* sessions suggest the presence of cultural rules of incorporation (Lambek 1980). In Mapulanguene, the dominant belief is that, between spirits and their human hosts, decision-making belongs to the spirits, who are seen as fearless and extremely powerful. When a spirit occupies a particular 'body' (woman, man, animal, plant or an element of the landscape), the status of these hosts and places inevitably changes. Spirits are not objects, but rather a cultural recourse with the ability to take over their human hosts. In the extreme, moments of possession reveal the impotence of our contemporaries to control and define the past, to transform these experiences into versions of history. Similarly, such cases also demonstrate the limited ability of spirits to 'have power over' a body: spirits are "socially accessible only through personal experiences and through the actions of their human hosts" (Lambek 1993: 306).

Spirit possession is a contemporary reality that allows individuals and groups to rebuild their identities by curing misfortunes and promoting well-being, reconfiguring the institutions involved in resolving these conflicts. The paths and agents of these narrations evoke experiences of violence in their multiple forms, indicating that violence is, in itself, a dimension of the reality experienced by the people. Being a component of the peoples' experience, violence generates confusion, uncertainty and inconclusiveness. As Taussig (1987) warns, violence is slippery, escaping easy or simplistic definitions. Leaving indelible marks on peoples' lives, the circuit of violence includes not only victims, but also the perpetrators of these actions and situations. Detailed readings of micro-stories point out how these situations are constitutive of identity processes which defy any micro-narrative; how they are frequently biased, fairly unclear, and do not acknowledge abuses and omissions. In the case of Mozambique, the state opted to selectively ignore elements of the past, in order to create an official history. This version of history, dynamically driven by the nationalist struggle, continues to be focused on the condemnation of colonialism, the basis for organising the national project. Discussions in the media – along with several memoirs, biographies and works of fiction – have shattered the relative silence surrounding these processes, against a political backdrop produced by an apparent interest to promote a selective reading of the country's history.

These multiple stories are interlinked, and an important part of the identity of the groups that produce them. Therefore, it is essential to make room for these other narratives to be heard and integrated into the national debates. Thus, as in other realities, Mozambique faces the need both to analyse the repercussions of its colonial heritage and, on a different level, to recover what remains of its social and political structures, as well as its identities – those other micro-narratives rooted in the pre-colonial past.

Thus, dealing with memories requires an acknowledgement that the collective memory has a plural origin, both from the perspective of the different places occupied by the different narrators, and of that which is narrated and the shape taken by the matter. Thinking of memories in the plural, placing them as different narrations of the history of certain locations, brings with it the obligation to (re)think the identity processes and the social and political metamorphoses experienced by societies. Building platforms where these multiple voices are heard is a process of democratisation, where the past is transcribed for specific aspects of individual lives, in the constitution of their identities (Lass 1994: 88) and where the more personal reconciliation processes are transformed into a constitutive part of Mozambique's social and political memory.

Accusations of spirit possession and witchcraft as endemic practices become a form of containing, challenging and regulating powers. In times of 'moral crises', where tensions are high and uncertainties rife, witchcraft could get out of hand and turn into an epidemic, radicalising history. It is precisely this ability to make identity changes possible – either individually or collectively – that explains much of the

<sup>50</sup> Florinda M., traditional healer, interviewed in Maputo, 2006.

power and success of the dynamics of adapting and engaging witchcraft in modern times. The result is another version of modernity.

Although spirit possession is a stabilising factor in social relations, it is by no means a static regulator of behaviours and identities. Collective local memories offer local perceptions and knowledge of their history. The silencing to which these memories have been subjected, including their absence in academic literature, reflect the strength of alternative discourses that peremptorily question the centrality of the argument of a single historical narrative. The retelling of these stories, and the presence of spirits from the past, allow the violence and terror to be relived and explained. These discussions about history, which include both harsh times and times of perseverance, are essential to make sense of the memories and identity of a particular community. They allow the restoration of fractured groups and shattered communities, such as the Khosa.

As suggested in this chapter, it is important to bring history into the realm of identity politics, in order to understand the colonial presence as well as the contemporary reality of Mozambique, where the appeal to 'national reconciliation' is important. At a first glance, the long years of armed conflict suffered by the country seem to have been overcome, pointing to successful reconciliation. However, as this chapter points out, such reconciliation remains very much incomplete, with numerous 'other' stories still missing. The shadow left by these stories acts on the present. They help us to understand the conflicts and divisions that currently trouble the country, and they emphasise the opportunity that exists for reinforcing the reconciliation process, based on a plural justice system.

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## Traditional Authorities and Legal Pluralism: A Comparative Analysis of Two Case Studies in Mozambique and Angola

Fernando Florêncio

### Introduction

According to John Migdal's (1998) classification, African states can generally be defined as 'weak states', given their poor territorial penetration, incipient legitimacy and limited control over the entire population and territory. In this sense, the deconcentration and decentralisation processes underway aim to counteract this trend and strengthen the state – particularly the central state – thus helping to increase state control and legitimacy, and to expand the network of administrative structures to the entire territory.

Like the colonial states, the independent African states eventually realised the ineffectiveness of the political and administrative centralisation processes – that is, of trying to establish state hegemony, in the process eradicating other forms of social, political, legal and religious organisation within the so-called civil society. Consequently, from the mid-1990s, African states began to 'accept' the existence of other forms of social organisation, namely those of a 'traditional' nature, attempting to control and fit them into the state-building process, particularly at the local level in rural areas. Legal pluralism has been gaining a greater and more topical social space in this process of state-building. However, in view of the 'weaknesses' of central governments, legal pluralism can give rise to confrontation at the local level, between state law and customary law. It is in this space that traditional authorities have played an

important role, acting as state intermediaries on the one hand, and as regulators of coexisting legal orders on the other.

In this context, the integration of traditional authorities into the process of state building in Africa inherited two characteristic problems from the colonial period, which have continued after independence: (1) traditional authorities occupy an ambivalent position; and (2) the legal orders associated with them are controversial.

The colonial system of indirect rule<sup>1</sup> was, for a long time, regarded as a relationship of domination of the colonial states and of subordination of the traditional authorities.<sup>2</sup> However, it has ultimately begun to be seen as a much more complex and ambivalent relationship, in which both players use their legitimacy and capacity, sometimes mutually and strategically reinforcing one another – both in terms of legitimacy and in terms of sources of domination – and sometimes feuding for the domination of the relationship itself (Florêncio, 2003, 2005, 2008). Independent states have developed strategies to control the traditional authorities, their capacities and legal limits, attempting in particular to impose a hierarchy of legal powers between the different actors, and between the different local legal orders and national state law.

The Angolan author N'Gunu Tiny argues that there are two models of 'accommodating' traditional authorities and customary systems in the national legal systems: the one-tier (monist), or integration model; and the dualistic, or recognition model. In the first case, a type of indirect rule<sup>3</sup> system is set up, in which traditional authorities are formally or informally integrated into the local administrative apparatus. In the second model, traditional authorities emerge as representatives and leaders in their own communities, i.e. as autonomous local state institutions (Tiny 2007: 74).

However, according to Tiny, neither of the two models expresses a truly pluralistic vision. In both, the relationship between the state and traditional authorities is

<sup>1</sup> Indirect rule, described in British colonial literature, in particular, as being based on regard for traditions and customs of traditional societies, was in reality never fully applied in any African colony, since colonial administrations – including the British – always used it in a more or less coercive and manipulative manner (on this matter, see Lombard, 1967). In that sense, the term serves essentially to describe a form of governance in which the colonial power used African traditional political systems as the foundations of the administrative system, given the lack of significant human and economic resources, and the colonial administrations' lack of legitimacy in the eyes of the African populations. The system of indirect rule allowed colonial states to control African territories and populations, by using, controlling and manipulating their African political authorities.

<sup>2</sup> Trutz von Trotha (1996) argues precisely that colonial states divested traditional authorities of their powers to the point of entrusting them with merely administrative tasks. A critique of this position can be found in Florêncio (2005; 2008).

<sup>3</sup> For a discussion of the current use of the term 'indirect rule', or its replacement with the expression 'neo-indirect rule', see Florêncio (2008). Mahmood Mamdani (1996), on the other hand, prefers to use the term 'decentralised despotism' as a constituting part of the colonial state, which permits a distancing from the dichotomy between indirect rule and direct rule.

viewed from a hierarchical perspective, in which the latter are always subordinate to the former (ibid.). Thus, from the perspective of the state, customary legal systems must be subject to state law and, in particular, to constitutional standards.

This chapter seeks to use the practices and representations of traditional authorities and local/municipal<sup>4</sup> state agents to compare the monist and dualist models, and to determine the extent to which the two local legal orders – traditional and state – complement or oppose each other. The findings in this chapter are based on a comparative analysis of the municipality of Bailundo, in Angola, and of the districts forming the Ndau region in Mozambique.

As a broader theoretical problem, the chapter discusses the advantages and disadvantages of legal pluralism in the contexts of weak states, exemplified by Angola and Mozambique. The intention is to find out whether legal pluralism – institutionalised in Africa with the implementation of indirect rule – does not, in fact, reproduce a dualist model of citizens and subjects so characteristic of the colonial model. As Mahmood Mamdani (1996: 109) argues, the defence of customary law was a basic pillar of the system of indirect rule and shaped a bipolar relationship between two universes, in addition to encapsulating the African populations in a traditional organisation, i.e. the tribe. The main question asked in this chapter is whether the independent states are reproducing the bipolar relationship between universes – or, put differently, whether they are reproducing the colonial relationship between citizens and subjects, thereby allowing different types of 'citizenships' to exist within their national territories.

## Legal Pluralism and the Colonial State

Among the structuring ideological components of Portuguese colonialism is the thesis of vocational civilisation, and the notion that the local populations and their 'cultures' should be progressively and selectively 'assimilated' into the Portuguese civilisation. However, this ideology of assimilation asserted that, for as long as that aim was not fully achieved, the traditions and customs of the indigenous populations in the Portuguese colonies should be maintained and respected.<sup>5</sup> Thus, since the late 19th Century, colonial legislation that was produced, in various domains, gradually emphasised the existence of two types of societies within the same colonial space: the colonising society (white, European, based on names), and indigenous societies (gentile, native).<sup>6</sup>

<sup>4</sup> Municipal state, in the case of Angola, and district state, in the case of Mozambique.

<sup>5</sup> For more detail on this topic, see Moreira (1955).

<sup>6</sup> There are numerous projects and legislative codes on *indigenous* criminal law. An example of this

This distinction was embodied in legislation in the 1930s, with the publication of the following key documents from the Portuguese colonial administration: the Political, Civil and Criminal Statutes of the Indigenous People of Guinea, Angola and Mozambique (*Estatuto Político, Civil e Criminal dos Indígenas da Guiné, Angola e Moçambique*), published in 1929; the 1933 Constitution of the Republic; the 1933 Colonial Act<sup>7</sup>; the Organic Charter and the Overseas Administrative Reform Act (*Lei da Reforma Administrativa Ultramarina – RAU*), both also published in 1933.

The Political, Civil and Criminal Statutes of the Indigenous People established the loss of rights of the 'natives' (*indígenas*), in particular in Article 7, which states that "no political rights in relation to European institutions shall be granted to natives." The legal subordination of the natives culminated with the establishment of the 'Indigenous Private Courts' (*Tribunais Privativos dos Indígenas*). These courts regulated the legal relations between the natives and were independent of the Portuguese judicial organisation (Article 14). They were established in each district and were chaired by the administrator, assisted by two members, appointed by him, and by two 'customary affairs' advisors, who could be 'customary leaders' (*chefes gentílicos*) or "other indigenous people of good standing and knowledgeable of local legal traditions" (Article 15, § 2).

In this way, it could be argued, the Portuguese colonial administration adopted the indirect rule system,<sup>8</sup> in which African societies were incarcerated, from a political and legal perspective, in what was understood to be a traditional model of life. This incarceration was masked in the legal texts as respect for traditions and customs. For instance, the Statute,<sup>9</sup> reads that: "such a system, which is fair, practical and effective, involves respect for those same habits and customs, in everything [...] that is not in conflict with the principles of humanity and with the sovereignty of Portugal".<sup>10</sup>

The immediate conclusion that can be reached is that the Statutes clearly established a political and legal dualism in the colonial society, with native populations being barred from full integration into colonial society. Thus, a model based on Mamdani's (1996) division between citizens and subjects, as mentioned earlier, was for-

is António Cabral's *Indigenous Criminal Justice Regulations Project*, of 1925, and the *Milandos Code Project*, by the same author and in the same year.

<sup>7</sup> Although first published in 1930, the Colonial Act was revised in 1933 in light of the new Constitution, and declared constitutional matter in that same year.

<sup>8</sup> The institutionalisation process of the indirect rule system was also established in 1933 with the Overseas Administrative Reform (RAU), which formalised traditional authorities, called "gentile authorities", as an integral part of the colonial administrative apparatus.

<sup>9</sup> For easier reading, the term Statute is used as an abbreviation of the title Political, Civil and Criminal Statute of the Indigenous People of Guinea, Angola and Mozambique, which was also commonly known as *Lei do Indigenato* (Law of the Natives), or *Estatuto do Indigenato* (Statute of the Natives).

<sup>10</sup> In *Estatuto Político, Civil e Criminal dos Indígenas da Guiné, Angola e Moçambique*, pp.4.

mally created in the Portuguese colonies. From this perspective, traditional political institutions, namely the traditional authorities, take on particular importance. On the one hand, they guaranteed the continuity of this organisational model, and on the other, they provided for an institutional bridge between the two universes, that of the colonised and that of the colonisers, including a subordination of the former to the Portuguese state.<sup>11</sup>

Of particular importance to the roles of African traditional political institutions and of traditional authorities were the Overseas Administrative Reform (RAU) and the Decree Law 23:229, of November 15, 1933, which, among other matters, defined the integration of traditional authorities in the colonial administrative apparatus.

The following are the main points in the chapter of the RAU that outlines the functions and duties of traditional authorities:<sup>12</sup> (1) the obligation to faithfully obey the Portuguese administrative authorities (Article 99, § 1); (2) publicise the orders of the Administration (Article 99, § 2); (3) maintain order in their chieftaincy (Article 99, § 3); (4) supply men for the police and armed forces, whenever requested (Article 99, § 4); (5) inform the Administration of any extraordinary occurrence in the chieftaincy, such as crimes, deaths, endemic diseases, illegal trade and demarcation of land (Article 99, § 5); (6) notify the Administration of and register weddings, births and deaths (Article 99, § 6); (7) prevent the trade in and production of alcoholic beverages and poisons (Article 99, § 7); (8) prevent the practice of witchcraft and divination (Article 99, § 9); (9) apprehend criminals or suspects, and hand them over to the administration authorities (Article 99, § 14); and (10) encourage the populations to carry out the type of agriculture suggested by the Administration (Article 99, § 16). The RAU did not recognise the role of traditional authorities in judging any type of crimes, only allowing them to apprehend suspects and report evidence to the administration (Article 99, § sole). Traditional authorities could also request the Administration to expel from their territory any individuals who disturbed the public order (Article 100).

### The Ndau case

The Ndau ethno-linguistic group is one of the Shona groups living in central Mozambique, occupying a horizontal strip running approximately from the Save river in the south to the Búzi river in the north. They mostly occupy the current districts of Mossurize, Sussundenga and Machaze (Manica Province); and, Chibabava, Búzi and Machanga (Sofala Province).<sup>13</sup> In pre-colonial times, the vaNdau were organised

<sup>11</sup> The *Estatuto do Indigenato* was only formally abolished in 1961, with Decree Law 48.893.

<sup>12</sup> Called customary authorities (in Portuguese *autoridades gentílicas*) in the RAU. In the case of Angola, these authorities were known as *sobas*, and in Mozambique and Guiné as *régulos*.

<sup>13</sup> The data presented in this chapter come from several field studies carried out in the districts of Mossurize, Sussundenga, Machaze, Chibabava and Búzi in 1994, 2000 and 2001.

in small autonomous chieftaincies, interlinked by kinship ties between their leaders, known in Shona as *mambo*.<sup>14</sup>

According to the RAU, the main functions and duties the vaNdau traditional authorities were expected to perform on behalf of the colonial state were to control labour and the annual hut tax, and tasks related to maintaining order – including judge and policing roles performed by traditional authorities in the settlement of *milandos* (conflicts) between 'natives'. Each *régulo* (chief or traditional authority) and headman (*chefe de grupo de povoações*)<sup>15</sup> had, informally, but with the tacit knowledge of the local administration,<sup>16</sup> its *milandos* courts to deal in particular with minor cases, such as petty theft, minor disagreements and civil disorder, in addition to issues relating to so-called 'customs and traditions', such as succession, adultery, divorce, land disputes between natives and, above all, *uloi* (witchcraft).

All members of the power structure participated in the vaNdau traditional authorities' courts. Besides the respective traditional authority (the *régulo* or headman), who performed the role of presiding judge, there were also the *nduna*<sup>17</sup> (who generally occupied the position of court secretary<sup>18</sup>); the *muvia* (a person who essentially performs rituals within the mambo council); the *matombo* (plural for elder) council; members of the traditional authority's *ucama* (lineage); individuals of importance from the area; and the *cipaios*.<sup>19</sup> These participants served simultaneously as councillors, prosecutors and defence attorneys. There was also a hierarchical relationship between the different courts, corresponding to the hierarchy of the institution. In this way, the headmen informed the *régulo* of any *milandos* they resolved and would refer those they were unable to resolve to the *régulo's* court.

In a sense, the population could manipulate this system to their advantage, since, unlike in pre-colonial times, the decisions of these courts were not binding. Thus, an individual or group who was unhappy with the decision of the court of their headman could resort to the court of another headman, or that of the *régulo*, or even go to the Administration.

<sup>14</sup> For more information on the Ndau, see Florêncio (2003; 2005).

<sup>15</sup> In the case of Mozambique, the RAU instituted three categories of traditional authorities: *régulo*, *chefe de grupo de povoações*, and *chefe de povoação*.

<sup>16</sup> Despite not being constitutionally established, the existence of these traditional courts was of extreme interest to the colonial Administration, since the vast majority of the *milandos* presented by the 'indigenous' population involved accusations of witchcraft, a question the Administration did not know how to address.

<sup>17</sup> Term derived from the Nguni word *induna*, which refers to a counsellor of the *mambo*.

<sup>18</sup> In the latter years of the colonial Administration, many of these courts already had a register where all procedural steps and court decisions were recorded.

<sup>19</sup> A kind of native police force that served both the colonial Administration and the traditional authorities.

The *regulos* were instructed to forward to the Administration any *milandos* their courts were unable or unauthorised to resolve. Among the latter category were violent *milandos* involving grievous bodily harm or homicide; crimes against the state, such as refusal to do forced labour, pay hut tax, or enlist for military service; serious cases of theft; etc. For these cases, the Administration had the aforementioned private indigenous courts, headed by the administrator, assisted by two *regulos*, who were appointed biannually. With the end of the *Estatuto do Indigenato* in 1961, these courts were abolished and replaced by Justice of the Peace courts (*tribunais de Julgados de Paz* – at administrative post level), and Municipal Justice courts (*tribunais de Julgados Municipais*), chaired by the administrator.

Contrary to the instructions given, the traditional authorities frequently manipulated the control that the Administration should have had over their legal competences, such as by concealing information on serious *milandos*, like homicides, and judging them in their courts without forwarding them to the Administration. This occurred mainly in the more remote areas of the administrative posts, which were very difficult for the Administration to penetrate and control, and where it practically had no presence.

Most of the *milandos* brought before the traditional courts were related to the practice of *uloi* (witchcraft or sorcery) since, according to vaNdau ideology, the actions of the *varoi* (plural for witches or sorcerers) were used to explain the vast majority of misfortunes (sickness, death, economic failure, etc.). The colonial legal system was not capable of addressing these issues and, as far as the populations were concerned, it did not have the legitimacy to settle these cases. For this reason, the traditional authorities were used to guide in the process and sanction all procedural steps.

In colonial times, the method used to settle a *milando* involving *uloi* closely followed the type of procedures used in pre-colonial times, namely the use of divination and 'poison oracles' – such as the *mwavi*, and the *bata-badza* test.<sup>20</sup> The colonial Administration always tried to control the legal powers of traditional authorities and exercised heavy pressure on the practices of *mwavi* and *bata-badza*, but it was unable to abolish them completely. These continued to be used in areas where colonial control was not very strong.<sup>21</sup>

The colonial Administration also tried to maintain strict control over the penalties and sanctions applied in the traditional courts. In pre-colonial times, the *mambo* had almost unlimited legal power and the sanctions applied ranged from material

<sup>20</sup> *Mwavi* is a poison that is administered to a person accused of witchcraft, and which proves the accusation if the person dies after ingesting the poison. *Bata-badza* is a test in which the accused must grasp the red-hot handle (*badza*) of an iron pot: if burn marks are left on the hand of the accused, the accusation of witchcraft is considered valid.

<sup>21</sup> It should be pointed out that the different religious congregations also put significant pressure on these practices, with practically the same results.

compensation for victims<sup>22</sup> to penalties involving expulsion from the *nyika* (chieftaincy), or even death. The latter two were commonly applied to individuals accused of homicide or of being varoi. With the introduction of the colonial Administration, the *régulos* and traditional courts lost those prerogatives, and penalties consisting of reparation or financial compensation for the offended, or their families, became the norm.

On the other hand, the creation of the private indigenous courts gave the populations a set of mechanisms, which were not available to them during the pre-colonial period, to manipulate the decisions of the traditional courts. It can be said, therefore, that with the introduction of the colonial regime, the traditional authorities not only saw their legal powers reduced, but also lost some of their legitimacy, since limitations were imposed on their capacity to enforce decisions.

However, the colonial state was generally a 'weak state,' not least in many Ndau constituencies. Due to a shortage of material and human resources, the state had a weak presence and insufficient control in these constituencies, which meant that the traditional vaNdau authorities continued to apply the same penalties and use the same poison ordeals and *bata-badza* as in pre-colonial times. They also judged cases for which they were not authorised, in clear defiance of what had been instituted by the colonial Administration.<sup>23</sup>

### The Bailundo case

Bailundo is a municipality in the province of Huambo, Angola. The population belongs to the Umbundo ethno-linguistic group. The municipal area corresponds to the current limits of the former M'Balundo kingdom, and the current traditional authorities of the municipality are an integral part of the kingdom's current political structure.<sup>24</sup> Unlike the example of the Ndau, where the traditional political structure was based on small autonomous chieftaincies, the kingdom of the M'Balundo was one of the most important Ovimbundo kingdoms in the pre-colonial era, and was only subjugated by the Portuguese colonial Administration in 1902. This was an extremely centralised and hierarchised kingdom, headed by a king, the *ossoma inene*.<sup>25</sup>

<sup>22</sup> This was usually done in kind, as labour services or, during the period of Nguni domination at the end of the pre-colonial era, in money.

<sup>23</sup> In this regard it must be pointed out that the plurality of situations, in both regional and temporal terms, does not allow an analytical model to be established. Sometimes the Administration was unaware of these practices, and at other times it would condone them, either for strategic reasons or due to a lack of operational capacity.

<sup>24</sup> For more information on the kingdom of the M'Balundo, see Florêncio (2010).

<sup>25</sup> To understand the traditional power structure of the M'Balundo kingdom and its integration by the colonial state, see Florêncio (2009; 2010).

In certain regions and during certain periods, the Portuguese colonial state in Angola could also be classified as a 'weak state.' Fola Soremekun (1965: 171) specifically quotes a 1911 report from the evangelical congregation of the American Board Mission, which attests to the fact that the colonial government did not have the capacity to govern and that, in the 'bush,' small traders were the true rulers. As previously mentioned for Mozambique, in the case of Angola, African traditional political institutions also played an important role, forming the foundation for the continuity of the native and colonial administration models, and the institutional linkage between those two universes – that of the colonised and that of the colonisers. In these two overseas provinces, the Portuguese colonial State integrated the respective traditional authorities into the same model of indirect rule.<sup>26</sup>

As in the case of Mozambique, the legal responsibilities of the Angolan traditional authorities played an important role and were fundamental to the Portuguese colonial administration. In Angola, these courts, called *ecanga*,<sup>27</sup> also existed at all levels of the traditional authority structure. In the case of Bailundo, all traditional authorities, namely the *ossoma inene*, the *olossoma*<sup>28</sup> and the *olosseku*,<sup>29</sup> had their traditional courts, which operated within a hierarchical system similar to that of the pre-colonial period. The court was presided by the respective traditional authority, assisted by members of its council, the *elengo*, except in the case of heads of villages, *sekulo*, who did not have an *elengo* and were therefore accompanied at their trials by the village elders. However, there was a significant difference from *ombala* (chieftaincy)<sup>30</sup> to *ombala* with regards to the importance given to the specific members of the *elengo*. For example, in trials conducted in the Chijamba *ombala*, it was the *tchinduli*<sup>31</sup> that announced the verdict and the penalties to be applied. However, in the Lunge *ombala*, the final verdict of the court and the penalties were announced by the *mwekalia*<sup>32</sup> and not the *tchinduli*. To highlight these differences even further, in the Janjo *ombala*, this duty is performed by the *ndaka*.<sup>33</sup>

Just like in Mozambique, these courts were limited only to conflicts or disputes between the native populations of Angola, since neither the 'assimilated' nor the Europeans were covered by the *Estatuto do Indigenato*, their rights and duties being reg-

<sup>26</sup> In both cases, the legal framework was provided by the *Estatuto do Indigenato* and the RAU.

<sup>27</sup> Umbundo term which refers to the traditional authorities' courts.

<sup>28</sup> *Olossoma* is the plural of *ossoma*, or "chief", whom the Portuguese called "soba".

<sup>29</sup> *Olossekulu* is the plural of *sekulo*, which is the Umbundo term for village chief.

<sup>30</sup> Term used to designate the territory of a chief, but also his residence.

<sup>31</sup> One of the *ossoma* counsellors and member of the *elengo*.

<sup>32</sup> The *mwekalia* is the most important figure of the *elengo*. The *mwekalia* appoints the *ossoma*, and may even remove them. The same goes for the royal *elengo* of the *ossoma inene*.

<sup>33</sup> Another figure of the *elengo*.

ulated by the Portuguese civil code. The conflicts that these courts were authorised to judge were fairly similar to those listed in the case of Ndaú, namely, petty theft, minor physical aggressions, and 'matters of tradition and customs' such as inheritance disputes, succession, adultery and witchcraft. The latter two formed the vast majority of the cases tried.

In the case of an accusation of witchcraft, the process would proceed according to a model that maintained many pre-colonial features, and which is still in use today. Firstly, the person on whom a 'spell was cast', or a family member, presents the case to his or her traditional authority. The traditional authority appoints a *quimbandeiro* (diviner or diviner-healer), who will then conduct divinations on the misfortune. Once the source of the misfortune is detected – i.e., the agent of evil, the witch, or the *onganga* – the *quimbandeiro* reports the case to the traditional authority, who orders the court to convene and the respective 'accused' to be present. If the accusation refers to a serious act of witchcraft, for example one that involves death, then the accused may be subjected to a special ordeal, the *umbulungu*<sup>34</sup>, as the accusatory procedure. In this case, if the accused fails the test and dies, then it is proved that he or she was an *onganga*, similarly to what was described previously for the *mwavi* ordeal.

Also in this context, the colonial administrative authorities tried to exercise strong control over the accusatory procedures, namely the *umbulungu* ordeal, and over the physical punishments applied. In the case of Bailundo, the churches played an even more important role than the colonial Administration, particularly the Angolan Congregational Evangelical Church (*Igreja Evangélica Congregacional Angolana* – IECA) which, since its establishment in the region at the end of the 19<sup>th</sup> Century, led a process of social change among the Ovimbundo, both in terms of ideology and social practices.<sup>35</sup>

## Legal Pluralism in Angola and Mozambique since Independence

### Mozambique and the Ndaú case

After signing the Peace Agreement in 1992, the Mozambican Government was faced with the need to rebuild the state Administration at district level throughout the national territory – both in the regions left deserted by the war and in those occupied

<sup>34</sup> *Umbulungu* is a poison made from the bark of a tree, in a process that is known only to certain experts, such as some of the locally renowned *quimbandeiros*.

<sup>35</sup> On the influence of this protestant church, see Edwards, A. (1962) and Pèclard, D. (1998; 1999).

by Renamo. The district administrations progressively incorporated the traditional authorities into the state's process of national unity and reconstruction at the district level.<sup>36</sup>

In this process, the traditional authorities began to receive, albeit informally, a series of tasks and functions with which they had been familiar since colonial times.<sup>37</sup> In terms of maintaining public order, traditional authorities have, since 1994, been performing functions identical to those of the colonial period. Thus, the traditional courts, commonly known as the '*régulo* courts', were reintroduced to deal with matters relating to minor crimes such as theft, physical aggression not involving homicide, and so-called traditional matters, such as inheritance, succession or property disputes and accusations of witchcraft. The latter continue to constitute the majority of the *milandos* brought before the courts. As in the colonial period, more serious crimes must be channelled to the district Administration, namely to the state police.

Also as was the case during the colonial period, these traditional courts take place in the *nyika* of the *regulos* and headmen,<sup>38</sup> meeting generally once a week at the home of the first wife of the respective traditional authority. The composition of these courts is exactly the same as during the colonial era.

The traditional courts, along with the customary or common laws that substantiate them, represent an unlegislated local legal structure, which is a kind of informal parallel law. At district level, the formal legal structure is composed of the district court and the community courts, which exist in the localities and which were created under Law 4/92, of 6 of May (see also the Introduction to this volume, and the contribution by Sara Araújo).<sup>39</sup> In practice, the district courts judge cases that the community courts and traditional courts are unable to resolve.

In reality, the community courts and the traditional courts have practically the same type of competences and decide on the same type of *milandos*, except for accusations of witchcraft, which may be taken to the community courts but are generally referred back to the traditional courts. Informal mechanisms have been established to regulate the legal competences of each of the different legal structures – i.e. the

<sup>36</sup> The period under analysis reports on the situation in Mozambique since the end of the civil war, in 1992, and the consequent transition to the multiparty regime; and in Angola, from the end of the civil war, in 2002.

<sup>37</sup> On this process, its dynamics and problems, and particularly for the Ndaú region, see Florêncio (2003; 2005; 2008).

<sup>38</sup> The position of headman at the second level (*chefe de grupo de povoações*) no longer applies officially in Mozambique. Now only one level of headman exists, the *chefe de povoação*, just below the *régulo*.

<sup>39</sup> In 2001, this legal structure still did not cover the entire country and, for example, in Búzi, had not yet been implemented in all localities. The district courts themselves operated with serious difficulties, particularly in terms of their staff.

district, community and traditional courts. Thus, for example, the traditional and community courts are barred from dealing with homicides and other violent crimes, or with significant property damage, while complaints involving accusations of witchcraft, for example, are invariably referred to the traditional courts by both the district and community courts.

In certain circumstances, the traditional courts are faced with legitimacy problems, since the populations do not always respect their decisions – or even seek them in the first place, resorting to the district courts instead. This lack of legitimacy may be partly due to the nature of the sentences issued – some of which are unconstitutional, as will be discussed below – and partly to financial factors affecting some sections of the population. The fact that the services provided by the district and community courts are almost free of charge is also a ‘discouraging’ factor for the population, particularly the neediest. In contrast, in the traditional courts, even laying a charge always involves the payment of fees, in money or in kind.

In short, it can be said that the different legal structures (district, community and traditional courts) are subject to strong manipulation by the populations, who resort alternately to one or another depending on their personal interests. This is nothing new, for the same happened during the colonial period.

As asserted previously, accusations of witchcraft continue to be the type of *milandos* most frequently seen in traditional courts. In the trial of an accusation of witchcraft, the procedures have remained unchanged since colonial times. After the sentence has been passed, the accused party pays an indemnification to the offended party, and a new fee to the court. At the beginning of the trial – i.e. after the parties involved have presented their case to the traditional authority in their area – the authority begins the process by sending the parties to a *nyanga* (diviner or divine-healer). Currently, among the vaNdau, the *nyanga* still use poison ordeals, *mwavi*, and the *bata-badza* test, particularly in areas where the district administration and district police do not have sufficient control over the traditional authorities.<sup>40</sup> Once the *nyanga* has done his or her ‘search’ for the witch (*maroi*), the claim is once again taken to court. At this stage, the *matombo* (elders) play a vital role, acting simultaneously as prosecutors and defence attorneys. In certain courts, it is these elders who pass the final sentence. Depending on the type of crime the guilty party is accused of, the penalties may range from financial compensation paid to the victim to physical punishments aimed at expelling evil spirits, and even banishment from the *nyika*.

Customary law and the sentences passed by the traditional courts are very often in contradiction with national law, namely with the Constitution, as is the case of the poison ordeals or the *bata-badza* test. Another very controversial aspect is that of sentences to expel people from the *nyika*, particularly for crimes such as theft,

physical aggression and witchcraft. Certain matters pertaining to family law are also judged in contravention of national laws, such as cases relating to property law and to guardianship of children, where Ndau customary law favours the practice of levirate marriage. These contradictions are even more evident in the more remote areas of the district villages and localities, where the formal legal structure has not yet penetrated and where traditional courts are the only mechanisms available for settling disputes.

### Angola and the Bailundo case

In Angola, the post-war reconstruction of the state is still very recent. Similarly to what happened in Mozambique, after the civil war the Angolan state was faced with the task of expanding state administrative structures to the entire national territory, including the regions that had been under the military and administrative control of UNITA (*União Nacional para a Independência Total de Angola* – National Union for the Total Independence of Angola). In this context, a strategy that includes the incorporation of Angolan traditional authorities<sup>41</sup> was also developed by the MPLA (*Movimento Popular de Libertação de Angola* – Popular Movement for the Liberation of Angola) party-state.<sup>42</sup> Following the idea of N’Gunu Tiny, the central state has, since 2002, developed a strategy to include Angolan traditional authorities as components of the so-called ‘local power’ (*Poder Local*), establishing a hierarchical and vertical relationship between the state and the traditional authorities. According to the same author, the state began to implement a monist-type model during the post-war period, thereby attempting to exercise some control over the traditional authorities and the population (Tiny, 2007: 77).

This process of including Angolan traditional authorities fits into a broader project of administrative deconcentration and decentralisation, and of the creation of local government, which was formally instituted through Decree Law 17/99 defining the roles and competences of local government. According to Aslak Orre (2007: 186), the intention of the state-MPLA is not so much to see the deconcentration and effective decentralisation of the state, but rather to strengthen the authority and hierarchy of the central state throughout the national territory. By controlling the traditional authorities, the party-state in this way intends to achieve hegemonic control over the entire Angolan population, particularly in the rural areas where the party-state is not strongly entrenched and has less legitimacy.<sup>43</sup>

<sup>41</sup> For a more detailed analysis of the process of incorporating Angolan traditional authorities, based on the study of the kingdom of M’Balundu, in the Bailundo municipality, see Florêncio (2010).

<sup>42</sup> Despite substantial alterations to the constitution in 1992, in Angola’s case the implementation of the Party-State or State-MPLA theory is still perfectly plausible in practical terms.

<sup>43</sup> The process of controlling and integrating traditional authorities at national level is managed and defined, from top to bottom, by the Ministry for Territorial Administration (MAT).

<sup>40</sup> With the civil war and the withdrawal of the State, these practices began to be carried out again in many areas.

In the Bailundo municipality, as in the rest of the country, the traditional authorities of the former reign of the M'Balundo have been included in the process of state-building, according to a method similar to that of the colonial period which fits with a type of model that can be termed neo-indirect rule.<sup>44</sup> In this context, the traditional M'Balundo authorities are called on to perform a series of tasks for the municipal Administration, such as controlling and distributing the community land fund and the sacred areas; monitoring the settlement of populations displaced during the armed conflict; mobilising populations for state programmes in health and education; registering births and deaths; collecting certain municipal taxes (small market traders); and granting hunting and fishing permits and licenses for commercial activities.<sup>45</sup> In addition to these administrative tasks, the traditional authorities are very often involved, voluntarily or otherwise, in political and party processes, namely in mobilising populations for rallies and other activities of the main political parties (MPLA and UNITA).

Similarly to what happened during the colonial period, they also have a number of other duties relating to the maintenance of order. These are fundamental duties, given the impact they have on the lives of the populations – not least in the Bailundo municipality, which still does not have a fully operational legal and judicial structure. There is a municipal judge, but the court is not operational for lack of other judges. Also, the Criminal Investigation Police (*Polícia de Investigação Criminal* – PIC) only operates in the municipal capital, the town of Bailundo, and only small units of the ordinary Police force are present in the communes. In terms of the Attorney General's Office, there is an Attorney General at municipal level who has to travel to the various commune headquarters whenever requested. Since there are neighbouring municipalities that have no Attorney General, such as Mungo and Cunduimbai, the Attorney General of Bailundo must also travel to these locations.

Thus, the traditional M'Balundo legal system was rebuilt on models similar to those of the colonial period, which in turn closely followed the pre-colonial models. Each *ombala* has a court, presided by the respective *ossoma*, accompanied by the remaining members of its *elengo*. There is a hierarchical relationship between these courts which corresponds to the political hierarchy between the aforementioned *olossoma*. Taking the commune of Luvemba as an example, there are 17 *olumbala* (plural for *ombala*), with 17 *olossoma*, of which three are considered large: Chijamba, the most important, governing 18 villages (*kimbu*); Chiculupungu, responsible for 13

<sup>44</sup> On the relevance of this term and its application to the case of Bailundo, see Florêncio (2008; 2009; 2010).

<sup>45</sup> At present, and contrary to what occurred during the colonial period, traditional authorities do not participate in hut tax collection tasks (no national tax exists at present). Another task that they stopped performing was the control of forced labour (which was formally abolished still during the colonial period, in 1964).

villages; and Janjo, heading 12 villages. Cases that cannot be resolved by the lower *olumbala*, are referred to the Chijamba *ombala*. If, in turn, the Chijamba *ossoma* is unable to resolve the case, it refers the case to the royal *ombala*, to be judged by the king. This process is the same for all other communes in the municipality.<sup>46</sup>

It is clear, therefore, that the traditional authorities ultimately play a fundamental legal role, particularly at communal level. As in the colonial past, they are authorised to resolve minor cases in their *ecanga* courts, such as adultery, petty theft, witchcraft, etc. Other types of crimes, such as rape, violent crimes, violent physical aggression and homicide, must be taken to the communal administration or to the communal police (*polícia comunal*). Since there is no Attorney General's Office at communal level, the communal police subsequently re-direct the cases to the municipal Attorney General.

In practice, however, the separation of legal competences between the Attorney General's Office and the traditional authorities is not very clear. The Municipal Attorney General himself acknowledges that traditional authorities very often exceed their competences, judging crimes of homicide or other violent crimes without even informing the communal police. This clearly reflects the weakness of the state in this area. In general, these unreported homicide cases relate to accusations of witchcraft. Once informed of these situations, the Attorney General may intervene and lay charge against the responsible *ossoma*, but this corrective measure is merely theoretical, for this has never effectively happened in Bailundo.

Nonetheless, the *olossoma* generally respect their formal competences and limits, sending the more serious cases to the communal police, who in turn refer the cases to the PIC and the Municipal Attorney General. On the other hand, the Municipal Attorney General stated that there are also inverse situations, where the Attorney General's Office itself refers certain cases to the traditional authorities, particularly those involving accusations of witchcraft, which continue to form the bulk of the accusations brought before the traditional authorities' courts. These can only effectively be resolved with recourse to traditional judgements, which involve, as was previously shown, a complex web of processes involving divination and consultation with the oracles, as well as the use of ordeals.

Currently, trials involving accusations of witchcraft are very similar to those of the colonial period, both in terms of divination processes and ordeals, and in terms of the sanctions applied. However, at present there is extreme ambiguity as regards the use of the *umbulungu*, which, as has been explained, is a poison ordeal. Several informants, such as the current Ekuikui king, Mister Augusto Katchiopololo, stated that the *umbulungu*, in the manner practiced in the pre-colonial period, was forbidden during the colonial era. According to this informant, since the colonial era it has

<sup>46</sup> The municipality of Bailundo has six communes: communal headquarters, Lunge, Luvemba, Bimbe, Hengue and Cuhulu.



not been used directly on human beings, but only on animals, such as chickens – in a kind of transfer process, or ‘scape-goating’, to expiate people’s crimes.

However, others say that many *olumbala* began once again to use the *umbulungu* with the advent of civil war and the difficulty of controlling witchcraft, which in fact became uncontrollable. They maintain that, despite being forbidden, *umbulungu* is still carried out in secret, particularly in the royal *ombala* of the M’Balundu.<sup>47</sup>

From these statements, it can be presumed that the practice of *umbulungu* on human beings accused of witchcraft, though rare or sporadic, may still occur in certain cases. However true this may prove to be,<sup>48</sup> it is still unconstitutional: the use of a poisonous substance on a human being is effectively a ‘partial death sentence’. Furthermore, it confirms that the discussion of the merits of legal pluralism is much more difficult and complex in practice than its theoretical and ideological meanings suggest.

Thus, in regard to the sort of penalties imposed by the *ecanga* courts, it is clear that the situation is still considerably ambiguous and controversial, especially given that traditional authorities continue to refer and resort to “tradition” to apply certain sanctions. These include corporal punishment or poison ordeals (*umbulungu*). However, not all sanctions have this legal framework and, even in cases of witchcraft, such sanctions are only applied when death is involved. In general, the sanctions involve financial indemnification or compensation in kind.

On the other hand, there is a strong component of popular participation in a traditional trial, since the entire community may watch and actively participate in it. It can also be said that the existence of this kind of legal pluralism is viewed as very positive by the population, who note the respect for their ‘culture’ and the fact that the state and constitutional law are not able to resolve their basic, everyday problems, such as cases relating to the occult, witchcraft and sorcery. However, it is necessary to underscore that so-called traditional, customary or common law and constitutional law collide and overlap in certain areas, and may even contradict each other. In an interview with high school youths from Bailundo, interviewees highlighted two very sensitive areas of collision between traditional law and national law: physical punishments and the *umbulungu* ordeal, and family law. In the first case, it is evident that the *umbulungu*, and the physical punishment inflicted on those accused of witchcraft are highly unconstitutional, and only happen with the acquiescence of state authorities; in the second, the traditional law restricts the rights of Angolan women which are consecrated in the Constitution.

On its part, the state is aware of this discrepancy and even of the unconstitutionality of certain practices and sentences passed by the courts of traditional authorities.

<sup>47</sup> According to the Chilumbe *epalanga*, only the *ossoma* inene may, in principle, decide whether a *umbulungu* ordeal should be carried out.

<sup>48</sup> The field work did not allow full clarification of this issue.

As was highlighted by the Attorney General of Bailundo, Gabriel Caála, these inconsistencies result from the absence of a national legal framework to regulate the legal competences and duties of the traditional authorities’ courts. What may be emphasised is the fact that both the Angolan state and the traditional authorities effectively continue to reproduce the social representations of the functions performed by the traditional authorities during the time of the colonial state.

Finally, it seems equally relevant to emphasise that the authority, and even the legal legitimacy, of the traditional authorities may be declining, particularly among urbanised youth. This was evident in the above-mentioned interview, in which the youths themselves stated that they would prefer to be judged in the traditional courts, not because they are more legitimate, but because, if they were convicted by a traditional court, they would pay a given fine – as opposed to being arrested, which would be the case if they were accused by the Police.

## Conclusion

Based on a comparative study of the Ndaú case in Mozambique and the M’Balundu kingdom case in Angola, this chapter sought to show that the discussion on legal pluralism in Africa is intimately related to the discussion on the role of traditional authorities in the construction, or re-construction, of independent African states.

Similarly to what happened in the colonial period, independent states have used the traditional authorities as administrative ‘extensions’, particularly in the rural areas, in order to exercise effective and legitimate control over the territory and populations. This model of administration via traditional authorities became known during colonial times as indirect rule. Despite the continuities represented by the model of including traditional authorities in local administrations, significant changes have been introduced. Currently, actors at local level perform new administrative roles and, simultaneously, participate in local political games. Thus the model would now be more appropriately termed ‘neo-indirect rule’.

As was shown for Portuguese colonialism, legal pluralism in the colonial period substantiated the existence of two types of separate societies: the colonial society and the colonised, or indigenous, societies – or, in the view of Mamdani (1996), the society of citizens and the society of subjects. The maintenance of indigenous legal orders did not advocate any type of respect for or acceptance of the ‘customs’, but rather an ideological subordination. In practice, this revealed the incapacity of the Portuguese colonial state and its administrations to manage and control the entirety of their colonised territories and populations.

In the post-civil war era, in particular, the Mozambican and Angolan states have initiated their local (district and municipal) level reconstruction and consolidation processes, in which traditional authorities play a fundamental political, administra-

tive and legal role. This chapter has shown that this process has been marked not only by continuities from the colonial period, but also by ruptures. Among the continuities is the legal role that the traditional authorities perform today.

In this chapter, I have defended that the two states, particularly the Angolan state, have not yet been able to establish a national legislative framework that includes the courts of traditional authorities, despite having generically defined their competences – which are, essentially, the same as in the colonial period. Both states have opted for a kind of monistic framework, with a hierarchical relationship between state law and customary laws. However, practice reveals significant interchanges between the institutional monistic model and the dualist one. In other words, it can be said that the state in theory defends a monist framework, whereas local practices embody a dualistic framework.

Consequently, the legal practices revealed in this chapter point to a set of important conclusions. First, I highlighted the fact that, for the main social actors involved – the traditional authorities and the representatives of the state – the significant legal frameworks and models for action are those which have endured since colonial times, both in terms of the types of cases that can be judged by traditional authority courts and in terms of the penal sanctions they apply.

Secondly, today, as in the colonial past, the local state administration is in effect severely incapable of controlling the courts of traditional authorities, which still judge cases they are not authorised to handle, namely violent crimes and homicides. This type of situation occurs mainly in the more remote rural areas, where the presence and legitimacy of the state are limited or even nonexistent – particularly in the case of Angola.

A third conclusion points to an area of significant discontinuity in relation to the colonial period. As was shown, in the colonial period the ‘natives’ were not covered by the legal and constitutional framework of the Portuguese Republic, and its customary legal frameworks were their ‘Law and Constitution.’ However, today both countries have national constitutions and legal frameworks which are applied universally to all citizens. The existence of legal pluralism cannot, and should not, override this national framework, let alone delegitimise it.

Now, some of the legal practices illustrated in this chapter – both in the example of Bailundo and in that of Ndau – show that, in some cases, there are substantial illegality, and even unconstitutionality, which the state does not control and the national law does not adequately address, particularly as regards certain aspects of social life that are fundamental to the populations, such as witchcraft, or rather, the occult.

The state – here in the sense of its local representatives – is extremely aware of these practices and unconstitutionality, and has at times taken steps to correct and punish them. But this does not always happen, either due to incapacity or to a lack of knowledge or interest, and this fosters the notion that the state intervenes only when such cases reach a certain level of public notoriety.

The question that this state attitude raises is whether the independent state, either for incapacity or lack of interest, may be reproducing a logic of citizens and subjects in its society through the current system of legal pluralism – a logic which may have made sense in the colonial ideology, but runs counter to current principles of nation building.

The fourth and final conclusion also indicates a very sharp break with the colonial past. Faced with modernisation and social change brought about by the growing urbanisation of rural spaces, the expansion of the education system, migration of populations during the war, etc., traditional authorities and ‘traditional customs’ are beginning to lose their legitimacy and meaning for significant parts of the rural populations, in particular the youth, who are socially “closer” to these factors of social change and modernity. From the case of Bailundo (but also as observed in Mozambique during fieldwork in 2000 and 2001), the conclusion was that youth today opt for a pragmatic attitude, playing between different universes, which are opposed in many areas – in this case between two legal universes or systems of legal orders, the state and the traditional. These new actors are no longer ‘encapsulated’ by the traditional system, or by their cultural meanings, but rather use them – or, to put it differently, gravitate between the two universes – depending on their own self-interests.

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## Toward an Ecology of Justices: An Urban and Rural Study of Mozambican Plurality

Sara Araújo

### Introduction

Even though the liberal state has assumed itself as the sole maker and administrator of law, the plurality of justice is a reality widely documented by the anthropology and sociology of law. In recent decades, the states themselves, grappling with the inefficiency and inaccessibility of its courts, have been promoting judicial reforms which include a trend towards recognising, encouraging and creating non-judicial dispute resolution bodies. In this sense, the discussion on the role of different forms of extra-judicial justice is today globally relevant and should occupy more than just a marginal place in the debate on access to justice. Focusing on the Mozambican society, I discuss in this chapter the relationship between access to law and justice, and what I refer to as 'community justices'.

Community justices refer to organic dispute resolution bodies that use an impartial third party and favour forms of dispute settlements and models of action that differ from and tend to be more flexible than those traditionally proposed by the judicial courts. Whereas the option to define the concept in the negative can be perceived as a limitation, this specificity, in my view, bestows it with its greatest virtue – elasticity of boundaries. The category of community justices does not reflect homogeneity of norms, practices and actors. It "presupposes that the liberal model of justice administration – state centralised, bureaucratic, hierarchic, professionalised formal-law ruled justice – is not the only model in force in society" (Santos 1992:

137). Community justices take on different configurations and diverse social and political meanings. In this sense, they constitute an almost endless research object.

If it is easy to find consensus, among scholars of judicial and legal plurality, on the idea of the heterogeneity of extra-judicial bodies, the same cannot be said for the terminology that joins them. There are multiple names that have been chosen to classify plurality. The discussion remains open and there is no final consensus in sight. I reject the concept of 'alternative dispute resolution', inasmuch as these forms of justice tend to be complementary and not alternatives to judicial or formal state justice. I refuse to use the concepts of informal or non-state justice, because many of the bodies that fall within the sphere of community justices are part of state institutions or enjoy state recognition.

The concept of community is polysemic, but is almost always associated with positive undertones (Bauman 2003). The community justices category remains dissociated from a romantic interpretation of the plurality of justice. It is also distant from the colonial anthropological interpretation that associated communities with homogeneous groups, frozen institutions and customary laws. This concept has grown from Santos' (2000; 2002) analytical proposal about three principles of regulation in modern societies: the principle of state, the principle of market and the principle of community. The principle of state includes a vertical political obligation between citizens and the state, with the relationship being guaranteed by coercion and by legitimacy. The principle of market consists in the established horizontal obligation, based on mutual-self interest between market agents. The principle of community includes a horizontal political obligation which binds individuals to each other according to non-state and non-market criteria of belonging (Santos 2000; 2002). Building a community is, to a large extent, its regulation and the self-management of conflicts is a way of building communities (Amaya 2004).

State justice and community justices are not expected to always operate in isolated spheres. Rather, the trend is increasingly toward an interception between the principles of regulation in the provision of justice. Community structures import state logic and principles or invade the structures of states. On the other hand, the state imports community logic and principles, while at the same time imposing limits on them. Thus, community justices may or may not be linked to state institutions, and may be more or less permeable to the direct influence and mechanisms of the State.

Underlying my research is Santos' 'sociology of absences and emergencies', an epistemological proposal conceived against the waste of experience, i.e. the invisibility of diversity. The sociology of absences is based on the idea that "what does not exist is, in fact, actively produced as non-existent, i.e. as a non-credible alternative to what does exist" (Santos 2003a: 743). It is a research that tries to demonstrate this fact by studying and giving credibility to the variety of worldwide social practices that coexist with the hegemonic ones. In this sense, the author suggests an 'ecology of knowledge', whose objective is to challenge the monoculture of modern science by acknowledging the diversity of knowledge that exists in the world (Santos 2003a; 2006b).

Based on the concept of 'ecology of knowledge', I seek to promote an 'ecology of justices', confronting the liberal conception of law and justice with the diversity of law and justice that exists in the world. The objective is to contribute towards the knowledge of the large and complex reality that fits into the notion of legal pluralism. This explains the flexibility of the concept of community justices. I sought a broad category and definition in order to promote an approach to the field that is as free from prejudices as possible. It is imperative to avoid excluding forms of justice solely because they fail to fit in a previously established, closed definition. I want to acknowledge and investigate an often unforeseeable mobile and diverse reality (Santos 2003a).

This chapter is divided into three parts. In the first, I very briefly present the theoretical development of the concept of legal pluralism. To this end, I attempt to show how it has grown from a static concept of law to dynamic approaches of legal plurality, as well as introduce the concept of 'interlegality'.

In the second part, I focus on the Mozambican historical context and present the strategies that have been used by the state to include or exclude plurality, as well as the manner in which community justice selectively complied with or resisted external impositions. I also address some of the issues that have been included in the important discussion on the relationship between legal pluralism and the democratisation of access to justice in the African context, particularly in Mozambique.

Finally, I introduce part of the results from the empirical work carried out in Mozambique, including one rural case study and three urban case studies. I attempt, above all, to illustrate the multiple configurations that legal pluralism may take, as a result of the presence of the state (present and past), local dynamics and international initiatives. Very briefly, I address how community justice acts on the ground, what its role is in promoting access to justice and how litigants selectively seek it. In that sense, I intend to show how the separation between formal and informal justice, and state law and community law, is not always clear. In doing so, I also show the relevance of the concept of interlegality as a fundamental component in analysing the legal reality in Mozambique.<sup>1</sup>

## Legal Pluralism and Interlegality

The idea of 'legal pluralism' dates back to the European anti-positivist legal philosophy of the 19<sup>th</sup> Century. It emerged as a reaction against the process of reducing law to the state which was undertaken by the codification movement and elaborated by

<sup>1</sup> This chapter is based on empirical work which has been developed since 2003 as part of a research Project in which I participated, and which involved a partnership between the *Centro de Estudos Sociais da Universidade de Coimbra* (CES) and the *Centro de Formação Jurídica e Judiciária* (CFJJ) in Mozambique. The central objective was reform of the justice system in Mozambique. Since 2008

legal positivism. It was based on the claim that state law was far from exclusive and, in a number of cases, was not even central in the normative order of social life (Santos 2002: 89-90).

The empirical acknowledgement of the concept originates in the ethnographies on colonial and post-colonial societies in the early 20<sup>th</sup> Century. Merry (1988) catalogued these works as the first period of the production of studies on legal pluralism, and termed it 'classic legal pluralism'. In Africa, some of these initial studies were led by anthropologists and ethnographers at the service of the colonial power who collaborated in the process of acknowledging and differentiating tribes and coding customary law. When the Europeans arrived on the African continent, tradition was treated as immutable and the colonisers attempted to define and solidify it. Closed tribes were designed, with inflexible legal systems that could fit into descriptions and categories defined on the basis of selected testimonies (Oomen 2005). Max Gluckman was one of the scholars who marked the turning point in the approach used by the anthropology of law in Africa. With this author came the realisation that the study of customary law needed to go beyond discussions with groups of elders and move toward an analysis of the adjudication processes and the context of their occurrence (Gluckman 1955; Moore 2000).<sup>2</sup>

In the second period of studies defined by Merry (1988), the 'new legal pluralism' expands the field of analysis to Northern industrialised societies. Apart from this geographical expansion, there was an evolution related to the increasingly dynamic way in which legal pluralism was beginning to be designed, moving beyond a static perception of a coexistence of different legal orders. The development of the concept was largely due to an article by John Griffiths, published in 1986. This author introduced a dynamic aspect to the theoretical positions, defining law as the regulation of a semi-autonomous social field and legal pluralism as the normative heterogeneity resulting from the fact that social action occurs in a context of multiple and overlapping semi-autonomous social fields (Griffiths 1986). Borrowed from Sally Falk Moore (2000 [1978]), the concept of semi-autonomous social fields relates to the idea that the small field that can be observed by the anthropologist should be studied in terms of its semi-autonomy, i.e. taking into account that, internally, the field can generate rules, customs and symbols, but it is also vulnerable to the rules, decisions and other forces emanating from the wider surrounding world. This semi-autonomous social field, in Moore's definition, is capable of producing rules and the means to induce or

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I have been developing the idea of 'ecology of justices' as part of my PhD project, applying this concept in the city of Maputo.

<sup>2</sup> Note also that some jurists at the beginning of the 20th Century made important contributions to the discussion. One example is Ehrlich (1926), who was responsible for developing the concept of 'living law'.

coerce enforcement. However, it is set within a broader social matrix that both affects and invades it.

Santos (2003b) added a third period to these first two, where, in addition to local and sub-state legal orders, the analysis includes transnational and supra-state orders. In the current reality, where national and international legal pluralisms are combined, Santos highlights the notion of 'porosity of legal orders'. The author argues that the higher density of relationships brought about by globalisation fosters the porosity of legal orders, which are now more open and permeable to reciprocal influences. In his words, we live "in a world of legal hybridisations, a condition which even state national law cannot escape" (Santos 2003b: 49). This hybridisation also occurs at micro level, inasmuch as citizens and social groups organise their experiences according to official state law, customary law, community or local law, or global law and, in most cases, according to complex combinations of these different legal orders. Santos termed this legal phenomenology 'interlegality' (Santos 2003b: 49-50).

At the end of the 1980s, Merry (1988: 879) was already claiming that there was "a general agreement that [legal] pluralism does not describe a type of society, but is a condition found to a greater or lesser extent in most societies". Although this is a widely studied phenomenon, the discussion is not closed yet. Ten years later, in a literature review, Woodman (1998) accepted the lack of substantial criticism of the concept. However, he admitted that informal discussion on the topic shows that legal pluralism is far from being recognised in legal and academic circles. In the same article, the author also calls attention to the lack of consensus on the meaning of 'law' and 'legal pluralism'.

The answer to 'what is law' has given rise to intense controversies. Aware of the incompleteness of any definition, Santos refers to the work associated with it as the 'Sisyphean task'. In that sense, the author assumes the instrumentality of the concept and gives it a broad definition, which allows for an empirical analysis of the differences. Law is, then, a "body of regularised procedures and normative standards, based on which a third party prevents or resolves disputes within a social group" (Santos 2003b: 50).<sup>3</sup>

In my research, I have adopted Santos' concepts of law and 'interlegality'. My aim is not to describe norms, but to observe the diversity of conflict resolution institutions, understand how they are accessed by citizens, the way the different laws circulating in the communities are used and negotiated, and how decisions are reached. In order

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<sup>3</sup> This definition is not exempt from criticism. Brian Tamanaha (2000), for example, accuses Santos' approach of being functionalist and essentialist, and prefers to follow the theory of autopoiesis, understanding legal pluralism not as a set of norms in conflict with a given social field, but as a multiplicity of different communicative processes that observe social action in light of the legal/illegal binary code. In Araújo (2008), I present a more detailed critical analysis of this discussion.

to study the reality and the impact of legal pluralism on the promotion – or inhibition – of access to justice, it is necessary to apply a dynamic perspective, that is, one which does not try to forcefully identify unalterable, inflexible legal orders and immobile community bodies, but rather addresses the reconfiguration of local laws and recognises the flexibility of local justice.

### The Mozambican State, Community Justices and Access to Justice

Between the colonial period and the present, the Mozambican state has gone through a sequence of political models that have never entirely succeeded in their attempts to radically break with the previous ones. There have been several radical transformations since 1975, with the end of the colonial model, the creation of the socialist state, and the creation of a neoliberal capitalist economy and a multiparty democracy. In each of these periods, under different forms and in view of various internal and external pressures, the state assumed different relationships with different community bodies, sometimes excluding or ignoring them, and at other times including them and appropriating their legitimacy.

In global terms, there is a wide discussion of the role of community justices and the way in which the states have dealt with them historically. Usually, community justices are culturally and geographically closer to citizens, less expensive and quicker. In that sense, they may promote the democratisation of access to justice. However, these bodies are associated with a series of concerns that include, among others, their colonisation by the state and the expansion of state power over the population through them; the creation of an inferior citizenship; and the tendency to reproduce existing inequalities in societies, given the lack of mechanisms to neutralise their powers.

Supporters of legal pluralism in Africa are frequently accused of romanticising the past, ignoring that it was marked by the distortion and crystallisation of laws by the colonisers and by the creation of a second class citizenship (Mamdani 1996). It is evident today that traditional justice and customary laws did not survive unchanged alongside the colonial institutions and laws. In that sense, some authors see them as a colonial imposition aimed at controlling and exploiting the population, and consider them a legal fiction (Wilson 2000), a vestige of the colonial nightmare. The idea of a tradition that does not date back to immemorial times, but that was recreated, is scarcely contested. However, it is accepted that the process of inventing tradition did not comprise an exclusively top-down movement, i.e. that tradition and customary laws were created through a permanent struggle between the colonisers and the colonised. The readings vary from the ones that tend to recognise the processes of

struggle (Santos 2003b, 2006b; Moore 1992) to the ones that emphasise a movement of imposition (Mamdani, 1996).<sup>4</sup>

In the history of Mozambique, the reconfiguration of traditional justice and its association with second class justice dates back to the *Indigenato* regime, formally introduced in the 1920s during the period of Portuguese domination. This was based on a division between citizens and indigenous people, which was translated into two administrative models and two forms of law and of justice. The settler areas followed the Portuguese metropolitan administrative model, with *municípios* (municipalities) and *freguesias* (parishes), and were regulated by the law and civil institutions of the Portuguese state. The indigenous areas were divided into *regedorias* (chieftaincies), alleged reincarnations of the pre-colonial tribes, and were ruled by customary law (Gentili 1998; Meneses et al. 2003; Araújo and José 2007). Traditional authorities, headed by the so-called *régulos*, were responsible for administering the *regedorias*. They were, however, subordinate to the *circunscrições* (constituencies), which were under the responsibility of the colonial administrators. Private Indigenous Courts were established to regulate matters relating to the native population and, in theory, the *régulos* only resolved minor disputes. These courts were a structure outside the Portuguese legal organisation and were headed by the administrator, albeit advised on customary matters by traditional chiefs or other indigenous representatives. In practice, the role of the *régulos* could go beyond that stipulated in law and they ended up solving a large part of the disputes between the indigenous people (see Fernando Florêncio's contribution to this volume). The *assimilados* (assimilated) were a small minority of citizens of lower status. They had identity cards, which differentiated them from the indigenous population and granted them access to certain spaces and rights forbidden to the indigenous people (Gentili 1998; Meneses et al. 2003; Araújo and José 2007).

Similar to what happened in other African colonies, the divisions established by the Portuguese were not only based on what existed, but were reconfigured to serve the interests of the colonialist domination and exploitation. For example, the larger chieftaincies were divided so as to be less threatening, and the chiefs who were less inclined to collaborate were pushed aside or killed and replaced with other, more malleable ones (O'Laughlin 2000; Dinerman 1999). Also similar to the history of other places, traditional authorities sought to balance the colonial government's demands with the need to maintain legitimacy in the community, finding forms of passive or active resistance (Moore 1992; Gonçalves 2005).

In 1975, after the country's independence, the Mozambican socialist project to dismantle (*escangalhar*) all colonial vestiges and build a new society also implied the demolition of customary law and traditional chiefs. *Régulos* were seen as allies of the

<sup>4</sup> On this topic, see Araújo (2008).

colonial power and a symbol of humiliation and inferiority. Hall and Young (1997) state that, after independence, the Frelimo elite and the social group it addressed were deeply convinced of the superiority of modern civilisation and of the need to place themselves at the same level. However, this position did not result in the direct import of a western model of justice. The state's discourse was filled with the idea of replacing the dualist system of justice and traditional authorities with a justice system intended to be indigenous, but not tribal (Sachs and Welch 1990).

Thus, in 1978, the Organic Law of the Popular Courts (*Lei Orgânica dos Tribunais Populares*) was approved.<sup>5</sup> This law provided for the creation of popular courts (*tribunais populares*) at different territorial levels, where appointed professional judges worked alongside judges elected by the population. At the base of the pyramid, the local, or neighbourhood popular courts were competent to deal with minor infractions and operated exclusively with elected judges with no formal training. Where it was not possible to reconcile the parties in conflict, these courts were supposed to decide according to principles of good sense and justice, and taking into consideration the presiding principles on which the socialist society was built (Sachs and Welch 1990; Gundersen 1992; Trindade 2003; Gomes et al. 2003; Araújo and José 2007).

Local popular courts were supposed to replace traditional authorities (TAs) in terms of their legal functions. The administrative tasks that TAs had also performed became, in the new structure established by the Mozambican state, the responsibility of the *Grupos Dinamizadores* (dynamising groups – GDs). This did not mean, however, that the TAs disappeared. Traditional authorities are cunning (José 2005) and elastic (van Nieuwaal 1996) and very often they were able to find spaces for autonomous action and to maintain their active legitimacy. In the post-independence era, the TAs continued to act in various contexts and came to fill a void so often left by the state (Dinnerman 1999).

Already in the 1980s, Frelimo was forced to acknowledge the economic failure of its socialist project. Within a context of liberal democracy, the 1990 Constitution established the bases for substantial changes of the judicial organisation, and the Law of the Popular Courts was replaced by the 1992 Organic Law of Judicial Courts (*Lei Orgânica dos Tribunais Judiciais*).<sup>6</sup> Following a restrictive interpretation of the constitutional provision stipulating that 'the courts decide cases in accordance with the law', local courts were erased from the judiciary organisation, with the district courts taking on the functions of first level trials. In the same year, the community courts (*tribunais comunitários*) were created through a specific law.<sup>7</sup> Excluded from the judicial organisation, these would continue to operate with judges elected by the community and perform the role of the previous local popular courts. However, community

<sup>5</sup> Law 12/78, of 12 December.

<sup>6</sup> Law 10/92, of 6 May.

<sup>7</sup> Law 4/92, of 6 May.

courts have never been regulated by law (Trindade 2003; Gomes et al. 2003; Araújo and José 2007). Santos (2003b) classifies them as a legal hybrid institution par excellence, since they are in an institutional limbo – in that they are recognised by law, but remain outside of the judicial system and, to date, have not been regulated.<sup>8</sup>

The new democratic framework also opened space for decentralisation. Under this process, supported by the World Bank, the role of traditional authorities was once again subjected to discussion. In 2000, a decree was approved establishing the forms of articulation of local State bodies with community authorities, including the traditional authorities (Meneses et al. 2003; Meneses 2005; Santos 2006b).<sup>9</sup>

Over the past few years, a series of documents and state and international initiatives have pointed toward a formal recognition of legal pluralism, as also discussed in the Introduction to this volume. In 2004, it was acknowledged in the Constitution (art. 4); the PARPA II – 2006-2009 (Absolute Poverty Reduction Strategy Plan) insists on the regulation and importance of community courts as one of the key elements to implement a fair and prompt justice system, namely through their articulation with the judicial courts (articles 227, 294 and 310); the Integrated Strategic Plan for the Justice Sector (PEI) for 2002-2006 establishes the review and regulation of the community courts law as a priority, while the 2009-2014 PEI identifies the proper operation of the community courts and other conflict resolution bodies as a target. However, to date, discussions have not always been translated into an effective recognition of community justices.<sup>10</sup> The most evident example of this is the procrastination in regulating the community courts. The lack of support, recognition and monitoring measures that may include them in a global project promoting access to justice tends to consign them to a position of second class justice, which exists to serve those who are unable to access the modern State institutions.

The plurality of justice continues to divide positions in Mozambique, as is the case in the rest of the continent. Moreover, the discussion concerning the reproduction of inequalities, particularly with regard to discrimination against women, is still very much alive and relevant. Some research indicates that women are moving beyond their role as victims of patriarchy, identifying the use of legal strategies that enable them to challenge the inequalities in different ways. Other observations point to the difficulties in inverting the female position of inferiority (Hellum 2004; Griffiths 1997; Khadiagala 2001; Osório and Temba 2003). The criticism and challenges are not enough to wholly discredit non-hegemonic forms of justice, but should serve to keep us vigilant (Pedroso et al. 2002). And vigilance, I suggest, can only be maintained through a profound knowledge of how local justice bodies operate, rather than by looking in from the outside in a generalist way.

<sup>8</sup> On this issue, see also the Introduction to this volume.

<sup>9</sup> This was Decree 15/2000, of 20 June.

<sup>10</sup> See also the Introduction to this volume on a discussion of this topic.

## Case Studies: Diversity and Interlegality

The different political and legal logics that make up part of the history of the state of Mozambique were not always fully replaced, and to a large extent they coexist and overlap in society today, giving shape to what Santos (2006b) terms a “palimpsest of political and legal cultures” (Santos 2006b: 47).<sup>11</sup>

The legal landscape in Mozambique is variable, complex and surprising. In each space, and at every moment, the framework of community justices is the result of a local combination of the way the historical moments of the state, the local initiatives and the international dynamics are expressed. Citizens circulate among the available institutions, not only in accordance with the legal logic of these institutions, but also according to citizens’ own interests and individual expectations, thus applying the concept of ‘forum shopping’ (Benda-Beckmann 1988) in the different locations. In the community justices, the different laws that circulate in society tend to be used in an interconnected way, and litigants have space to negotiate their solutions to disputes. The margin for negotiation can vary significantly, depending on the individual circumstances of the litigant and the way in which the forum is managed by those in charge. Thus, each kind of dispute is not always resolved in the same forum, or using a single type of conflict resolution and decision-making procedure.

In the next pages, I outline some features of the frameworks of community justices’ in four Mozambican geographical areas. In so doing, I attempt to substantiate the arguments presented earlier, namely the ideas of diversity and interlegality, even though their evidence and intensity vary according to context. The first case study, Macossa, presents a rural reality where there is no judicial court, where local dynamics tend to overwrite the state logic and where a network of community justices assumes the responsibility for resolving local disputes. The remaining three cases are from the city of Maputo. They show that, even within the most urbanised area of the country, community bodies assume an important role and may take on very different forms, both on the outskirts of the city and in its centre.

### District of Macossa

In Macossa, in the north of Manica Province, we discovered a network of community justices in which the *régulo* (traditional chief) was dominant and the police played a leading role.<sup>12</sup> Located in the interior of the central part of the country, in a geo-

<sup>11</sup> On this issue, see the Introduction to this volume.

<sup>12</sup> The case study was carried out jointly with André Cristiano José, Ambrósio Cuahela and Joaquim Fumo.

graphical area of difficult access, the district was marked by the war between Frelimo and Renamo up until the signing of the peace agreement, in 1992, and by a continued distance between citizens and the state.

Unlike what happened in the country’s capital, the *grupos dinamizadores* were not implemented and the traditional authorities maintained a strong presence, even while formally banned, retaining still today an unquestionable legitimacy, acknowledged by the citizens and by the district administrator himself.<sup>13</sup> The network of local popular courts was not extended to Macossa, and the attempt after 2000 by the Records and Notary Delegation (*Delegação dos Registos e Notariado*) to establish community courts made use of the legitimacy of the traditional authorities, establishing the community courts over the traditional structure. Of the seven courts established, only one is actually viewed as a court, submitting its activity reports to the relevant authority (the Records and Notary Delegation). Most of the population is unaware of the existence of community courts and continue to acknowledge judges as the traditional authorities they have always been. With no judicial court, the district is, in theory, covered by the judicial court of the neighbouring district. However, the material and human difficulties of that court prevent it from performing that role.

Social cohesion is guaranteed by the combined work of the *régulos*, *sapandas* and *fumos*,<sup>14</sup> churches, families, the association of traditional healers (*Associação de Médicos Tradicionais – AMETRAMO*) and the police. The latter, when dealing with so-called ‘social cases’, may hear and resolve them or refer them to the bodies considered most appropriate. Social cases are classified in opposition to criminal cases, and relate to conflicts within the domestic sphere or between neighbours. These are normally cases of adultery, verbal abuse and other types of disagreements which the police and other bodies resolve by promoting dialogue between the parties.

The main evidence from the Macossa field work pointed to the state’s weak role in regulating the local legal landscape, and also the integrated manner in which community justices operate, mutually acknowledging and referring cases to each other. The concept of forum shopping is clearly revealed in the practices of the population. Citizens decide between the different conflict resolution bodies based not only on the conflict to be resolved, but also on their physical proximity to the conflict resolution bodies, their relationship with them, the seriousness of the matter, and their expectations of outcomes.

The amount of litigation is low, and we were only able to follow a few conflict resolution processes directly during the period the empirical work was carried out. However, the cooperation between the police and other bodies in resolving cases shows how the separation between state law and justice and non-state law and justice is far from clear. In addition to playing the role of channelling disputes to the

<sup>13</sup> On this issue, see José (2005).

<sup>14</sup> The *sapandas* and the *fumos* are traditional authorities hierarchically under the *régulo*.



bodies comprising the local network, the police station is itself, oftentimes, hardly distinguishable from the community justices. According to statements by the Station Commander and local traditional healers, the police often offer their own facilities to AMETRAMO so that it can resolve cases of witchcraft.<sup>15</sup>

### City of Maputo

The country's capital, Maputo, is divided into seven municipal districts, which are sub-divided into neighbourhoods and quarters. Municipal District 1 (DM1), recently renamed KaMpfumo, is frequently referred to as *cidade de cimento* (cement city) and is the most urbanised area in the country. When compared to other contexts, this district comprises a greater number of individuals belonging to the intimate civil society and the intermediate civil society.<sup>16</sup> It is a place of political and economic elites and with a larger percentage of citizens who know how to read and write in Portuguese, the language used by the formal justice system. Despite being part of the city, adjacent districts are considered the periphery, and poverty-related problems are much more evident there. Among these is Municipal District 5 (DM5), or in its more recent designation, KaMubukwana. This area has a large number of sub-standard houses and serious sanitation problems. Presented below are two case studies in DM5 (Inhagoia 'B' and Jorge Dimitrov neighbourhoods), and a third one covering the entire DM1.

#### Municipal District 5 – Inhagoia 'B'

In Inhagoia 'B' we identified the *Grupo Dinamizador* (dynamising group) and the community court as the main conflict resolution bodies. They operate in the same building and work together in an environment of complementarity.<sup>17</sup> However, the operating logics of the two bodies are different, varying according to their degree of similarity with formal judicial practices, their commitment to promoting reconciliation, and their level of authority, promptness and legitimacy. The type of conflicts they resolve do not differ significantly, and may be grouped into three main categories: housing disputes, marital disputes and witchcraft disputes.

The secretary of the *Grupo Dinamizador* (*secretário de bairro*) operates informally. His practices are very different from those of the judiciary and he is committed to

<sup>15</sup> Interviews with the traditional healer Zeca Gemo, 3 May 2004; the President of AMETRAMO Ndzeque, 13 May 2004; and the Station Commander, 29 April 2004.

<sup>16</sup> Santos states that African civil society is made up of three concentric rings: intimate civil society; intermediate civil society; and outside civil society. The first consists of the ring of citizens linked to state power, who therefore enjoy easier access to justice; the second is composed of the people with some access to formal justice; and the third is made up of groups and classes excluded from the state and from the services of the judicial system (Bidaguren and Nina 2002; Santos 2003b).

<sup>17</sup> This case study was carried out jointly with André Cristiano José. On the same, see Araújo and José (2007).

promoting reconciliation, favouring reciprocal concessions and gains and granting margins of negotiation for both litigants. He acts promptly and is effective in his decisions as he seeks to resolve the real problem, going beyond the formal dispute itself.

The community court, on the other hand, is more formal and tends to be more similar to the routines of the judicial courts. Case resolution begins with a reconciliation phase, which almost always fails, and in which the judges hear the parties but without putting much effort into the task. If the process does not end there, then it goes to trial. The community court judge's bench includes instruments used in the judicial courts, such as codes and other legislation, which become relevant and during the trial phase. Written files mimic those of the judiciary and include multiple references to state legislation. In these references to state law, judges – who complain about the lack of state support and training – find a way of compensating for their lack of legitimacy. This is illustrated in the following excerpt from a file:

#### *Sentence*

#### *Judgement*

*Agreed in conference at the court of Bairro de Inhagoia 'B', in Municipal District 5 of the City of Maputo.*

*The Court has jurisdiction, the case is appropriate, the parties are legitimate, and there is no void, exceptions or preliminary issues preventing knowledge of the substance of the case.*

*All in all, it should consider assessing the matter. [...]*

*(Case from the TC at Inhagoia 'B', 2003)*

We also found, for instance, a reference to the Family Law even before its approval, while it was still in the discussion phase. The reference to state law, which was in fact incorrect, served to legitimise a practice accepted by community law, but which state law rejects, i.e. polygamy. This was the case of a marital conflict, in which the wife accused her husband of abandoning her. After the couple's admission of their love for each other, the defendant was ordered by the judge, allegedly in accordance with the Family Law, to assume a polygamous union:

*Whereas the defendant pleaded guilty to the charge, he was ordered to return home, where he will enter into a polygamous union enshrined in terms of article 30 of the Family Law, therefore:*

*With all the factual matter having been appraised during the trial, the defendant's behaviour is sufficiently integrated and subsumed under the typical conditions of the crime of adultery and abuse of trust of his partner.*

*The defendant's infidelity toward the person with whom he cohabited was clear.*

*In these terms, this court of the Bairro de Inhagoia 'B', in urban district 5 in the city of Maputo, has unanimously, and in the name of the Republic of Mozambique, decided to sentence the defendant "xxxxx" to assume the responsibility of a polygamous union, with his decisions having to be shared equally with both.*

*(Case from the TC in Inhagoia 'B', 2002).*

Even though the community court is the legal body with the acknowledged mandate to resolve disputes, forum shopping is an integral part of citizens' lives, and the more agile, effective and consensual neighbourhood secretary structure is generally preferred.

### Municipal District 5 – Jorge Dimitrov Neighbourhood

In the Jorge Dimitrov neighbourhood we found a completely different legal configuration than in the previous case. Currently, there is no community court in operation. In the 1980s, a local popular court was established which, according to law, should have been transformed into a community court and still be operating today. However, this court closed, and in its place there is currently an office belonging to the NGO *Mulher Lei e Desenvolvimento* (Woman Law and Development – MULEIDE), which operates in the headquarters of the *Grupo Dinamizador*. The MULEIDE Legal Education Group (*Grupo de Educação Legal da MULEIDE*), which conducts conflict resolution sessions in the Jorge Dimitrov neighbourhood, is made up exclusively of community members. Among these we found the *Grupo Dinamizador's* Deputy Secretary and two former judges from the local popular court that closed down. They all refer to themselves as counsellors (*conselheiros*), in an attempt to distance themselves from the formalism associated with 'judges'.

The type of cases dealt with depends, to a large extent, on the demand. Any person may present a conflict at MULEIDE, but of the 16 cases seen, 14 were presented by women and two by men on behalf of their daughters (for acknowledgement of paternity). This is in line with the NGO's target group: women. Services are characterised, as a rule, by a more informal kind of procedure than those found in the community courts.

The practices of the MULEIDE group can be situated in the intersection of different spheres, corresponding to different legal and political logics. It is close to the state sphere in that it occupies a place awarded to community courts by law and it articulates with the *Grupo Dinamizador* structure. Similar to what takes place in the community courts, the councillors of the group are community members, thereby acting within a logic of the local sphere and resorting to local law. Conversely, the councillors are bound to the global sphere and to international law due to team's association with an NGO that defends international human rights. The result is a kind of unique action which is full of strategies that aim to harmonise the contact between the different spheres and laws and to avoid conflict between them, often using them selectively according to the objectives of the councillors and the disputants.

Interlegality is very often used by the counsellors as an instrument to invert women's inferiority without coming into direct conflict with patriarchal laws, and to increase the parties' space for negotiation. This point is, for example, illustrated by the following excerpt from an interview in which one of the counsellors uses a type of discourse that awards women power, coming closer to the discourse on human rights, without challenging directly the patriarchal concept of the male role: "Man is as hard as a rock [...] Cannot build the country if they are at war at home. Being the head of the house, yes, it is right, but if you are the head, she is the owner."<sup>18</sup> It is the same work!"<sup>19</sup>

### Municipal District 1

It is not very common for a social scientist, who uses ethnographic fieldwork, to choose Municipal District 1 as a case study. This is primarily the space for researchers, universities, bookstores and central decision-making bodies, and not the object of research. Unless the topic is something that is found specifically in the city (such as political and economic elites or judicial justice), the researcher would be expected to travel to surrounding districts and to provinces further away from the capital. Usually, the urban centre is where the results are appraised, discussions and debates held, and books launched. Community justices are discussed in the capital, but mainly seen as something that serves the citizens 'out there'. As Jason Sumich (2008) argues, the ideology of modernity continues to be important. Based on his work on Mozambican elites, the author concludes that "the capacity of elites to see themselves as 'modern' – within a nation that, according to these elites, is not 'modern' – allows them to affirm their difference, creating a sense of identity and cohesion. At the same time that it creates this link within a group, it allows for the affirmation of social inequality and differentiation" (Sumich 2008: 332). In the words of Sumich, "the assertion that, within the nation, some are more modern than others, is also a basis of social hierarchy, particularly in Maputo" (ibid.: 342).

This does not necessarily mean that community justices are non-existent or irrelevant. It is not difficult to find motives other than the lack of formal education, economic difficulties or geographic distances that may justify the preference for non-judicial forms of justice. Judicial justice has serious problems and, depending on the nature of the conflict or the type of relationship between the litigants, many disputes may be resolved in more appropriately by another type of conflict resolution body (Santos and Trindade 2003). I did not specifically seek "the traditional" or "the exotic". My concept allows me to include old and new forms of justice, in order to understand where and how people resolve conflicts.

The number of structures we found that fit into my concept of community justices is quite substantial. I identified five categories of community justices: those created by

<sup>18</sup> Note that, in Portuguese, housewife translates as *dona de casa* (literally, house owner).

<sup>19</sup> Interview with a Counsellor of MULEIDE Legal Education Group (27 January 2004).

the state, those created by NGOs, those created with private capital, traditional bodies, and religious bodies. These forms of justice may be more or less informal in their shape and actions, i.e. they may be more or less rigid in their procedures and use state law to a greater or lesser degree. As in other geographical spaces, citizens circulate between them, benefiting from the possibilities of forum shopping, opting for those they consider most appropriate to resolve their problems and, very often, resorting to several of them within the scope of the same conflict.

Due to the limited space available for this chapter, I will highlight only the dispute resolution body that represents the greatest discovery in my empirical work: police stations. Even though they are not legally recognised as conflict resolution bodies, at times they perform that role in ways that are similar to those of community conflict resolution bodies found outside DM1, such as the neighbourhood secretaries, *régulos* or community courts – namely, through non-judicial conflict resolution. There is a wide range of conflict situations that can result in a citizen going to the police. A great proportion of them are disputes related to non-payment of debts, whether formally or informally contracted.

A number of police stations share the jurisdiction of DM1 and it is relatively easy to reach one of them on foot from any place within the inner city. The case study chosen was of a police station located in a central area of the municipal district under analysis. According to the Station Commander, the Police of the Republic of Mozambique (*Polícia da República de Moçambique* – PRM) are the first conflict resolution body that citizens will look to:

[...] the police are, in terms of justice resolution or conflict resolution bodies, the closest to the citizens. In other words, the first thing that any person who has a case thinks, regardless of it being a criminal case or not, is 'I'm going to the Police [...]!' Because, for citizens, every case is a matter for the police to solve.<sup>20</sup>

The same actor admits that the PRM oversteps its jurisdiction when it resolves what he refers to as social cases, which include both debts and minor disputes between neighbours. However, he advances formal arguments to justify the legitimacy of their decision to resolve social cases:

When we consider that there is a dispute, although no criminal fact is presented, but that may result in a criminal fact, we notify the other party so that we can offer some sort of counselling to restore their relationship. I am referring to the principle of good neighbourliness, right?<sup>21</sup>

<sup>20</sup> Interview with the Commander of the Police Station of Maputo (24 February 2009).

<sup>21</sup> Interview with the Commander of the Police Station of Maputo (24 February 2009).

At the same time, he acknowledges that conflict resolution mechanisms are imported from the community and that the flexibility of procedures marks those situations in which a consensual solution is sought. This discourse reflects the practices directly observed during my several months of fieldwork at the police station.

Therefore, what [...] we end up doing is nothing more or nothing less than transferring that which would be the resolution at the level of the family – all those mechanisms, those questions that are asked – over to ourselves [...] And we haven't adopted a specific rule [...]. [W]e do nothing but seek a means of reconciliation. Therefore, we minimise the differences between the parties.<sup>22</sup>

In many cases, especially in disputes involving money, the main role of the police officer, who acts as the third party, is similar to that of a mediator, intervening very little and seeking to help the parties reach an understanding. In other circumstances, which depend on the type of case and on the officer on duty, there may be more involvement. References to formal law are not infrequent, but advice based on community law (such as respect for the elders) is also included. Since this is a cosmopolitan urban centre, where people from various parts and religions come together, a situation may also call for respect for the rules of a specific community: "Officer on Duty [to plaintiff]: What happened was disrespectful. If I know that my bosses are Indian and that they follow those traditions, then they need to be respected."<sup>23</sup>

The police present a paradigmatic case in the intersection between the principle of state and of community. In terms of resolving social cases, their proximity to the community bodies is clear, from the similarity in behaviours. However, their legitimacy does not stem solely from the simplicity of the language used, the opportunity they give to the parties to discuss the case, or the flexibility of their procedures. The fact that the police are located within the sphere of the state and are associated with the legitimate use of violence (this connection is latent in various discourses) also leads citizens to trust in the effective resolution of the cases and in the compliance with the decisions.

## Conclusion

Legal plurality in Mozambique is complex and unpredictable, and cannot be analysed based solely on what was or is provided for in legislation or from a single narrative. As Santos showed with the metaphor of the palimpsest of political and legal cultures,

<sup>22</sup> Interview with the Commander of the Police Station of Maputo (24 February 2009).

<sup>23</sup> Observation at the Police Station (22 February 2010).

history is made of ruptures and continuities whose effects gradually took on different shapes at the local level. The past and present strategies of the state intersect with local and global dynamics, virtually constituting specific configurations in every moment and space. It is not possible to show only one picture of reality, because it is composed of multiple images that assume diverse expressions and include different justice bodies.

As a rule, specific roles, which reflect rights and duties, are given to men and women in dispute resolution sessions. However, the normative orders tend to be used in an interlinked way and the parties are given some space for negotiation, although the scope of it may vary significantly. Some more authoritarian models of action tend to hamper the construction of collective, workable and flexible solutions and are detrimental to the access to justice.

The ecology of justices was the basis of the rural and urban case studies presented in this chapter and resulted in the identification of four legal landscapes. In the first, Macossa, I highlighted the integrated operation of the different bodies, the expressive materialisation of the concept of forum shopping, the predominant role of the traditional authorities, the importance of local dynamics, and the state's incapacity to impose its legal and judicial initiatives. In the second case, Inhagoia 'B', I called attention to the different roles of the neighbourhood secretary and the community court, the way in which the latter attempts to mimic the practices of the judiciary and the citizens' capacity to opt between the bodies so as to choose the one that is most effective in promoting consensual solutions. In the third case, Jorge Dimitrov, the main community justice is a result of the overlapping action of an NGO, former elected judges, and the *grupo dinamizador*. This community justice selectively and strategically uses different normative orders. In the last case, I emphasise that even in the most urban centre of the country community justices assume a relevant role, albeit presenting specificities such as higher proximity to the state. In this case, I highlight the surprising role of police stations in responding to citizens' needs for justice.

Based on the realities identified in this chapter, the most significant finding is that community justice bodies continue to play a key role in the access to justice, not only in rural areas characterised by a great distance between citizens and the state, but also in urban areas, where the state provides a wider range of services. In some cases, the origin of community justice bodies is based in the community, like in Macossa, and in others, the state pillar has a much stronger presence, as is the case in Maputo. Citizens move within these dispute resolution networks, circulating according to the proximity of the community justices; the type of conflict; their own strategies (which may vary according to gender, age or other factors); and the legitimacy attributed to each of the structures.

The experiences identified in this chapter may contribute to the discussion on access to justice. As we saw in the community court case in Inhangoia 'B', not all experiences follow a logic of serving the citizen and his or her rights. However, just as the judicial courts are not excluded from the core of the debate on the problems

and difficulties they face (such as inaccessibility, slowness, inefficiency or high costs), other forms of dispute resolution, although not perfect and still requiring monitoring, should also be a relevant part of it. It is important for the latter to occupy a space that does not place them in a subordinate position, but instead values the type of work they do, namely the resolution of problems that are important to the citizens but cannot be dealt with within a judicial court. In other words, community justices should not just be tolerated because they can reduce the excessive case-load of the judicial courts, but should be encouraged and supported in what makes them more appropriate to resolve certain types of disputes. It is essential to continue with empirically-grounded studies, so as to acknowledge legal diversity. There is need to identify both those practices that are detrimental to people's access to justice and those that citizens recognise as good justice.

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## CHAPTER 6

# Sorcery Trials, Cultural Relativism and Local Hegemonies

*Paulo Granjo*

## Introduction

To state that sorcery exists in Mozambique is a mere declaration of an obvious and recurring fact. People use it to obtain effective results, or protection against them, and in pursuit of legitimate or illegitimate, beneficial or malevolent goals. Nonetheless, the potential effectiveness of this practice is an issue that tends to divide readers into outspoken scepticism, attitudes of plausible doubt, elaborate discourses about its symbolic efficacy, and somewhat ashamed fear or concurrence.<sup>1</sup>

However, the focus of this chapter is not so much the actual practice of sorcery and related rituals. My purpose is to analyse something that invariably leads to serious and sometimes tragic consequences – whether or not it may affect the real practitioners of such crafts – and is interlinked with the issue of ‘legal pluralism’, the subject of this book. I am referring to accusations of practice or ordering of spells by individuals, and the trials of such accusations.

I will begin by stressing that sorcery is an essential element of the system of ‘domestication of uncertainty’ that is dominant in Mozambique, and of social efforts to give meaning to, and try to overcome, unexpected or aleatory events. However, as I

<sup>1</sup> Indeed, the belief in the effectiveness of sorcery is unassailable, as it holds a strong ‘protective belt’ to use the expression coined by Lakatos (1989) for scientific theories. The occurrence of an unsuccessful empirical case could be due to a technical error in the execution of the spell, to a more powerful counter spell, to the sorcerer’s insufficient power or even to the fact that s/he is a charlatan, without jeopardising the presumed effectiveness of sorcery in general.

will subsequently discuss, allegations of sorcery are also an important instrument of social control used against particular kinds of victims. They tend to reproduce and re-inforce existing relationships of inequality and domination within society, more often than not in a particularly violent manner.

I will provide an account of such violence, and of the dynamics of accusation and trial, by describing the typical course of an accusation, the production of evidence and trial procedures, and by examining two specific cases. The reader will then be able to appreciate that sorcery trials are seen as an institutionalised form of justice by those concerned, that accusations and trials usually interact with other non-state actors and institutions that are also considered ‘justice providers’, and that the basic rights of defendants are often violated in the course of events.

I then argue that the acceptance and legitimacy of sorcery trials (and, ultimately, of the overall idea of legal pluralism) are based on the projection of ‘cultural relativism’ principles upon individual and collective rights. Hence, I will discuss, in scientific, ethical and political terms, the harmful effects of that projection and its abusive nature. In so doing, I will consider an alternative to the common, and misleading, dichotomous dilemma between, on the one hand, accepting ‘cultural’ rules as an impediment to the rights of certain groups or, on the other, imposing compliance with general and abstract rules, regardless of the meanings that the people assign to the practices in question. I then suggest that whenever ‘cultural’ practices and human rights clash, the primacy should be given to the perspective and will of those individuals and groups that are dominated in such cases.

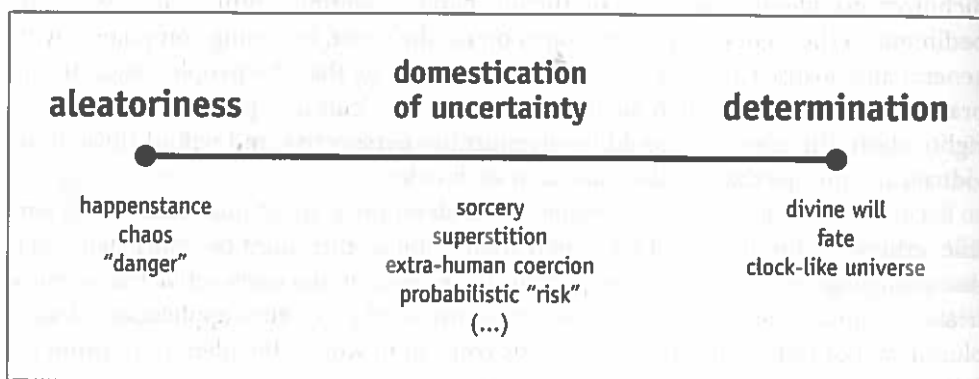
Lastly, I will suggest, for the reader’s consideration, a set of questions of a scientific, ethical and political nature which should not at this point be concealed when discussing legal pluralities. These questions are based on the perspective that sorcery trials are not an unusual and extreme ‘deviation’ in the practical application of legal pluralism, but rather an expression of this concept in which the inherent harmful effects are easier to perceive.

## Sorcery and the Domestication of Uncertainty

When studying the social role of sorcery in Mozambique, the first aspect to take into account is that sorcery is not an isolated belief, but rather a vital part of a wider (and largely collective) system of interpretation of, and action on, misfortune and other uncertain events. This fact is far from irrelevant. As George Murdock (1945) emphasised last century in a statement that has not been disputed, divination systems exist in every culture known to history or ethnography. However, those systems are not isolated from wider conceptual frameworks. Their rationale is based on interpretation systems intended to give meaning to contingency and to guide human intervention in the uncertain and unfamiliar. Since such interpretation systems also exist

in every culture, it is plausible that they meet a human need of a universal nature, thereby demonstrating the cross-cultural importance of the human struggle against the humiliation of uncertainty, against the lack of meaning and against human dependency as regards anything that appears uncertain and random.

The resulting systems may originate from different principles. When investigating the logical possibilities of understanding uncertainty and threat, we quickly realise that the possible alternatives may vary between two extremes: on one side, the absolute assumption that aleatoriness is 'real' and is the principle underlying uncertain events (thereby acknowledging contingency or happenstance); on the other side, the assumption that uncertain events are fully determined by extra-human logic or entities, such as divine will, fate or the mechanistic laws of a clock-like universe. Between these two extremes there is a continuum of conceptual possibilities that share the attempt to ascribe meaning and causality to uncertainty and aleatoriness, which enables the latter to be perceived as cognoscible, regulated or even dominated by humans. This represents what I describe as forms of 'domestication of uncertainty' (see Granjo 2004).



It is quite common for different systems of domestication of uncertainty to co-exist within the same society. Depending on the specificities of each occasion, people may decide to use only one of those systems, mixing them in a syncretic way, applying them alternately to various aspects of reality (Granjo 2008), or using them complementarily – even if their rationales may seem contradictory.

Mozambique is no exception in this regard. Here, too, there is a co-existence of materialistic, religious, magical, technological, and spiritualistic systems of reasoning and interpretation. We may nevertheless affirm that there is one particular system of domestication of uncertainty in use throughout most of the country which, though co-existing with other systems, predominates in the interpretation of events that disrupt normality. This is based on the notion that chance and coincidence do not exist. Thus, events that markedly harm (or benefit) someone require the existence of underlying causes, particularly if such events are recurrent.

These underlying causes do not replace and are not opposed to material causality. Indeed, they do not attempt to explain how a specific dangerous event occurs, but rather why such an event has harmed the person in question. According to this point of view, the world is full of material and natural threats, ruled by material causes; however, while undesired events follow material causality relations, they may only harm a specific person due to social causes which make both the victim and the source of danger coincide in time and space. These social causes need to be identified when misfortune strikes, in order to explain it and to prevent its recurrence in a similar or more serious form.

In such an event, however, the first hypothesis to verify is the victim's possible ignorance or negligence. The reason for what happened to the victim may reside in her/his own inadequacy in situations where the victim was unaware of the danger or unfamiliar with the right way of performing some action; the victim lacked the experience to perform the action; or the victim was not used to taking the necessary precautions. Other social causes, of a spiritual or a magical nature, will only be sought if the victim was struck or harmed by the undesirable event despite being competent and careful, or if her/his failure to take the normal precautions may be deemed exceptional.<sup>2</sup>

In such situations, one of the likely causes is the suspension of protection by the victim's ancestors. Since the latter maintain a relationship with their descendants similar to that of elder relatives, it is their duty to guide them, protect them and keep them away from danger – which they probably did not do in the event in question. If that happened, it was not a punishment, but rather the result of normal constraints faced by the ancestors: since they are the spiritual remains of the living person they used to be, they have lost certain human capabilities, among them the ability to communicate directly with the living. As such, the only way the ancestors can let their descendants know that they have a grievance they wish to communicate (through divination or the trance of a specialist) is to allow undesirable events that may alert the latter to the need to seek communication. The next step for the living would be to try to find out the causes of the ancestors' dissatisfaction and what can be done to appease them.

The other likely cause or reason could be sorcery. Mostly attributed to envy or other objectives that may be considered negative, such as greed or selfishness, sorcery is normally regarded as functioning in an inverse order to the actions of ancestors when they attempt to protect their descendants. In fact, while it is believed that powerful spells may directly manipulate material factors and create their own dangers, such diagnoses are relatively rare and largely limited to exceptionally tense situations

<sup>2</sup> According to this reasoning, if, for example, a person was infected by HIV because s/he didn't know about AIDS, forms of transmission or care required to prevent it, or if, knowing these things, s/he didn't use condoms regularly, no other explanation is required for such illness. On the other hand, if that person used to wear a condom regularly but did not on the occasion in question, thus becoming infected, an explanation for such fact will be required.

of social strain. What is more common is for sorcery to act upon people or beings – attracting them to danger, distracting them from its existence and imminence, influencing their behaviour, or even hiding from them some aspects of reality or creating illusions and imaginary situations.<sup>3</sup>

However, regardless of the variations in its performance and objectives, sorcery plays a central role within a system of domestication of uncertainty, here as in other regions of Africa.<sup>4</sup> Yet, contrary to common assumptions, it does not regard people as being restrained by the principles it advances, helplessly moving towards a predestined or irreversible future. The acknowledgement of social complexity, including the interaction of individual and collective volitions and actions – from the living and from the dead, of a material, spiritual or magical nature – turns sorcery, and each particular spell, into a factor that interacts with many others, in a framework of multiple attempts to mould an uncertain future (Granjo 2008a).

Sorcery provides, therefore, a means to give logic to uncertainty and aleatoriness by making them explainable, and by enabling the reintegration of misfortune as both a cognoscible phenomenon and a result of human action and, as such, liable to manipulation by such action. Thus, sorcery – along with the other aforementioned causal relations – is a means to understand something that otherwise would not make any sense. It is also a way of acting on reality, provoking or avoiding the undesirable. Yet the roles of sorcery and, particularly, accusations of the practice of sorcery (the main focus of this discussion), are not limited to the domestication of uncertainty.

### The Accused and Social Control

To accuse someone of practicing or ordering spells is not just an attempt to explain misfortune, or to incorporate into normality something that is deemed abnormal. Accusing someone of sorcery (or even the implicit threat of such an accusation) is also a powerful instrument of social control, and the pursuit of economic and political strategies. Here again, this is not exclusive to Mozambique. Works such as *Schism and Continuity*, by Victor Turner (1957), or *Witchcraft, Power and Politics*, by Isac Nie-

<sup>3</sup> Health and illness are a variant of this general system of domestication of uncertainty. Being healthy is the normal state of people, but one that requires harmony between the living, ancestors and the social and ecological environment (Honwana 2002). Health is also threatened by the lack of care, by sorcery performed by the living and by the disapproval of ancestors – but in parallel with the ecological dangers and the demands of the spirits to work as traditional healers.

<sup>4</sup> To be sure, despite the central role that spirits and ancestors assume here, the general principles are similar, for example, to the classic interpretation of Evans-Pritchard on Azande witchcraft (1978 [1937]). For even more similar systems see, for example, Janzen (1992); Campbel (1998); Dijk et al. (2000); and Binsbergen (2003).

haus (2001), expressively demonstrate this in quite different historical and geographical contexts. Nevertheless, one should bear in mind that such potential for social control and collective manipulation may take on distinctive meanings and have diverse consequences. There are also important regional disparities within Mozambique.

In his book *Kupilikula*, Harry West (2009) draws a scenario in the Mueda plateau (in Cabo Delgado Province, Mozambique) where sorcery occurs in an invisible world that interacts with ours, and into which infamous sorcerers project their spirit in order to carry out their evil doings. Such doings may only be counteracted or reversed by a similar projection of righteous sorcerers to act on whatever was motivated by the infamous ones. Such action, through a spiritual, shamanic voyage into an invisible world detached from ours, contrasts with the beliefs that prevail in the southern and central regions of the country. Here the active spiritual force is not the living person's, but rather that of the spirits of the dead which possess her/him or which s/he is able to dominate and put to her/his service.<sup>5</sup> It is the spirits who act on the perceptible reality in forms we term magical. They do not do it in an invisible world (although they are themselves invisible), but in ours, which they also inhabit.

This formal difference identified in Mueda does not render the moral references of the practice (and accusations) of sorcery dissimilar to those in the rest of the country – even if they are perhaps more explicit in their logical consequences. Thus, any person who is more powerful or wealthier than those around her/him may in principle be deemed to be a sorcerer, either because s/he needed magical support to achieve that exceptional status or because that status demands that s/he provide protection to her/his subordinates – which is only possible if s/he knows how to fight malevolent sorcerers with benevolent uses of sorcery.

This assertion of the ambiguous nature of power finds another expression here, one of a more general character. Malevolent sorcerers are selfish and use their power and knowledge exclusively for their personal benefit. As such, those who enjoy the advantages of power without fulfilling the obligations of protection such power commands, or those who become wealthy without sharing part of their wealth with those they lead, by 'eating alone', prove, through such behaviour, to be malevolent sorcerers.

This is what led, for instance, to the lynching of several persons accused of owning, or transforming themselves into, the lions that terrorised the population of Muidumbe in 2002 and 2003. The persons lynched were relatively rich and powerful and, as pointed out by Harry West (2008) and Paolo Israel (2009), the case was an expression of political criticism of the post-socialist appropriation of wealth and power, to the detriment of and with disregard to the ordinary population.

The same was observed, albeit in a more subtle way, after the popular uprising of February 2008 in Maputo. It was said at the time that 'the people came out of the

<sup>5</sup> This second allegation, which pertains exclusively to the practice of sorcery, is infrequent – unlike spirit possession, which is common among 'traditional healers' and even ordinary persons.



bottle'. This eloquent expression, which travelled quickly from the outskirts to the centre of the city, also translated the political and socio-economic criticism into the language of sorcery, through a reference to the belief that many women illegitimately dominate their husbands, making them apathetic and abusing them through a spell that 'puts them inside the bottle'. This spell can only be broken by a stronger counter-spell – in this case the uprising (Granjo 2008b; Granjo 2010). However, the accusation of sorcery is ever-present in daily life in events far less spectacular than these larger public convulsions.

As already mentioned, unexpected misfortunes, and particularly an unusual sequence of disease and death, require a logical explanation that may allow people to make sense of them, to control and overcome them, and thence restore normality. Sorcery is but one of many possible explanations for such events, and yet the sorcery spell is a possibility that can easily gather consensus, including about the probable instigator. This may take place, for instance, in the absence of obvious social causes on the side of the victim, or someone close to the victim, which could give rise to the suspension of protection by the ancestors. It might also occur in the event of social conflicts or tensions, or of behaviour considered strange or envious – which is always very likely. However, considering that the suspicion of the practice of sorcery is justified by specific types of relations and social status, the resulting accusations also tend to be considerably typified. In consonance with the findings of the study led by Carlos Serra (2009) on the lynching of people accused of sorcery in rural areas, my data also indicate that these accusations tend to be focused on specific, socially disadvantaged individuals. Above all, while the most feared and famous sorcerers (though not the most confronted or challenged ones) are usually men, the overwhelming majority of people accused of sorcery are women.

Exceptions usually occur when a male individual has particularly serious conflicts with the affected group, shows exaggerated and hasty micro-political ambitions, or possesses a substantial amount of property at an age that is considered too advanced for him not to have begun to redistribute the estate among his heirs. Another situation that involves men, and where the accusation is socially equivalent to that of sorcery (although strictly speaking it is not), is when a woman has a complicated sexual relationship with her husband, expressed by violent or 'mad' behaviour. These cases usually entail the suspicion that the woman had already been offered in marriage to a spirit by her father, whether as compensation for a family debt to the spirit or with the objective of enriching himself through such a pact.

Thus, the accusation of men – accounting, as mentioned above, for the minority of instances – tends to be linked to the resolution of family conflicts and to the punishment of greedy political and economic behaviour, with male vulnerability increasing with age. However, not just any woman is accused of sorcery either, despite the vulnerability rendered by their gender.

The dominant images surrounding the effectiveness of sorcery are associated with distance. In other words, only the most powerful specialists will be able to cast a

spell from remote locations, whereas the average sorcerer has to be close to the victim to do so. Whether or not this image of proximity is originally the reason or the ideological formalisation of what I am going to say next, the practical outcome is that the sorcerer should be physically close to the victim, but at the same time keep a social or behavioural distance from her/him so as to give reason for the evildoing and the desire to do it. Therefore, relatives by marriage have an inevitable structural position as primary suspects – particularly women living with the husband's family. If such women demonstrate behaviour deemed undesirable they will automatically become suspects. This could for instance, include situations where the women are quarrelsome or defiant of their mother-in-law and sisters-in-law, are not respectful of or zealous enough toward their husbands and elders, or are envious of the assets or children of other women.

Widows are also more vulnerable to possible accusation, particularly if they own locally significant assets and if, upon being widowed, they begin to behave too independently. Widowed women are affected by a convergence of factors, including a limited defence capacity, an image of economic greed, a life experience that may have given them access to magic secrets, the economic expectations of the possible beneficiaries of the accusation, and gender power tensions. These factors will, in turn, add to the already existing and common suspicion about the widow's likely responsibility for her husband's death, which may be revived and work as complementary 'evidence' in the presence of new suspicions.

Furthermore, behaviours that diverge from the local role models of femininity and gender power may become sufficient reason for suspicion and consequent accusation.<sup>6</sup> There are degrees to this, of course, which are certainly not immune to the particular backgrounds and dynamics of the negotiation of gender roles that may have taken place in each case and context. However, a woman does not necessarily have to be 'a very strong woman that can beat up any man' – as various newspapers described a woman who was impaled in 2008 during a surge of lynchings in Chimoió – in order for consensus to be gathered about her condition as a sorcerer. As we will see below, suspicion of sorcery could simply result from a woman standing up against her husband following a long history of violent domestic aggression on his part.

In certain cases yet, a woman could be accused not because of any characteristic of her own, but because of her husband's behaviour. Even in urban areas, both in popular and more elitist circles, when a man 'obeys' his wife or has habits deemed atypical – such as leaving most of his salary at home, not going out with friends, not showing interest in other women, cooking or openly doing house chores – this tends to be considered by his relatives and neighbours as against his nature or choice, and as the result of a spell cast or ordered by his wife to illegitimately keep him under

<sup>6</sup> This aspect, too, is far from being a Mozambican peculiarity. Not only is it often mentioned in the European context, but it is also found, for instance, in Brazil (Maluf 1992).

her grip. And although the accusation of such a spell has less serious physical consequences than others, it may nevertheless lead to counter-spell actions and divorce (Granjo 2011).

Therefore, although an accusation of sorcery could be based on different sets of leads that may give rise to social consensus about its validity, it tends to be marked by two characteristics: (1) a focus on socially disadvantaged persons with limited defence capacity – mostly women and elderly women – and; (2) a justification based on the ascription to such persons of behaviours and actions which are not compliant with the models imposed by the power relations that are in force locally. Thus, accusations of sorcery are powerful tools of social control that both punish deviations to the dominant norms which govern behaviour and power relations, and coerce compliance – either through the accusation itself or through a latent threat of accusation upon the first occurrence of misfortune.

However, reiterating in part what has already been mentioned above, we should also note that there are special instances where the practice of sorcery is tolerated or even considered legitimate, even if publicly admitted and openly practised by women. A good example of this is the case of a gardener employed by the general manager of a large company. To the astonishment of the employer, the gardener was taking for granted the fact that his mother had put a spell on him – which made him sad, but not angry. It turned out that the man was the genealogic successor to a 'traditional' chieftaincy, but had refused to take up that position because he had a stable and relatively well-paid job. Moreover, he was investing all the money he was able to save in the ongoing construction of a new home, regardless of the alleged financial difficulties experienced his mother, siblings and uncles. He was, therefore, in a relatively serious situation of double default before his family, his community and his ancestors – a situation which, even in his own estimation, justified or excused his mother's use of such violent means of coercion.

Sorcery may thus be implicitly authorised or even respected by the community, as long as it is not concealed and it adopts a social control and coercion role, as a means to compel individuals to adopt a more socially desirable conduct. In other words, the practice of sorcery is accepted as long as it fulfils the social role that is expected of it in accusations of sorcery.

### How Sorcery is Judged and How People Get Accused

This potential ambiguity regarding the acceptance of practices of sorcery is also valid – at least in abstract terms – in what concerns the dynamics and possible outcomes of accusations of sorcery. Indeed, an accusation of sorcery, even if confessed by the accused or deemed proven by the accusers, does not necessarily lead to punishment and marginalisation.

This dominant system of domestication of uncertainty and the local phenomenology of possession create an opportunity which, on the contrary, enables and facilitates social reintegration. To that effect, it would 'suffice' for the accused to acknowledge her/his fault and agree to have been possessed by an abusive spirit that forced her/him to act and behave against her/his own will – and that such allegation be consensually accepted by the accusers and confirmed by experts.

Such confessions do not have to be calculated or a hoax to be rational, according to anthropological criteria. After all, if the possibility is accepted that a person may commit an act under possession without being aware of it, and if everyone – including the experts in the matter – is sure that this has been done, then it becomes plausible to the accused that s/he might in fact have done it.<sup>7</sup>

However, if a person commits an act under the domination of a spirit, the responsibility rests on the symbiotic entity that is the person possessed. As such, the person in question is also responsible – even if, strictly speaking, s/he is not guilty. More importantly, as soon as the spirit is removed from the body and prevented from returning by means of arduous but innocuous ritualistic procedures (Granjo 2007), the person returns to her/his former state. S/he is no longer considered a threat and, therefore, nothing prevents her/his full social reintegration.

Nonetheless, the exceptional nature of this outcome – which has always been recounted to me along the lines of 'as it once happened...' – is a further indication that accusations of sorcery do not have the explanation and justification of misfortune as the sole objective. They may also be essentially motivated by a quest for social control and punishment. Indeed, the creation of scapegoats and the collective pressure leading to their economic exploitation, banishment, mutilation, insanity, and even death are far more frequent. Ultimately crucial to the outcome is the level of consensus established about the person to blame, her/his guilt, and the benefits of removing her/him from society or even from the world of the living.

Such accusations often end up not leading to any formal trial, whether performed by non-state political entities or by healers' associations. Particularly in more remote areas away from state authorities, a confirmation of the collective suspicion through divination by a specialist is usually enough to expel, injure or kill the accused – in principle, but not necessarily, with the prior consent of a 'traditional authority'. In more densely populated areas or even in cities, however, the gathering and analysis

<sup>7</sup> In fact, the person in question will not only be submitting social pressure, but also complying with a combination of factors that Dan Sperber (1992) notes as a rational reasoning to adopt beliefs which are apparently irrational: the person will be believing that something which s/he can only conceive in an incomplete and approximate way (sorcery under possession) is possible, based on the assumptions and consensus that there are people with complete and precise knowledge of this phenomenon and that, if s/he were to have that same knowledge, s/he could confirm it as true – in a process similar to what, for example, makes it rational for a person who is not an expert in astrophysics to believe in the existence of black holes.

of evidence, as well as the political promulgation of the punishment tend to be formalised. Unless the accused confesses immediately, the first divination that confirms the suspicions by the accusers usually has to be confirmed by a group of experts appointed by the respective professional association,<sup>8</sup> in a previously arranged meeting that takes place within a tense and solemn environment. Although the details of the case – including possible material evidence of sorcery – are explained at length by the complainants, and possibly challenged on behalf of the defendant, the formal means of proof is joint divination by the appointed experts. In the southern region of the country this is done by casting the *tinhlolo* (Granjo 2007a),<sup>9</sup> whose reading, which allows for different lines of interpretation, is almost always influenced by the allegations. However, even if the ‘sorcery judges’ have the authority and the competence – acknowledged by the parties by their mere attendance at the trial – to confirm or deny the guilt of the accused, the only tools the judges have that may help to lead to a confession and/or a settlement agreement are their rhetoric and performance skills, associated with the fear and respect they evoke. Sometimes such tools are not enough and it is necessary to convene more restricted sessions that take place in the bush, which I will describe below.

The path that leads a person to a sorcery trial can, however, be more complex and unexpected. It may pass, for example, through a community court (*tribunal comunitário*) which, considering itself incompetent to judge what has been brought before it as a sorcery case, or itself suspecting that a given case involves sorcery, refers the matter to a sorcery court. This is what happened in the first of the two examples that I will recount below. (I will do so in the most neutral and unbiased way I can, so as to limit the impact on the reader and avoid any possible legal consequences arising from these events.<sup>10</sup>)

The case began, as mentioned, at a community court. The complainant was a married woman, applying for divorce due to continuous aggression by her husband over the years they had spent together. The last time she had been beaten she had been able to run away and seek refuge with her family of origin, whence she filed the claim. However, the detailed description of the events revealed that, on that last occasion, the woman had stood up to the husband and hit him on the head with a frying pan in order to escape. The mood changed instantly upon this disclosure. The ‘judge’ was as-

<sup>8</sup> Usually AMETRAMO, the Mozambican Association of Traditional Healers.

<sup>9</sup> A divination set including bones, shells, stones, coins and other objects chosen by the diviners and their masters, complemented by six half-nuts of *nulu* (*tiakata*) and six dorsal crocodile scales (*tinguenha*). It should be cast and interpreted in the presence of an appropriate spirit in the body of the diviner, and the reading and interpretation of the combined cast items is elaborated and discussed with the persons present.

<sup>10</sup> Due to possible legal consequences, I will also not disclose whether these cases (or any of them) were attended by me or narrated by third parties.

tonished, and both he and the people representing the husband set about questioning whether such an unusual reaction from the woman could not be explained only by the fact that she had become a sorcerer. The judge, feeling incompetent to try such matters, immediately summoned a ‘sorcery court’. The new trial, albeit *ad hoc*, began in accordance with the usual procedures mentioned earlier. However, given that the (now accused) woman insisted on denying her guilt, one of the judges gave her a mirror and asked her what she saw in it. As expected, the woman said she saw her image reflected in it. ‘That is the proof,’ said the judge. ‘This is a magic mirror that only shows sorcerers!’ I do not know what happened to this woman, who continued to deny the accusation, but that extraordinary piece of evidence did convince most of those present.

The next case I am presenting, however, illustrates a common course of events when someone consensually found guilty insists on denying the accusations of sorcery against them. The new trial does not take place in an urban or peri-urban area, but deep in the bush, in an isolated location that can only be reached on foot, but preferably close to a crossroads. Moreover, it is no longer, strictly speaking, a public trial. Although some representatives of the parties may be present, the proceedings are strictly confidential, with the exception of the final outcome.

In this case, the defendant was also a woman, who appeared to be around 50 years old. Although the procedures also involved a relatively long session of questions and allegations, it was clear that the defendant’s guilt – reconfirmed by casting the *tinhlolo* – was taken for granted. Therefore, the issue was not about investigating the defendant’s guilt, or even proving it, but about forcing her to confess.

Following a long phase of reprimands, pleas and threats, a series of tests were initiated whereby the defendant, under constant pressure, had to find objects, animals or plants, or had to demonstrate her confidence and courage, in order to prove her innocence. A string of failed or virtual impossible tests (such as finding the rare and elusive pangolin) gradually increased her insecurity and emotional tension. Although exhausted and disoriented after many hours of physical and psychological coercion, the woman kept on denying the accusation. Then they administered the *mondzo*.

This is a liquid concoction of plant origin that induces a state of absent-mindedness and lack of control. The person who drinks the liquid ends up confessing everything s/he did wrong (whether or not it was sorcery) in conversation with an imaginary person. Nevertheless, as in stories of espionage involving the ‘truth serum’, it is presumed that some people are able to control its effects, and never confess. Such exceptional instances may result in a second administration of the product, which is likely to result in an overdose that renders permanent the state of absent-mindedness and hallucination – as happened to the woman in this case.

Finally, cases of extremely high social tension and unanimity about the guilt of the person accused may end up with a submission of the accused to an ordeal whereby a toxic substance is administered which is supposedly harmless to the innocent, but should kill the guilty or drive her/him mad.

I cannot disclose how this particular case was concluded.

## Good Intentions, Cultural Relativism and Rights

I presume that cases such as these will not leave the reader indifferent, even if the reader is the most enthusiastic supporter of 'legal pluralism', or someone who has learned – as I have – to consider local divination and healing practices in their own terms and within their own conceptual framework. However, the reflection these cases elicit should not be limited to the means of evidence used, the degree of coercion and violence, or even the violation of rights deemed fundamental and safeguarded by the state – beginning with the exclusion of the death penalty. All these questions are unavoidable. But since we are in the presence of something that is intended, and accepted by all involved, as a specialised method of providing justice that articulates with other instances of 'legal pluralism', the concerns that make us question this system of judgment should lead us to question the legitimating principles of legal pluralism as well.

Running the risk of generalising and simplifying, one might say that the lines of reasoning which try to legitimise legal pluralism – and their respective motivations and principles – follow two main vectors. On the one hand, they are based on a practical concern: the capacity of the state's to provide justice is and will be scarce. This could be addressed by mobilising and recognising locally legitimate conflict resolution entities, acting in accordance with locally accepted principles.<sup>11</sup> On the other hand, they are based on a concern for ideological equity: it is assumed that there is a 'Western' hegemony<sup>12</sup> which enforces institutional frameworks, principles and notions of rights that are alien to, and disrespectful of, all other cultures. Therefore, for such other cultures, resolving conflicts and administering justice in conformity with their own principles and means would constitute factors of emancipation and of fairer social functioning. This second vector, developed fundamentally within the academic context, finds its theoretical and moral legitimacy in the very anthropological and respected principle of cultural relativism.

I believe the case of accusations and trials of sorcery is an excellent starting point (as could be the inequalities in gender, age, or between any other social groups whose differences in status are culturally encoded) for assessing the extent to which the ap-

<sup>11</sup> However, the type of entities which are locally acknowledged by the people as conflict resolution providers may vary significantly throughout the country, together with the level of authority and legitimacy attributed to each one of them. Compare, for instance, Farré (2008); Florêncio (2005); and West (2008).

<sup>12</sup> Hegemony is normally understood, within the framework of this type of rationale and discourse, in the more popular and vague sense of strong and imposing domination, and not in any of the Gramscian connotations that are at the origin of the word. I discuss these aspects later.

plication of the concept of cultural relativism onto people's rights is problematic and potentially perverse.

In truth, however, the concept is already tricky in abstract and theoretical terms, even before we confront it with empirical cases. This stems from the fact that the healthy assumptions that the various cultures are not superior to each other and that each culture should be understood in its own terms are not, in this case, applied to strictly cultural phenomena, but rather to political ones.

From the perspective of the more inclusive notions of 'culture' (to which I subscribe), we can of course state that the 'political' is also cultural. Indeed, if we understand 'culture' as a set of socially transmitted and shared forms of both perceiving, classifying and conceiving the world, and of feeling and acting, very little of what is human will not, broadly speaking, be culture. But only fallaciously could such a generalised statement conceal an essential and *sui generis* aspect of power relations, and particularly of the recognition or denial of certain rights or privileges of specific social groups: at any point in time, and in any culture with dominating and dominated people, the rights bestowed on the latter (just as, symmetrically, the privileges and grounds for inequality that benefit the former) are the result of the history and dynamics of power conflicts and negotiations. In other words, the rights of dominated groups are imposed on the dominating ones in an essentially political process of conflict and negotiation. Their encoding into cultural rules (as with the cultural encoding of the grounds for inequality, even when these are assumed to be natural or spiritual) is nothing more than the 'freezing' of an incidental and temporary correlation of forces, however long-lasting, within social norms and people's collective world view. This means that unless we maintain an essentialist image of 'cultures' that considers them static, homogenous, exclusive and isolated, the application of cultural relativism to people's rights is abusive and inappropriate. But there is a second problematic issue, which is simultaneously academic and practical.

If the most noble purpose of projecting cultural relativism on the provision of justice (through legal pluralism) is, as I presume, to promote the emancipation of cultures and societies which are subjected to the diktat of alien principles and criteria, such a purpose could only be achieved without perverse harmful effects if the dominated societies were homogenous, harmonious and devoid of power relations and strong conflicts of interest.

This homogeneity is obviously not the case in the Mozambican context – or, for that matter, in any other context that I am aware of. In tedious fashion, Rousseau's 'noble savage' (1978 [1750]) is able, after all, to combine his empirical inexistence with the ability to incite imaginary exoticists. What we are faced with, in practice, are strongly diversified and hierarchical communities, wherein (as almost everywhere else) inequality and relations of domination between groups are culturally codified.

This means, on the one hand, that regarding local cultural rules as homogeneously representative of the community as a whole is the same as regarding the values and interests of the dominating groups as general, or as interpreting the local relations of

power, inequality and domination on the basis of the reasoning offered by the dominating groups to legitimise such relations – similar, one might say, to the long anthropological error of interpreting the Indian castes system on the basis of classical texts written by Brahmins, thus reducing this system and the domination by the higher castes to the point of view presented by the latter (Perez 1994).

On the other hand, it means that, by disregarding the existence of endogenous processes of hegemony<sup>13</sup> in communities that are considered 'different', and by assuming that the dominant values in such communities are 'genuine' and representative of the 'entire' community (as if the community was homogeneous, and as if the acceptance of such values by the dominated members was not, itself, the result of a process of domination) contributes to the reproduction of the very discrimination and hegemony that exists within communities. In other words, by trying to counteract the abuse arising from the imposition of 'Western' values in a context of intercultural domination, one is validating the abuse arising from the imposition of values by local dominant groups and the type of dominating relationship employed by these groups upon the subaltern. By calling for the emancipation of an abstract and imaginary community, we are reinforcing the instruments of oppression of those – quite concrete – who are dominated within it.

### Conclusion: Dilemmas and (Possible) Solutions

For the reasons outlined above, I argue that we must hold that 'culture' and 'tradition' (although central to a contextual framework) are not valid impediments to equity and individual rights, let alone the protection of those who, by virtue of their situation or status, are the most vulnerable. However, embracing this is one thing; quite another is to assume that, when a practice includes formal elements that appear abusive in light of internationally dominant values of equity and human rights, such values should overrule the meanings people attach to such practices, and the social consequences they ascribe to them. I doubt that the dilemma between these two poles – which tend to be considered as the only possible ones – has a definite solution, or even a totally satisfactory one. However, it seems to me that there is a third alternative, which is also relativist and continuously renegotiated. This alternative has the advantage of neither imposing foreign values nor denying human rights or reproducing inequalities.

I suggest that, in the case of a conflict between 'cultural' principles/practices and human/citizenship rights, the criteria applied should not be the dominating rules,

<sup>13</sup> I am now using 'hegemony' in both Gramscian senses of domination of a group achieved and validated by convincing the subaltern through ideological means, and of acceptance and partial integration of the dominant ideology by the subaltern (Gramsci 1971).

whether international or local, but rather the will and perspective expressed by the dominated individuals and groups in regard to the case in question. This is certainly not an easy solution. It requires, first of all, knowledge, participation and transfer of the decision-making power to the dominated and vulnerable, with the state assuming responsibility for challenging local relations of power and domination.

But there is an additional problem, which derives from the more reinforcing meaning that Gramsci (1971) attributed to the word 'hegemony', when he coined it: that of the acceptance and integration into their own ideology, on the part of the dominated, of the principles of the dominant ideology, which were conceived precisely in order to legitimise the domination to which they are subjected.<sup>14</sup> As a result of this process, there is always the risk that the dominated will reproduce the locally dominant ideology by supporting the very practices and principles that oppress them.

Nonetheless, the solution proposed above seems to me to represent the smallest and fairest among possible risks – and, most importantly, one that transfers any external expectations of emancipation from the domain of external imposition of power to the field of political debate and symbolic and ideological negotiation.

Having reached this level of generalisation, it would now be appropriate to revert it on the theme that served as the starting point and empirical basis of this chapter: accusations and trials of sorcery as variations of 'legal pluralism' which are capable of clarifying the tensions and limitations of the latter. When doing so, one could always argue that sorcery trials are an extreme case within the diverse framework of 'legal pluralism' practices and, as such, should not jeopardise harmless and socially useful mechanisms of conflict resolution and justice provision that are accepted by all parties involved. Indeed, since they involve the resort to spiritual or magical means of evidence, and because they may lead to the economic despoilment, ostracism, mutilation, insanity, or death of the defendants, sorcery trials contrast significantly with, for instance, the mediation of family quarrels at a police station or a community court.

However, we often learn about verdicts from those 'harmless' non-state instances of conflict resolution that clearly abuse the legal, constitutional and human rights of accused citizens, or even their family members – as in cases where the accused are forced to give their daughters, even when only minors, to the accusers as compensation. Furthermore, the abuse of dominated and vulnerable individuals and groups may vary in degree depending on the type of non-state 'justice provision' institution and on the local context, but such abuses derive from the same principle of cultural legitimacy (and, consequently, from the same legitimating principle of culturally codified inequalities). Besides, as we have seen, sorcery trials and other non-state instances of justice provision may often maintain links and interactions to each other.

<sup>14</sup> It is this type of process, for example, that leads mainly women to pressurise and teach other women to submit to male domination, or makes individuals from socially dominated classes to assume that 'there have always been rich and poor' and that this is a 'fact of life'.

Thus, one may argue that sorcery trials are the extreme pole on a continuum of possibilities of abuse and domination; but all those possibilities are, ultimately, inherent to the logic of 'legal pluralism' itself.

As previously mentioned, when we analyse specific examples of accusations and trials of sorcery, it is clear that, regardless of the degree of refinement, exotism and/or violence involved, they are not exclusively explanations for misfortune or mechanisms of conflict resolution and social control. They are also powerful instruments of reaffirmation and reinforcement of the local principles and relations of domination and inequality, to which those who are dominated may adhere either due to the effect of hegemony or because they themselves are potential victims of similar accusations.

This phenomenon gives rise to uncomfortable questions of a scientific, ethical and political nature which should not be avoided when we examine legal pluralism: Is it correct to use cultural relativism as an assumption for discussion when people's culturally recognised rights are not, strictly speaking, a cultural but a political phenomenon, i.e. a codified result of mutable correlations of forces and domination? Is it reasonable to stimulate practices and principles of legal pluralism when these do not merely weaken modernist hegemonies and ideological domination at the global level, but also strengthen relations of domination and hegemony at the local level? Should state legal and judicial action protect local and historically imposed inequalities, or should it strive for equity amongst citizens? Should legal practices and decisions that breach the constitutional and human rights of citizens, against their will, be socially and politically accepted (and endorsed)? What can and should be done in order to prevent them?

The answers I would give to the above questions are hopefully evident throughout this chapter. However, as a foreigner with no decision-making power whatsoever over such matters, I believe it is more important for me to formulate these questions and encourage their careful consideration than to try to answer them myself.

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# Negotiating Order in Post-War Mozambique: The Role of Community Courts in Redressing Unsettled Wartime Conflicts

*Victor Igreja*

## Introduction

This chapter deals with the ways in which war survivors, judges and traditional healers in central Mozambique have engaged in complex negotiation processes to settle serious crimes that were committed during the civil war (1976-92) between the Frelimo-led government and the rebel movement Renamo. It focuses specifically on how such negotiations have taken place in community courts and the consultation rooms of traditional healers. The negotiations developed by judges, litigants and traditional healers reiterate the idea that "it is better to accept a painful past than to deny or repress it" (Todorov 1999: 18). The negotiations held by the war survivors also suggest the importance of focusing on what Aquino de Bragança and Jacques Depelchin (1986: 34) referred to as "pending problems", which the Frelimo-led government tried to suppress by enacting the amnesty law shortly after the end of the civil war.

During the peace negotiation process (1990-1992) between the Frelimo government and Renamo, brokered by Mozambican and foreign individuals as well as Christian religious groups, the issue of justice for the serious crimes committed during the civil war was not considered. The negotiators and the parties in conflict decided that justice was a serious impediment for the peace negotiations and could endanger the sustainability of the peace agreement. Thus the issue of serious human rights violations was silenced (Igreja 2008).

On 4 October 1992, the former adversaries signed the General Peace Agreement (*Acordo Geral de Paz – AGP*). Ten days later, the Frelimo government enacted Amnesty Law no. 15/92, which prohibited any court in the country from prosecuting individuals that had allegedly committed war crimes. This law did not take into account the rights of the war survivors to demand justice for the serious violations and crimes they had endured in the war. The law was also neglectful of cultural diversity in respect of the interpretation of violent experiences and of what was required both to forgive and forget the past and to actively engage in securing justice for violent crimes. Already during the 16<sup>th</sup> and 17<sup>th</sup> centuries, surveys conducted by the Portuguese authorities in the centre of Mozambique (Feliciano and Nicolau 1998), commented upon by Manuel Moreira Feio (1900: 11), had clearly noted the complexity of the systems of justice in the region. "I have already stated that the natives have their own legislation as well as courts and procedures," Feio concluded. "Thus, one should not think that among these people there is no sense of justice and that one form of government or another may be imposed upon them with impunity and without restriction – or one tax law or another, any norm regulating their civic relations, or any other repressive system, or that, with the application of punishment, it may be possible to regenerate or transform their gentile customs."<sup>1</sup>

While some aspects regarding the local conceptions of justice and techniques of conflict resolution observed in the past century have changed as a result of the violent encounters with Portuguese colonialism and postcolonial attempts at radical transformation of society (Alexander 1997; Igreja 1997b; Kyed and Buur 2006), other aspects of local justice and ethics of reciprocity have persisted. For example, among the people living in central Mozambique, the ethics of reciprocity determines that violent conflicts which culminate in a person's murder cannot be forgiven or forgotten before being redressed in legitimate institutions of resolution.

In my opinion, the amnesty law constituted a formal and practical obstacle to a more comprehensive peace building and development process. Yet the irony of the Mozambican peace process and democratic experiment is that the official authorities that opted for the amnesty law were also unable to leave the past behind, as the law envisaged. Instead, during the first ten years of peace and multi-party democracy, Frelimo and Renamo members of the national parliament systematically appropriated the official silence to wage fierce political battles wherein memories of the violent past were used as the principal weapon (Igreja 2008). These wars of memory clearly demonstrate the importance of promoting the resolution of crimes committed during the war, as a means to allow normal social life to resume, and so that a public order negotiated and accepted by all may prevail. This thesis is supported by the initiatives that took place in the local villages post-war, and by the violent confrontations in the

<sup>1</sup> This was a follow-up study that had been previously conducted in 1883 by the then general secretary of the provincial government, Joaquim da Cunha (cited in Feio, 1900).

national parliament. Although some war survivors, as well as judges and traditional healers, have informally mobilised to create justice for some of the ignoble crimes committed during the war, the amnesty law has negatively influenced the processes of conflict resolution in the post-war era – particularly in traditional or community courts. This is because the traditional or community judges, more than any other community authority, are very conscious of the need, within a pluralistic society, for each group to “accommodate in its own normative world the objective reality of the other” (Robert Cover, cited in Minow et al. 1995: 125). They are aware that trials of wartime crimes constitute a violation of the normative world of the Mozambican state – i.e. of the amnesty law. For this reason, in their negotiations with war survivors, judges often tend to exercise restraint in an attempt to keep such conflicts out of the court, and to promote reconciliation without truth. Only exceptionally do the community judges actively adjudicate serious wartime conflicts.

In order to grasp the complexities involved in the negotiation processes of creating justice for wartime conflicts in community courts, I will first present a succinct analysis of the theoretical debates about amnesty laws and their role in the resolution of civil wars. I will then attempt to move beyond the limitations of these debates, by means of approaches that consider multiple conceptions of political power, the plurality of justice mechanisms, and subjectivity and agency in cultural contexts. These approaches pave the way for the description of legal pluralism in Gorongosa over time, and for the presentation of a dispute about serious crimes committed during the Mozambican civil war which was brought before a community court in Gorongosa. In this case, the resolution process intersected state laws and local cultural values, and involved institutions of justice and health. I conclude by arguing that the threat to public order and safety which derives from the intricacies of properly redressing conflicts related to serious war crimes requires the Mozambican parliament to revoke the amnesty law. This revocation would send a strong signal to the Mozambican society that the rule of law is not being built on foundations of injustice and crimes. The revocation of the amnesty law could contribute to the increased legitimacy of the state and non-state institutions in Mozambique.

### Amnesty Laws, State-Society Relations, and Legal Pluralism

Amnesty is a legal norm that state authorities can use for dealing with the legacies of a violent past. The utility of amnesty in post-conflict countries is a matter of fierce debate in the field of transitional justice. These debates shift between critical and cautious positions (Villa-Vicencio and Doxtader 2003). Martha Minow (1998: 5) considers the type of amnesty that thoroughly precludes any form of official accountability on the part of alleged criminals as ‘an unacceptable offence’, because “inaction by legal institutions means that the perpetrators prevailed in paralysing the instruments

of justice”. In contrast, John Dugard (1999: 1001), who considers that amnesty is no longer accepted on the international level, is nevertheless cautious about amnesties, arguing that “in some situations, amnesty may still offer the best prospect for peace.”

Although these two positions are valid – one asserting against amnesties and the other suggesting pragmatism – both are based on state-centric approaches to law and justice systems. This is a clear limitation. They presume that the state monopoly over the establishment of amnesty laws automatically generates impunity in post-war societies. Formal legal approaches in transitional justice processes have failed both to move beyond the old and limiting ‘ideology of legal centralism’ (Griffiths 1986) and to seriously consider the positionality and performativity of culture in shaping the resolution of serious war-related violations and crimes. As a result, very little is known about how war survivors and their traditional community institutions engage in serious struggles to attain justice in postconflict settings.

In the context of debates on political centralism and power in society, Michel Foucault suggested that the analysis of the relations of power should “necessarily extend beyond the limits of the state” (Rabinow 1984: 64). In line with these debates, Joel Migdal (2001) developed a model of ‘state-in-society’, which puts forward the “idea of thinking about society as a web or *mélange*, rather than a pyramidal structure with the state’s rule-making mechanisms at the apex” (Migdal 2001: 36). The basic implication of the state-in-society approach is that “the state is not the endpoint of some evolution of political forms, but only one modality of concentrating and representing human agency that always entails alternative, even rival, forms” (Greenhouse 2002: 6).

Systematic ideas about alternative and rival forms of legal power in society were equally developed within legal anthropology, particularly on the subject of legal pluralism. Debates on legal pluralism centred on the reconceptualisation of the relations between law and society; these debates enhanced the recognition of cultural, political, legal and religious pluralism in many societies, which give rise to ‘semi-autonomous social fields’ (Moore 1973). In this chapter, I do not discuss in depth the scholarly debates on legal pluralism. For my purpose, I combine the approach of ‘state-in-society’ and the idea of an existing, corresponding ‘semi-autonomous social field’ (*ibid.*) to analyse how justice is created and negotiated to redress wartime abuses and crimes in an official context of blanket amnesty law.

According to Moore (1973: 720), “the semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it”. This conceptualisation offers interesting tools to think “about the possibilities of domination through law and of the limits to this domination, pointing to areas in which individuals can and do resist” (Merry, 1988: 890). Thus, an important issue to address, in a study of how justice for war crimes is created in semi-autonomous social fields, relates to “the ways the conceptual and practical boundaries of legal recognition and legal jurisdictions draw on and contribute to repertoires of signs by which cultural



identity is recognised and contested in the broader social landscape within and beyond the law" (Greenhouse 1998: 63).

Although legal pluralism is a structural feature of post-civil war Mozambique, I argue that it is important to pay attention to the different forms of interactions between law and cultural identities. This is because justice for wartime abuses and crimes must be negotiated and created in community courts to acknowledge experiences of victimisation. In the absence of resolution mechanisms that allow memories of experiences of victimhood to be transformed into a state of survival, both on an individual and collective level, victimhood can become indelible to identity. Legal recognition through traditional justice is also necessary to reinforce a sense of belonging to specific cultural identities that contest the will of the centralising state on matters of wartime abuses and crimes. Language is another important conceptual tool to grasp the multiple interactions and struggles in community courts, since it is also through language that cultural identities are formed, enacted and transformed through dialectic interactions with multiple forces in society (Mertz 1992: 423).

Anthropologists have not systematically focused on the study of the complex forms that legal responses and processes of recognition and contestation of cultural identity take in post-conflict societies. Yet lately there has been a growing recognition that the conceptual tools of legal pluralism can enlighten the study of state and traditional forms of justice in such societies. The most recent studies on the role played by traditional legal institutions in countries undergoing transitions from a violent past have analysed the so-called hybrid legal response, the defining feature of which is the state-driven amalgamation of aspects of formal and informal legal institutions. Some examples of hybridisation include the *gacaca* in Rwanda (Huyse and Salter 2008; Sarkin 2000), TRC in South Africa (Wilson 2000) and *adat* or *lisan* in East Timor (Burgess 2006). One general commonality of the post-conflict features of *gacaca* and *adat* or *lisan* is the active intervention of state institutions (and occasionally international institutions) that bureaucratise procedures of traditional justice and attempt to scale them up from ethnic-village levels to entire countries and transnational spaces. These interventions can be seen as innovative, since the hybridisation of legal orders and procedures creates the possibility of legally dealing with the magnitude and vast array of wartime crimes (Huyse and Salter 2008).

The problem, however, is that this bureaucratisation of tradition creates a misleading idea that traditional justice mechanisms per se cannot peacefully litigate cases of serious offenses created by modern warfare. A strict focus on either official legal responses or state bureaucratised traditional justice mechanisms fails to account for non-state complex processes ignited to create justice in transitional societies dominated by state amnesty laws. These complex processes intersect culturally embedded legal adjudications with issues of subjectivity and agency. Yet when thinking about agency, there is a need to consider that, unlike Western secular ideas of agency that regard 'intent' as the monopoly of human beings alone, the analysis of agency in non-Western societies is consistent with the idea of "plural formulations of agency"

(Greenhouse 2002: 23). In some of these formulations, 'intent' derives from a diversity of sources, including religious agents (Asad 2003). Spiritual agency can be thought of as the intent of transient spiritual forces to generate purposeful action through (but not exclusively) human beings. However, the spirits' power and intent to drive action cannot be totally dissociated from the needs and agency of their human hosts (Igreja, Dias-Lambranca and Richters 2008; Masquelier 2001).

Anthropological studies demonstrate that, at the end of the civil war in Mozambique, the spirits of the dead emerged and created social spaces for war survivors to safely deal with deeply unsettled conflicts (Igreja and Dias-Lambranca 2008; Igreja et al. 2008). These studies provide indications about different dimensions of the ethics of reciprocity, in which some spiritual agents are seen as part of "struggles to enunciate calls for justice" (Mueggler 2001: 9; see also Rosenthal 2002). The role of spiritual agents in creating different subjectivities, legal languages and action needs to be taken into account in order to understand the meaningfulness of the local struggles against impunity through traditional courts in post-civil war Gorongosa.

In the following sections, I briefly focus on the dynamics of violence of the civil war and some of the characteristics of legal pluralism in central Mozambique. This provides the context to analyse the resolution of war-related conflicts in community courts.

### Wartime Offences, State Impunity and Pressures to Adjudicate

Gorongosa district was the epicentre of the protracted civil war (1976-1992) between the Frelimo-led regime and the rebel movement Renamo. The district was divided between areas controlled by Renamo and by Frelimo. Between 1981 and mid-1985, Renamo had almost complete control of the entire region of Gorongosa. The war brought all kinds of horrors: forced conscription of young men and women to fight in the war (Igreja 1997a; Schafer 2007); physical and psychological torture; mutilation of human bodies; killing of men, women and children; betrayal among family members that led to the murders of kin and neighbours; destruction of villages; and famine. Although the war was fought all over the country, the rural areas were the most affected by civil war violence.

One of the most traumatic forms of control exerted by Renamo was a practice known as *gandira*. *Gandira* was a military-logistic strategy involving forced labour by the men and women living under their control and by those they kidnapped from Frelimo-controlled villages. The practice was also associated with family separations, rape and sexual slavery of young girls and adult women (Igreja 1996; 1998b). Despite the extreme violence that characterised the war zones controlled by both Renamo and

Frelimo, social life prevailed (Lubkemann 2008). With different degrees of insecurity, people continued to work in their fields, to get married and divorce, to participate in Christian religious services and to search for cures provided by traditional healers and for conflict resolution mediated by traditional chiefs or by soldiers. Within the war zones, people also conducted different kinds of small business. However, suspicion of one another and betrayals with very traumatic consequences permeated social relations. Violent experiences left profound unsettled conflicts among the families and in the communities in general, which did not disappear with time (Igreja 1997b;1998a).

The amnesty law did not succeed in forcing war survivors into quarantines of silence and oblivion, as it had envisioned. Civil war-related disputes still shaped relations between war survivors in central Mozambique long after the war. Some of these survivors brought their serious divisions and conflicts to the traditional courts to find solutions and closure. Initially the community judges refused to deal with these cases, because they were aware that they lacked a legal mandate to settle them. However, they also felt overwhelmingly pressured by the war survivors to find peaceful resolutions that actively revisited the horrors of the civil war. In order to understand why some war survivors ignored the amnesty law, inducing the traditional judges to adjudicate wartime offences, and to understand why the judges changed their response, it is necessary to outline the features of legal pluralism and their individual and collective implications in Gorongosa.

### Legal pluralism in Gorongosa over time

Gorongosa society is founded on patrilineal kinship, polygyny and an agricultural system of production. People live in a vast territory made up of various scattered villages.<sup>2</sup> The management of the territory is under the responsibility of a traditional chief known as *nhakwa*<sup>3</sup> and his subordinates, who operate in parallel with state structures. The traditional chiefs ascend to power through family inheritance. The chiefs in Gorongosa have secular and religious responsibilities to safeguard the ancestral land and to organise the people within their polity.

From a historical perspective, traditional authorities in Mozambique cannot be understood without an analysis of the metamorphosis brought about by Portuguese colonialism, the Frelimo-led liberation war, the Frelimo-led post-colonial state and its short-lived Marxist-Leninist revolution, the civil war between Frelimo and Renamo, and the current politics of pluralistic democracy. Various academics have extensively written about these multiple trajectories (Alexander 1997; Buur and Kyed 2007; Geffray, 1990; Lundin and Machava 1995; Sachs and Honwana-Welch 1990). What is of

<sup>2</sup> This section is based mostly on my longitudinal participatory research and my observations of how some of the characteristics of the court proceedings changed over time (1997-2010).

<sup>3</sup> The Portuguese colonial administrators called them *régulos*.

interest here is to reiterate that in the aftermath of Mozambique's independence in 1975, the Frelimo-led government attempted to impose a new political, economic and cultural order by, inter alia, banning the structures of traditional chieftaincy and their system of conflict resolution. This postcolonial Marxist-Leninist political project failed, and in the middle of the 1980s, the Frelimo-led government initiated a cycle of reforms which culminated in 1992 with the promulgation of Law no. 4/92, termed the Law of Community Courts. Following political reforms in the post-civil war period, the Council of Ministers adopted Decree 15/2000 of the *Autoridade Comunitária* (Community Authority) in an attempt to establish formal mechanisms of articulation between the state and community institutions.<sup>4</sup>

In Gorongosa, legal pluralism is characterised by the presence of state, traditional and Christian religious norms. The state justice system is represented by the district court, police, prison and, recently, the office of the general prosecutor and the office for the assistance of children and women victims of domestic violence. With the exception of the police, the state justice structures are located only in the district capital. This means that, in many villages of Gorongosa, traditional legal authorities resolve the majority of family and community disputes. In spite of the existence of Law no. 4/92 of the community courts, the non-state mechanisms of conflict resolution are not limited to the one described in this law.

According to my long-term empirical research, there are no major differences, in terms of their respective *modus operandi*, between what used to be called traditional courts and what are now designated as community courts. One exception is the practice of presumption of innocence, which until the mid-1990s was practiced in the various traditional courts, according to my observations. This was done through the clapping of hands every time the plaintiffs and defendants made their exposés, which emphasised the idea of equality of the conflicting parties before the court, and of the unpredictability of the results of the court proceedings. This practice is now less systematically used. Often, the procedure is based on the presumption of guilt: the plaintiff is placed in the position of being right even before the court proceedings begin. The similarities between traditional and community courts are partly related to the process of the constitution of the latter in Gorongosa. When the community courts were created, various judges that had been active in traditional courts, or their relatives, were mobilised to join the newly created courts. In some villages, there are both community and traditional courts and sometimes they compete or form alliances for clients. This competition, which can be both positive and negative, also derives from the clients' own strategies to have their conflicts settled according to their personal interests. Hence I will use 'traditional courts' and 'community courts' interchangeably.

<sup>4</sup> Decree No. 15, of 20 June 2000, establishes the articulation between the local state organs and the community authorities. *Boletim da República*, No. 24.

In general, human behaviour is organised by rules (*mutemo*), which include rules of the state, rules of the spirits (ancestral and non-ancestral), local customs of the living and Christian religious rules (Igreja and Dias-Lambranca 2009). These rules, which change overtime, shape the local ethics of reciprocity. The ancestors' rules and the customs of the living determine the degree of seriousness of a breach and the types of resolution that should be pursued. Cases involving blood and death, as well as cases where the victims die without justice, are considered unforgivable unless there is a resolution. The rule is that '*micero ai vundi*' (a conflict does not rot). Thus, this type of conflict requires '*ku gwanda micero*' (a complete resolution). If it remains without resolution, it develops into a state known as *mukusswe* (literally meaning 'yesterday's leftovers of porridge'). Yet when *mukusswe* is used by some of the local cultural experts during the resolution of cases involving a violent death, the expression reflects the human existential tension between "a kind of erosion that strives to bring everything to ruins" (Ricoeur 1999: 10) and the immaterial dimension of the spirits that strive to give shape and visibility to ruins-in-the-making. In this context of conflict resolution, i.e. "when persons negotiate their social universe and enter discourse about it" (Comaroff and Roberts 1981: 249), *mukusswe* means a hidden state of impunity among the living but known to the spirits. With the passage of time *mukusswe* becomes like a snare that triggers different kinds of illnesses among adults and that catches and kills the offspring of the living. As in other regions of the globe (Gustafsson 2009; Mueggler 2001), the spirits of the dead victims do not cease to disturb and afflict the alleged perpetrators and their relatives until the living find a comprehensive resolution for the conflict. Since the cultural identity of the people in Gorongosa centres on the value of the collective, issues of responsibility and guilt, particularly vis-à-vis specific types of serious violations, are as much individual as they are collective. In this regard, the target of the spirit's revenge is the family group of the individuals responsible for the past violation. This predicament, which links the state of impunity with the triggering of illnesses, reaffirms the cultural intersections of justice, health and well-being. On the negative side, it links injustice with illnesses and suffering.

Another rule holds that spirits intervene to create justice through the practice of *ku pikirira* or *ku temerera*. People in Gorongosa consider *ku pikirira* as a very dangerous curse, regardless of their religious beliefs and practices. It is believed that the enunciation of this curse unleashes an invisible process that culminates with its material realisation. As observed in various other cultures (Brennies 1987), *ku pikirira* shows that power inheres in every subject. Although this type of verbal threat is illegal according to traditional laws, people still use it to compel offenders to act in righting their wrongs.

Unlike the rules of the spirits, which require redress at any cost, the rules of the living are flexible and include different forms of bargaining during the resolution of disputes. Rules for the resolution of various conflicts vary with the different regions of Mozambique, but the general conflicts include family disputes, debt, bodily harm,

damage to property, sickness, sorcery and petty theft (Santos and Trindade 2003). There are also rules to deal with conflicts over breaches of verbal contracts, incest and public modesty taboos, sexual assault, the illicit deflowering of young girls, domestic violence and defamation. In situations where the defendants systematically refuse (*upoca*) to accept culpability, the judges transfer the case to a traditional healer (*paza*; in the plural, *mapaza*). Healers are specialised in making facts visible in cases shrouded in secrecy. While the rules of the living do not admit revenge (*ku hirindzira*), the rules of the spirits allow reciprocity to be similar to revenge: the culprit and her/his kin suffer unless the culprit admits wrongdoing and pays the required compensation. During adjudication, the traditional judges are expected to be neutral (*nhampena*).

Until the mid-1990s, the resolution of conflicts was expected in the first instance to take place in the households. When conflicts were mediated within the household, the process was known as *ku gara pance* or *ku gazicana pance* (to sit down in order to conciliate). If consensus was not reached within the household, people took the case to the traditional courts. However, in the post-war era people are often unable to reach resolutions on their own, as the war seriously damaged relations of trust in the family and the neighbourhood.

Consequently, there has been a substantial increase in people seeking adjudication of conflicts in traditional courts, which are seen as neutral places. In general, the courts are composed of judges who are older men. Recently it is also common to find young judges. Very few women work as judges. The presence of female judges is shaped by gendered cultural perceptions and divides. For instance, in cases of illicit deflowering of young girls or marriage infidelity, female judges are used to explore the details of the case in a secluded place. The case is presented separately before female judges, who report back to the court so that the resolution can proceed. Gender divisions are visibly evident: men sit on one side and women on the other. However, during the court proceedings each individual has the right to speak, regardless of gender or age. The gender bias emerges as a result of the existence of some family laws about marriage, divorce and child custody.

The courts apply a combination of procedural, restorative and retributive justice. Each individual represents her or himself. The relatives and community members take part as well. Sometimes the audience intervenes. This procedural feature of case presentation makes the mastery of rhetoric an important resource during the court proceedings. Although people's narratives of events follow a similar structure (outset, development and end), very often, as observed elsewhere, "the definition of disputes is generally determined in the first instance by the litigants themselves" (Comaroff and Roberts 1981: 130). The agency of the plaintiffs and defendants allow for a comprehensive description of the context of the breach. Research on procedural justice (the fair attribution of participation in trials) demonstrates that when disputants in a conflict are given a voice in hearings and trials, their participation generates a positive perception regarding the fairness of the procedure and the outcome (Tyler and Lind 2001). This procedural norm gives room for individual creativity in the use of

language to litigate cases. Importantly, the room for individual creativity, I argue, is central to understanding how the litigants swayed traditional judges to adjudicate wartime conflicts despite the amnesty law (Igreja 2009b).

In the majority of disputes brought to the courts, the parties involved are "primarily concerned to emerge victorious, not simply to ensure that conflict is resolved and that amicable relations are restored" (Comaroff and Roberts 1981: 130). When culpability has been established and accepted by the culprit, the judges ask the injured party to determine the form of reparation. The judges in their turn determine the punishment if they regard the infraction as very serious. Finally, the chief judge advises the parties in conflict to cultivate *ku verana* (understanding) and *ku lekerera* (forgiveness) in their homesteads. The parties are urged to shake hands in front of the court's audience. These organisational and procedural features of the traditional courts give legitimacy to the courts as local institutions. They influence the war survivors' decision to turn to the traditional courts for war-related disputes. However, the amnesty law of 1992 represented a major constraint for judges in community courts. In fact, initially the judges refused to deal with war-related conflicts except if the dispute had either of the following two features: First, if the conflict was on the brink of escalating into physical violence the community judges engaged in 'justifiable disobedience', that is, "the decision to act in accord with an understanding of the law validated by the actor's own community but repudiated by the officialdom of the state" (Robert Cover, quoted in Minow et al. 1995: 146). Second, when the spirits of the dead, particularly *gamba* spirits, constituted part of the wartime charges, the judges adjudicated the conflict because performatively the spirits, in their role as creators and enforcers of rights, have primacy over the state laws (Igreja 2010).

### Negotiating the resolution of wartime crimes: a case study

From 2001-2008, ten cases involving twenty-five alleged perpetrators (living and dead) were presented to community courts in Gorongosa. In general, the cases related to serious wartime violations and crimes involved false denunciations to belligerent armies, resulting in severe physical and psychological damage; rapes and forced marriages; illegal imprisonments in non-state prisons; torture; and assassinations (Igreja 2009a). The use of the amnesty law by community courts has deterred war survivors from approaching these courts, and explains the small number of such cases brought before community courts to date. What follows is a case study which I will use to illustrate the various strategies employed by war survivors, particularly plaintiffs, judges and traditional healers. Central is to foster the resolution of wartime conflicts, as a means to enable social life to move on and for a negotiated order to prevail.

The case was first reported to a community court in 2008 by the plaintiff, a woman, whom I will call Miquilina, against the defendant, a man, whom I will call Cincoreis. Initially, Miquilina reported this case for reasons other than the alleged torture and murders that she witnessed during the civil war. If war-related murder had been her

main complaint, the judges could have dismissed the case by referring to the amnesty law. Her case was accepted by the court due to involvement of war-related spirits. Unlike other cases, in which the spirit punishes through direct possession trance and is capable of voicing the aetiology of the conflict and the individuals involved (Igreja, Dias-Lambranca and Richters 2008; Igreja and Dias-Lambranca, 2008), Miquilina was going through dissociative trance experience. In other words, she was suffering, but the spirit did not directly speak through her body. Her main suffering was that all her six children had died. She had married and divorced three times, as the ex-husbands refused to live with a woman who lost children sequentially (Igreja et al., 2010). On one occasion, Miquilina almost died because of delivery complications. According to various traditional healers, she was suffering due to wartime abuses and crimes for which Cincoreis was responsible. Miquilina experienced this ordeal as an unacceptable injustice. As she complained, "I cannot continue to suffer because of someone else's evil deeds during the war". Miquilina sought the intervention of the community court, in order to compel Cincoreis to assume his share of liability.

She told the court that both parties were living in a Renamo-controlled area during the civil war. At the time, Miquilina was still young and was married to a cousin of Cincoreis, who had disappeared but was believed to have committed suicide by hanging himself in an unknown place. Miquilina's version of the past events was as follows: At the height of the war, Cincoreis was living in a different village, also within the Renamo-controlled area. He used to travel to other villages to conduct small business. In 1987 there was a severe drought, which brought serious famine to the region. The Frelimo government troops blocked all humanitarian aid and other kinds of assistance to the people from entering the Renamo-controlled areas. It was during this time that Cincoreis came to the house where Miquilina lived with her deceased husband and her parents-in-law. Cincoreis was accompanied by his wife, Dita, and he had brought fish that he wanted to exchange for salt. After the transaction, Cincoreis and Dita went back to their village. Some days later, Miquilina's mother-in-law, who was a traditional healer and also the aunt of Cincoreis, complained that someone had stolen her money. Initially, Miquilina was accused of stealing the money, which she adamantly refused. Then her mother-in-law accused her nephew Cincoreis of the theft, which he too denied. Miquilina and Cincoreis agreed on the sequence and veracity of the events up to this point. The major disagreements in the court emerged with respect to what ensued.

Miquilina said that, in the midst of the war, her mother-in-law reported her case to the *mujibas* (the Renamo police) in order to achieve a resolution. They attempted to capture Cincoreis and bring him to her, so that he could give back the stolen money. Miquilina also reported that Cincoreis had hidden in the bush when the *mujibas* came to his house. Apparently in an attempt to compel Cincoreis to return and respond to the accusations, the *mujibas* captured his wife, Dita, who was eight-months pregnant at the time. The *mujibas* tied her up as if she was a war prisoner and she was taken to the house of Miquilina's mother-in-law.

Cincoreis rejected this version of the events. He said that he did not run away, but that he came to his aunt's house with his wife and the *mujibas*. Miquilina said that the *mujibas* interrogated Dita regarding the money and tortured her. She said that the *mujibas* severely beat her with a bamboo stick, and broke one of her fingers. As a result, Dita's baby was born prematurely, with a broken arm, and died soon thereafter. Miquilina claimed to have witnessed all the violence that took place in the household of her parents-in-law. She said to the court that when her mother-in-law realised that the *mujibas* had severely wounded Dita, Miquilina was ordered to prepare some food for the victim. Days later, Dita passed away as a result of her injuries. Cincoreis agreed with the facts about the murder of his wife and baby, but claimed that Miquilina had not been present. He said that on that same occasion he was also severely tortured by the same *mujibas* and he, too, came close to death. At this point, there was a major standoff between the two parties about the sequence of events and the reasons behind the wartime violations and crimes. If, indeed, Miquilina had witnessed the violence and subsequent deaths of Dita and the baby, the court could have concluded that Miquilina was traumatised by the ordeal. One possible sign of trauma was her difficulty in forgetting the episode, which was illustrated by the vivid details of her account in the court. Despite these details, Cincoreis insisted that Miquilina was not telling the truth. According to him, she had not witnessed anything. Miquilina held on to her version of the episode and also argued that Cincoreis only returned to face the accusation of robbery when he got the news that his wife had been tortured and her condition was deteriorating.

Under these circumstances, it was very difficult for the judges to establish the truth. This was aggravated by the lack of key witnesses, and by the fact that the persons accused of direct involvement in the crimes were dead. The very few remaining relatives of Miquilina's former mother-in-law (and aunt of Cincoreis) lived in very distant villages. They had not returned to the crime scene since they had escaped during the civil war. However, the distance to the court for the available witnesses cannot be seen as a problem in itself. In other cases (not related to war crimes) that I witnessed, community judges had managed to call witnesses from even more distant locations.

Miquilina argued that consultations with several traditional healers had disclosed that Dita was also married to a spirit at the time of her death – that is, besides being married to Cincoreis. The healers had said that since Dita had died because of Cincoreis' robbery and his subsequent escape, the spirit punished him as a person morally culpable for Dita's tragic death. When Cincoreis felt that the spirit's punishment was unbearable to him and his family, he underwent an illicit ritual known as *ku tussirana* or *ku teta*. Through this ritual, a traditional healer negotiates with an afflicting spirit to transfer the vindication from one target to another (referred to as 'go and fight there'). In this case, Cincoreis asked the spirit, through a healer, to move into Miquilina's life, by arguing that she was the first suspect in the alleged theft of her deceased mother-in-law's money. The afflicting spirit also settled on disturbing

Miquilina's life because of her former kin relations, through marriage, to Dita's direct murderers. Miquilina stated that Cincoreis' ritual was the cause of her suffering, and prevented her from leading a normal life. She felt that this ordeal constituted a very serious and unacceptable wrong. Cincoreis refused to have "launched" the spirit of his deceased wife to ruin Miquilina's life. The judges felt incapable of formulating a judgement in the face of these allegations and counter allegations. Consequently, they referred the case to a traditional healer who uses the oracle known as *paza*.

### Intersecting interventions of judges and healers

Miquilina went to a traditional *paza* healer. She was accompanied by her mother, Cincoreis and two of the community court judges. Contrary to the behaviour of defendants in other unsettled wartime conflicts (Igreja 2010), it was remarkable to observe how Cincoreis was cooperative from the outset of the trial. He clearly demonstrated that it was also in his interest to have the case fully clarified and resolved.

The *paza* healer performed an examination to verify whether Cincoreis had launched the spirit of his deceased wife to punish Miquilina. During the examination, the accounts of each of the parties regarding the wartime abuses and crimes were repeated. However, the *paza* healer did not pay special attention to their mutual accusations. He focused strictly on whether or not Cincoreis had manipulated the world of the spirits by unjustly injuring Miquilina. The result was negative and the *paza* indicated that the previous healers consulted by Miquilina had failed to conduct a proper inspection. As a result the *paza* acquitted (*ku pembera*) Cincoreis. He determined, instead, that Miquilina's suffering was partly the result of the spirit of her husband, who had committed suicide during the civil war, and partly due to a murder committed by her late paternal grandmother during the colonial war. According to the healer, it was the spirit of the paternal grandmother's victim that had brought about the suicide of Miquilina's deceased husband. Overall, the *paza* attributed full liability for Miquilina's suffering to the tragic event that occurred in her own *dzindza* (paternal family genealogy). The healer concluded that the spirit had waited until the end of the civil war in order to seek revenge in Miquilina's body.

The *paza* healer's approach to the conflict implied that the accusation of stolen money, and the resulting deaths of Dita and her baby, ceased to be central to the resolution process. Miquilina and her mother were clearly not happy with this result, and both displayed signs of doubt. Miquilina kept insisting on the crime she had witnessed during the war and held on to Cincoreis' partial responsibility for the tragic death of his wife. Yet the healer maintained his initial diagnosis. He was annoyed when Miquilina and her mother insisted more directly that the torture and crime committed against Dita and her baby had to be considered. The community court judges kept quiet and did not interfere. The result for the *paza* was a crisis of authority. He began to make threats in order to restore his authority, reminding the plaintiffs that the district administrator, the police and the judges recognised his power to

uncover complicated cases shrouded in deep secrecy. He added that police officers sometimes offered him protection in order to perform witch-hunts in the district.

However, galvanised by the presence of the judges, Miquilina and her mother did not appear intimidated. Both insisted that the healer should consult his oracle to determine whether Cincoreis had stolen money during the war and whether the spirit of Dita was afflicting Miquilina. The healer subsequently did so, but the results were negative. His performance gave the impression that he was rather indifferent about Cincoreis' involvement in the death of his wife and baby. What mattered to him as a *paza* was whether Cincoreis had "launched" the spirit to strike Miquilina. He affirmed that, through his oracles, there were no indications that Cincoreis had performed such an illicit act. The healer accused Cincoreis only of being a male prostitute. This was a curious revelation, which no one present in the session understood. The *paza* kept laughing to himself over this revelation.

To close the case at this stage, Cincoreis was rubbed with white maize flour, to signify his acquittal. The *paza* recommended that Miquilina undergo a traditional treatment to restore her health. The case was then transferred back to the community court, where it was ruled that Miquilina should follow the recommendations of the *paza*. She was also told not to trouble Cincoreis until the treatment was completed. Only with time could it be established whether the *paza* healer was right in his ruling. Miquilina and her mother accepted the resolution and she received the treatment. The court followed up on Miquilina's treatment in order to establish the efficacy of the *paza* healer's intervention.

## Conclusion

In the case Miquilina versus Cincoreis, presented in this chapter, the judges of a local community court in Gorongosa could have addressed the standoff between the parties about certain tragic wartime events by asking those witnesses that were still available to appear in court. However, as in other cases I witnessed in Gorongosa, the amnesty law was a serious stumbling block. It was risky for the judges to try to clarify the wartime-related issues of the case, because it could lead to their being prosecuted. For example, in a similar case, the chief judge of a community court was sent to prison after the police were informed by one of the defendants that the judge had been adjudicating cases related to the civil war.

As observed by Peter Fitzpatrick (1992: 7), instead of resolving conflicts, sometimes laws "provide modes and occasions for its creation, expression and perpetuation, for sustaining one sphere of life in enduring conflict with another." The state amnesty law was enacted with the objective of sustaining the peace agreement, but it also represented a serious source of conflicts. It was a source of conflict that seriously restricted the possibility for judges and litigants to engage in comprehensive

conversations about the responsibility for the wartime evil deeds, thereby proactively participating in the development and maintenance of order in post-war society.

It could be argued that the community judges should not fear to openly adjudicate war-related crimes on the grounds that a speech by the former Mozambican president, Joaquim Chissano, during the tenth anniversary of the General Peace Agreement in 2002, gives them competence to suspend the amnesty law during their court resolutions. In this speech, Joaquim Chissano publicly admitted for the first time that "[...] divisions still persist because the communities know little about one another. The war that lasted almost twenty years created difficulties of communication and the integration between the zones and the people from all over the country." In order to reconcile the various communities in the country, Chissano suggested that "there is a need to promote meetings, interchanges, and debates between communities to openly talk about what in the past divided us and today unites us, to heal the wounds in order to build a healthier and more coherent unity" (Igreja, 2008).

Yet neither the judges nor the police have referred to Chissano's speech when confronted with cases of violations of the amnesty law. Perhaps this is because the judges and the police are not aware of the existence of Chissano's speech in 2002, or because they simply ignore the fact that it provides enough legal ground to rebuke the amnesty law. It may also be because political speeches no longer seem to have the force of law in the context of democratic consolidation, as was otherwise the case in the heyday of the Frelimo-led socialist revolution, when popular meetings were commonly held to study the speeches of the country's leaders. In the post-civil war era, political speeches and laws seem to be gradually gaining new meanings and impacts on society.

One of the ways that community court judges and litigants have been able to resolve disputes that did not clash with state authorities has been to focus on the interplay between impunity and spiritual agency, and in so doing, to refer litigants to a *paza* healer, as in the case of Miquilina and Cincoreis. The *paza* healer was competent to make a ruling, but the details of what really happened during the civil war remained unclear and unresolved. The involvement of spiritual agents in war-related cases gives expression to and reinforces the local 'semi-autonomous social field' (Moore 1973). The result is that the amnesty law is circumvented to a certain extent.

The case of Miquilina versus Cincoreis was presented in a language of rights and obligations that involved harmful spiritual actions. This language of reciprocity and the corresponding practices created a space for the narrations of tragic wartime experiences. Yet in the end it was not possible to arrive at a comprehensive resolution of the conflict. Despite the limitations that the amnesty law imposed on the community court proceedings, Miquilina did have some success in ending her suffering. When I followed up on the case, in 2009, she had reunited with one of her former husbands, had become pregnant and delivered a baby. In 2010 the baby was alive and well. This happened after she followed the traditional ritual healing. Importantly, this successful outcome was provisional. Miquilina's main affliction was not to conceive

children, but to keep them alive. Only time will tell if her baby survives. Moreover, the unsettled wartime dispute lingers on in the relationship between Miquilina and Cincoreis: the wartime crimes were never fully explained, and the court has not finally judged whether the *paza* healer was right in his interpretation of the aetiology of the misfortunes. The process that the disputing parties went through did not produce '*ku gwanda micero*' (complete resolution). The lack of full redress of the wartime disputes thwarts the possibility of establishing trustful and meaningful relations between the families of war survivors such as Miquilina and Cincoreis.

The continuous eruption of war-related conflicts nearly two decades after the General Peace Agreement demonstrates that the absence of justice represents a serious obstruction to peace, social order and development. As observed in the resolution of other wartime abuses and crimes (Igreja 2010), the community courts and traditional healers play an underestimated role in negotiating order in the former war-torn communities. The actions of war survivors and the interventions of community court judges dissipate the arguments that the resurfacing of the memories of past horrors could imperil the peace in Mozambique. The peaceful resolution of war-related crimes strongly bespeaks the need for the national parliament to repeal the amnesty law. The formal attribution of competence to courts – through an extraordinary law founded on the accumulated experiences of traditional and community judges – to deal with wartime crimes could, I argue, contribute to a meaningful and sustainable peace. It could also help to spread and enhance practices of accountability and the rule of law in Mozambique.

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## The Police Strategic Plan and its Implementation

Francisco Inácio Alar

### Introduction

The Strategic Plan of the Police of the Republic of Mozambique (PEPRM: 2003-2012) was designed to guide reforms and formal changes in the Police of the Republic of Mozambique (PRM) (MINT 2003). This white paper was designed in response to the call for public sector reforms in Mozambique. It aimed to guide the intended changes and improve the policing sector. The PEPRM can also be seen as a response to new challenges in Mozambican socio-political development, which require adjustments to PRM's strategic management perspective (Mintzberg et al. 1998; Mintzberg 2000; Bryson 2003). This chapter is a grounded analysis of the strategies proposed in the organisational and operational areas of the PEPRM, since these areas appear to be the most relevant for the envisioned changes in police management. The chapter draws on interviews and secondary data to describe the main components of the PEPRM, its current degree of success and its impact on the management of police performance. It also identifies components of the PEPRM that deal with combating corruption and with enhancing transparency, equity, accountability, efficiency and effectiveness as core components of performance management.

A key insight of the chapter is that it questions the extent to which reforms are actually possible and, above all, if they are really desired by the general political leadership – and by people within the Ministry of the Interior and the police hierarchy in particular. This is ascertained through (a) a review of the manner in which the PRM developed its strategic plan, in terms of the involvement of key stakeholders in the discussion and the selection of objectives and strategies; (b) a discussion of how realistic the objectives are; and (c) an assessment of the extent to which there was com-



mitment and political will for the proposed strategies to take place. The question of whether reforms are actually possible arises from the permanent dichotomy between formally proposed strategies and implementation processes. Some scholars explain this dichotomy as the prevalence of an informal organisational culture (Chabal and Daloz 1999) or of an act behind the *façade*, where two sets of rules govern: the ones expressed in regulation, norms and strategic plans, but not applied at all, and the ones that are unwritten, but well-known and actually used in practice. In the case of Mozambique, I argue, not only did the PEPRM have unrealistic objectives, but its implementation was also, to a large extent, inhibited by the prevalence of informal rules and lack of political will as a new government came into power.

This chapter begins by summarising the structures and main insights of the Police Strategic Plan, before assessing the implementation process within strategic areas such as organisation, operations, support services and social assistance. The chapter closes with a conclusion that highlights the main achievements and failures as well as relevant and irrelevant strategies in the police strategic plan.

## Structure and Insights of the Police Strategic Plan

To identify its main problems and propose solutions, the PRM undertook a strengths, weaknesses, opportunities and threats (SWOT) analysis. One of the core contributions of this internal exercise was to come out with the first ever detailed diagnostic of the key problems facing the PRM, which was incorporated in the PEPRM, adopted and made available online in 2003. The SWOT revealed a number of weaknesses, including lack of a clear definition of the police mission and of adequate equipment to deal with civilians. The analysis also identified external threats, such as lack of public understanding of the role of the police and a negative image in the eyes of international partners. It further revealed several internal problems, such as abuse of power, corruption, low salaries and the lack of social assistance, incentives and privileges (i.e. subsidies, medical care and judicial assistance) for police officers. The same framework raised functional problems, such as budgetary deficits and over-centralisation, a lack of specific and transparent regulations on career and wages (promotion and salary regulation), a weak control system, weak planning capacity at local level, and the absence of a performance evaluation system.

The PEPRM covers four main areas that correspond to specific programmes and their respective strategies to be undertaken from 2003 to 2012: organisation, operations, support services, and social areas. For each area, the plan indicates a set of programmes, strategies, objectives and expected results, which is in line with the strategic planning characterising the composition and steps of a strategic plan (Bryson 2003; de Waal 2005). In general, the organisational area proposes actions to improve management not only of the police, but of the criminal justice system as a whole,

including the creation of new laws, institutions and new frameworks to guide the relationships between different agencies inside and outside the police. Each area covers a wide range of specificities and branches. Within the operational area, the core purpose is to improve the operational response of the PRM to different crimes, by proposing specific measures for each particular situation.

One strategic dimension of a strategic plan is the leadership and ownership of the strategy. In this case, the study on which this chapter is based looked at the extent to which the PEPRM was a genuine national planning tool, rather than another foreign led and imposed reform strategy. The findings show that there was high involvement of national experts from outside and inside the police and the Ministry of the Interior (MINT). The strategic plan's coordinator and deputy-coordinator were top managers at the General Command and MINT, respectively, while three senior consultants were recruited among respected national experts. Only one international consultant was included. The support team comprised seven senior staff of the PRM. International donors included three United Nations agencies, led by the United Nations Development Program (UNDP), the Netherlands, Spain, Switzerland and Germany, with technical support from the *Guardia Civil*, of Spain, and the *Policia de Segurança Pública* (PSP), of Portugal (Pinto 2007: 4). The monitoring team, in 2003, included all participants, who ranged from senior officers in MINT to civil society and representatives of the donor community.

## Assessing Implementation

The following section analyses the implementation of key proposed strategies in the different areas, starting from organisation and closing with social services, where the issue of incentives is located.

### Organisation

The organisational area outlines four strategies focusing on the more general issues related not only to the police but also to the criminal justice sector as such. The strategies focus on the creation of a system of public order and security, guaranteed co-ordination in the criminal justice system, organisational and operational redefinition of crime investigation, and management improvement and modernisation. All these tasks were originally planned to be accomplished in 2004.

The stated objectives and results seem at first to indicate clear and achievable tasks with measurable indicators as suggested by strategic planning scholars (de Waal et al. 2004; Jorm et al. 1996; Mintzberg 1998; Pynes 2003). In reality they were very broad and unrealistic, and therefore not achieved. A more practical indicator to assess the commitment of the PRM to create a 'public order and security system' would have

been to define guidelines by the police as owner of the initiative. Such guidelines were not produced within five scheduled years. However, data collected in 2007 confirms that there was an on-going debate on the matter. The need to establish the system of public order and security was raised in two main police meetings in 2007: the First Meeting on Public Order and Security, held in Niassa Province on 10-12 August 2007, and the Eighth Meeting in the Council of the PRM, held in Maputo on 12-13 December 2007. However, the issue was raised with a completely new approach, namely as the design of a Strategy of Public Order and Security. This was an attempt to ignore and replace the PEPRM. In fact, the new General Command leadership of MINT, which came to power under the new cabinet in 2005, kept a distance from the PEPRM and, instead, spent a whole mandate trying to design something else. This exercise was not fully removed from improving and even acknowledging the existence of a strategic plan.

A national crime observatory, set to open in 2004, had not opened by 2007. Signs of commitment to this objective could have included at least the development of the necessary guidelines, but the PRM had not even achieved this by 2007.

The aim to create an integrated system of police information focused on ensuring operational information in real time, which could allow police to, inter alia, verify the authenticity of driver's licenses, criminal records and certificates of vehicle ownership, as well as to acquire arrest warrants, using computer databases. The deadline for the achievement of these strategies was 2007. Objectives such as the above, which involve other institutions, are difficult to achieve in the short term, as they depend on institutional bargaining capacity and the good will of other organisations. They also imply changes in existing legislation or approval of new laws. A performance driven approach (de Waal 2002a) suggests that a strategy highlights what is truly important at the same time that it balances long-term and short-term priorities. Fundamental stakeholder institutions in the attainment of this objective include agencies under the Ministries of Justice and Transportation as well as other agencies within MINT, such as the identification services. The police are not the leading institution in this network, but merely an executive body whose core function is law enforcement, not the creation or modification of law. This position of the police limits its capacity and legitimacy to influence other institutions toward more profound changes. Nevertheless, it is significant to note that the PRM, as but one of the institutions within the criminal justice network, at least thought about a shared information system.

Another PEPRM task is the creation of coordination and control mechanisms of public and private security. The public security that requires appropriate control mechanisms is the municipal police force, which falls under local government control. This force is not accountable for criminal law enforcement. Performance indicators for this objective include revised municipal police situations and legislation on private security by 2004. Once again, it is relevant that the PRM has identified these gaps. However, the power and legitimacy of the PRM to influence any change in the municipal police is limited by the fact that there is no hierarchical relation between

the two institutions. The PRM does, however, provide technical support to the municipal police force, as the latter is a new organisation established in the context of decentralisation and the creation of local government. On the other hand, the efforts to control private security companies have been undermined by the fact that some police officials own private security companies – in violation of the police code of conduct on incompatibilities (Article 79 of the Police Statute – Conselho de Ministros 1999). The weakness in control was uncovered when, in 2007, a private security company faced charges of functioning illegally. Immediately, a high ranking police officer defended the legality of the company. This defence of the company also confirmed the allegations that police officials are violating legal limitations by owning private security companies (AR 2007). This means that mechanisms to control public and private security may be available, but are embedded in a biased environment that limits their effectiveness from the start. Conversely, considering strategic management principles, which underline the need to focus on a "limited number of key priorities" as well as "[...] measurable and achievable goals" (de Waal 2005: 14-15), the proposed revisions of municipal legislation seems irrelevant in light of many other internal PRM problems. More important than changing existing laws and regulations is to improve their effective fulfilment. For instance, the Internal Security Law is embedded in the National Security and Defence Policy (AR 1997). Even taking into account that the PEPRM considers the scope of making the laws clearer, the police have shown little effort in building foundations for improvement.

The second strategy within the organisational area indicates the need to ensure coordination within the criminal justice system. While the strategy seems to go beyond the aspect of police competence by aiming at ensuring coordination in the whole criminal justice system, where the police is not the leading institution, the proposed actions seem useful since they focus on the police itself. Paradoxically, such relevant activities as the provision of legislation skills and manuals, and the improvement of the capacity of officers to draft preliminary proceedings, were not given the necessary priority. On the contrary, they were planned to be achieved at the end of the implementation of the PEPRM, in 2012.

During fieldwork, it became clear that police officers had poor, if any, access to formal documents: when officers were asked simple questions like 'do you have a copy of the police statute?' they typically replied that only the chief in the general command had a copy. Police chiefs in sub-units had no copies of the police legal framework, such as the Police Statute, not to mention the Penal Code and the Constitution, as required by the PEPRM. Some significant efforts by training centres such as the Academy of Police Sciences (ACIPOL) and Matalane Practical Police School have borne fruit, including, for example, training in human rights and substantial legislation. However, these efforts lack continuity in the workplace, because officers do not have access to significant legislative material.

Conversely, in 2007, the proposed inspection commission had not begun to work. MINT had a general inspection section that by 2007 had only one chief inspector and

his secretary. The annual implementation plan of 2007, however, indicates that 150 inspectors were to be recruited and trained, but this was not confirmed in my research.

The third strategy within the organisational area focuses on an organisational and operational redefinition of crime investigation (crime investigation police – PIC). It envisions two specific objectives: to increase crime investigation performance and to improve the organisational structure of crime investigation. It is important to note that control over the criminal investigation branch in Mozambique is under dispute. The debate on whether the investigation branch should remain under PRM subordination or be moved to the prosecutor's office, or to the Justice Ministry as during the Portuguese era, has raged for several years. The argument to detach it from the PRM is that it does not enjoy the autonomy that other judicial administrative institutions already have, leaving it exposed to operational interference from the police commander and MINT (PGR 2001: the Attorney General Annual Report to Parliament). By 2002/2003, it appeared that the idea of detaching the investigation branch from the PRM would succeed and new investigators would be recruited. However, when it came to discuss the appropriate legislation, the Interior Minister dismissed the idea, arguing that such a separation is not the case among other member countries of the Southern African Development Community (SADC). This discussion on the subordination of PIC undermines the relevant debate on policing means and technical capacity. However, some changes are in place. Internally, at least, there are ongoing reflections and studies on how to improve investigation capacity.

Regarding the improvement in the organisational structure of crime investigation, there are signs of an ongoing search for a better model. An example of this effort is an internal study entitled 'Reflection on the Situation of the Crime Investigation Police' (CGPRM–PIC 2005). At the same time, this police branch is working more closely with the prosecutors who bring the cases to court. According to the former General Prosecutor, Joaquim Madeira, interviewed in 2007, the PRM is increasingly receptive to working with prosecutors and even in allowing them to do their legal control work.

The last strategic domain in the organisational area focuses on the improvement and modernisation of management. It comprises two specific objectives: to prepare legal regulations and to adapt the PRM to the administrative organisation of the state. Data collected in 2007 show no significant achievements of the proposed objectives by 2008. Documents analysed demonstrate many delays and gaps in the design and approval of regulations to operate some already existing laws. Many benefits provided in the Statute of the Police (approved in 1999) required specific regulations which, after almost eight years, are still in the process of being developed. The statute for the members of the PRM provides that police officers have the right to free public transportation, medical care for themselves and their families, and housing (Conselho de Ministros 1999). One legitimate question is, if the PRM is failing to make existing legislation work, how does it intend to adapt or change it?

In sum, organisational strategies were formulated in a very broad way. They failed to focus on the internal improvement of the police, and the achievements depended

on the performance of other institutions. Besides limited leadership commitment within MINT to the overall strategic plan, the very broad and ambitious objectives appear as the core reason why little was achieved. The redefinition of criminal investigation is the only strategy focusing directly on a core area of the PRM. It is also in this area that efforts towards improvement are found. The strategy on the improvement and modernisation of police management failed to focus on key issues that could have produced tangible results, such as investment in modern policing technology (e.g. use of cameras and information technology). Instead, the PEPRM focused on a review of legislation and norms which, over time, have proven difficult to achieve. This, I suggest, is because it requires involvement of multiple institutions, including in many cases the parliament and the Council of Ministers. It might have been more useful to focus on ensuring compliance with the law within the police, but this aspect was set as a long-term goal by the PEPRM. The aim of modernisation remains unaccomplished.

### Operations

The second major strategic area of the PEPRM is operations. It covers some challenging tasks, such as guaranteeing the security of citizens and their property; creating a sub-system of police information; strengthening the prevention and fight against crime; improving operational planning and control; ensuring protection of land, sea, river and lake borders; and strengthening environmental protection. Other operational initiatives proposed in the strategic plan cover community policing and women and children issues.

Information collected in Maputo shows some variation in the achievement of this task. The first year (2004) of implementing the PEPRM witnessed initial signs of sound commitment. The first group of about 100 officers graduated by the Academy of Police Sciences (ACIPOL) with a higher education degree was deployed under new strategies designed by the General Commander. Following the change of government in 2005, new patrolling systems were introduced. The city of Maputo received about 100 motorbikes and bicycle patrols, which provided greater police visibility, alongside military patrols.<sup>1</sup> However, by January 2007, only 10 of the 100 motorbikes were operational, because of poor maintenance capacity. Moreover, efforts towards improvement have been undermined by the infiltration of the police command by criminal organisations (AR 2007, Pinto 2007). It seems that the police are able to analyse the crime situation and know how to improve its capacity, but decisions to increase budgets and equipment depend on international donors and the central government.

<sup>1</sup> The use of military patrols has been criticised but in this point we analyse the physical presence and visibility of security forces as one obvious indicator of purpose in crime prevention and combat.

The creation of a sub-system of police information and a database on operational information led to a debate about how to take better advantage of the information gathering capacity of the State Information and Security Service (SISE – the State intelligence) for public safety – according to officials interviewed in MINT. Mozambique has disjointed and conflicting security systems. Open discussion on this matter remains taboo. This may be the reason a police information system has not yet been created.

In 2007, many cases revealed weakness in the information service, with clear signs of high levels of infiltration of the police by organised crime. The General Commander, Custódio Pinto, said publicly in an interview with the main daily newspaper, and in an opening speech to the first Public Order and Security meeting: “We must understand that we are facing organised crime. Members of organised crime do anything to infiltrate criminal administration institutions in order to succeed with their criminal actions. At the same time, they silence those who try to stop them, so as to reduce the combative motivation of police officers.” (CGPRM 2007b – Maputo: 12 and 13 December 2007; Filimone 2007)

By ‘silencing’ the General Commander was referring to the assassination of police officers that occurred in two consecutive years as a new crime phenomenon in the country. The Director of PIC in the City of Maputo, Dias Balate, also expressed his concern about criminal infiltration in the force. His interview took place two months into his term of office, after he replaced a director indicted for the murder of suspects feared to have compromised information. For him, there are two fronts in the war against crime. The first is to uncover individuals within the crime investigation force working for the criminals and the second is the direct fight against crime. As parliamentarians put it, when questioning the Minister of the Interior in 2007:

The assassination of three police officers on Angola Avenue, among them, Mondlane and Cuco, not only has proven that there are power struggles among police chiefs, but has also uncovered the weakness of the internal information system. It is also ironic that the group comprised young and inexperienced officers. The question is, where are the skilled officers? What kind of strategy is this, of assigning newly trained officers [with less than one year in the work] alone to risky missions? (AR 2007).<sup>2</sup>

Nevertheless, the police information system is getting back on track. This is suggested by the reported dismissal of about ten high-ranking officials in 2007 and by the dismantling of criminal associations, as detailed in the 2007 partial criminal report presented during the eighth PRM Council meeting (CGPRM 2007a). According to the same report (PGR 2005 – Attorney General Annual Report to the parliament),

<sup>2</sup> Translation from Portuguese to English by the author.

the aim of creating a database on operational information was not achieved. Officials working in the Information Technology (ICT) department have also suggested that lack of trust inside the police force may undermine the establishment of an electronic database. When considering the infiltration of the PRM by agents working for criminal gangs, it is important to ask, who will manage such a database? The issue of criminal infiltration may explain exactly why the ICT department at the Central Command remains a marginal area.

Strengthening the police in the prevention of and fight against crime is one of the strategic objectives subdivided in the following specific objectives: to define and standardise adequate operational means (communication equipment, transport, individual equipment, etc); and to establish laboratories for the collection and analysis of evidence. The performance indicators are operational means defined and standardised (communication equipment, transport, individual equipment, etc.). This objective is still unfulfilled. Not only the police, but the entire country depends on international donors.

As already acknowledged in the PEPRM, the police lack power to decide the standards of equipment. Each donor prescribes and determines which equipment dealers must be used. Internally, best price is the only criterion in the procurement system, which undermines quality standards. The challenge of establishing forensic laboratories to increase evidence processing capacity is sporadic and lacks a systematic approach, since it relies on the goodwill of donors. Almost every attorney general’s annual report to parliament on the legal situation within the country complains about poor police capacity to collect evidence. This ranges from the simplest forms of evidence, such as to measure alcohol level in drivers, to more complex evidence collection techniques, such as fingerprinting and DNA testing. There is evidence that other governmental institutions have capacity to process evidence, but there is a lack of coordination between the police and such institutions. The result is a failure of evidence. Hospital labs, for instance, possess the needed research capacity for many types of evidence analysis, but demand cash and immediate payment for each test. Failure to achieve this strategic objective is one of the reasons for poor police performance: many cases are taken to trial without strong material evidence (PGR 2001: the Attorney General Annual Report to Parliament).

Strengthening operational planning and control is a generic strategy focusing on developing basic operational plans for action, and ending arbitrary arrests and other illegal actions within the police force. In order to fight arbitrary arrests and other illegal actions, the PRM plans the following activities: to increase compliance with detention rules; to improve guarantees of the rights of prisoners; and to update and control detainees’ registration in police units and sub-units. The entire process of planning and control is long term. Some plans had a 2005 deadline while others are to be implemented continuously until 2012.

Evidence on the ground indicates that the fulfilment of the above aims remains far-off. The PRM is still reactive rather than proactive at all levels and in all depart-

ments. In many cases, the police seem caught by surprise, reacting to events and not following a specific plan or protocol.

Protection of victims and witnesses is weak. In many cases, the victims themselves are the ones asked to notify suspects of hearings. Of the five police stations visited during fieldwork, the Maputo city police headquarters and the Maputo city directorate of PIC had no rooms for victims to identify suspects safely and anonymously. Interviewed officers confirmed that the country as a whole has no special rooms for protected and confidential identification of suspects. On the contrary, the police routinely confront suspects and victims together in hearing rooms as part of the interrogation method. The system is currently so vulnerable that any victim and witness protection system created now would likely be unsafe due to information security leaks within the system. Information leaks relate to corruption and lack of incentives. Interviewees in Maputo stated that they were not willing to testify because of lack of protection. Even as victims, they contact the police as their last resort.

Regarding the campaign against arbitrary arrests, the former Attorney General, Joaquim Madeira, interviewed in 2007, claimed that the police are improving. He also stated that, by 2006/2007, the police no longer refused to open its cells for prosecution inspection. The Constitution gives the Office of the Attorney General the responsibility to ensure that the police comply with all applicable laws (AR 1990 – Constitution of the Republic, 1990, Article 176(1)).

In the area of operations, the PEPRM includes strategies to improve special programmes on community policing and attendance of women and children. Through community policing, which is a new policing strategy in the country, the PRM aims to strengthen community involvement in the prevention and fight against crime. According to the PRM 2007 report, more than 2 000 community policing councils are already working around the country but their effectiveness is questionable (see also Macamo and Kyed in this volume). Community policing has not gained the necessary respect within the police. Critics from the community itself show that the community policing initiative has not yet gained complete public acceptance, as it is associated with the brutality and unlawful Popular Vigilantes of the socialist era. According to reports from communities visited in Maputo, the most frequent criticism of the community policing councils is that they attract the unemployed who are not accountable to the community. They organise illegal night patrols and harass citizens. These claims were made especially in the neighbourhoods of Hulene (Municipal District 4) and 25 de Junho (Municipal District 5), where the respective community policing councils carry firearms and conduct patrols. The central problems are lack of regulation and unclear community expectations from the councils.

With respect to institutionalisation of a programme of attendance to women and children and efforts against juvenile delinquency, findings show that this may be one of the most successful initiatives. For this area, the general command established a coordinating body under its own control. Two police stations in Maputo have special services to address domestic violence. According to the commander of one of the

police stations, the victims of domestic violence are not only women and children, but also men.

As with strategies on the organisation of the PRM, some operational objectives remain broad. However, findings show important awareness of challenging issues. This is clearly a starting point. The pursuit of the operational objectives achieved mixed results, and may provide cumulative experiences to enable further improvement.

### Support services

The third strategic area of the PEPRM comprises core support services: personnel and training; logistic and finances; international cooperation; and public relations and communications.

On the personnel and training aspect, the police training institutions have been working constantly to adjust their teaching to PRM's needs. ACIPOL, for instance, has improved its curriculum with the assistance of international partners such as the University of Witwatersrand and the Hague Institute of Social Studies (ISS), in a project co-funded by the government of Mozambique and the Netherlands.<sup>3</sup> Moreover, although many courses have been updated to fulfil operational needs, this has been done without any direct repercussions on promotions. Promotion courses are indicated in the promotion system (Conselho de Ministros 1999) as the core conditions to proceed to the next rank. However, officers who took several updating and specialisation courses complained that they did not get any promotional benefit. Courses purely defined as promotion courses do not exist. Therefore, officers expect that the courses they take as part of their training, updating and specialisation may count towards promotion.

The personnel and training area has also focused on increasing the enrolment capacity of the police academies through the gradual increase of enrolments up to the capacity established in the existing institution; setting up a new academy in the central region of the country; and preparing human resources for the new teaching institutions. The main outputs expected are an increase in new enrolments in the police training institutions and the establishment of new police training institutions by 2008. Many PRM and MINT reports and plans mention the need for two more basic police training schools in the central and northern regions of the country but there are no signs of commitment in practice. Until 2007, only one basic police training school operated in the country and was located in Maputo province. This research found no evidence of efforts to establish a new academy on police sciences in the Northern region of the country, as proposed in PEPRM.

<sup>3</sup> This information is based on my personal experience as an academic staff member of the ACIPOL directly involved in the design of the project funded by the Netherlands, and as former instructor in the Matalane Practical Police School.

Only the ACIPOL, with assistance from international partners, has established three resource centres in each of the country's three regions. The centres are knowledge multipliers for police officers. They were conceived especially for police science courses, with a distance learning component. These courses are meant to upgrade police chiefs' academic knowledge skills and to relate them to modern systems of policing. They comprise face-to-face and distance learning methods, facilitated through resource centres where the participants receive learning materials and communicate with the facilitators via the internet. The resource centres provide access to the internet and are regional meeting points for debates and knowledge sharing.

The final goal is to increase the force from about 20 000 members in 2003 to 30 000 in 2012. Many factors challenge this ambitious goal. Existing data show that, every year, 1 100 new police officers join the PRM – 1 000 constables from the basic police school and about one hundred graduates from ACIPOL (between 2004 and 2007) (CGPRM 2007a, 2008). However, a parliamentarian from the opposition party Renamo, Rahil Kan, revealed in a television debate that "on average 1 000 officers die every year [half of them as direct victims of HIV/AIDS, and about 100 are expelled or leave the PRM]. Therefore what we have is replacement of forces, and not an increase" (Langa 2007: STV).<sup>4</sup>

The PEPRM proposes to guarantee gender balance by ensuring a 30 per cent raise in the number of women in the force. In Maputo, women constituted 16 per cent of total police members in 2007 (PRM-Maputo 2007a). The Maputo city command increased the number of female police officers by 8.23 per cent (45 more women) between 2006 and 2007. If the trend continues, the agency may meet its goal by 2012.

The PRM aims at guaranteeing impartiality, transparency and efficiency in the recruitment process by establishing a public participation mechanism in the selection of officers and to prepare specialised personnel for a yet to be instituted recruitment service. It consists of taking police candidates to a public meeting in their residential neighbourhoods. Led by a recruiting team accompanied by a relatively high-ranked PRM or MINT executive, participants are asked to describe publicly the general conduct of the candidate. During fieldwork in 2007, I witnessed one of the meetings in Maputo conducted by the Deputy Minister of the Interior, José Mandra, who was accompanied by high officials of the General Command, the candidates and journalists. This representation of people gives a political shape to the recruitment probing process. The new recruiting methodology started in 2005 and, in 2006, one community failed to denounce its two candidates who were well-known criminals. The PRM only discovered the real conduct of these candidates in the middle of their police training course. In 2007, the Deputy Minister used this case to persuade the people to be sincere in the public consultation.

<sup>4</sup> This is also confirmed by data collected during the 1st National Meeting of the Public Order and Security, held in Cuamba, 10-12 August 2007.

HIV/AIDS is ravaging the police. The PEPRM includes, within its strategic objectives, the reduction of the infection rate through education campaigns and by assisting the infected and affected people. AIDS is killing and threatening the achievement of the strategic plan in its ambition to increase human resources. The number of infections continues to rise, while many are still dying. According to the Rapid Intervention Force, 90 per cent of the 35 officers who died in 2006 were victims of AIDS-related diseases. This is not peculiar to the police. The country as a whole is failing in its fight against HIV/AIDS. The phenomenon requires a deeper analysis which is outside the scope of this chapter.

The PEPRM lays down a range of strategies aimed to tackle corruption and indiscipline. While certainly relevant, the targeted activities can only be expected to bring limited results, such as ethics education workshops and updating of regulations. Only at the bottom of the list of priorities does the PEPRM propose to institutionalise a control and inspection system to fight corruption. Changing regulations and creating new departments or services have proved to be difficult tasks to achieve in the PRM. Laws without specific regulations for enforcement overload the system. The strategy to fight crime includes the need to incentivise good performance by awarding the best officers. Yet, many important incentive mechanisms have not been activated.

By proposing strategies to fight corruption, the PEPRM alerts the executives and managers about the problem of corruption. Although it seems that the country is changing the impunity of corruption, results on the ground are very limited. In 2007, about eight high-ranking officials were forced into early retirement under suspicion of affiliation with criminal gangs, but none of them faced criminal charges. A total of 102 officers in 2006 and 116 in 2007 were charged with wrongdoing – 15 and 16, respectively, in Maputo city command (PRM-Maputo 2007; CGPRM 2007a). However, these numbers do not correspond to the level of public complaint about corruption and indiscipline within the PRM. The problem in Mozambique is that, even when there is evidence of wrongdoing, a high-ranking official can only be punished by being dismissed from her/his post, while keeping all the privileges of the post, as with the officials given early retirement.

On logistics and finances, the PEPRM proposes the negotiation of an increase in the police budget; the definition of a policy of acquisition and maintenance of work means; the modernisation and decentralisation of management; and the definition of standards of police infrastructure and equipment. The PRM has its bargaining capacity limited by its lack of autonomy and, above all, its lack of prestige. Conversely, the police budget appears as part of MINT's general budget. This limits parliament's capacity to analyse what the police receive, and any efforts to advocate for increased police funding. The police's public image of mismanagement reduces its bargaining capacity. The former attorney general, Joaquim Madeira, expressed his doubt about lack of resources to improve police work, arguing that high officials in MINT led luxurious lifestyles. However, he could take no action at the time – he lost his position as attorney general before he could bring any high-ranked officials to justice. His

statement was confirmed, a year after he left his position, with the legal recognition of mismanagement and the consequent arrest of high-ranked MINT executives.

With regard to infrastructure and equipment standards, the power to decide is also limited by donor dependency and by the national procurement system, based on the lowest bid supplier. It seems that an aversion to modernisation prevails within the PRM. Efforts to create a PRM website have met with resistance, as it is feared it may become a means for leaking strategic information. With regard to decentralisation, central managers appear unprepared to delegate their power and thus to allow local level management a direct share with local institutions. This problem was raised by provincial commanders during the Eighth PRM Meeting in 2007. They demanded that their budget be included in the provincial government's common basket fund, to allow open debate for local adjustments in line with the security priorities of the province. They added that provincial commands are excluded from local supplementary financial resources, which the government sometimes finds through direct partnership with donors and, sometimes via surplus from other provincial governmental agencies. There was no response to this request.

Given the public awareness of limited working conditions, the central government has progressively increased the total budget allocated to MINT in recent years. However, since it remains in the current common basket funds in MINT, and due to lack of transparency in the debate over police resources, the increase meant for the area of policing may end up in the Migration, Identification or other agencies within MINT. The secrecy surrounding financial management in MINT facilitates the embezzlement of state funds.

Efforts to mobilise international and private sector support for the PRM have met with some success. In December 2007, a private company provided 50 4x4 vehicles to ensure adequate protection over the Christmas period. However, reliance on donors and the private sector weakens the ambition of the police to define its own equipment standards. For instance, maintenance of the vehicles is very expensive, and the police's maintenance department is unfamiliar with this new type of vehicle.

Limited data hinder the analysis of possible achievement of the objective of creating new procedures for the maintenance of police equipment. However, with the exception of sensitive equipment such as firearms and communication systems, many of the proposed efforts in terms of internal maintenance capacity are against the procurement procedures. Moreover, they contradict the new public management approach of outsourcing which the country intends to undertake as part of its public sector reform strategy.

In the area of public relations and communication, the PRM aims to improve its relations with the public and to promote its image by improving service delivery; organising training in marketing and public relations; improving infrastructure and conditions of service to the public; creating dedicated emergency telephone lines; developing civic education campaigns; and conducting public opinion surveys. To fulfil these objectives, the PEPRM proposes to enhance and specialise the PRM's public

relations at all levels, equipping them with the necessary material and human resources, redesigning the television educational programme 'For Law and Order', and producing various publications. More specifically, the PRM seeks to improve its relationship with the media by defining relationship criteria, maximising the availability of relevant information of public interest, and organising regular briefings with the media. The big challenge for the public relations service is the gap in the quality of police service provided to the public. It is hard to sell a product of poor quality. Very little is being done towards improving the infrastructure needed to provide a better service to the public. There is no new telephone line, and the line that has operated for many years is inefficient. The public sector reforms strategy, especially as regards quick-win activities, proposed that all public services create green lines for reporting misconduct. However, the police have not performed this task. Only the traffic control unit conducts civic education campaigns on road traffic rules and safety.

It is difficult for the police to undertake the proposed tasks on public image promotion while the PRM lacks basic working resources for operational areas. Managers are likely to undermine the importance of the police's public image due to scarce resources for operational tasks. The public relations department has been trying to improve the relationship with the media by promoting meetings to facilitate effective contacts and to listen to the concerns of journalists on what is missing in their communication with the police. However, poor performance and increasing misconduct by the police damage the relationship and give way to new confrontations between the media and the police.

### Social assistance

Social assistance strategies focus on guaranteeing the provision of social assistance to police members and on reactivating the social services of the PRM. The PEPRM proposes a set of initiatives to improve the capacity of the social services and sets out a range of legal frameworks for wider social benefits to police members. It also proposes a sub-system of support to the social services and medical assistance to the PRM by building pharmacies and medical assistance units. The greatest ambition relates to the creation of a social security system. This will require the development of social security packages specifically for PRM members, together with the appropriate financial institutions. It is also necessary to mobilise PRM members to join packages, for example through advertisement.

At least in this domain, the task of reactivating social services has been achieved and is already operating through a contributor system. Both general staff and police officers are subject to a compulsory monthly deduction in their salary for social services. Although, in the statistics of the PRM, the social services (CGPRM 2008) show a significant amount of funds spent in social assistance to police officers – particularly the permanently disabled, widows and orphans of AIDS victims – officers interviewed complained about lack of transparency in the distribution of such benefits.

The medical assistance sub-system for the police appears to involve the double exploitation of police officers: existing PRM clinics and pharmacies charge more than ordinary public hospitals. The Police Statute (Conselho de Ministros 1999) guarantees the right to free health and medical care for police officers and members of their immediate family. Because the PRM failed to fulfil this right for more than eight years, the General Command decided to include the police in the general public servants medical system, which requires further contributions. Under this decision, police officers have to pay a monthly health care contribution from their salary, all the while knowing that public servants' health care is not efficient. In practice, officers are paying for services from which they do not benefit. When they go to police clinics, they have to pay more than ordinary people do in the public hospitals. There are cases in which MINT will pay for medical care, but the criteria are not clear.

The creation of a social security system still remains an aim, and not yet a reality. In any case, it would have been more relevant to improve the existing social security mechanism – e.g. ensure that all members enjoy state rights such as housing, medical care, compensation in case of occupational diseases, timely payment of pensions, a transparent system of promotion) rather than creating a new social security system with costly mechanisms. Another challenging task is the proposed creation of rest and entertainment centres.

## Conclusion

During the first two years of implementation of the PEPRM, there were active efforts and high expectations at the various levels of the police command and in the Ministry of the Interior. This period also witnessed high expectations within society at large, as attested to by public debate in the media. This was fostered in part by the dissemination of new guidelines to police units and to ordinary citizens through the community policing councils. The approval of an operational guideline (Measures for Permanent Use) by the General Command, in 2004, also sent a strong message about the commitment to carry out the PEPRM, according to police officers interviewed in Maputo (CGPRM 2004 – NEP01/CGPRM/GC/2004). This guideline evoked the need to comply with the strategic plan by indicating a range of actions and strategic measures in the management of police stations, organisation of patrol groups, shifts, composition of managerial staff, and the deployment of new graduates. It also determines the need to equip police stations with the necessary legislation. A pilot strategy, consisting of seven police stations in the two neighbouring cities of Maputo and Matola, was implemented through the deployment of officials trained in police sciences (bachelor and honours degree) by ACIPOL to work as police chiefs side by side with the longer serving ones. The results of such strategic shifts started to produce significant changes. In the same year (2004), ACIPOL also graduated its first group of cadets.

Another achievement in the first period of implementing the PEPRM included an increase in community policing councils around the country, albeit without a formal institutional framework to guide operations and their relationship with the police. Even so, during 2004 and 2005, the then head of the Central Public Relations Department, Nataniel Macamo, was a leading figure in attempts to renew the idea of community policing and to improve its framework. In 2008, a national conference was held that aimed to clarify the role of community policing and to discuss the development of a legal framework.

All officers interviewed revealed that many of the recommendations in the above-mentioned General Command standing order (CGPRM 2004) on the deployment of officers graduated by ACIPOL and other higher education institutions were abandoned under the new general command in 2006. This was the corollary of the changes that started in 2005 when a new government came to power. The general command set up a new deployment strategy for the graduates from the ACIPOL. The new measures rejected the initial idea of experimental modernisation in the capital of Maputo, sending new officers to remote districts instead, allegedly 'to gain experience before assuming serious responsibilities' (CGPRM 2007b).

These changes were a direct reflection of the overall shift in the implementation of public sector reforms. Interviews with high and low-ranked MINT officials and with members of the police indicate that, although some improvements suggested in the PEPRM have been achieved, there are now contesting opinions on whether the strategies of the PEPRM remain valid or if there is a need to replace them. Many high-ranked officials declare that the PEPRM remains valid but practice shows a different reality. The new Director of Public Order and Security (from 2005), when interviewed during the First National Meeting of Public Order and Security, in August 2007, said that the scope of the PEPRM was valid. However, the same meeting revealed that the new MINT and general command managers were busy trying to design a so-called 'Strategy for Public Order and Security', which seems to be another police strategic plan that does not take into account the already existing framework.

The academic insight arising from my analysis of PEPRM confirms the scepticism expressed by Mintzberg (1998) about the applicability of the rational perspective, which is postulated by strategic management. The problem is that strategic management presupposes the possibility to forecast the environment, to predict challenges and, therefore, to select the right strategy. In this process, a lot of bargaining is required between strategists, managers and several – and sometimes divergent – stakeholders for the suggested strategy to succeed.

In the Mozambican context, one critical challenge arises from the change of managers in the police. In other words, a change from managers who identified themselves with the PEPRM to new managers who rejected whatever had been proposed by the previous leadership. This is part of the policy discontinuity that shape public management in Mozambique. Instead of taking account of previous strategies and existing plans to improve organisational performance, new leaders are more concerned with



the projection of a personal public image of innovation. If it had only been a question of rejecting the way objectives and strategies are defined in the PEPRM while accepting the PEPRM as a main planning guideline, then it could have been possible to establish a strong team working towards changing strategic formulations within the wider scope of improving the police. However, this was not the case. The PEPRM in theory provides flexibility for adjustments. Nevertheless, in the implementation process, this is not visible. This pattern confirms that informality prevails in the public administration.

This chapter has shown that the PEPRM defined some unattainable objectives, at least in the short-term. Many objectives and planned activities are unrealistic because they require intervention by and the commitment of other institutions. At the same time, the police did not actually take the necessary first steps, such as to set up guidelines for how other institutions could participate. The police did try to define priorities through PEPRM, but as shown in this chapter, few priorities were carried out in practice. This is the result of a combination of factors, ranging from a poor definition of priorities to little commitment to the PEPRM. The poor definition of priorities points not only to ambitious objectives as such, but also to an organisational culture shaped by informal practices, such as secrecy of information, corruption and infiltration by criminal organisations, which have influenced the lack of priority to certain areas of the PEPRM. Furthermore, the justice system, as the primary network in which the police is embedded, requires urgent reforms to foster improvement in the rest of the public sector in terms of transparency, accountability and, above all, the sense of justice that citizens need to feel in practice. However, the justice system reform has poor resources and experiences significant delays (see Public Sector Reform report by UTRESP 2006). This is another important factor behind the failure to effectively achieve the improvements suggested in the PEPRM. Finally, the lack of policy ownership resulting from donor dependency contributes to the poor implementation of plans such as the PEPRM.

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# Vigilante 'Justice' and Collective Violence

*Vitalina do Carmo Papadakis*

## Introduction

The problem of lynching in Mozambique has been discussed for several years. Reality has shown that the problem is far from being solved, since new cases of lynching are reported regularly, particularly in the provinces of Maputo and Sofala, with the authorities proving incapable to understand and staunch the problem. The approach to this topic is complex, inasmuch as the reasons behind the lynching are not clear. However, on the whole, this phenomenon occurs as a means to achieve 'justice' for a crime or as an act of purification against a 'witch'. In either situation, the intention of those who participate in the action is to maintain order within the community.

This chapter focuses on the issue of lynching as a form of collective violence, in the context of vigilante justice, and as an expression of social disenchantment with the different state mechanisms for conflict resolution and public safety. In the Mozambican landscape, this means discussing the phenomenon as a reflection of citizens' loss of trust in justice institutions, and of the unstable relationship between the state and society, which can be seen as a result of the state's incapacity to guarantee safety and justice. The objective is to address not only the act of lynching itself, but, particularly, the causes giving rise to it as well as the responses by state justice and security officers in fighting and preventing it.

I begin this chapter by discussing the reasons for the lynchings. I then describe the process of lynchings in Mozambique, before analysing the way in which citizens see the justice system in Mozambique. I also discuss the criminally culpable act of lynching, as well as the responsibility of the participants. I then discuss the government's role in combating the evils that motivate lynchings.

My reflection on the phenomenon in question is based on bibliographical research, national television reports, newspaper articles, articles on the Internet and my experience as a criminal judge.

## Lynchings and their Motivations

The expression 'taking justice into one's own hands' means to personally take revenge for an act which the judiciary is responsible for punishing. If the act of doing justice is carried out by a community that summarily executes a criminal, supposed criminal or witch doctor, it is said to be a lynching.<sup>1</sup>

Lynching is understood to be the murder, by an enraged crowd,<sup>2</sup> of a person (or group of persons) who has, or is suspected of having violated socially pre-established rules. Lynchings, as a form of collective violence, are a response to citizens' demand for exemplary punishment of an alleged offender that can serve as an example to the community.

The reasons for lynchings and the ways in which they are carried out vary over time and space. However, what motivates a crowd to carry it out is almost always a conservative motivation. That is, an attempt to impose exemplary and radical punishment on whomever (person or group) presumably acted against the values and norms that sustain the way in which social relationships are established and recognised (Martins, 1996:12, 13), i.e. in a manner classified by society as being violent.

As far as popular justice is concerned, Foucault (2001:45) noted that the 'judges' are not neutral toward the parties to the proceedings (offended and accused); that the judgement is carried out without a preliminary enquiry, i.e., without hearing the parties based on a standard of truth and on certain notions of fairness and unfairness; and, lastly, that the decisions do not have authority, since they are not based on State power. Although the author is referring of popular justice, the characteristics described above are similar to those of lynching. José de Sousa Martins (1996:11-12),

<sup>1</sup> The expression 'lynching' derives from a summary procedure of judgement and execution known as the 'Lynch law'. This name originates in the history of a North American farmer from Virginia, Charles Lynch, who led a small organisation in 1837 whose purpose was to judge and punish bandits and sympathisers of the English colonisers, particularly in New England (the name given to the six American States corresponding to the English colonies established in the XVII century: Maine, New Hampshire, Vermont, Massachusetts, Rhode Island and Connecticut), during the struggle for American independence. Currently, lynching is defined as the murder of an individual or small group of individuals, generally by an enraged crowd, without judicial proceeding.

<sup>2</sup> "A crowd gathers people who have no ties other than the occasional, fortuitous and accidental tie stemming from an action guided by a passing objective, although shared through a fleeting sense of identity and companionship, a kind of brief and transitory community" (Martins, 1996: 17).

states that lynchings are based on often hasty or sudden judgements in which the accusers, who are almost always anonymous, pass judgement moved by emotion, hate or fear, and without the participation of a judge as a neutral actor. These are judgements which have no possibility of appeal, because the punishment imposed on the accused is executed immediately.

This punishment is linked to the atonement of guilt through the application of a sanction, as a reaction to an evil deed which may or may not be a crime. Generally, the penalty or punishment meted out to the accused consists in causing her/his death or physical abuse, regardless of the severity of the act and of whether or not guilt is determined. In vigilante 'justice', not only is the punishment not proportional to the crime, but there is also the risk that the victim will be confused with the criminal and that an innocent person will be punished.

Contrary to justice carried out by the courts, which is rational, has pre-established rules and limits imposed on its exercise, vigilante 'justice' is emotive and spontaneous, and the penalty for the accused is not previously known. It all depends on the emotional state and fear of the 'justice seekers' as a result of the act of which the victim is accused.

### Cases of Lynching in Mozambique

There are no official data on cases or attempted cases of lynching in Mozambique. The information in this chapter was taken from several available sources, particularly the works organised by Carlos Serra (2008; 2009) on lynchings in Mozambique, newspapers, national television reports and articles taken from the Internet.

By analysing these sources, it can be concluded that lynchings are carried out fundamentally by groups of people with some instability and discontinuity – in other words, they do not come together to lynch for community self-defence reasons, but rather are groups that exercise the typical violence of an anonymous crowd, dispersing afterwards and probably never meeting again.

In Mozambique, these phenomena occur where violence or insecurity are more widespread, and arise as a form of revolt against crime and the inefficiency of the justice and security systems. They may also take place in contexts where witchcraft is seen as the root cause of the misfortunes that occur within many families. Sometimes victims are identified as being responsible for crimes related to theft, robbery, child abduction, trafficking in human organs, human trafficking, child abuse, rape, and homicide; other times, they are accused of witchcraft. The latter case occurs, as a rule, when difficulties faced by families are justified on the basis of supernatural forces.

In cases of accusations of crime, the victims are mostly young or adult men and rarely reside in the neighbourhood where the lynching occurs. When the accusation

is one of witchcraft, the victims are mainly elderly women, and normally belong to the family of the lynch mob.

The cases that were recorded occurred under the watchful eye of the crowd – children, youth and adults, men and women – and almost always with very similar characteristics. The victims are normally apprehended and tied, doused in gasoline and slowly burned to death. Sometimes tyres are placed over their bodies before they are doused in gasoline and set on fire. There have been cases in which people were beaten to death or buried alive, or even beaten and then burnt with grass and kerosene. Death is not only a way of preventing evil deeds from being repeated, but also a form of inflicting suffering, as punishment for having committed them. For José de Sousa Martins, mutilations and burning of bodies are rituals to dehumanise people whose conduct is socially inappropriate (Martins, 1996:20).

A notorious and gruesome fact is that the death of a lynching victim, as a solution to a problem, has become so 'natural' that even children witness the act. This is seen as a moment of fun, a happy event, because it is the death of a 'thug'. Sometimes, when the police arrive the victim is either already dead or dies soon thereafter. The crowd takes control of the deviance, meting out, on the alleged criminal or witch doctor, punishments focused on the body and which may entail death. This behaviour reveals that the enraged crowd forgets the most basic of human rights – the right to life – and leads one to think that societies have regressed in their evolution, since this violent way of punishing criminals or alleged criminals is nothing new. The French courts were already doing it in the 18<sup>th</sup> Century. Describing the death of Robert Damiens, a Frenchman sentenced to death for having injured Louis XV with a knife with the intention to kill, Cesare Baccaria (2008:7-8) brings us the following images of the conviction:

Tried and sentenced to death on March 28, 1757, he was transported in a cart to the Grève square, where a decapitation platform was erected. The weapon used in the crime was placed in his right hand, which was burnt with sulphur fire. He was then tortured with red-hot tongs and bits of flesh were ripped from the fleshiest parts of his body (chest, arms, thighs and calves) and molten lead, boiling oil, burnt pitch, as well as wax and molten sulphur were poured over the wounds. Finally, his arms and legs were tied to four strong horses so that he could be quartered. The horses pulled for an hour but were unable to pull him apart, so two more horses were added, but in vain. The judges had to allow cuts to be made in his joints to facilitate the task, and finally one of the horses was able to pull off his left leg; his last arm was only pulled off at night, and Damiens died. His mutilated body was reduced to ashes, which were then thrown to the wind.

The cruelty used to achieve a single goal, carried out in public and transforming it into a dramatic show, demonstrates the similarity between Damiens' death and a lynching.

In Mozambique, lynching almost always occurs in public spaces in urban areas when the allegation is of a criminal nature, and covertly in rural areas when there is accusation of witchcraft. Lynching is always motivated by a feeling of lack of security, which is caused by an increase in and the sophistication of criminal activities, the ineffectiveness of the judicial courts, the absence or scarcity of police in the neighbourhoods, ineffective community policing, and witchcraft. This situation tends to be aggravated by the precarious conditions of the neighbourhoods (i.e. they are poor, with narrow streets and no lighting) and by the lack of faith in institutional justice.

According to Oliveira et al. (2002: 142), in the lynching phenomenon there appears to be a "clear mismatch between the European and classic standard of restorable institutional justice, based on the assumption of the possible rehabilitation of the criminal, and punitive popular justice, based on the perception that all deviances in order and collective coexistence must be punished." According to the authors, popular justice "is based on the assumption of vendetta, on the notion of the restorative or compensatory social function of revenge, particularly in cases of violent crimes" (ibid.).

When a suspect is caught, the people feel that it is useless to hand her or him over to the authorities, only to be released immediately thereafter, and believe that the punishment meted out by the community is more effective. This concept is what underlies the sudden motivation for collective violence, which is, thus, a popular manifestation of the lack of faith in the state's mechanisms of justice and public security. The population does not believe in the police and in the justice system, either because it feels that they do not know how to deal with crime properly, or because the criminals are not properly judged. It could also be because justice officials and magistrates are perceived to be complicit in bringing about the disorder in the first place, particularly in terms of the law they apply, the formal procedures they impose, and the suspicions of them being involved in bribery.

### Distrust in the Justice System

The climate of constant suspicion and blame-laying between the police and the courts – as a result of the different methods, visions and strategies for action in the context of justice enforcement and/or in maintaining public security and public order – has contributed to the distrust in the formal justice system. For the police, the courts are also responsible for the increase in crime, since criminals and detainees are released on their orders. The courts, in turn, accuse the police of arbitrary detentions, since very often there is insufficient evidence to justify the detention or continued detention, or they blame the police and the public prosecutors' offices for the poor quality of their investigations, which leads to the release of the accused due to lack of evidence, and not because of their innocence. Very often, the courts and the police are also in

disagreement because they use different legal languages. Stereotyped visions are built and, with these, attempts are made to disqualify the 'other'. Thus, whenever an alleged criminal, condemned by social conscience, is set free without legal proceedings being brought against her or him, or without having been acquitted, a climate of apparent impunity is created which discredits the justice institutions. Consequently, people stop trusting the police and the courts. Associated with this reality is the idea that police action cannot be trusted because, whenever called, the police claim that they lack material and human resources. This is apparent by their absence or scarcity, or by situations where the responsibility of the investigation is shifted over to the citizens. Thus, in areas with strong potential for conflict or violence, people become very angry with the state institutions in charge of guaranteeing public order and tranquillity.

Community policing, created in 2000 through the Ministry of the Interior with the objective of preventing and fighting crime, was also criticised by the population, with members accused of being criminals, of colluding with criminals or of being indifferent to the waves of crime in the neighbourhoods (Ministry of the Interior 2005). Members of community policing units depend on police action, and whenever they detain and hand a crime suspect over to the PRM (the Police of the Republic of Mozambique), the citizens expect that such suspect should be kept in prison and be criminally prosecuted. For the citizen, there is certainty of guilt, and the state is left with the responsibility to apply the punishment. When this does not happen, the responsibility to punish may be taken over by the masses, as described earlier.

In sum, there is popular dissatisfaction with the state justice system due to the difficulty in citizens' access to security and justice. This is ultimately caused by social, cultural and economic problems, poor dissemination of laws to the intended recipients, and difficulties in interpreting the justice system (Serra 2008: 132). No one is willing to wait a long time. Everyone wants to feel that justice has been served, so that they can go on with their lives. They do not allow the author of the crime, particularly if s/he is known, to live alongside them without some form of retribution.

### Accountability of Those Participating in the Lynchings

Mozambican criminal law does not acknowledge lynching as a crime. The act of lynching is punished depending on the outcome, such as homicide,<sup>3</sup> in its consummated, frustrated or attempted stage, since there is intent to kill, and with cruelty.

<sup>3</sup> The crime of murder using torture or acts of cruelty to increase the suffering of the victim is punished as an aggravated crime (article 351, circumstance 2 of the Criminal Code). For the act to be considered in the aforementioned article, the torture or acts of cruelty should not be necessary to carry out the crime, but rather are aimed at increasing the suffering of the victim (Osório 1924: 70).

Since the act of lynching always carries some legal type of crime, by law, their perpetrators must be sanctioned. Article 28 of the Criminal Code considers that the "criminal liability for the lynching shall fall solely and individually on the perpetrators of the crimes and contraventions." Thus, the responsibility for lynching, as a crime of homicide, would fall on each of the participants in the lynching and not on the crowd involved, always taking into account the lesser or greater participation of each of them.

The people involved in the lynchings can only be held criminally liable if they are identified, which is not easy, given the "culture of silence and fear", the "complicity between members of a specific neighbourhood" and the "difficult police coverage" (Ser-ra 2008: 143). Very often, when the police arrive at the location the victim is already dead and, because it is an act carried out by a crowd, identifying those responsible is never consistent. The residents of the area frequently opt for omission, indifference, vague justifications, or simply the 'law of silence'. They state that they did not witness the lynching or simply refrain from mentioning it. Instead, they focus on the act that allegedly justified the punishment, highlighting that the person who was lynched was responsible for the crime in the neighbourhood.

The participants are aware that the act is forbidden, and they do not confess to being responsible for it. The majority strategically hold that they were spectators, thus admitting that they witnessed the act, but not that they participated in it.

Whenever they are identified, participants in a lynching are brought to justice. The prescribed penalty is normally 20 to 24 years of imprisonment for a consummated crime and 16 to 20 years for a frustrated one. This underlines an extreme contradiction in the views of citizens: on the one hand the state punishes people who participate in lynching very harshly, yet on the other, the 'real criminals' sometimes receive light sentences, allowing them to be released earlier than expected, and at other times are simply acquitted due to lack of evidence.

People expect justice to intervene to mediate the conflict, and not to oppress them. In other words, justice is expected to prevent and reprimand crime and, in so doing, to help avoid lynchings.

### State Mechanisms of Justice and Security

The fight against crime and, consequently, the guarantee of public safety are quintessentially the responsibility of the State, through its police, public prosecutors' offices, courts and prisons, equipped with the necessary human and material resources and with properly trained and decently paid staff.

In reality, the police are not present in all neighbourhoods, they do not answer all calls and do not deal with all types of crime. They focus their energies on large-scale crime and on crime in the city centre, pushing 'petty' crime and crime in peripheral

neighbourhoods – where access is difficult and lighting poor or inexistent – into the background. Sometimes they act only after a crime has been committed (theft, murder, sexual abuse, mistreatment, rape) and do not contribute to the prevention of crime.

Although the people turn to the police whenever a crime is committed, they believe that laying a criminal charge is a waste of time, since no investigation will be carried out, and if it is, the culprit will never be found, and they only do it because they have no other choice. However, the police are not always indifferent to the crimes of which they are aware. Sometimes their efforts are unsuccessful due to lack of material, technical and human resources; lack of staff trained in criminal investigation; and lack of forensic medicine services<sup>4</sup> and laboratories for criminal investigation,<sup>5</sup> well-equipped and able to serve the entire country. When police action is ineffective, interventions by the court are practically useless, and nobody is held accountable for the crimes.

The work overload that results from an insufficient number of public prosecutors prevents the courts from taking on the full responsibility of a criminal investigation. Moreover, the lack of judges with knowledge of investigation techniques, and the lack of articulation between state institutions (police, public prosecutors' offices, courts, Ministries and their directorates, registry offices, etc.) and between the State and public and private institutions (banks, telephone companies, etc.) contribute to an increasing inefficiency in the formal justice system, which favours impunity and increases distrust.

Justice is perceived to be slow, most people do not understand the logic of its operation and they do not have the financial resources to hire a lawyer to take on a case. The relationship between citizens and the employees of formal justice institutions is at times hostile, and this may lead to despair and psychological distress, particularly when the cases do not reach a satisfactory conclusion. Witnesses have absolutely no protection, and therefore people are not willing to bear witness, for fear of retaliation.

It has been evident, for a long time, that the prison system is unable to rehabilitate offenders and that, once released, they return to the society that rejected them and very often resume their criminal activities. Mozambique has overcrowded prisons, with no health or hygiene conditions. There are reports of violence carried out by prison officers, situations of violence between inmates, and the escape of prisoners in custody or those already convicted. This scenario shows that the criminal system in Mozambique is a long way from being able to guarantee the public order and tranquillity so desired by its citizens.

<sup>4</sup> Only one was established, which is operating out of Maputo Central Hospital.

<sup>5</sup> Forensic Science Laboratories were only established and are in operation in the cities of Maputo and Beira.

## Conclusion

I believe that lynching is not something that happens because of a predisposition for it. Rather, it is a spontaneous phenomenon that results from a situation of insecurity, where it becomes irrelevant to prove that the victim of a lynching is or is not responsible for the situation of insecurity in a given place.

According to the publications edited by Carlos Serra (2008; 2009) on lynchings in Mozambique, whereas people generally disapprove of lynchings, some participate in them and others, while not participating, view the acts as a way to fight impunity. The trial and execution of vigilante 'justice' is quick, unlike state justice, which is slow and has no guarantee of a satisfactory outcome for the victims.

People believe there is a breach in the social contract with the state, which does not guarantee their safety and tranquillity. State law and institutions are seen to protect the criminals more than the victims, conferring more rights to the former than to the latter. Hence, lynchings in this context arise as a type of behaviour and a means for collective expression of a society's discontent with the actions of the formal justice institutions and the police. The demand for a secure environment and for the state to be prepared to resolve conflicts is legitimate, although it is sometimes associated with a failure to understand the logic behind the way the state operates. In carrying out its duties, the state is governed by rules that limit its actions.

However, it can also be asserted that the Mozambican criminal system does not contribute as it should to put an end to lynching. For example, investigations are not always carried out after a lynching, and when they are, they often fail to identify those responsible. Moreover, just as innocent people can die in lynchings, the police may also arrest someone who is innocent, because it is very difficult to identify those responsible when many people are involved, let alone if there is a crowd.

Those carrying out the lynching – and in general the members of the community where they live – recognise the need to have a police force that maintains public order, security and tranquillity, an independent institution that passes judgement impartially and equitably. The problem lies in the relationship between the security and justice institutions and the citizens, who expect swift and expeditious justice, i.e. one that is accessible to all, that is quick and has solutions that meet their demands and concerns.

Preventing lynchings does not come down solely to sanctioning the performers of such actions, but also involves guaranteeing effective public security, capable of preventing crime.

Finally, it is important to mention that, as already stated by Sinhoretto (1998:15), justice meted out by lynch mobs is not, in any way, a justice system parallel to official justice, since society does not want to take over from the state in administering justice.

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## Spirits at the Police Station and the District Court

Carolien Jacobs

### Introduction

*I have to beat my wife because of the bad spirit  
that is in her. Otherwise the spirit will cause  
illness in me.*

These words were spoken by one of the parties in a conflict case that was being heard at the police station of Gorongosa town, in Central Mozambique. The man had sent his wife back to her parents because he was fed up with the bad spirit that possessed her. The man and his family-in-law agreed that the wife needed to be treated by a traditional healer in order to get cured. A conflict appeared, however, over who should pay for her treatment; the husband or his family-in-law. The spirit, the husband argued, acted violently against him and he was afraid to fall sick because of it. Therefore, he felt he had the right to send his wife back to her parents and to get divorced from her. Moreover, he ignored any responsibility for his wife and refused to pay for her treatment. Instead, he argued that his family-in-law had to pay, since the spirit allegedly originated from his wife's ancestors. The parents-in-law conversely argued that it was the husband's obligation to pay the traditional healer, as he was still the formal 'owner' of the woman. According to tradition, he was responsible for paying his wife's expenses. The police was consulted to mediate the conflict and to advise the parties on how to (a) get properly divorced, and (b) find proper treatment for the wife to be cured from the spirit.

This example shows that spirits are not only significant in the disputing processes that take place within the 'traditional realm' of traditional healers. Spirits can equally

be at the core of disputing processes when these are heard within the secular or formal rooms of dispute resolution, such as the offices of the state police. In the case above, divorce was required due to a spirit possession. The parties asked the police for advice on who should pay the traditional healer to establish the exact nature of the spirit and the right remedy for dealing with it. During the hearing, the police officer at first was hesitant to acknowledge the spirit. However, when he sensed that the dispute could not be overcome without consulting a traditional healer, he decided to send the parties to one. He also ordered the husband to pay for the treatment, thereby recognising the family-in-law's claim that traditional norms require a husband to pay for the expenses of the wife he 'owns'. In doing so, the police officer rejected the husband's claim that the spirit originated from an ancestral spirit of the woman. Had he recognised this claim, the woman's family, as the 'sender', would have had to pay. When the officer ordered the parties to go to a traditional healer to 'heal the woman's illness' he left open the question of whether the illness had a spiritual or a natural cause.<sup>1</sup> He also did not require the parties to inform the police about the result of the consultation with the traditional healer.<sup>2</sup>

This chapter explores how 'spiritual arguments' are used at various stages of disputing processes in Gorongosa town. What is usually at stake is an explicit reference to spirits and the guidance they provide to people in the material world. Spiritual arguments can be seen as a specific use of traditional religion that helps people to explain, justify, or defend their behaviour and 'allocate responsibility' (Gluckman 1972). Importantly, this chapter shows that spiritual arguments are not only used within the traditional realm. They also manifest themselves within the secular 'rooms' of dispute resolution (Galanter 1981) that are provided within the statutory framework of justice. In Gorongosa, secular rooms principally include the police station and the district court. Spiritual arguments are usually not given a place in official documents of the police or the court, but rather seem to be silenced. In everyday practice, however, state officials – such as police officers and court personnel – have to find ways to deal with people's invocation of spirits in disputing processes. In this chapter, I provide several ethnographic examples that illustrate the way spirits are mobilised in disputes that are heard in secular rooms, and at what stage of the disputing process

<sup>1</sup> The policeman did not speak the local vernacular and the woman and her family spoke only little Portuguese. The husband – proficient in both languages – acted as translator. When the policeman ordered the man to take his wife to a traditional healer, and thus pay for the treatment, my assistant and I noted that he erroneously translated that his in-laws should take the woman to the healer. The incident reveals much about levels of inequality in regard to access to justice, but it is not within the scope of this chapter to discuss this aspect.

<sup>2</sup> As far as I know, the people did not return to the police with the result of the consultation. The consulted traditional healer confirmed the presence of a spirit, coming from the woman's family side. The costs of the consultation were eventually shared. Afterwards, the couple got divorced and the woman returned to her parents.

this mobilisation occurs. In the example above, it was only when the police officer acknowledged, albeit implicitly, the spiritual argument of the parties that he was able to facilitate a resolution.

Scholars have thus far tended to neglect the role of spirits in disputing processes, not least within secular rooms. This may be due to the invisibility of the non-human world in formal policy and legislation. Classical studies of tradition, for example, have primarily focused on traditional authority structures and described the customary laws that are applied by such structures, with or without the invocation of traditional healers as expert witnesses (see for example Evans-Pritchard 1937; Marwick 1952; Colson 1953; Gluckman 1955; Comaroff and Roberts 1981; Bohannan 1989). More recently, attention has been given mainly to witchcraft, considered the most 'exotic' part of traditional religion (Fisiy and Geschiere 1990; Geschiere 1997; Niehaus 2001; Comaroff and Comaroff 2004a, 2004b; Ashforth 2005). Yet others have focused on the private dealings with witchcraft, which often result in violent mobs (cf. Green 1997; Ciekawy and Geschiere 1998; Ogembo 2001; Israel 2009). In this chapter, I mainly address the ways in which tradition pervades the state's judicial structures through the actions of citizens, without the involvement of traditional authorities and explicit references to customary laws. Traditional religion does not only encompass witchcraft, but also 'spirits' in a more neutral and socially accepted sense. Gorongosa District has a nationwide reputation of being 'at the heart of tradition', and is therefore a suitable place to explore the role of spiritual arguments within non-traditional realms of disputing.

The first part of this chapter provides a short background to the fieldwork setting and then addresses the way spiritual arguments come up in conflict cases at the police station. To be able to place the police station in the wider secular context of dispute resolution, I secondly address the district court. I mainly focus on the frequent disputes that are referred to as 'social cases' by the police officers, i.e. domestic violence, child marriages, divorce and other civil cases that do not require the intervention of the Criminal Investigation Police (PIC).

The police station in Gorongosa town is probably the most frequented place by people who find themselves in conflict situations. It is therefore, as I illustrate in this chapter, an obvious place to study the role of 'tradition' in secular rooms of disputing. Thus far, research on the actual functioning of the police in Mozambique is limited. Moreover, available studies on the Mozambican police focus mainly on policing within a democratic system (see Seleti 2000; Baker 2003), police accountability (Amnesty International 2008), and community policing and vigilante justice (cf. Kyed 2009; Serra 2008; Bertelsen 2009). Usually, little attention is paid to the role of traditional, cultural, or spiritual issues in police work (one exception is Kyed 2007). This chapter seeks to fill this gap in studies of the police in Mozambique.

Based on my empirical findings, I argue that there is a lot of haphazardness in how spirits are given a place in disputing processes. Spiritual arguments are manifested in manifold ways within the state's rooms of disputing, but silenced in official

documents. Nevertheless, plaintiffs and defendants continue to use such arguments. This calls for a reflection on the position of local state officials in relation to spiritual elements within disputing. The diverse reactions that spiritual arguments provoke among both ordinary citizens and local state officials alike underline the difficulty of attributing a place to the spirits in non-traditional or secular rooms of disputing. However, the persistence of the spirits urges state legislators and institutions to consider ways to deal more effectively with spiritual arguments. Traditional norms that underpin spiritual arguments are unlikely to fully disappear. More likely, people's references to spirits will continue to play an essential role in many disputing processes. Acknowledging the role of the spirits is the same as acknowledging the reality of many ordinary citizens. If the government wants citizens to use the statutory modes of justice and ensure itself a leverage of popular legitimacy, it needs to take seriously people's arguments in disputing processes. When such arguments include a spiritual element, the government should at least take this element into consideration.

### The Gorongosa District Police Station

The *Comando Distrital da Gorongosa* is the district's main police station. On a daily basis, several people hang around the premises of the police station, awaiting attendance, either outside in the shade of a mango tree or sitting on a wooden bench in the small waiting room of the building. The threshold to file a complaint seems low: people enter in the heat of a dispute and most of them expect to be attended right away. For the population in Gorongosa town, the police station seems to be the preferred place to go with their conflicts. This choice, I suggest, is due to the speed with which people are attended and the lack of costs involved. Another explanation for the popularity of the police station might be found in the town's social structure. Having grown rapidly during and after the civil war, people no longer have as close and personal relationships with each other as previously. Abel (1979) puts such changes in the context of modern society, where multiplex relationships are less prevalent. As a result, people increasingly seek justice via those mechanisms of justice where the social ties are rarely, or not at all, taken into consideration, or where less importance is attached to maintaining social relationships.<sup>3</sup> In Gorongosa, the police station seems to be the prime representative of such a modern institution.

<sup>3</sup> The buzzing of activities at the police station in town stands in sharp contrast with the silence that usually surrounded the much smaller police station in Vunduzi, also located in Gorongosa district. In Vunduzi, the station functioned with only two police officers. One of them told me frankly, 'on some days, nothing really happens here and I sleep the whole day in the office'. The reason for this striking difference is not fully clear to me, but it seems to have to do with the presence of a strong



Apart from the Criminal Investigation Police, the 'Office for Attendance to Women and Children' was another special unit at the police station. This office is charged especially with cases of violence against women and children, and has existed in Gorongosa since November 2003 (see Mejía, Osório and Arthur 2004). For several years it was headed by a female officer. During the time of research, however, there were no female police officers in Gorongosa and this office was led by one of the male officers who had received extra training on these issues. When he was not on duty, the cases under his jurisdiction were simply attended by a 'regular' officer. The following marital conflict was presented at this office and highlights the role of spirits at the police station.

### A case of spirits at the police station – *Helena vs. Júlio*

Helena and Júlio came to the police station due to recurrent marriage problems. Helena is in her late twenties and her husband, Júlio, is some years older. They were directed to the police officer responsible for the office of women and children affairs. It is not the first time they came to the police station. The officer hearing the case summarises it as follows:

She has given birth to nine children already. Six of them have passed away [...] Each time they go to the traditional healers, they are told the children are dying because of a drug that the man has used in the past for which he did not pay the 'contribution' [...] A traditional healer has told them that the conflict will continue unless they apply a particular treatment. He is now collecting 'these things'<sup>4</sup> but she [the wife] refuses to participate. Since things are not getting any better, the woman no longer wants to live with her husband. These things are spiritual cases. What will happen in the future? One does not know and that's why she does not want her husband anymore.

The policeman emphasised the complexity of the case because of the drugs and spirits involved. When somebody goes to a traditional healer to ask a certain spirit for a service or a favour, the spirit normally has to be 'paid' because it means work

community court in Vunduzi, as well as stronger traditional structures. I am not sure whether this is indicative for the whole of Mozambique, since data on the police are rather limited. The fact that Portuguese is the dominant language at the station might be another impediment that is felt more strongly in Vunduzi than in Gorongosa town. Besides, the importance of maintaining social relations is higher in small communities.

<sup>4</sup> i.e. the sacrifices that, as part of the treatment, have to be made to the spirits for the conflict to be settled.

for the spirit. Payment can take many forms, such as the sacrifice of a chicken, a goat, and even a person. When payments are not properly made, the spirit will take its own remuneration. Although police officers often – including during hearings – expressed their disbelief in spiritual arguments, the officer in this case explicitly recounted the role of the spirit as an essential part of the conflict. After his summary, the police officer asks Helena whether she would accept going to a traditional healer. She refuses, arguing that she is tired of the whole situation and argues that the children would die anyway because of the attacks of the spirits. During the discussion, the police commander passes by. With only limited knowledge of the case, he quickly concludes that there is no problem to solve and that the couple should go to the district court to get divorced and agree on the monthly allowance to be paid by Júlio to Helena. Considering the way the officer started the talk with the couple and the emphasis he put on the problems with the spirits in explaining the case both to the commander and to me, he might have suggested to follow a different path towards achieving a solution. Nevertheless, he obeys the orders of his chief and starts to write a letter to transfer the case to the district court.

Some days later, Júlio tells me that he has been to the traditional healer to carry out the suggested ceremony for the three children, but without Helena's attendance. He feels the children are safe now. They will continue to live with their mother in a new household, separate from their father. In contrast to many other women who get divorced, Helena refuses to receive a monthly allowance from her ex-husband because, as she says, "if he provides me a house, I cannot take another husband. Every time he will come to visit us, he will want to have sex with me. I don't want any threats."<sup>5</sup> Despite the letter from the police station, they never went to the district court.

This case not only underscores the attractiveness of the police station, even for people who live outside of town, but also shows how people involved in conflicts in Gorongosa 'shop between different forums' of conflict resolution (cf. von Benda-Beckmann 1984) in rather haphazard and impulsive ways. Before going to the police station, the couple had gone to a community court. At this court, however, they could not be attended immediately and, instead of waiting, they decided to travel two days on foot to the police station in town.<sup>6</sup> The town's police station is attractive because it is always open and easy to access, as opposed to other forums of conflict resolution like the community courts, traditional chiefs and the traditional healers. Although formally not completely within the police's jurisdiction, the so-called 'social cases'

<sup>5</sup> Based on this, my assistant told me that he suspected Helena already had another 'husband'. A woman alone, he argued, would normally not refuse to receive an allowance to enable her to make a living.

<sup>6</sup> The distance was not very great, but walking with two small children they could not travel quickly and had to spend the night with relatives halfway.

constitute a major part of their caseload. Though the police normally look into such cases, at times, they are less committed. This inconsistency applies not least to the consideration given to spiritual arguments that often arise in social cases. Considering the high number of people consulting the police, however, this uncertainty apparently does not outweigh the advantages of promptness and lack of costs.

In the case of Helena vs. Júlio, it is clear that spiritual forces that were not under their control constituted an eminent part of their problem. During the first part of the hearing at the police station, the officer provided room for discussing the role of the spirit. He thus acknowledged the spiritual element, and while he did not capture all the details, he at least tried to shed light on the spiritual reality that was claimed by the disputants. The commander represented another position within the police. He did not take the spiritual argument seriously, and the officer had to obey his order to transfer the case to the district court. Due to the prevailing hierarchy within the police organisation, the commander would probably not have tolerated any objections from his inferior. Conversely, the police officer may also have acted as he did because he was split between believing, on the one hand, in the power of the spirit that was destroying the couple's home, and adhering, on the other, to the formal judiciary framework that he was trained within, which leaves little room for spiritual considerations (cf. Comaroff and Comaroff 2004a; 2004b on South Africa).<sup>7</sup>

The final intention of the police in the case above was to keep Helena and Júlio within the statutory structure of justice by sending them to the district court. But police responses might vary, as the example in the introduction to this chapter illustrates. Importantly, despite going to the police in the first place, Helena and Júlio actually ended up turning their back on the state by going to a traditional healer. They did so to be able to bring the spirit back into the disputing process, as the spirit was at the core of the problem. Only in this way could their conflict be solved in a satisfactory manner. Within the district court this would have been more difficult. However, it also implied that arrangements on the monthly child allowance to be paid by Júlio were not made. The police's intention to keep the couple within the statutory structure of justice did not succeed. This might have been avoided if the police officer had been allowed to send the couple to a traditional healer: the couple might have returned to the office with a declaration of the traditional healer. Proper arrangements could then have been made about the child care allowance and the police officer would still – to some extent – have been in control over the final outcome of the case.

This case raises the important question of what the result would be if state officials considered spiritual arguments not only while hearing the cases brought to them by

<sup>7</sup> In this case, I did not talk with the officer to hear his personal opinion, but in other cases he did share his opinion that 'among these people, these spiritual things can happen.'

citizens, but also when providing judgments. Would state law lose power or could, in fact, the opposite be the case? Since spiritual arguments are usually formulated by citizens in their own local terms, as opposed to state-legal terms, it is difficult for state officials to establish the spiritually-based truth that is claimed by citizens. Spiritual arguments refer to individuals' personal relationship with a specific spirit, which is invisible to others. Because spiritual arguments are formulated by the citizens, this might, to some extent, lead the state to lose power and control over dispute settlements, as the logic of the citizens has to be applied rather than the logic of statutory justice.

Conversely, not taking the spiritual reasoning of the population seriously might lead to an even greater loss of power and control of state legal institutions and the officials functioning within these institutions. When people do not feel satisfied with the solution proposed to them, they might turn their backs on the statutory system and employ other strategies to come to a solution. Dissatisfaction with the solutions provided by state institutions can result in using alternative paths, including non-state actors, such as the traditional healer in the case of Helena vs. Júlio. In other cases, alternative paths include the traditional authorities, who acknowledge the impact of spirits on people's behaviour and well-being. The choice of alternatives often takes place independently of the orders of state officials.

In order to achieve, maintain or increase legitimacy, the state has to be able to respond to the concerns citizens are struggling with. State law should not only conform to its own standards, but also deal with the social problems people are confronted with (see Hoebel 1942). In the colonial context, Evans-Pritchard already warned that "the European may be well advised to remember that such acts of magic, the performance of which are public enough to be brought to the notice of his office and have to be proved to have taken place, are little likely to be condemned by public opinion as illegal or immoral" (Evans-Pritchard, 1931:53-54).

Today, despite the arrival of the churches and the partial loss of tradition, things have not changed much in Gorongosa. Although the European officials have been exchanged for Mozambicans, Evans-Pritchard's argument remains valid. Public opinion still largely acknowledges the role of spirits. State officials act differently to the continuous presence of spirits in 'secular rooms', but often do go so far as to accept their presence. In the case of Helena vs. Júlio, the acceptance of the spirit was in the end rejected by the police. In the case presented in the introduction to this chapter, however, a different route was taken by the police: by carefully phrasing his sentences, the police officer hearing the case was able to engage in the spiritual reasoning of the people, but without explicitly acknowledging the spiritual arguments used. He did so by simply stating, "go to a traditional healer to find out about her illness." However, this case shows that sending people to a traditional healer is a possibility that is taken into account only under certain circumstances, and only by some police officers.

Importantly, police officers can take different directions during the course of hearing a case. This was exemplified by the actions of the police officer who heard Helena and Júlio, who in fact came from the area and spoke the local language, in contrast to some of the other officers. In the beginning he showed that he accepted the spiritual argument by subtly suggesting that the couple should go to a traditional healer: "We cannot accept whether this is real, this has to be solved by the traditional healers." However, this option was only weakly emphasised, and instead he ended up preparing a document that would transfer the couple to the district court. Putting emphasis on the role of the spirits but at the same time aiming at a state-legal procedure showed the different directions he had to consider. In many other cases, officers ignored the spiritual argument altogether. Below I address in more depth the ambivalent position of policemen between local and state-legal forms of reasoning.

### State Officials and the 'Laws from the Mango Trees'

Above, I have focused mainly on how citizens employ the spiritual argument in cases of conflict at the police station, and on what impact this has on the resolution of a conflict. The next case will shed light on the role of the police officers themselves. Apart from having to devise ways to deal with spiritual arguments raised by citizens, officers also have to find ways to make space for their own spiritual beliefs and modes of reasoning. Themselves often having been raised with the belief in spirits, police officers share with their clientele many of the same perceptions. On the other hand, they have also been trained in applying a legal-rational sense of justice. Not surprisingly, they are often caught in a position of ambivalence towards the spirits and have to decide on ignoring or acknowledging the spirits, and on accepting or eradicating them.

#### Case: *Eduardo vs. Vitória*

It is a chilly early morning in June 2008, and still quiet at the police station. A woman is hanging around nervously. Her name is Vitória. With her embroidered clothing, golden earrings and straightened hair, she seems rather out-of-place in the rural-town environment of Gorongosa. After a short wait a man turns up who – by his appearance – seems to be a good match for the woman. He is at least as nervous as she is, wears a suit and a tie with a tie-pin, and shows some pictures he has taken with his brand-new digital camera. Meanwhile he tells the officer that he is nervous and in deep problems, "like someone drowning with water up to his mouth." I know the man vaguely: it is Eduardo, a young man from Gorongosa who, despite being only basically literate, has become a successful businessman who owns an electronic equipment shop at the market and a commercial minibuss.

Eduardo's problems have been the subject of gossip in town for some time, gossip which includes Vitória. The two had a sexual affair outside their respective marriages, until Vitória's husband discovered some amorous SMS from Eduardo on her mobile phone. Her husband decided to get divorced and, following local traditional prescriptions, sent her back to her parents. Also, Eduardo no longer supports Vitória financially (as he had done during their affair), because he wants to try to 'save' his family and end his affair with Vitória. Vitória has come to the police station to demand an excessive amount of money from Eduardo as compensation (60 000 Mtn). She argues that she needs the money to build her own house and set up a business so that she can make her own living until she finds a new fiancée. She threatens to settle down at Eduardo's home if she does not get the money. Eduardo is clearly opposed to this, as he fears that conflicts will arise between Vitória and his wife. But Vitória insists, warning that if he does not agree to her demands, "I will kill and this case will become a criminal case." Eduardo argues that he is able to pay a maximum of 20 000 Mtn, but Vitória refuses. Since the two voluntarily committed adultery together, the police cannot impose a payment on Eduardo. Adultery is not a crime according to Mozambican law. Vitória continues to insist on the money because "otherwise people will die." As a result, the police officer decides to transfer the case to the district's attorney-general, who will decide on the possible payment.

After Vitória and Eduardo leave, the PIC commander – who has followed the hearing – and the 'chief of operations'<sup>8</sup> continue to speak about the case. The chief argues that the woman is dangerous and Eduardo is in danger because of that. "The woman intends to go 'up there', to the mountains, where the laws are different from our state laws." The chief is thus insinuating that the woman will go to a traditional healer in order to kill Eduardo. The mountain is home to the most famous traditional healer in the region. The PIC commander recollects how, in the past, there used to be different laws for the different groups of people. There were laws for the indigenous people and laws for the assimilated and civilised part of the population. In some ways, he would not regret going back to that time and have these laws applied again. This division makes sense to him, as it was possible to apply the laws of the people. The chief defines the practices as superstition, but seems to be very much convinced that the woman will use magical powers to kill the man if no solution is found. He argues:

Her [Vitória's] husband was married to another woman first and in order for her [Vitória] to marry the man, she killed his first wife. Her husband knew about the magic she uses and is happy to have a reason to abandon her. That's why he did not ask for the bride price [*lobolo*] to be paid back. He wanted to abandon her already before, but without having a reason, he feared being killed by her.

<sup>8</sup> The *chefe das operações* ranks second in hierarchy, right after the highest commander.

Normally, when a couple gets divorced, the husband will demand back the *lobolo* and (part of) the material costs he has invested in his wife during the marriage. This money has to be paid either by the parents-in-law, if the woman returns to her parents, or by a new prospective 'owner', such as Eduardo. However, in this case it is not the ex-husband, but the wife, who is asking for money. For the chief of operations, this break of norms indicates that there is more going on than just adultery. Thus the chief believes that Vitória will turn to the '*leis nas mangueiras*' (the laws from the mango trees), by which he refers to the spiritual world of the mountain area.<sup>9</sup>

The PIC commander is a pious Seventh-Day-Adventist and tells me that the Bible inspires him very much, both privately and when performing his work as a policeman. To him this case is especially complicated, because the Bible says that adultery is bad and should be punished, whereas the state law does not say so. The perceptions are competing in both his heart and mind and he feels it is difficult to prioritise between them.

Vitória and Eduardo follow the order of the police and appeal to the district's attorney-general.<sup>10</sup> Vitória still demands the same amount of money. The attorney finds the amount extreme, but Vitória does not give in. No agreement is reached. A few days later, Vitória moves to Eduardo's homestead. Gossip in town seems to indicate that Vitória has used evil magical powers to do so. The chief of operations is not the only one who suspects that Vitória will apply the 'laws of the mango trees.'

In this case, no explicit references were made to spirits or to the use of magical powers by the plaintiff or the defendant. Also, spiritual arguments were not raised during the actual disputing process. Rather, the police officers themselves brought up the spiritual arguments after the hearing had taken place. To the police, spiritually-based fears were thus at stake in the dispute. This case brings another dimension to the ambivalent position of police officers when consulting conflicts that involve spiritual elements. It is not only a question of taking citizens' arguments and their perceptions of reality seriously (as in the case of Helena vs. Júlio). Even when no explicit spiritual claims are made, police officers may themselves be convinced of the involvement of spiritual forces.

In the conflict resolution process, statutory authorities have to decide whether they are loyal to the state or to 'the people' (see Gould 1999 on Navajo police). Person-

<sup>9</sup> The 'laws from the mango trees' can be taken as a metaphor referring to all traditional authorities and traditional healers, who generally hold their first consultations in their yards, in the shade of a mango tree.

<sup>10</sup> One of the reasons why Vitória and Eduardo did go to the district court, where Helena and Júlio did not, might have to do with the higher socio-economic position of the former couple. People with a higher status often seemed to be more at ease at the district court. For them, the threshold to access the court seemed to be lower, whereas community courts or traditional authorities seemed to be more accessible for people with a lower socio-economic position. As already mentioned, an analysis of the access to justice is not within the scope of this chapter.

al beliefs in either a Christian God or ancestral spirits, loyalty to the people, and training in state law all influence the positioning of police officers when attending to the cases they receive. The case of Vitória vs. Eduardo reveals the ambivalence that is intrinsic to the position of local police officers, trying to find a delicate balance between 'Euromodern' and 'Afromodern' legal reasoning (Comaroff and Comaroff 2004b).

## People's Ambivalent Perceptions of Spiritual Arguments

State officials are not the only ones having difficulties in defining their position in relation to spiritual arguments. The general population also responds in a variety of ways to spiritual arguments. Although spirits are a central feature of Gorongosa's culture, spiritual arguments are primarily based on one's personal relationship with a specific spirit. The relationship with the spirit is a means to shift responsibility from the person to the spirit. Hence the person can no longer be blamed for her/his wrongful behaviour as the spirit is the one in control. Spirits are therefore invoked throughout the disputing process. In the absence of visibility or material proof, spiritual arguments can be difficult to contest or to accept. Not surprisingly, the argument provokes a variety of responses from people, who apply their own rationality in deciding whether or not the argument is legitimate.

In the following, the focus of attention is Gorongosa's district court. The material presented will illustrate the variety of ways in which the population reacts to the invocation of spirits in disputes and the different positions they take with regard to spiritual arguments.

### Spirits at the district court

Trespassing in the Gorongosa National Park, usually in combination with illegal hunting or poaching, is repeatedly dealt with at the district court. A typical pattern can be discerned in most of the cases in this category: a group of several men is caught while hunting in the National Park. Often they have spent already several days in the Park before being caught and – according to their confessions – before being able to make off with significant loot. The alleged loot is low. Most confess that they have been able to catch only one warthog, a common animal in the Park. Generally, the men do not have firearms. Some use machetes, knives and traps.

The interrogation usually begins with the judge asking if the person is unaware that hunting in the Park is forbidden. As this is common knowledge in Gorongosa, all trespassers admit that they know this rule. When asked why they decided to go there, the common answer is 'suffering at home'. Since the trespassers are usually caught red-handed, there is no way to deny the accusations. Based on the Forest Law and its regulations, fines for illegal hunting in the National Park are heavy, and can amount

to up to several thousand Euro.<sup>11</sup> It is impossible for local people to pay such amounts. Hence, the fine is usually converted into several months of labour in the Park, which provides the Park with a steady flow of labourers.

A case in July 2008 at first seemed similar to other 'hunting cases'. A group of eight men was tried for illegal hunting and poaching in the Park. Although they had spent two days there before getting caught, the men – individually interrogated – all maintained they had been able to trap only one warthog altogether. The case became particularly interesting when the first of two brothers in the group was being interrogated. The brothers were considered leaders of the group. They both admitted having carried a weapon.<sup>12</sup> The first argued that he had bought the weapon "to have protection at home." When his brother, Joaquim, was interrogated, it became a little clearer what this protection entailed. He was asked why he had bought the weapon, and answered:

It is tradition of our house. My grandfather used to have a weapon, so we had to have one as well. For a long time we did not have one, but then there was a bad spirit and we consulted a traditional healer who told us we would need a weapon to make that bad spirit leave. So we cleansed our life but it brought us little success.

The same evening I discussed the case with a friend, who knew about the court case.<sup>13</sup> After I explained the issue at stake, he laughed and said that the brothers have a long-standing reputation as hunters. My friend even accompanied them on several hunts during the civil war, when the National Park was a common destination for many men in Gorongosa desperately searching for food. To him, the spiritual argument was just an excuse to defend wrongful behaviour. Later however, I discussed the case with my research assistant, who showed more understanding for Joaquim's spiritual argument. Before becoming a Zion pastor, my assistant was working as a hunting medium, which means he used to 'have' a hunting spirit (*mzimbu*). He explained that hunting spirits require a weapon and that the weapon cannot 'stand still', but must be used. However, this does not mean that the 'owner' of the hunting spirit can hunt in whatever way he wishes. Certain rules have to be obeyed to satisfy the spirit and a ceremony has to be carried out to request the spirit to show the places where the

<sup>11</sup> The *Lei de Florestas e Fauna Bravia* has been issued as law no. 10/99, the regulations as decree no. 12/2002.

<sup>12</sup> It was a weapon of '*fabrico caseiro*' – homemade or traditional. They said they had bought it from a trader and that it worked with aluminium and gunpowder.

<sup>13</sup> Hearings at the district court were generally public and open to everybody, and I therefore felt I could share this case with my friend. I did not usually discuss cases at the police station with others, as these were only open for me as a researcher.

animals are hiding. Once in the Park, certain 'rules of tradition' have to be obeyed. To my assistant, Joaquim's defence was completely acceptable. When there was no weapon in the household, the hunting spirit of the family could not feel at home and other spirits could infringe on the spiritual stability in the family.

These two different reactions to Joaquim's allocation of responsibility to the spirit highlight the variety of attitudes towards spiritual arguments. These range from scepticism to acceptance. Spiritual arguments are not understood and accepted in similar ways because they are based on an individual's personal relationship with a specific spirit. Such a relationship is difficult for others to observe as it reaches into the spiritual, invisible world. Scepticism towards the spiritual argument is therefore rife not only among state officials, who have been taught to apply the law without room for tradition, but also among the wider population.

How did the court officials react to Joaquim's spiritual argument? Did it affect his sentence? In the district court, the argument was not taken up by any of the court officials during the hearing. The members of the hunting group were all condemned to pay a fine of 18 200 Mtn. Since Joaquim and his brother were considered the leaders of the group, they had to pay an even higher fine of 28 200 Mtn. Obviously all the men were unable to pay. The fine was converted to obligatory labour in the Park for periods of four and six months, respectively. Reading the minutes of the process afterwards, I did not find any reference to the spiritual argument brought up by Joaquim. The reaction of the judges in this case was indicative of the general position of the district court.

Although I attended several cases at the district court in which the defendants referred to the spirits, this was never taken up by the judges as a convincing argument. In only one instance did the defendant's official counsel take up the argument in his plea to reduce the punishment. The spiritual arguments that came up during the hearing of cases were never traceable in the minutes of court hearings. A kind of 'sanitisation' of the court documents took place: the documents did not show anything irreconcilable with the legal-rational thinking that has become such a pervasive part of state justice since the neo-liberal reforms from the late 1980s. The officials have been trained to act in such a way as to ensure that the process corresponds with the logic of Euro-modern legal thinking that began to gain ground in Mozambique already during colonial rule, as is also the case in other African countries (see Moore 1992; Comaroff and Comaroff 2004a). Consulting the court documents alone will leave invisible the fact that the spirits are frequently present in the court room.

Even though spiritual arguments were denied as valid arguments in the disputing process, the officers at the court would sometimes show sensibility to local traditional rules and ideas of justice. This sensibility only came to the fore, however, when the verdict had been given and as the verdict was being explained in a locally understandable terminology to the parties involved. Thus after reading the laws applied in sentencing, the district judge often fell back on customary rules to clarify the sentence and the law applied. "We take profit from all religious and traditional norms when

suitable", the district judge explained to me. In other instances, the application of the local norms did not come to the fore during the court session but was present in the background and led to verdicts that slightly deviated from prescriptions in the law. Good examples of this were to be found among domestic violence cases. According to state law, domestic violence should be strongly condemned, but "if we would apply the law, almost all men in Gorongosa would have to be imprisoned", said the district judge.<sup>14</sup> Therefore, in most of the domestic violence cases, the violating husband was sentenced to prison on probation only.

Despite being silenced during the hearings and in the documents, the tradition-based arguments were thus present in the secular disputing room of the state, yet only implicitly influencing the proceedings. Demian (2003: 106) finds a similar situation in the formal courts in Papua New Guinea: "custom is excluded until the conclusion of the case", but kept apart from the actual court proceedings. She suggests that this is "possibly because it [custom] carries 'too much' moral weight to be of use to magistrates trying to achieve straightness between litigants" (ibid.). However, in the case of Gorongosa, I suggest, court officials profit from the moral weight attached to tradition by making reference to tradition when explaining the sentence to the people involved. The reason for not adjudicating the tradition-based arguments seems to have less to do with moral weight and more with the personal opinions of state officials as well as with the incompatibility of the spiritual argument with statutory law.

## Conclusion

In this chapter I have addressed how people in Gorongosa refer to the spirits as a way to explain, justify, or defend their behaviour in various stages of disputing processes. I describe the reference to the spirits in the context of conflicts as 'spiritual arguments'. A key insight of this chapter is that spiritual arguments are made not only in the traditional realms of disputing, where they are most 'at home', but also in secular rooms of disputing such as the police station and the formal court. To avoid losing out as a locally relevant mechanism of dispute resolution, state officials are urged to find a position in regard to spiritual arguments. But spiritual arguments are complicated and officials' dealings with them are faced with ambivalence. In many cases, spiritual arguments are based on an individual's personal relationship with a specific spirit. It is therefore difficult to assess the validity of the arguments.

<sup>14</sup> There is an allusion here to 'cultural defence' as it has been discussed by various scholars in multicultural settings (cf. Golding 2002; Renteln 2004; Demian 2008). Within the Mozambican context, however, the cultural or 'spiritual defence' is not used by a small minority, and therefore I do not take up the issue here.

State officials often hesitate to explicitly address and take into consideration the spiritual arguments of plaintiffs and defendants. They have been trained to apply state law, which excludes any consideration of spiritual arguments. State officials are left with their own individual decisions to attribute a role to the spirits and thus acknowledge what citizens might consider an essential aspect of their dispute. However, incompatibility with legal-rational thinking alone cannot explain why state officials are reluctant to deal with spiritual arguments. Even the general population is divided on how to assess the validity of spiritual claims. A multiplicity of reactions prevails among ordinary citizens. Some understand and are willing to acknowledge the spirits. Others claim that references to the spirits are simply, yet unjust, ways to disclaim responsibility for someone's behaviour. This variety of views further complicates the position of state officials: not only are spiritual arguments at odds with the law they are supposed to apply, but they are also disputed among the population. State officials – who are themselves part of the population – also differ in their attitudes toward spiritual arguments, and the same officials may even react differently in different cases, sometimes understanding and accepting, at other times not. Such diverse reactions were, it should be noted, regardless of state legal prescriptions. By acknowledging the spirits, the officials try to meet the demands of citizens, thus gaining legitimacy and strengthening their position as a relevant disputing mechanism.

Although state officials do not consistently acknowledge the spirits, and in fact frequently silence their role, people continue to refer to the spirits in the state rooms of disputing. Why do they continue to do so? The cases in this chapter illustrate that, despite divided public opinions, many people view the spirits as the right explanation for their behaviour. Spiritual arguments seldom provide any benefits or success, and appealing to spirits can therefore hardly be seen as rent-seeking behaviour. This seems to indicate that spiritual arguments are based on the sincere convictions of the people involved. The despair of Júlio and the stoicism of Helena during my talk with them indicated their sincere conviction that a vengeful spirit was taking the lives of their children.

For conflicts with a spiritual element, it is crucial to establish whether a person's individual relationship with the spirit is indeed directing her or his behaviour. The question, thus, is whether spiritual arguments are valid and whether responsibility is rightly shifted from the individual to the spirit. A unanimous answer is unlikely to be obtained. Cases will have to be studied individually to establish their validity. The persistence of spiritual arguments shows that spirits will not disappear from the secular rooms of disputing, and people will continue to make reference to the 'invisible realm' (cf. West 2005; Obarrio 2007) and use 'spiritual arguments' in conflict cases.

Those state officials who do not consider spiritual arguments seriously run the risk that people seek non-state alternatives to achieve what they regard as a satisfactory solution. The nature of spiritual arguments means that alternative solutions are likely to be found outside the state's justice system. As I have argued in this chapter, however, it is unlikely that fully ignoring the spirits will make them fade out of the state

justice rooms. Since police intervention is costless and swift, it is likely that people will continue to go to the police station as a place of first redress. In this light, it may be advisable for state officials to critically reflect on their position as mediators in disputing processes and find consistent ways to deal with spiritual arguments.

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# 'New' Non-State Actors in the Plural Legal Landscape of Mozambique: The Contested Role of Community Policing

*Helene Maria Kyed*

## Introduction

Since 2001, 'Community Policing' has increasingly become a significant component of the legal pluralistic landscape in Mozambique. This development is not unique to Mozambique. Community policing (CP) has enjoyed widespread popularity on a global scale since the late 1980s, as a philosophy and strategy of 'democratic policing'. Irrespective of its many manifestations, CP values active citizen participation in addressing problems of crime in collaboration with the state police. Likewise in Mozambique, CP councils were formed to build community-police partnerships which, it was promised, could help reduce crime and foster a more transparent and publicly accountable police service.

This chapter explores how the CP model launched by the Mozambican Ministry of Interior (MINT) since 2001 has been appropriated in practice. It asks what CP has meant for everyday policing practices and for how public safety and justice provision is organised locally. A key focus is on how the actors enrolled in CP interact not only with the state police, but also with other actors, state and non-state, who engage in solving conflicts at the local level. The chapter shows that the everyday practices of CP actors deviate considerably from MINT's official model and, more significantly, how this has given way to new layers of collaboration, overlap and competition between different justice and public safety providers. As a result, CP adds further complexity

to the dynamics of legal pluralism in local arenas. This result is partly informed by the lack of a clear legal framework, and partly by the fact that policing itself is an avenue to power, prestige and resources over which different actors compete. Moreover, there has been a tendency for CP actors to take on state policing roles and even to copy extra-legal state police practices. Having said this, there is also variety between how CP has been appropriated in different local arenas. The chapter illustrates this by drawing on two case studies, one rural and one urban. Before presenting the case studies, the chapter provides a short background description of the official CP model developed by MINT. The chapter concludes by suggesting some possible ways to improve CP, both in terms of law and implementation.

## The Official Community Policing Model

Community policing was introduced by MINT in 2001 and cast as responding to a "situation of anarchism in society", manifested by rising crime, self-redress, rights violations and mistrust between police and citizens (MINT 2005a: 3). The ideas informing it were also influenced by changes in international donor support to police reform and by developments in South Africa, both drawing on experiences from the West. The 'philosophy' behind adopting CP in Mozambique was that "public order, security and peace should not be the function of police authorities alone", but require "active citizen participation in and responsibility for local community security" (MINT 2005b: 5).<sup>1</sup> CP promised to fulfil a threefold objective: to reduce crime by involving citizens in identifying security problems and solutions and by bringing the police closer to local communities; to democratise policing by diminishing human rights violations and by fostering a transparent and publicly accountable police service; and to strengthen the internal coherence of local communities and their trust in the police through the collective resolution of problems and law/rights education (MINT 2005b; GTZ 2002).

Concretely, the CP model adopted covered Community Policing Councils (*Conselhos de Policiamento Comunitário* – CPC), whose members should be voluntary and approved by the populations of smaller administrative areas. Members should include community leaders and representatives of different sectors in society: economic agents, religious associations, NGOs, schools, private and public institutions and "other important social actors" (MINT 2005a: 10). The state-recognised community authorities, such as chiefs and village secretaries, should be compulsory CPC members, because they have knowledge of community affairs and are seen as locally legitimate (ibid.:8). Thus, CPC members should not be seen as freely elected by com-

<sup>1</sup> For a more detailed description of the CP philosophy, see Kyed (2010).



munity members, but as legitimised on the basis of their position as important social actors in a given community.

Moreover, CPCs should not substitute the state police, but be forums to discuss and gather information on security problems and solutions affecting the community (MINT 2005b: 10). The CPCs can mediate minor conflicts – such as quarrels over land plots, disagreements between neighbours and family disputes – as well as facilitate patrols in public spaces, but they cannot settle criminal cases. CPC members are prohibited from carrying any instruments of force, and may only arrest people caught in the act of committing a crime under the ordinary powers of ‘citizens’ arrest’ (Amnesty International 2008). CPCs also have the responsibility to forward information about criminals to the police, as well as to put pressure on the police to be more responsive to community crime problems by recording unacceptable behaviour of police officers (MINT 2005b: 11-16). Thus, the CPCs are envisioned as ‘mediators’ between citizens and the police. This role, it is hoped, will transform the police simultaneously to service local communities and to nurture law-abiding citizens.

The implementation of the CP model began in late 2001, with a poor, crime-afflicted Maputo suburb as pilot project. In 2002, another Maputo suburb and three municipal towns in Manica Province were used to test CPCs. These pilot projects were closely supervised by MINT representatives. The German bilateral donor, GTZ, provided assistance for awareness raising meetings, exchange visits, the establishment of a CP unit within MINT, and materials to CPCs and to local police stations (GTZ 2002; MINT 2005b). The pilot projects were deemed successful by the end of 2002. Crime had diminished, active community participation was reported, and trust between the police and communities had increased (MINT 2005b). Subsequently, MINT decided to expand CPCs to other provinces. CP was also mentioned in the 2003-2012 Strategic Plan for the Police (MINT 2003). By late 2004, there was a total of 1 113 CPCs in the country, but by then they only covered urban and semi-urban areas (MINT 2005b: 14).<sup>2</sup> From 2005, CPCs were also formed in rural areas, as the new Guebuza-led Government’s five-year plan (2005-2010) included the aim of expanding CP to the whole country. By early 2008 there were a total of 2 710 registered CPCs.

However, the massive expansion of CPCs has not been supported by any law or ministerial decree. The legal basis of CP is confined to Article 61 in the Constitution on the right of citizens to participate in civil defence (República de Moçambique 1990). Implementation of CPCs was thus pursued with the help of guiding principles from concept chapters and seminar notes provided to police commanders. After the first pilot projects, the police commanders were made responsible for implementa-

<sup>2</sup> By June 2005, CPCs were distributed as follows: Maputo city (34), Maputo province (45), Gaza (63), Inhambane (56), Sofala (68), Manica (57), Tete (62), Niassa (183), Zambézia (59), Nampula (43) Cabo Delgado (483).

tion, at times in collaboration with local state administrators and community leaders (MINT 2005b: 14).<sup>3</sup> The absence of a law on CP parallels an unclear legal relationship between the CPCs and other local institutions, state and non-state, that resolve conflicts and provide justice *within* the same geographical areas as the CPCs. In principle, the official functions of the CPCs – i.e. to mediate minor conflicts, such as quarrels over land plots, disagreements between neighbours and family disputes – overlap considerably with the roles of other non-state institutions (e.g. the community courts, traditional leaders and secretaries of villages and suburbs). Nonetheless, there is no coherent legal framework that guides how such non-state mechanisms of justice and public safety provision should interact with each other as well as with the formal justice system and the police. Their respective roles, mandates and jurisdictions remain unclear (see the Introduction to this volume). Rather, what exists is a set of dispersed laws and decrees that recognise the roles of different non-state authorities in conflict resolution. Moreover, the CPCs have been completely left out of any discussions of reforms pertaining to the justice sector and to the improvement of linkages between the different non-state mechanisms. When seen from an empirical perspective, this is problematic, because of the overlapping jurisdictions and the multiple layers of collaboration and competition in practice. This becomes all the more apparent as I now turn to the empirical case studies.

Before turning to the case studies, however, it is important to highlight that there is a wide variety of local manifestations of CP across the country – i.e. in terms of how CP members operate, how the state police interact with CP and how CP has been organised and is related to other local institutions. The following case studies should therefore not be seen as a mirror reflection of the whole country. I begin with a rural area – a former war zone and Renamo stronghold in Manica province.

### Rural Case Study:

#### CP as New Civilian ‘Agents’ of the State Police?

In the rural district of Manica Province under consideration here, the local police were in charge of implementing the CP, which began here in 2004. At the sub-district level, the process began with the police ordering the local chiefs and village secretaries to each choose eight “clever, trustworthy and physically strong persons” from within

<sup>3</sup> A national seminar on CP, held in February 2008, was intended to provide recommendations to the Council of Ministers for the formulation of a law on CP to be approved by Parliament. A commission was subsequently established to draft a law on CP, consisting of MINT officials, members of community policing councils and other relevant stakeholders. In 2009, a draft decree was produced and later presented to MINT.

their 'communities'.<sup>4</sup> Consequently, the formation of CP groups was locally seen as a 'state order'. At the same time, the selection of CP members followed historically-embedded modes of appointing those police persons of chiefs, who for a long time have assisted the chiefs in notifying and taking contenders to the chief's court (Kyed 2007a). Chosen by the chiefs and their councillors, these police persons are usually their close relatives, which supports a lineage-based system of authority. Chiefs also chose CP members who they considered to have relevant experience for state policing tasks, such as persons with military background. The members chosen, who were between 20-35 years old, matched the local age category of youth who perform the physical work of community security. They are distinguished from the category of *madoda* (elders), who have the maturity to provide counselling and settle problems. The latter matches MINT's criteria for CPC membership, but here such elders were those selecting the CP members, not the members themselves.

Overall, the formation of CP groups therefore drew on a mixture of local systems, of chiefs' police assistants and the chiefs' ideas about state police requirements. Importantly, the wider population had little influence over the formation of CP groups. Only after the selection of CP members did the local chief of police introduce them to the population. Participants were asked to approve or disapprove the members by clapping hands or expressing dissatisfaction. However, as asserted by one participant, "we did not say anything against that, because they [CP members] were chosen by the chief and the government agreed." Another added, "I don't have any opinion. Who decides is the state and we cannot go against the ideas of the state." The CP members expressed similar views. In contrast to MINT's emphasis on voluntarism, the majority of the CP members claimed they had no choice but to join when they were chosen by the chief: "We cannot do anything [...] We obey the orders of the government, they [the chiefs and the police] chose us and it is not possible to go against that."<sup>6</sup>

The CP members and the population in general were of the opinion that CP members were recruited to work for the police. Thus, there was no deep sense of community ownership of CP. Nonetheless, the chiefs of police held that 'community legitimisation' was ensured when they asked the population to approve the members. The result of the process was a massive recruitment of young men, amounting in one

<sup>4</sup> Interview, Chief Commander of Police at administrative post level (August 2005).

<sup>5</sup> There were also incidents where young men resisted recruitment. This occurred particularly in areas most strongly influenced by Renamo. For example, in one such locality, all but two of the chosen *comunitários* refused to "work for the Frelimo police" (Interview with CP member, September 2005). The local police officer intervened and obligated six new persons to be members, including two Renamo supporters, while trying to persuade people that "CP is not a Frelimo police." The politically-based resistance to join CP reflects the paramilitary history of the police and the association of the police with serving Frelimo interests against Renamo during the war (Kyed 2007b).

<sup>6</sup> Interview, CP member (September 2005).

administrative post to 18 units (144 members) within an estimated population of 46 000 (and with eight PRM officers in 2005). That the CP members were indeed recruited to work for the police was reflected in how the police trained and instructed them:

We [the CP members] were told by the police that 'you are like soldiers who control the people' [...] we were shown how to study people's behaviour [...] whether they would do something bad [...] and to collect information by hanging around and listening. And then we were told how we should behave ourselves in front of criminals or drunks [...] not to be aggressive and approach them calmly. The chief of police also showed us how to arrest people and how to tie their hands. Then we were shown how to do a search, how to look for drugs and weapons, by putting the person up against a wall. We were also shown how to *chamboquear* [beat with a baton or cane] troublemakers.<sup>7</sup>

In short, the CP members were seen as the new civilian 'agents' of the state police in the rural hinterland, not as community-based discussion forums. In everyday policing practice, it also became apparent that CP was appropriated by the local police to reassert some of the ground state policing had lost during the civil war.

### Everyday policing

After the formation of the CP groups, the members had to divide their work between assisting the police posts directly and helping the chiefs to forward criminals to the police. CP members from the chieftaincies took turns doing 24 hour weekly shifts at the nearest police post.<sup>8</sup> Here they were given batons and handcuffs, and also quite a heavy workload, including searches, arrests, use of force during interrogations, night patrols and a range of smaller services at the police post.

When cases appeared outside the immediate vicinity of the police posts, the police sent out the CP members to arrests suspects either on foot or with the help of lifts provided by passing vehicles. With no means of transport available, this eased the work of police officers considerably. Arrests performed by CP members covered crimes ranging from minor disputes to domestic violence, rape, stabbings, fights, drugs, arson and theft. Only in cases of homicide were they accompanied by a uniformed police officer. The CP members never carried any identification that showed they were authorised by the police, but this was not seen as a problem, because "when

<sup>7</sup> Interview, CP member (September 2005).

<sup>8</sup> This system of 24-hour shifts at police posts was the case in the whole district and, according to the police commander, it was purely a local police initiative, not based on orders from the provincial or national level (personal communication, June 2010).

people see the handcuffs [...] when they see the *chamboco* [baton] they know that we are official [...] because these things [...] these instruments can only come from the government."<sup>9</sup> The police not only authorised, but also set limits to how the CP members could use the instruments of force. They were only allowed to use handcuffs if persons refused to be voluntarily escorted. The use of batons was only allowed if the accused was aggressive, and was limited to a maximum of five strokes.

At the police post, the CP members were also charged with raising the flag, bringing people from the cell to the interrogation room, cleaning the premises and cooking for police officers. At times they also performed extra-legal duties, such as when they were ordered to *chamboquear* persons being interrogated by police officers. There were also situations where police officers ordered CP members to apply corporal punishment. This was strictly supervised by police officers.

Another regular task given to the CP members were night patrols. These involved the enforcement of the so-called *lei fora da hora* (after-hours law) – an extra-legal curfew imposed between midnight and four o'clock in the morning. Anyone caught walking outdoors at night was inspected for ID cards. Except in cases of family emergencies, persons without ID were arrested by the CP members and brought to the police post. Here they spent the night, and in the morning did 'public' work for the police, such as sweeping the premises. When arrestees were suspected of crimes or made complaints, they were 'educated' with a *chamboco*. Although the *lei fora da hora* is not a statutory law (it is actually unconstitutional because it restricts freedom of movement), it was enforced as if it was 'a law'. According to a CP member, the arrests "are a way to educate the people, so they know the law [...] that it is illegal to walk out at night and not to have papers."<sup>10</sup> The CP members also secured peace around bars at night and inspected passing vehicles for stolen or smuggled goods. At times CP members also checked receipts for goods. If people had no receipts, the goods were seized in the police station and only returned to the 'owner' if s/he could produce a receipt.

These different practices point to a clear outsourcing of policing tasks to non-state actors. Importantly, outsourcing covered not only the physically hard work of everyday policing (e.g. arrests and searches involving long distances of travel), but also those methods that are now illegal, in post-war legislation, for the police to apply (e.g. torture and corporal punishment). Consequently, CP members were made to do the 'dirty work' of the police. Despite the extra-legality of some of the tasks the CP members were authorised to perform, police officers always spoke about such tasks as enforcement of 'law and order'. This 'legalisation' of *de jure* illegal policing tasks may reflect a continuity of past state policing practices, but at the same time police officers were well aware of post-war legal requirements.

<sup>9</sup> Interview, CP member (August 2005).

<sup>10</sup> Interview, CP member (September 2005).

The question, then, is why the police outsourced extra-legal tasks to the CP members. Was it simply a way to avoid breaching the law directly themselves? In some respects this may have been the case. However, statements by police officers suggest that the extensive outsourcing to CP members was most significantly shaped by what the police perceived as effective measures to enforce 'law and order' in the rural hinterland, which did not always correspond with legal requirements. In part, outsourcing was associated with problems of state police capacity, such as lack of transportation and human resources to cover the whole territory. CP was seen as an expansion of police capacity and a means to reach areas where the police had no physical presence. The CP members not only helped to reduce crime, but also boosted state police control as such. The extra-legal methods were conversely presented as necessary means to 'educate' rural people to abide by the law. Importantly, the very authority of the state police was also at stake in the outsourcing of tasks to CP members. This aspect, I suggest, was informed by the wider legal pluralistic landscape that characterised the rural former war-zones. In this landscape the police was but one actor claiming authority over law and order enforcement. Other actors competed for such authority. The CP members added further strength to the police in this plural landscape. The flipside, for the police, was that the CP members did not always obey police orders.

### Competition and contestations – authority, prestige and income

The police's use of CP to strengthen police authority, I suggest, formed part of a wider string of post-war attempts to assert the police's overriding or sovereign authority to regulate order enforcement, including the use of force. Such attempts had begun a few years earlier with the state recognition of chiefs. While the police welcomed collaboration with chiefs to strengthen crime control, they also tried to bring chiefs under state regulation. Chiefs were prohibited from settling crimes and applying force, which were both functions that chiefs had regularly performed prior to their state recognition (Kyed 2009a; Kyed 2007a). The crux of the matter is that, at the end of the war, non-state actors such as chiefs were the *de facto* sovereign authorities in the rural hinterland: the state police, if not outright absent, were weak and had little say over order enforcement. The state recognition of chiefs allowed the police to establish alliances that could both ease their daily work and improve their legitimacy. Simultaneously, collaboration with chiefs was used as a means to reclaim state authority to punish crimes and regulate the use of force, as the prohibitions on chiefs testified to. Similarly, the police's strict control of the CP members' use of force illustrates how state police authority was at stake. However, state police attempts to assert authority remained contested in both cases.

While chiefs did collaborate with the police, they did not always obey the prohibitions that accompanied police collaboration: chiefs continued to settle many crimes and, when requested by the victims, they did apply physical punishment. For the

chiefs, their authority was also at stake. Many rural residents preferred to have crimes settled in the chiefs' courts due to the kinds of justice these courts enforced, such as compensational justice and consideration of the spiritual aspects associated locally with many crimes (see Kyed 2009a). Thus, forwarding all crimes to the police could harm the popular legitimacy of chiefs. The number of 'clients' in the court was also an important sign of a chief's level of prestige. Having many clients also helped to sustain the chiefs' council of elders, as it would bring in smaller incomes in the form of client fees.

Failed efforts by the state police to assert monopoly over handling crimes were therefore contested by a number of factors that underpinned the authority, prestige and survival of the chiefs' courts. Other actors also competed within this field. This included the traditional healers, the community courts and village secretaries' courts. The cases the latter courts settled and the procedures they applied overlapped with those of chiefs. The police also frequently referred social cases to the community court, which created much dissatisfaction among the chiefs. Collaboration did indeed exist between the different non-state courts, but the relationship was oftentimes characterised by elements of competition and contestations over case settlement.<sup>11</sup>

The CP initiative added further complexity to this landscape of competing state and non-state institutions. While the CP groups did not begin to settle cases in quasi-court like forums – as in the urban case study discussed below – they did play a significant role in how cases were handled and negotiated. To the chiefs, the CP initiative was received with mixed feelings. Many chiefs felt that the police failed to ensure that the CP members respected the chiefs' authority, such as when they did not inform about arrests in their areas. Some complained that "after the *comunitários* went to work with the police [...] got those instruments [...] they think they are big [...] that they have power [...] and they don't respect the chief [...] they don't respect the elders."<sup>12</sup> The CP initiative was seen by some chiefs as a redoubled effort by the police to boost their own authority vis-à-vis the chiefs.

However, the police's command over CP members was far from secure. A number of CP members also took matters into their own hands, ranging from overt illegal and, indeed, illegitimate acts in the eyes of rural residents to more subtle forms of facilitating the handling cases. For example, on a number of occasions, rural residents complained that CP members abused the authority that had been granted by the police to extract excessive sums of money from persons they came to arrest. Some also complained that CP members, during night patrols, threatened to take people to the police or beat them if they did not pay. When such complaints reached the police,

<sup>11</sup> As discussed in depth elsewhere, rural residents also played a significant role in this competitive landscape, as some would strategically manoeuvre between the different courts and even the police in search of outcomes that would satisfy their interest (see Kyed 2007a).

<sup>12</sup> Interview, Chief (August 2005).

the CP members were told off and, in the worst cases, expelled from the group and punished with some days of incarceration. In the majority of cases, however, the CP members acted in more subtle ways outside the purview of the police, and with acceptance from the parties involved. This included solving cases 'on the spot', without the required police involvement, because victims preferred this. At times CP members also forwarded criminals to the chiefs' courts, rather than to the police. In both these cases, the CP members had a good chance of receiving a small amount of cash, either as an act of gratitude for refraining from bringing people to the police or in the form of the usual client fee that taking suspects to the chiefs' court implied. These acts coexisted with police collaboration, and therefore, as regards chiefs, the CP members also found their own ways of both adhering to and by-passing police orders. This way of operating clearly challenged police authority, and was largely motivated by aspirations of authority, prestige and livelihood sustenance.

Unsurprisingly, CP members also had other motivations beyond simple compliance with police orders. Many hoped that by being part of CP they could one day become a local leader or a person with some sort of standing, or that it could help them get a salaried job, or even to become a police officer. Working for an authority like the police could be an avenue to attain these dreams, as could the help they provided rural residents in solving their problems. It could give them local legitimacy and prestige, even if this at times involved bypassing the police.

A strongly articulated motivation for continuing their work was also the expectation of some form of income, or at least a subsidy from the government, in the near future. This aspiration reflects how the CP members saw themselves as performing their tasks *for* the state police – not as persons who volunteered to spend their free time serving the security needs of their 'communities'. It was furthermore informed by the fact that the system of chief police assistants had for a long time included 'client fees'. Each time a police assistant accompanied parties to be heard in the chief's court or at a traditional healer, they were allowed to issue a smaller payment, with the amount depending on the distance they had to walk (in 2002-5 this could be between 10 and 100 Mt). Added to these aspects, it should be noted that the CP members were all unemployed and had low levels of education. They sustained their livelihoods by cultivating small plots and/or by doing *biscatos* (small, temporary work tasks like trading in goods, building houses, etc.). The majority also had children to care for, and spending a lot of their time performing CP duties meant less time for other tasks.

The aspiration for some form of income is therefore not surprising. MINT's CP model does not meet this aspiration, because it is based on the principle of voluntarism and does not foresee the local recruitment of young and largely unemployed persons to work for the police. Some rural residents blamed the excessive extraction of money by CP members on the fact that the government did not pay them a proper salary to sustain their lives. Others asserted that it was because the police had given the CP members the authority to act in any way they liked. Irrespectively, the more subtle bypassing of police orders was strongly informed by this aspiration for liveli-

hood sustenance, as members learned that remuneration from the government was unlikely to come in the near future. Another result was that many gradually left the CP group, which led generally to a large reduction of CP members in many areas by 2009. Those who remained did so, they explained, because the CP at least gave them something meaningful to do, something that gave them a little recognition in the area. They also still hoped that one day their work would result in some form of compensation from the government, or at least a salaried job.

From the perspective of the sub-district level police, the CP practices of bypassing police orders highlight the inherent dilemmas of outsourcing policing tasks to non-state actors. While outsourcing can boost the authority of the state police, it can also challenge this very authority as non-state actors take matters into their own hands, at times illegally and at times in accordance with the preferences of rural residents. This intricate situation is not least the case because the police have nothing to offer in return for the services provided to them by young 'volunteers', but must rely simply on granting recognition and ordering compliance. For this reason, some police commanders, as in the district under consideration, have tried to help some CP members to obtain salaried jobs (such as private security guards) as a motivating factor to recruit new CP members. The reason is that the police officers depend on CP members to do the job, while also being aware that they may become yet another actor competing for authority, prestige and income in the plural legal landscape. Much the same can be said of the urban suburb of Maputo city that will be discussed next. However, here the CP members had taken matters even more into their own hands.

### Urban Case Study: Community Policing as a New Quasi-Legal Court of the Bairro Structure?

In Maputo's poor suburbs, in 2009-10, there was great variety in how the CP model had been appropriated in practice. While some reflected well MINT's model, some CPCs either had been dissolved, only existed in name or had been substituted by groups of young CP members. In the poor urban *bairro* (suburb) under consideration here, which I shall call *Bairro X*, the latter scenario was the case.<sup>13</sup> The Community Policing Council (CPC) which had been formed in 2002 under MINT's supervision no longer operated. This despite the fact that its implementation had adhered more or less to the criteria set out by MINT, and was more locally driven.

The local 'structure of the *bairro*', rather than the police, was in charge of forming the CPC in 2002. This structure encompasses the *secretário do bairro*, the Secretary

<sup>13</sup> The insights presented here are based on fieldwork conducted in a poor suburb of Maputo city from May 2009 to June 2010.

of the Frelimo party branch in the *bairro* and the group of people organised around these two figures: the *chefes de quarteirão* (the leaders of the different sub-sections of the *bairro*), the Frelimo women's organisation, and other members of the local Frelimo committee. The CPC members joined voluntarily and adhered well to the criteria set out in MINT's model (e.g. former and present state functionaries, a police officer, a teacher, an ex-combatant, a private security guard, and women and men who were part of the 'structure of the *bairro*'). Having said this, the members were not approved by the whole population, but by the group of people organised around the 'structure of the *bairro*', notably members of the ruling party.<sup>14</sup> The formation of CPCs in this urban *bairro* therefore drew not on chieftaincy procedures, but on equally historically-embedded procedures of mobilisation likened to the socialist party-state era.

The same approval procedure applied to the group of younger persons, mostly men, who either were encouraged or volunteered to become what turned out to be the operative element of the CPC. They were referred to as *comunitários*, or CP agents. In the beginning there were a total of 32 CP agents. They were coordinated by the CPC leadership and the *secretário do bairro*, and also worked with the state police. Thus, in contrast to the rural case study, the CP initiative was less under the command of the state police and more integrated with the *bairro* structure. This was also the case in 2009-10, but by then the CPC had ceased to function due to internal leadership disputes and disagreements over how the CP should be operated. What remained was a *de facto* local police force, made up of 11 agents (all men aged between 22-35 years) and a middle-aged woman who acted as the coordinator.

On a daily basis, the young men operated not from a police post, but from the *círculo* of the *bairro* – the name for the central governance site of a *bairro*, which also houses the *secretário do bairro* and the Frelimo party branch. One sector police officer was also attached to the *círculo*, but he only came 2-3 times a week and seldom spent the whole day there. The CP agents performed a range of police functions, including patrols; arrests of suspects and persons caught committing crimes or disturbing public order; control of people for IDs; search of persons in public spaces for drugs and stolen goods; investigations of thefts; and recuperation of stolen goods. Patrols and searches were mostly performed alone by the CP agents and rarely with uniformed police officers from the police station.

In contrast to the rural case study, the CP agents also heard, investigated and resolved cases within a designated room of the *círculo*. This covered mainly the resolution of crimes such as thefts, particularly of cell phones, trade in stolen goods, fraud, physical assaults, drug-dealing and consumption, and burglaries. While some cases were forwarded to the police station – usually when the sector police officer was

<sup>14</sup> A recent survey conducted in Bairro X illustrates that participation in the formation of the CPC's members was extremely low. Many never heard of a council, only of the young CP agents.

present or when the CP agents gave up on solving a case – case records reveal that a very substantial portion of crimes were dealt with at the *círculo*. When forwarded to the police station, it was usually the CP agents who accompanied the accused, either alone or together with the sector police officer. The types of resolutions used by the CP agents covered compensational justice, recuperation of stolen goods, reconciliation of disputing parties, and corporal punishment using batons. The CP agents frequently also used physical force as an ‘investigation’ technique.<sup>15</sup> Other investigation techniques included tracing information from other *bairro* residents, including from criminals, who the CP agents know because they are residents of the *bairro*.

In performing their tasks, the CP members copied state police practices and language (e.g. how they sat on the chair when doing hearings, how they spoke to the parties in a case, how they jotted down names and ID details of persons when recording cases, how they used the baton and so forth). They also used state police titles (e.g. ‘commander’, ‘chief of operations’, ‘patrol officer’, etc.). The CP agents also had their own book for case records. In short, CP in *Bairro X* had *de facto* turned into a kind of quasi-legal court, where the agents performed the role of the police and, at times, even that of judges. This result was at least partly nurtured by the state police.

Some of the instruments of force, such as batons and handcuffs, were originally granted to the CPC by the state police, whereas others were later acquired by the young agents themselves. The CP agents were also trained in 2002 by the state police in how to use the instruments, such as where and how to hit criminals with the baton. The state police also frequently engaged the CP agents in their daily police work. While the sector police officer took charge of hearing cases when in the *bairro*, he also relied on the agents to arrest suspects, collect information, notify suspects to appear at the police station, and provide assistance during hearings at the *círculo*. On two occasions, the sector police officer also ordered the community policing agents to beat suspects during investigations. At times the CP agents also received orders from the nearest police station to notify or search for suspects and often they accompanied suspects, handcuffed, to the station. In fact, very seldom did a police vehicle come to collect criminals caught *in flagrante*.

In short, as in the rural area, the local state police relied extensively, yet unofficially, on the CP agents in *Bairro X* to do what officially is their own job. It is therefore not surprising that the sector police officer saw the CP agents as having contributed significantly to his capacity to handle crimes. The manpower provided by the CP agents was important to him, because being the only officer in the *bairro* could be very risky for his personal safety. They boosted his authority to act on crimes. At

<sup>15</sup> Torture during investigations is done using batons: if s/he refuses to confess voluntarily, the suspect is told to lie down and ‘sleep’, with head facing down, and is then hit in intervals of 3-5 strokes in her/his buttocks until s/he discloses, for example, where the stolen goods are. This was a copy of how the state police officers operated.

the police station, the CP agents were seen as contributing to a reduction in crime levels and as a kind of extended arm of the police.<sup>16</sup> Likewise to the CP agents, the state police offered a significant source of authority, and when officers were present they obeyed their orders and viewed themselves as under the command of the state police. Many also aspired to become police officers and presented this as a key motivation for CP work. When resolving cases on their own, they also referred to state police authority to help enforce sanctions (usually in the form of a threat to take suspects to the police station). However, the relationship between the state police and the CP was also ambiguous. It was characterised by layers of interdependence, mistrust and competition.

On several occasions, the CP agents kept information from the police or were reluctant to respond to demands. When this was discovered, the police officers became very furious with the agents, but never explicitly complained about them to their superior. This, I suggest, was because the officers depended on the agents to improve their work, while also knowing that their authority to control crime was unstable when outsourcing functions to the agents. Conversely, the CP agents also had information about police officers that could harm them if it reached their superiors (such as frequent incidences of police corruption). This ambiguous relationship informed ongoing negotiations over who had the authority to decide cases and distribute information. Extensive hiding and covert games surrounded the resolution of crimes. At stake was not only authority, but also the potential ‘income’ and favours involved everyday policing. The following account is illustrative:

A few days ago, based on the investigation of rumours around the *bairro*, the CP agents managed to apprehend some stolen goods (a TV, a DVD player and a radio) that were hidden in the home of the brother of the accused thief. The brother of the thief thereafter went to inform the police station that the CP agents had recuperated the stolen goods, and had locked them up at the *círculo*. Subsequently, a police vehicle from the station came to pick up the goods, without even the slightest recognition of the work that the CP agents had done. Later it turned out, according to rumours, that the police had apprehended the thief, but instead of a process being opened, they had taken the thief to sell the stolen goods at an informal market, and shared the proceeds with the thief.<sup>17</sup>

The police told similar stories about CP agents. The extent to which CP agents were engaged with criminals is unclear, but it was common knowledge in *Bairro X* that they received ‘*agradecimentos*’ (‘expressions of gratitude’) for recuperated goods.

<sup>16</sup> Interview, Police Commander in Chief, Maputo (June 2009).

<sup>17</sup> Extract from field notes, April 2009.

The point is that the CP agents and police officers were engaged in a web of exchanges and favours that constantly blurred the boundary between law enforcement and illegality. It is precisely because local police officers are themselves part of this web and simultaneously rely on CP agents that they did not interfere much with the quasi-legal court system of the CP agents.

At stake for the CP agents were not simply the 'expressions of gratitude' from 'clients'. It was also the kind of recognition and the hopes for social mobility and some form of future remuneration that their work yielded.<sup>18</sup> While the CP agents strove for more state recognition, they also frequently assumed an air of superiority vis-à-vis police officers: "We do the job of the police [...] even better than the police [...] here in the *bairro* we have more power than the police [...] sometimes they [police officers] are even afraid of the criminals [...] we are not [...] like in that case last year where we had to rescue a police officer who was being attacked by a group of criminals". Having said this, the CP agents did not operate in isolation from the wider structure of the *bairro* or without the influence of the *bairro* residents. The running of a quasi-legal court also required some level of local legitimacy and protection.

### Outside police control – the local system of case settlement

The CP agents operated the quasi-legal court with authorisation from the 'structure of the *bairro*'. Here the police had little leverage. The CP organisation was integrated with the party-state structure of the *bairro* in different respects.<sup>19</sup> Within the area of conflict resolution and policing, there was a labour division between the CP agents, who handled crimes, and the *secretário do bairro* who solved various 'social problems' (including sorcery, conflicts over household plots, marital disputes, conflicts between neighbours, domestic violence and rape).<sup>20</sup> The *secretário* solved such problems on a daily basis, when they were brought to him by local residents, the CP agents or one of the *chefes de quarteirão*.

While not everyone interviewed among the residents of *Bairro X* held that they took their problems to their *chefe de quarteirão* or to the *círculo* as a first instance of conflict resolution, there was a general agreement that this was official procedure. The *secretário* here assumed the role of distributing litigation, which was fully accepted by the CP coordinator. At times the *secretário* also helped solve those crimes

<sup>18</sup> In fact, by 2010, ten of the CP agents in *Bairro X* had secured part-time jobs as security guards, due to their experience as CP agents.

<sup>19</sup> Elsewhere I discuss how the CP organisation is also integrated with the ruling party structure, notably in terms of providing security to the Frelimo campaigners during the past elections (Kyed 2009b).

<sup>20</sup> It should be noted that *Bairro X* does not have a community court or any traditional authority to handle such conflicts. This absence cannot be generalised for the suburbs of Maputo.

that the CP agents could not handle. According to the *secretário*, it "is always best to end the cases here in the *bairro* [...] because it helps avoid bigger problems [...] only not homicide or cases where criminals carry arms, because that is too dangerous for the *comunitários* to handle [...] because they have no arms."<sup>21</sup> He also held that the CP agents had helped ensure that more crimes were handled locally, and this had also reduced crime as such: "Before [the CP initiative was started] you could not even walk outside during the day [...] not even here, right in front of the *círculo*, where the authority of the state is [...] without the risk of being assaulted [...] have your wallet or cell phone stolen. Now the situation is normal."<sup>22</sup> This view was shared by the other members of the local *bairro* structure, such as the Frelimo secretary.

The *bairro* structure was also in charge of admitting new CP agents, and of disciplining them when they did not behave or when *bairro* residents complained about their performance. Since 2002, the *secretário* dismissed a number of CP agents (he did not recall how many), who repeatedly misbehaved by extorting money from residents or concealing information about criminals. However, interventions against illicit behaviour did not cover the use of physical force by the CP agents. This was performed next to the *secretários'* office, and could indeed be heard on the other side of the wall. If not regarded outright as integral to police work, the use of force was at least subtly accepted when performed behind closed doors. Regarding complaints from *bairro* residents about CP agents, the *secretário* stated that he would of course deal with the matter, but added that "those who wash the dishes, sometimes also break the plates". Thus he accepted some level of irregularity in the work of dealing with criminals.

In short, the structure of the *bairro* perceived the CP agents as an integral part of the local system of conflict resolution and crime control. Largely *outside* of state police control, the persons making up this structure defended and assumed the authority over the CP organisation. This also included protecting the CP agents when problems arose with the police, such as in a case where police officers accused the CP agents of having held back a stolen TV and a DVD player, presumably to sell them or use them privately. This way of protecting the quasi-legal court of the CP organisation, I suggest, is informed by at least three interrelated factors. First, the work of the CP agents was seen as reinforcing the local system of conflict resolution, thereby also as supporting the authority of the *bairro* structure to regulate order in the *bairro*. Secondly, this element of boosting local authority was combined with lack of trust in the capacity of the state police to handle crimes: the police were often absent from the *bairro*, and when cases were brought to them, *bairro* residents complained that criminals were simply set free (presumably because they paid the police). This view, shared by a little over half of *bairro* residents interviewed in 2010, was often followed by assertions such as "crimes are better solved here by the residents of the *bairro*" or

<sup>21</sup> Interview, *Secretário do Bairro* (June 2009).

<sup>22</sup> *Ibid.*

“when crimes are handled by the CP agents, then at least we know the criminals are punished.” A third reason for the local legitimacy of the quasi-legal court of the CP agents was their enforcement of monetary compensation and their relatively high rate of success in recuperating stolen goods, when compared with the state police. This aspect is very significant in a poor urban context where minor thefts are common and where victims do not have private insurance to cover stolen goods. The CP agents’ ability to recuperate stolen goods was (as opposed to many police officers) based on their knowledge of the networks of young petty criminals who hang around in the *bairro* and its surroundings. The flipside to this system is that it relies on the frequent use of physical force and draws on a web of favours and extra-legal exchanges with victims and criminals. Albeit protected by the *bairro* structure, the quasi-legal court system thus relied on extra-legal practices. Another drawback is that the local system of case settlement was far from legitimised by the whole *bairro* population.

The ‘community’ as envisioned in MINT’s CP model was *de facto* a limited representation of the residents of *Bairro X*. This was reflected not only in who took part in approving the CP agents, but also in who used the quasi-legal court and the *bairro* structure as such. A number of self-organised groups, as well as individuals, discredited or simply did not recognise the CP organisation. They regularly took matters elsewhere or into their own hands. At times people brought their matters directly to the nearest police station. Others turned to churches or the human rights league, and yet others simply left a theft or an assault unresolved. While the lynching of criminals by local residents was rare in *Bairro X*, there were incidents where groups of residents apprehended and beat thieves in public. The preferences and choices of *bairro* residents were influenced by a range of factors that reflect the heterogeneity of the *bairro* population. A 2010 survey suggests that a range of differences in gender, generation, class and education are significant. Moreover, the extent to which *bairro* residents approved of the CP organisation was also informed by geographic proximity to the *círculo*. Some people living far away from the *círculo* did not even know of the CP organisation. Others did not approve of the CP organisation because they were discontent with the ‘*bairro* structure’ as a whole, or with its leadership.

## Conclusion

Community policing in Mozambique can – at least as far as popular and local police perceptions are concerned – contribute to the reduction of crime. This seems to be the case in *Bairro X*, where CP agents invest enormous time in unpaid police work. Residents in the rural district of Manica also believed that crime had increased because the number of CP members had reduced markedly. However, as the case studies in this chapter suggest, community policing can also reproduce those very extra-legal policing practices that MINT’s CP model hoped to alleviate by vesting

policing more in local ‘communities.’ New layers of competition and contestations over the authority to police order have also emerged in what *de facto* is a complex plural landscape of partly overlapping claims to authority and aspirations for prestige, recognition, and livelihood sustenance.

The two case studies in this chapter illustrate the varied ways in which CP has manifested itself in local settings. CP has, for example, been appropriated by the state police as their extended arm, by outsourcing (often illicit) tasks to young unemployed men. Whereas this appropriation reflects core dilemmas of state policing in poor areas of Mozambique – where the state police are under resourced, understaffed and mistrusted – it has also brought about complex webs of exchanges, favours and power games within which poor citizens have to navigate carefully to access public safety and justice. Conversely, CP has been incorporated within the existing local authority structure and its system of case settlement, where they act as popular policing agents and, at times, even as judges. This role of CP fills the ‘gap’ of an insufficient police service in a way that is more locally owned, but it is not necessarily shared and legitimised by the whole ‘community.’ It is a ‘system’ owned by the exclusive few who are organised around the party-state structure.

According to other assessments of community policing in Mozambique, the key to making community policing work as intended is to pass a law that clearly outlines the rights and duties of community policing members. This will ensure better uniformity across the country and enable mechanisms for regulation and accountability. The law should also be accompanied by resources for the raising of popular awareness of community policing. Having said this, the question remains as to how such a law could be implemented, and by whom. It is also important to consider how the CP should relate to other state and non-state mechanisms of justice and public safety. If implementation is left in the hands of local police officers, local court judges and/or local party-state actors, a range of manipulations can be expected to occur, as suggested by the case studies in this chapter. Alternatively, representative councils that include relevant state officials, non-state justice providers, civil society organisations and ordinary citizens could ensure check-and-balance mechanisms that support a broad-based ownership of CP by the respective populations.

Furthermore, CP is unlikely to be successful from a rule of law and human rights perspective without continued efforts to improve state policing and access to justice. As long as the state police continues to be inefficient and to apply extra-legal methods (including corruption), it is likely that CP will exercise state police functions – and worse, that it will copy the extra-legality of the police. If the state police do not live up to local citizens’ expectations and needs for public safety, CP actors can be expected to ‘fill’ the gap of the state police. Having said this, a CP strategy also needs to address historically-embedded popular notions of justice which many poor citizens share with local police officers. This includes the desire for compensational justice as well as the legitimacy of certain forms of corporal punishment. The heterogeneity of popular views of justice and public safety provision further underscores



the need for a broad representation of citizens in setting the agenda for community policing.

Significantly, this chapter also illustrates that, as regards other public safety and justice initiatives, community policing initiatives need to take seriously the fact that issues of authority, prestige, and livelihood are at stake for the actors involved. Policing order and handling disputes are not neutral affairs, but can be avenues to boost power positions, achieve a better social status and/or achieve better livelihood conditions. For this reason, it is also significant to reconsider the principle of voluntarism inherent in MINT's CP model. There is a need to critically scrutinise the presumption that members of 'local communities' will necessarily avail their time and resources to serve the common good, without some form of individual interest and aspirations being at stake. This is not least the case when CP actors are, in many areas, actually relied upon to perform the state police's obligation of providing public safety to the citizens. It is worthwhile noting here that no less than 97% of the citizens surveyed in Manica and Maputo were of the opinion that the government ought to pay the CP agents. This is well summed up by a resident of *Bairro X*. I will conclude this chapter with her words:

Community policing is supposed to be voluntary, yes [...] they do not receive [...] even a tiny subsidy from the government. This is also how it was before, with the popular vigilante groups [during the socialist period], but at that time people did such things without receiving because it was the time of a struggle and the liberation. But today it is democracy and people are free. They won't just do things without getting something to survive. Especially not the young people [...] And you can also see that they [CP agents] are doing a lot of work for the police. They are helping to bring down the criminals [...] I think the government should pay for that work, because it is the government that has the responsibility to give security to the people. It is the right of the people.

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# Security and Justice Reform in Sierra Leone: The Uneasy Position of Chiefs

*Peter Albrecht*

## Introduction

This chapter analyses why donors have not adequately addressed the role of chiefs, specifically in the case of security and justice reform, and outlines a number of the implications of this. It pursues this analysis by focusing specifically on how internationally supported programmes on security and justice reform in Sierra Leone, since the late 1990s, have engaged with or, more accurately, impacted on chiefs as providers of security and justice. The importance of chiefs in governing communities outside Freetown, Sierra Leone's capital, is a fact, and is readily recognised by international actors in the country. However, at least until 2010, limited effort has been made to engage these actors in reform initiatives. In this chapter, I argue that this neglect has been informed by a rigid dichotomy between state and non-state actors that has dominated and continues to dominate the thinking of many academics and policymakers. It is moreover informed by the fact that the role of chiefs in Sierra Leone is fundamentally not well-understood by international actors.

Although the trajectory of justice sector transformation has gradually changed since its beginning in 1998, it was always predominantly concerned with building a stronger central state. Collapsed but internationally recognised state institutions were to be rebuilt and security was seen not only as a prerequisite for this process to take place, but as the very foundation of managing and protecting state sovereignty

(Albrecht and Buur 2009: 292). It is a strong feature of current international interventions that state institutions receive by far the most attention and financial support, even if their monopoly over the means of violence has disappeared, if indeed it ever existed. The equation between peace-building and state-building strongly informs this trajectory (Stepputat and Engberg-Pedersen 2008).

While this equation – that peace-building equals state-building – has been true for Sierra Leone, in 2010 it continues to define the outlook of major development agencies such as the United Kingdom's Department for International Development (DFID). In a 2010 policy document with the telling title 'Building the State and Securing the Peace,' "[t]he state equates with: (a) the institutions or rules which regulate political, social, and economic engagement across a territory and determine how power and authority are obtained, used and controlled (e.g., constitutions, laws, customs) [...]" (DFID 2010, draft). The paper uses the common distinction between state and non-state and acknowledges the central role of the latter. However, non-state actors are predominantly defined as either marginal to decision-making (civil society organisations) or as 'informal groupings' (e.g., gangs and drug cartels) (ibid). Although the paper was written in 2009-2010, its concept of the state as central to peace was no less central to how security and justice reform were envisioned and taken forward in the 1990s.

In 2010, the re-establishment of Sierra Leone's justice sector has spanned more than a decade, and has in that process informed international thinking and best practices of justice sector transformation as it is designed internationally. Notably, the Sierra Leone process has generated increased attempts to incorporate the so-called non-state providers of security and justice into international programming and policy-making.

The structure of this chapter follows the phases of programming, mostly because the approach to chiefs has been different from one phase of security and justice reform to the next. First, the Commonwealth Community Safety and Security Project (CCSSP), which began implementation in the midst of war, during the late 1990s. It constituted the 'heyday' of police reform. Inclusion of chiefs was by default, and through marginalisation rather than active engagement. In parallel to the CCSSP, the Law Reform Programme focused primarily on the state-orientated court system. As a consequence, a separation was established at the level of policy and programming between access to legal mechanisms and provision of security.

This lack of coordination between programmes in support of (re-)establishing the justice sector, in which I include the police and the court system, was addressed with the initiation of the Justice Sector Development Programme (JSDP) in 2005. While a so-called Primary Justice Sector Coordinator was now appointed, it was Freetown-based providers that continued to receive by far the most attention and funding. The project was marred by a number of administrative problems and challenges, which impeded the ability of advisors to move it beyond Freetown.

The third phase of security and justice reform in Sierra Leone is the Improved Access to Security and Justice Programme (IASJP) that was designed in 2010. For the first time, donor driven programming began to focus on what was referred to as 'non-state justice and security actors', 'community mediation projects' and 'legal aid endeavours'. However, the definition of non-state actors that was initially used excluded the chiefs, who were referred to as 'chiefdom administration' and 'traditional authorities'. While chiefs were referred to in connection with 'GOSL MDAs' (Government of Sierra Leone Ministries, Departments and Agencies), non-state actors were mentioned in line with, but as separate from, NGOs and other civil society organisations, and included driver's unions, market associations and so forth. In sum, Chiefs were seen, as before, as part of the problem rather than as part of the solution. They were viewed as a negative, destabilising factor that had to be countered.

The puzzle is why international development agencies have had this uneasy approach to chiefs in Sierra Leone. Why are chiefs sometimes considered part of the state, and sometimes not? Before exploring how security and justice reform has evolved over time in Sierra Leone, and how it has engaged with the chiefs, I briefly explore why chiefs do not fit easily into either state or non-state categories. This is followed by a discussion of the position of chiefs within the three cycles of justice reform in Sierra Leone, the third starting in 2010 with the design of IASJP.

### Chiefs: Between State and Non-state Categories

In national legislation, the paramount chieftaincy is recognised as an important institution in the governance of Sierra Leone. Constitutionally recognised, "the institution of the Chieftaincy, as established by customary law and usage" and "its non-abolition by law" are "guaranteed and preserved" (The Constitution of Sierra Leone 1991: 72(1)). Indeed, the government has a legal obligation to restore the 'traditional role' of paramount chiefs, including their administrative and customary judicial responsibilities, on the basis of the Ruling Houses existing at independence in 1961.

The basic political unit of the chieftaincy system is the section, made up of a number of towns or villages and headed by a section chief or sub-chief. The paramount chief has jurisdiction over the sections within the chiefdom. Paramount chiefs and section chiefs form the political hierarchy, together with town chiefs and village headmen. Chiefs, also referred to as traditional leaders, play a formal role in Sierra Leone's governance structures, nationally as members of parliament and as advisers through the National Council of Paramount Chiefs. At the local level, paramount chiefs are represented on the District and Town Councils, and are members of ward committees. The 2004 Local Government Act stipulates that the paramount chiefs have a 'traditional function', for instance, in preventing offences in their area; in prohibiting

illegal gambling; and in making and enforcing by-laws. The pillar of their power lies in their legal mandate to hold the land in trust for the people of the chiefdom, which means that they distribute the most important source of income generation.

Legally speaking, chiefs are thus closely integrated with state institutions. This makes the marginalisation of chiefs in security and justice reform all the more striking, especially when we consider the rather state-centred approach of the reform process. Having said this, the legal recognition of chiefs is unclear about the state's mandate to regulate and oversee the actions of chiefs. It is also unclear to what degree chiefs can act as free agents within their jurisdictions and ultimately as sovereign authorities within their chiefdoms.

It is a well-known fact that simply because legislation has been passed by parliament, this does not necessarily mean that it is also enforced in a given locality. In addition, among some of the key personalities in Sierra Leone's security architecture, the issue of limited reach and strength of the state appears to be a readily accepted fact that must be factored into all activities of Freetown-based institutions: "For us to get down to the chiefdom level to organise things, we need to get the chiefs into some structure. Right now they are not in any"<sup>1</sup>

Although extremely rare, the Minister of Internal Affairs has the legal authority to recommend the suspension of a chief, but this Minister does not have "much by way of a structural thing that will link him to the chiefs. Except if he decides to visit some place; but there is nothing there really [by way of representing him]. There is no requirement for the chief to communicate with him. Now, there is no real requirement for the chief to communicate with anybody"<sup>2</sup> As chiefs are central to governing Sierra Leone and have their official roles recognised by state law, one would assume that chiefs are part and parcel of the state. To a degree this is also the case. Yet, regulation of the chiefs by the state is limited.

Indeed, at chiefdom level, empirical evidence suggests that it is the chief that regulates the state official, and not the other way around – a relationship that became clear as I carried out fieldwork in Kamara Chiefdom in Western Kono. Indeed, my fieldwork questions if regulation by state institutions takes place at all, which ultimately gives the chief considerable powers. Chiefs, I suggest, belong neither to a pure non-state or a pure state category. This condition has made it difficult for international actors to engage robustly with chiefs, who have essentially refrained from clearly defining their functions and role as in-between state and non-state. In short, there does not seem to be a space for the type of actor that falls between categories. This will be explored further below, as I turn to the different phases of security and justice reform in Sierra Leone.

<sup>1</sup> Interview, Kellie Conteh (2009).

<sup>2</sup> Interview, Kellie Conteh (2009).

## Commonwealth Community Safety and Security Project (CCSSP) – 1999-2005

The CCSSP constitutes the 'heyday' of police reform in Sierra Leone, when massive donor investments in equipment and training occurred. The position of Inspector-General of Police (IGP) was held from 1999-2003 by a retired UK police officer. It was a programme that focused exclusively on the state police (the Sierra Leone Police – SLP) and that sought to marginalise strong alternatives to the state, and ignore weak ones. This process was greatly supported by having an IGP in place who not only believed in the concept of a central state, but knew nothing else.

The policing doctrine applied was conceived by international advisers and was defined as Local Needs Policing. It has guided reform efforts up until the time of writing. In its basic form, Local Needs Policing is a variety of community policing defined as "[p]olicing that meets the expectations and need of the local community and reflects national standards and objectives" (Adrian Horn, quoted in Albrecht and Jackson 2009: 32). As of 2010, all policing activities ideally – and, to a degree, also in practice – fall within Local Needs Policing.

Rebuilding the SLP under the CCSSP was an explicit state-building exercise with a mandate to provide internal security in Sierra Leone. Sierra Leone's collapsed but internationally-recognised state institutions were to be rebuilt, and with the CCSSP all eyes were on the SLP. The main priority was to establish the state's monopoly over the means of violence within the borders of the country. Below, I focus on the implications of the community-based elements of the CCSSP.

### Community-based policing and Local Needs Policing

Both community-based and paramilitary policing have played fundamental roles in shaping post-war Sierra Leone Police practices and its sense of itself as an organisation. Local Needs Policing has been the guiding principle for both and reflects an attempt to make explicit that the SLP is serving the people and not the executive. This concept of policing based on local needs starkly contrasts with the high levels of police violence that the citizens were subjected to before and during Sierra Leone's war.

Nonetheless, what the first post-war IGP has referred to as 'policing by consensus', with respect to rolling out the SLP immediately after the conflict, remains a reality. In short, the SLP does not hold the monopoly to provide security in the country. It is also clear that the so-called Local Policing Partnership Boards (LPPBs), discussed in greater detail below, are the most important national effort to engage chiefs in linking

policing at the local level with the SLP. In this regard, it is telling that the initiative to establish the LPPBs did not come from the international advisors, but from the IGP, Brima Acha Kamara, in 2002-2003. Donors' general discomfort with engaging chiefs, particularly in the late 1990s and early 2000s, can likewise be seen in donor dealings with the Chieftain Police.<sup>3</sup> Moves to integrate the Chieftain Police into the SLP were rejected during the life of the CCSSP, and were not reconsidered during the second phase either. In the words of Keith Biddle, Sierra Leone's IGP from 1999-2003, who made the executive decision: "The practical aspects, due to the inept management of the Chieftain Police by the Ministry of Local Government and the chiefs and district officers, proved to be too problematic"<sup>4</sup>

At the same time, the SLP has been relatively successful in substituting popular fears or outright disrespect of the police with a more collaborative approach, in towns as well as in rural areas. Both the national level actors and actors at the level of the Chieftain headquarter town recognise, in their statements and practices, that working closely with chiefly authorities in villages and towns is vital to effective policing. This realisation is as much driven by practical concerns as by ideological conviction. There is shortage of personnel as well as equipment within the SLP, which means that the government is essentially unaware of what happens in many parts of the country, not least in the porous border regions to Guinea and Liberia. The SLP is dependent on communities to acquire this information, but cannot expect to receive it as a matter of course.

<sup>3</sup> The Chieftain Police were created through a separate act from the SLP and were previously the enforcement arm of the District Councilors and Paramount Chiefs as 'Court Messengers'. Around 1956, as the British began to prepare Sierra Leone for independence, the SLP moved into the Protectorate. The Commissioner at the time was asked by the Colonial Secretary to absorb the Court Messengers. He considered it but eventually refused on almost the same grounds as the CCSSP. In short, the financial and management implications of doing so would have been too costly and time-consuming. Indeed, the UK police officer who initially led international reform assistance and subsequently became the first post-war IGP in Sierra Leone noted about the Chieftain Police: "I had enough on my plate without taking on the personnel problems that would emanate from such an amalgamation and suggested to Peter [Penfold, British High Commissioner in the late 1990s] that the CP [Chieftain Police] be left to wither on the vine, with the SLP through LNP [Local Needs Police] and LPPB [Local Policing Partnership Board] filling the space. An issue that exercised my mind was the manner in which the PCs [Paramount Chiefs] and DOs [District Officers] managed the CP. Many were enforcing questionable practices and collecting 'local taxes' – extortion money – for the chiefs and DOs. In some chieftainships, they were used to drag recalcitrant girls to the Bundo Bush for FGM [Female Genital Mutilation]. Many of the PCs and DOs really opposed the suggestion [of incorporating the CP into reform efforts] as they were apprehensive that things might turn difficult for them and that they would lose their powerbase" (email communication, Keith Biddle, 2009). The CP were, in other words left in place, under-resourced, with limited if any training, and under the jurisdiction of the PCs.

<sup>4</sup> Interview, Keith Biddle (June 2009).

### Local Policing Partnership Boards (LPPBs)

One SLP initiative of particular importance, in terms of building relationships with the authorities in Sierra Leone's towns and villages, is the LPPBs. In 2002-2003, LPPBs were established in each police division, following the ethos of Local Needs Policing. The first Sierra Leonean IGP, who took office in 2003, came up with the idea to establish LPPBs. They were set up in Sierra Leone to ensure stakeholder participation in the process of policing, and thus signified a clearly perceived need within the police to rebuild relations with town and village chiefly authorities. The LPPBs are also a pragmatic response to the need of the SLP to engage ideally citizens in general, in reality town authorities, in providing their own security. Due to infrastructural challenges and to general lack of resources and manpower, this is not possible outside the main District and Chiefdom headquarter towns.

In isolated towns and villages, the SLP relies wholly on LPPB members, who have been selected from among the civilian population by the chiefs to police their own areas. Only if deemed necessary by the LPPB member, who will be a close ally or family member of the Chief, will the matter be brought to the nearest police post or station, which often is not easily accessible due, primarily, to the poor conditions of infrastructure. Another reason is that the chiefs are expected by the SLP to deal with matters within their own jurisdiction. Murder, severe beatings (referred to locally as 'blood crimes'), substantial theft and sexual abuse of children will, in most cases, be dealt with by the police. Normally, the chiefs will make the call if a case is 'above' the town elders and leaders to deal with, and will in particular do so if they feel that they have something to lose from adjudicating on a given incident.

LPPB members are also expected to pass on relevant information – effectively intelligence – to the SLP. In places where the partnership boards are functioning, there is no denying their importance in linking police and village/town authorities. Importantly, the police benefits as much from the LPPBs in their work as does the population. The biggest constraint to LPPB members is that they have no budget. They receive no money for their efforts, and no 'transportation money' to attend LPPB meetings at district police stations, regardless of where they are travelling from. This has at times been a cause of complaint.

For these LPPB meetings to take place, the members rely on the commitment of police officers and LPPB members. In Motema Division, Kono District, for example, this means that a disproportionate amount of time during meetings concerns fund-raising for the partnership board. For instance, an agricultural committee has been set up in Kono, which has suggested establishing a cassava farm to generate an income for the LPPB members. Other suggestions include fund-raising parties on bank holidays. Because state institutions, such as the SLP, cannot – and indeed will not – fund the LPPBs, the LPPBs in eastern Kono have turned into a local police-supported, semi-private entity, supporting security provision and in some instances

wholly providing it. The LPPBs furthermore tend to be *de facto* under the supervision of the chiefs in their locality.

The LPPBs do not exist in all of Sierra Leone's districts. Indeed, in Eastern Kono, on the border to Guinea, they are few. What the LPPBs look like depends on the individual Local Unit Commander and his or her personal commitment and ambition. In Motema Division, one important incentive to establish LPPBs has been the IGP's personal involvement in designing the concept in the early 2000s. However, in Kenema and Kailahun, for instance, vast areas with limited road systems make it difficult for LPPB members to meet. Aside from Motema Division, Western Kono, Kailahun is the only other Division, covering the whole District, which has LPPBs in each Chiefdom.

Understaffing, combined with lack of vehicles, hampers the effectiveness of the LPPBs, as it does the SLP itself (Hanson-Alp 2009). In Eastern Kono, there is a corridor between Koidu/Sefadu, the District headquarter town, and the Guinean border, from where neither the police nor the army receive any information. No SLP-held information exists on the movement of goods and people. Kono is divided into two police divisions, Motema and Tankoro. LPPBs are few and concentrated in and around Koidu/Sefadu, within the jurisdiction covered by Tankoro Division in Eastern Kono.

As indicated above, when involvement of 'the community' is mentioned by police officers, 'community' in practice means the local authorities, i.e. the chiefs (town chiefs or headmen, section and paramount chiefs), and not the general population. This is the concept of 'community' that state authorities – including the SLP – work according to, and is to a large degree at odds with that of development agencies, focusing on 'the poor', 'the marginalised' and 'the vulnerable'.

As a consequence of the almost complete overlap between chiefly authority and LPPB authority, the latter is not necessarily tribally or socially representative of the locality in which it operates. In Tombodu, the headquarter town in Kamara Chiefdom, Kono District, the police explicitly state that they are working for the paramount chief. It is said, for instance, that the paramount chief can have any police officer – even the Local Unit Commander, who covers a division and several chiefdoms – removed at will, by contacting police headquarters in Freetown. By extension, this is also the case for the LPPB chairmen, who can only operate if they are accepted by the paramount chief. LPPB members are mostly appointed by the chiefs, and if they are not accepted by the local authorities they will have no legitimacy to operate.

At town and village levels, the LPPB Public Relations Officer (PRO), essentially an SLP representative that has been appointed by the chief, will typically be one of the authorities of the town. Specifically, and based on findings from my fieldwork, this means being either a member of a chiefly family or having proven one's loyalty to town authorities. When a criminal act takes place, the PRO will typically be supported by the young men of the village/town to make an arrest. These youth groups are the physical force of community provision of security. They could be referred to as

vigilantes, but they do not act in isolation from the local authorities and are carefully selected according to allegiance to the local chief.

If the crime relates to physical harm, i.e. if it is a 'blood crime', it is seen as being 'above' the town authorities to deal with, and the SLP will be summoned. Bringing in a third party to adjudicate – and to blame – is a way of handing over difficult decisions that may end up harming town authorities. This particular division of labour between the authorities in a village/town and the police is similar to the set-up prior to the conflict. Certainly, town/village authorities in general also provided for local security and justice in the past: state-sanctioned security provision by the police has for a long time been seen as somewhat of an external imposition, and certainly as a rare good. But from the point of view of Freetown-based security providers, these community initiatives are considered as a new development. "You're helping to develop his society", an interlocutor of Sierra Leone's security sector noted, "because of all of these interventions. At the end of the day these paramount chiefs do not see themselves as part of the issue, part of the state. Right now they don't".<sup>5</sup> From a Sierra Leonean perspective, it is a matter of integrating those different institutions that are central to the provision of justice and security, not breaking down either at the expense of the other. It is an argument that rarely crosses the lips of external interlocutors, but one that is put forward by Sierra Leoneans themselves, including key security sector actors:

I think they [international actors] should help to strengthen chieftaincies in the sense that our people, whether you like it or not, for now seem to respect that traditional setting. No amount of education from, you know, human rights organisations, international organisations, on this sort of thing would work right now. They would listen, yes, but as soon as you leave, they go back to their tradition. They [the general population] simply respect the chief. I think we should not undermine the authority of the chiefs by trying to introduce several layers of governance within the chiefdoms. At the end of the day it would only hurt government, because we would not have the capacity to do it properly, we simply don't. Let's not make ourselves look stupid on this matter. Let's go back to basics. This is how our people live. They live in these villages and in the village there's a town chief, they have a youth leader, a women's leader – these are structures that are there, and they all respect the chief. Even if you want to put lawyers and judges at chiefdom level, do you have the roads for these people to be travelling to court? You want the farmers to leave their farms to come to court? No, that is not going to happen, so leave it with them, empower the chiefs if you want to regulate it, yes we can do that, I'm sure the chiefs are open to that. This is not just about security – it's the whole system we're look-

<sup>5</sup> Interview (summer 2009).

ing at which goes far beyond the security sector. It's looking at transforming an entire culture, an entire society so that they would do things that will fit in the security of the country in order to provide an enabling environment for development to take place.<sup>6</sup>

It is neither clear nor a given, as some scholars argue (see Baker 2008: 158), that there is conscious intent behind state actions. It is not evident that 'it', 'the state', regardless of how 'disunified' or 'contradictory' it might be, *a priori* "seeks domination over all other organisations within the national territory and is intent on establishing binding rules regarding the other organisations' activities" (Albrecht and Buur 2009: 397). As suggested above, however, this is the perception that dominated international thinking when the CCSSP was implemented. Chiefs were involved through institutions such as the LPPBs, which were notably the invention of a Sierra Leonean rather than an international expert. However, there was no concerted effort by the CCSSP to do so.

Only in 2005, as the Justice Sector Development Programme (JSDP) began implementation, were the chiefs more included in programming. However, their role remained marginal, and the focus was mainly on human rights training.

## Justice Sector Development Programme (JSDP) – 2005-2011

The JSDP constituted a fundamental break with both the approach and management of CCSSP. The most radical change was the switch from a focus on efficient internal security provision to one on the governing structures of the justice sector and on the delivery of services at the local level, including outside of Freetown. The CCSSP and the Law Reform Programme were implemented during a period with little appreciation of holistic approaches to reforming security sectors, and the justice sector in particular.

By the time the JSDP began implementation, it was also evident that DFID as an organisation was becoming more reluctant to finance projects that had an explicit security focus and that were not developmental in approach. On the one hand, this meant a stronger focus on the institutions that are supposed to govern the justice sector, and therefore implied a governance perspective. On the other hand, it meant more direct and explicit interaction with the ultimate beneficiaries of security and justice provision, namely the ordinary citizens, which in development parlance include in particular women, children, the poor and the vulnerable.

<sup>6</sup> Interview (summer 2009).

It was, therefore, almost a given that there would be a number of complications and dramatic changes involved in broadening the focus from what was predominantly a police project (CCSSP) to a sector-wide justice sector project (JSDP). First of all, £25 million were now earmarked not for the police alone, but also for the judiciary, the prisons and the Ministry of Internal Affairs. The difficulty for the SLP was that, as support was refocused into other areas, the financial burden that remains for the Ministry of Finance in terms of both recurrent and capital replacement expenditure has, unsurprisingly, turned out to be unaffordable. Furthermore, the SLP continued to be dependent on contributions from international donors. This was something of a double blow. In the words of one of the JSDP advisers: "withdrawal of international funding inevitably leads to short-term paralysis and degradation of service with a real danger of attrition to the *status quo ante*" (Howlett-Bolton 2008: 8).

The quest for establishing a sector-wide justice programme came during the life of the CCSSP. Indeed, the design of the JSDP took place from June 2002, but was only approved in April 2004. Implementation began in March 2005 and the CCSSP officially came to an end in June 2005. This timeframe created significant start-up challenges. Some stakeholders were impatient to see activities starting. Others were concerned that the nature of support that had come through CCSSP would end. While not ending, the nature of the support changed dramatically.

### The scope of support by the JSDP

With a holistic justice sector approach, priority reform areas were dramatically expanded to a disparate number of activities and institutions. First of all, there was a need to produce a long-term, sector-wide justice reform plan. Furthermore, in 2007, a raft of different priorities was considered important, as expressed in one of the so-called 'Output to Purpose Reviews', an assessment produced by UK-based experts in collaboration with a Sierra Leonean counterpart. It shows the fundamental move away from direct support to security-related programming by DFID. Priority reform areas included out-of-date and inaccessible laws and procedures, such as the indexing of customary law, prison overcrowding, delays in courts, absence of adequate juvenile justice provision, lack of support mechanisms which meet the "needs of the poor, vulnerable and marginalised to access justice and the lack of connection between community needs and police operations" (JSDP OPR 2007: 9-10).

The focus on the SLP as an institution, ensuring that it would be able to perform effectively as provider of internal security, was taken over by a focus that fitted DFID's preoccupation with development. This shift had a great deal to do with the political direction coming from London and a deep-rooted hesitant approach of DFID to security-related programming. The shift was held consistently by the JSDP, both at the central level and in Moyamba District, which was the programme's only 'pilot district' outside Freetown and the Western Area. In Freetown, a heavy emphasis was put on what can best be described as governance-related activities among a number of state-

centred institutions. A Justice Sector Reform Strategy and Investment Plan for 2008-2010 (JSRS-IP) was launched in February 2008. As a strategic document, it has been regarded as an important contribution to Freetown-based reform efforts across the justice sector (particularly by the donor community). A Justice Sector Co-ordination Office was established in July 2007, located next to the Attorney General and Solicitor General's offices within the Ministry of Justice. Again, this body has been viewed by external assessors as a pivotal link within the overall justice sector. The Anti-Corruption Commission, established in 2000, was also supported by the JSDP.

The actual impact of these initiatives and their long-term sustainability are difficult to ascertain from available sources. The fairest conclusion is that transforming how a justice sector operates is a process that spans several decades, and is ultimately about social engineering. Few justice sector advisers would disagree with this assessment. It is also relatively few justice advisers that are willing to engage, in a targeted and robust way, with the institution of the chief. Perhaps a good indication of this, within JSDP, is the limited reach of the programme outside Freetown and the Western Area.

### The Moyamba District JSDP pilot

Moyamba District was selected as the first district outside of Freetown in which the JSDP would pilot its work. It was selected because it had a number of state-related justice institutions, including a prison, four police stations and five police posts, encompassing 14 chiefdoms and a population of 260 000. The district was also chosen because of its easy accessibility from Freetown. The original programme concept suggested that further districts would be added. However, this did not happen. Direct JSDP impact on the delivery of security and justice has therefore been limited outside Moyamba District.

Indeed, a 2009 review referred to Moyamba in the context of JSDP as little more than "a district test-bed for new projects and ideas" (JSDP Annual Review, March 2009). The general focus of the JSDP in Moyamba has been on community access to courts and more generally the police institutions, such as LPPBs, which interface with the population. A so-called 'circuit court' holding sessions across Moyamba was established, which helped overcome the inaccessibility to many parts of the district. An assessment from 2007 notes, however, that there was limited understanding of how the court deals with types of exclusion other than those of a physical variety (e.g. related to gender, identity and social standing). An example is given of four juveniles that were sentenced to beating with a cane in open court. There was limited defence representation or paralegal support. Civil society did, however, provide some oversight and also contributed to awareness raising (JSDP OPR, April 2007).

From fieldwork carried out in Kono District in 2008-2009, it is evident that the effectiveness of LPPBs depended directly on how important the Local Unit Commander found the LPPB initiative. Effectiveness here refers to whether the partner-

ship boards have been established at all, regularity of meetings and communication between members and the SLP, and collaboration between town/village authorities appointing LPPB members and the SLP. In 2009-2010, the only two police divisions where the LPPBs existed in all chiefdoms were in Motema (western Kono) and Kailahun (District-wide). The JSDP revived the LPPBs in Moyamba, extended them to Chiefdom level, where they amounted to what appeared to the external observer as a 'House Watch' scheme. Indeed, a decrease in some crimes, including larceny (63%, 297/109) and housebreaking (67%, 22/7) was reported in 2006, compared to 2005. Supposedly, an assessment notes, the "pilot neighbourhood watch scheme set up by the youths is working well and is helping in the reduction of crime" (JSDP OPR, April 2007). It should be kept in mind that the organisation of youth groups as security forces is not new in Sierra Leone. It has been a common method to provide a semblance of community security in places where the SLP has not been present.

As my fieldwork in Kono suggests, the absence of state-sanctioned security provision does not by definition mean that chaos and insecurity prevails. Assessments conducted by consultants sometimes give credit to intervention programmes for results that, in fact, they did not deliver. This may simply be out of ignorance of the context in which a given programme is being implemented.

### Chiefs in security and justice

In December 2005, a National Policy Framework for the Justice Sector in Sierra Leone was presented within the framework of the JSDP. It represented a "holistic sector-wide approach to support the development of an effective, efficient, impartial and accountable Justice Sector that is capable of meeting the needs of all the people of Sierra Leone" (JSDP, December 2005:2).

The document is not short of formulations about the importance of including so-called 'Customary/Traditional Laws and Practices'. These are, *inter alia*: development of policies on the judicial role of traditional leaders, implementation of initiatives that promote constitutional principles and human rights and enhanced accountability of traditional leaders to the public. Likewise, the Justice Sector Reform Strategy and Investment Plan, launched in February 2008, has as one of six targets to "improve public satisfaction levels with Local Courts, Paramount and Local Chiefs" (GoSL, December 2007: V). As one of the JSDP advisors notes, "[e]ach system will have its own advantages and disadvantages and both need support, even if the state system will inevitably require a greater share of financial resources" (Howlett-Bolton 2008: 8). To some degree, this statement is of more theoretical than practical application. It was never a central objective in the JSDP.

Even if paramount chiefs would be considered 'non-state' in current security sector reform policy thinking, they certainly cannot be considered as separate from the state. A 2007 assessment says, "[l]ocal courts constitute the lowest level of the formal system" (JSDP OPR, April 2007). They are under the oversight of, but not managed

by, the Ministry of Local Government, which in practice remains too weak to play a meaningful role in this capacity. According to the Ministry of Local Government, the Ministry also lacks the will to actively regulate the local courts. Simultaneously, the IGP suggested that "our own role is quite different from the Chiefdoms, because we are accountable to the law".<sup>7</sup> The question is whether the implication of this statement is that chiefs are not accountable to the law, but to sets of rules and laws defined at the local level. To a degree that is the case.

As noted above, substantive work has been undertaken in Freetown around the institutions that external advisers identify with the state. Inevitably, as the focus moves to Chiefdom level – as in Moyamba District – any attempt by the JSDP to influence institutions controlled by the chiefs touches on local level distribution of power. It is therefore a deeply political endeavour. Indeed, during the implementation of JSDP there was no attempt to fundamentally alter the institution of the Local Court system. Rather, focus has been on how to confine chiefs to their legally defined role in arbitrating cases, a management role which presumably can only be played by state institutions – the Local Councils and the SLP. However, as already alluded to, in many cases representatives of state bodies, which have been 'treated' and 'built' by external actors as belonging to the state, are *de facto* accountable to the paramount chiefs rather than the other way around. By extension, the question remains whether there is political will, from Freetown and/or from the Local Councils and the SLP, to overrule chiefs. Importantly, programmes at chiefdom level occur in a context where national-level politicians strive for enough leverage over the local communities to achieve political (e.g. votes) and economic (e.g. diamonds) resources. It is therefore doubtful that state officials will take it upon themselves to openly interfere in the dealings of paramount chiefs, who tend to be the gatekeepers to the political and economic resources available at the local level.

In Moyamba, direct work with the chiefs was channelled through human rights training, along with support to the Magistrates Court. Inevitably, conflicts occurred. A 2009 assessment reported on a Local Court Chairman who complained that cases were no longer being reported to him. Such complaints could reflect that a redistribution of power in the Chiefdom had occurred as a result of the programme. However, it could also be due to the fact that local court fines are a source of income for court employees, who are not paid regularly, if at all. This implies, of course, that JSDP has had some impact on how justice is delivered. As the assessment suggests, however, this is also partly due to civil society activities in the District, in particular in Local Courts, where officials have presided over cases that were not under their jurisdiction. The question remains, however, whether the balance of power in Moyamba has been fundamentally altered, a question that is not of interest to a technically inclined assessment, and therefore is not answered.

<sup>7</sup> Interview, Brima Acha Kamara (June 2009).



Given the role of chiefs as providers of 80% of local-level justice – an estimate put forward already in 2002 in Sierra Leone (Albrecht and Jackson 2009: 42) – it is striking how little direct attention they appear to have received from the JSDP.<sup>8</sup> Apart from providing support to the drafting of a Local Courts Bill and a restatement programme around customary law in Moyamba District, the JSDP has not prioritised support to Local Courts that are overseen by the chiefs, as well as other traditional justice systems. The 2007 assessment cited above notes that “the majority of disputes are resolved through the informal system outside the Local Courts (headmen, section chief, village elders or paramount chief). This is a weakness of the programme, which has put greater emphasis on formal justice institutions” (JSDP OPR, April 2007).

This circumstance ultimately reflects the default position of the donor community and the technical experts they hire: to work with the institutions that they know and understand, i.e. those of a state entity, and avoid other ‘non-state’ or ‘informally’ organised groups providing security and justice.<sup>9</sup> It is rarely something that international advisers take upon themselves to do, often because they are convinced of state institutions being the rightful holders of the monopoly over internal security provision. This is also implicitly reflected in assessments of the JSDP carried out in 2007, 2008 and 2009, where remarkably little space is devoted to chiefs as primary power-brokers and security and justice providers. There are several reasons for this (see also Albrecht and Buur 2009).

First of all, the function and rationale of how chiefs operate – their political role – is not well understood by international actors, who somewhat naively believe that the institutions of the chief will wither as state institutions are built. While they accept the importance of including chiefs in justice programmes, donors and the consultants they hire have difficulties designing appropriate programmes targeting chiefs. Second, because chiefs are obliged constitutionally to serve the ‘government of the day’, and because they are deeply political in their own right, it is difficult for donor agencies to find the appropriate balance between support of centrally governed state institutions and chiefs. This, in turn, raises questions about state sovereignty: while national-level officials might agree that chiefs are vital leaders in Sierra Leone, they might not accept that donor support is channelled directly to chiefs, thereby bypassing the central and internationally recognised government.

<sup>8</sup> A World Bank baseline survey carried out in 2007 revealed that the two most popular institutions for reporting crimes in rural Sierra Leone are the village headmen and elders. A total of 85% of the crimes and conflicts cited in the survey are reported first to these village-level traditional leaders. Of these, 60.8% are first reported to the village headman court (also referred to as town chief), and 24.7% to village elders, followed by the section chief courts.

<sup>9</sup> £679,950 out of £1.5m allocated invoiced to October 2006 for formal justice, versus £369,440 out of £1.3m for informal justice.

## Improved Access to Security and Justice Programme in Sierra Leone (IASJP) – 2010-2013

In 2009, DFID in Sierra Leone produced a document proposing a ‘new intervention’ with the title Improved Access to Security and Justice Programme in Sierra Leone (IASJP). It is intended to run for a three-year period (2010- 2013). At the time of writing, the project design process is taking place and the implementation is being planned. The terms of reference (TORs) for this process suggest that the programme will place delivery of improved access to security and justice in Sierra Leone “at both the centre of our ongoing state-building and human development interventions” (IASJP TOR, 2009). It also suggests that a key threat to building sustainable peace in Sierra Leone is “a lack of individual or community legal redress or rights” (ibid). The programme is expected to support the JSDP, which is described as “operating in several districts” (ibid). Importantly, the document presents the first example, in Sierra Leone’s security and justice sector reform process, of a programme design that recognises that ‘the non-state’ security and justice providers are at least as vital as ‘state’ providers.

It is not clear who these non-state providers are, how they operate and what sources of capital they draw on to consolidate authority. At least these issues are not dealt with in any depth. The programme document simply refers to ‘informal’ and ‘traditional’ security and justice providers, presumably denominating civil society groups and chiefs. It is ensured that these providers will be consulted and engaged in the new programme. The TORs are, in other words, not clear about what is meant when using the concepts of ‘informal’, ‘traditional’ and ‘non-state’. This, however, is critical. If donors are truly preoccupied with strengthening security and justice provision at the local level in Sierra Leone, the aim must be to engage with the most localised tier of governing structures, not least because they cannot merely be defined by their relationship to the state.

The interim project design document alleges that IASJP will interact with ‘non-state justice and security actors’, ‘community mediation projects’ and ‘legal aid endeavours’. However, the document’s definition of ‘non-state’ excludes the chiefs, who are instead referred to as ‘chiefdom administration’ and ‘traditional authorities’. While chiefs are referred to in connection with ‘GOSL MDAs’ (Government of Sierra Leone Ministries, Departments and Agencies), non-state actors are mentioned in line with, but separate from, NGOs and other civil society organisations, and include driver’s unions, market associations and so forth.

In the final programme document, produced in mid-2010, this has changed somewhat, and chiefly institutions now have a central and more explicit role. The ‘Chiefdom Administration and the local courts’, while mentioned in connection with ‘jus-

tice sector MDAs [Ministries, Departments and Agencies], are not categorised as either state or non-state, but merely considered in need of support. In a similar vein, paralegal and mediator organisations are mentioned in connection with LPPBs, all of which have mixed sources of authority, derived from Freetown-based, national, and more localised institutions. This might be the most appropriate way of approaching the state-non-state dichotomy, namely to avoid trying to operationalise the pre-defined distinctions. Rather, what the programme document appears to prepare the ground for is to look at *who* is providing security and justice, *how* it is being done, and *what* are the best ways of supporting the systems that are already in place.

## Conclusion

Throughout security and justice sector reform in Sierra Leone since the late 1990s, the chiefs have constituted a layer of actors that donors have found it difficult to interact with. Interaction has been indirect, by default or marginal, and always hesitant. This has happened despite the chiefs' central role as governing institutions in Sierra Leone's local communities, including in local security and justice provision. At the time of writing, IASJP is being developed as a new programme and there is a risk that chiefs will, yet again, be seen as the problem rather than as part of the solution to strengthening provision of these services.

At the same time, the 2010 programme document for IASJP alludes to a potentially significant conceptual shift in how chiefs and the institutions that they oversee are being understood and incorporated into programming. Rather than seeking to cast chiefs as state or non-state, respectively, or even as a hybrid between the two, it now appears feasible, at least on a conceptual level, to step out of this dichotomous impasse. The practical necessity for this is evident. Chiefs represent the most important authority across most of Sierra Leone, and dominate local politics, economic life, security and justice provision.

The marginalisation of chiefs in past programming has reflected that neither state institutions nor international actors have the resources or the will to fundamentally alter how Sierra Leone's localities are currently governed. At the same time, as this chapter has illustrated, because of their central governing role, chiefs have also *de facto* been integral actors in the implementation of security and justice sector reform, the LPPBs being one key example. Indeed, the success of local initiatives is directly tied to the role that chiefs play.

This becomes all the more important considering their somewhat ubiquitous role vis-à-vis Freetown-based institutions. As illustrated in this chapter, while they are formally and discursively tied into a 'state system' in the Constitution and in legislation, they are subjected to limited oversight, and therefore govern in relative autonomy. The fact that the programme document for IASJP goes beyond the state-non-state di-

chotomy may be seen as preparing the ground for a more productive way of engaging chiefs and similar institutions in other contexts that do not fit neatly into either a state or non-state category. From a donor perspective, the importance of this shift is that the focus no longer is on who donor agencies would prefer to see providing security and justice across Sierra Leone, but on who is actually doing it.

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# Cape Verdean State Legal Pluralism: The Establishment and Dissolution of the Popular Courts

*Odair Bartolomeu Barros Lopes Varela*

## Introduction

This chapter focuses on the process that led to state legal pluralism in Cape Verde after its independence. More specifically, it deliberates on the Popular Courts (*Tribunais Populares* – TPs), formally introduced in 1979 and abolished in 1991, and analyses the relations established between the law(s) conveyed through these courts and other local legal systems.<sup>1</sup> Addressing the one-party system period between 1975 and 1990, this study argues that the main objective of the Cape Verdean state was to create a 'New Law' that incorporated not only both revolutionary and colonial law but also ancestral legal practices and customs. This resulted in the materialisation of a 'legal miscegenation', which was promptly controlled by the country's legal and political elite.

The subsequent exclusion of traditional practices and customs was based on the false argument that traditional law was non-existent when compared to the reality of other African countries. The result was not only the failure of the emancipatory potential of the legally mixed setting, but also a momentary manifestation of a hegemonic and excluding legal miscegenation of colonial and revolutionary law. Meanwhile, revolutionary law was given very little importance in the state legal system,

<sup>1</sup> The chapter is based on work carried out within the scope of the preparation of my PhD thesis at the Centro de Estudos Sociais (CES) of the Faculty of Economics at Universidade de Coimbra (FEUC), with support from the Calouste Gulbenkian Foundation.

and was only represented by the TPs. This was a result of the post-independence counter-revolution caused by colonial law, involving the legal class from the colonial period. With the change of the political regime in 1991, the legal counter-revolution ultimately prevailed and state legal pluralism gave way to the official monistic system in force to date.

This chapter begins with an assessment of the principle of 'popular justice' introduced by the Cape Verdean state and other Portuguese-speaking African states. It then focuses on the period following the abolition of the Popular Courts in 1991. This period is characterised by the hegemony of state law, which was to a large extent inherited from the colonial law. An attempt is then made to briefly examine the current state of the forces which, in the face of this scenario, resist the growing hegemonic globalisation process of the principle of Democratic Rule of Law.

### Of the Roots of a Process

Colonialism provided the first sociological context that instigated an interest in legal pluralism. In other words, the coexistence within an area – arbitrarily joined as a colony – of state law and the so-called traditional law. A constant source of conflict and precarious adjustment, this coexistence was – in the Portuguese as in other colonies – largely a sociological and political phenomenon that occurred within the margins of official legal and political concepts of the colonising state. In the former Portuguese colonies in Africa, the metropolis' sociological understanding of legal pluralism, which was essential to guarantee the 'pacification', was always very elementary.

In the case of Cape Verde and Guinea-Bissau, the former leader and founder of the African Party for the Independence of Guinea and Cape Verde (*Partido Africano para a Independência da Guiné e Cabo Verde* – PAIGC),<sup>2</sup> Amílcar Cabral, and his followers, intended to establish an alternative to the colonial law in force. At the Cassacá Congress, held from 13-17 February 1964, the party defended the pursuit of a new form of justice "based on the deep-rooted aspirations of our People, and controlled by them through legitimate elected representatives, applying the new legislation and norms dictated by common sense, by life experience and by the customs in accordance with the Party's principles" (*Revista do Ministério da Justiça* 1979: 29). Thus, in the context of the anti-colonial struggles, popular courts were established in the so-called 'liberated areas'<sup>3</sup> of Guinea-Bissau. Since they settled disputes between inhab-

<sup>2</sup> The PAIGC was created in 1956.

<sup>3</sup> These were territories that were progressively removed from the administration of the colonial bureaucracy, mainly due to insecurity. The liberation movements sought to implement an administrative, defence and justice system in these areas.

itants of the villages (*tabankas*), these courts became commonly known as *tabanka* courts. In analysing their procedure, Cabral offers a positive assessment, stating that "[...] the sons of our land have revealed that they have the capacity to judge the errors, crimes and other misdeeds committed by other sons of our land" (*ibid.*: 29).

The employment of 'traditional' practices in justice provision aimed, in functional terms, to overcome the unfeasibility of applying colonial law to the 'liberated areas'. The necessary bureaucratic apparatus required for applying colonial law was non-existent and its implementation would have entailed financial costs that the liberation movements could not afford. However, the use of 'traditional practices' aimed, first and foremost, to foster a spirit of liberation, self-esteem, self-empowerment, emancipation, and resistance to the idea of dependence on the coloniser, as conveyed by the latter in the saying, 'you would not be able to live without us'.

Legal pluralism emerged during this process of resistance to colonialism and, in my opinion, it was shaped by a perspective of confrontation. This confrontational aspect explains to a certain extent why legal pluralism was used by liberation movements in the colonies. It is important to mention that most studies on legal pluralism in Portuguese-speaking African countries gave little importance to the influence of the *tabanka* courts in these countries. The fact is ignored, for example, that this model inspired other liberation movements, such as the *Frente de Libertação de Moçambique* (FRELIMO) in Mozambique, which resorted to 'traditional' practices to resolve conflicts arising in the 'liberated areas' during the anti-colonial struggle. However, recourse to 'traditional' practices did not begin from an intellectual formulation, like the '*tabanka* court', which was a hybrid conflict resolution model that was simultaneously revolutionary and African. The theoretical principle of the '*tabanka* court' was designed by Amílcar Cabral. Cabral's reference to the 'African' instead of the 'traditional', as a characteristic of the simultaneous coexistence of the revolutionary and the African, confirms that the model includes not only revolutionary objectives – inspired by the Soviet Revolution – but also modern African practices. The latter were fashioned by an 'alternative modernisation' or an 'African modernisation', inaccurately termed 'traditional'.<sup>4</sup> Thus, in order to analyse the articulation between the revolutionary and the African in the so-called revolutionary period of Cape Verde and Mozambique, attention should be paid to the fact that the interconnection between revolutionary justice and African justice has its roots in Guinea-Bissau, where Amílcar Cabral devised the *tabanka* courts and established them through the PAIGC.<sup>5</sup>

Despite the Cape Verdian regime's strong ties with the former USSR (Union of Soviet Socialist Republics) and its protection of a revolutionary process among the

<sup>4</sup> According to Dussel (2007), this type of practices that occur in the world may include what he terms transmodernity, which embraces constellations of alternative and marginalised forms of modernity with a view to contesting the excluding nature of hegemonic and western modernity.

<sup>5</sup> On the Cabralian thought, cf. Cabral (1974, 1977, 1978, 1979).

'masses', or within society, the regime did not totally overlook those other legal orders or forms of justice that were used in the archipelago. During the early years, attempts were made to acknowledge the fact that traditional or local law could be applied in a complementary and efficient manner to the (revolutionary) law of the new state and to the colonial law. Traditional law could also be used by the state to encourage the participation of the masses in the local power and justice administration bodies.

This recognition resulted in the implementation, initially informally, of the principle of 'popular justice' with the establishment of the TPs, termed 'area courts' (*tribunais de zona* – TZs). Despite the establishment of the 'Area Justice Councils' (Area Courts) through Decree-Law 33/75 of 16 October, which approves the Judicial Organisation of the Republic of Cape Verde (*Organização Judiciária da República de Cabo Verde*), the previously created TZs were only officially sanctioned in 1977. In my view, it was only during this short period of informality, between 1975 and 1977, that the 'traditional' character of popular justice was equivalent to or exceeded, in practice, the official 'revolutionary' character of the same principle of justice. During my ethnographic research in Cape Verde, I collected information on the period of the enforcement of 'local law', which was still free from the constraints of revolutionary law.<sup>6</sup> A former Area Court Judge, Manuel Costa Barros, from the locality of Djon Garridu, in the municipality of S. Domingos, states that: "it was the historical principle of local justice that controlled the excesses of the liberation" (Field Logs 2010: 136-153).<sup>7</sup>

According to data from the Ministry of Justice, in late 1976 Cape Verde had 55 popular courts. These operated regularly in an unofficial and experimental (non-institutionalised) manner on the islands of Santiago, Fogo, Brava, Santo Antão, S. Nicolau and Sal. Two years after Independence, Decree 25/77 of 9 April for the first time recognised *de jure*, retroactive to 1 November 1975, "those Area Courts that had proven most effective, totalling 32", spread out over the above-mentioned islands (*Revista do Ministério da Justiça* 1979: 31-2).

The country's first Constitution, approved on 5 September 1980, endorsed the principle of 'popular justice' by stipulating that "justice is administered based on broad popular participation" (Constitution 1980, article 87). Barely one month later, on 14 November 1980, Guinea-Bissau suffered a *coup-d'état* perpetrated by Bernardo Vieira, leading to a rupture in the joint political leadership that this country had had with Cape Verde since independence in 1975. Despite the political division, the new Party-State in Cape Verde, the *Partido Africano para a Independência de Cabo Verde* (PAICV), pressed on with the legacy of the anti-colonial struggles.<sup>8</sup> Thus, the insti-

<sup>6</sup> The ethnographic research took place between April 2007 and June 2010.

<sup>7</sup> Interview held on 21 April 2007.

<sup>8</sup> The constitutional review, through Law 2/81 of 14 February, which formalised the political separation between Guinea-Bissau and Cape Verde, did not change the 'popular' aspirations of justice intended to be established in the country.

tutional support of the TZs was respected. As is shown below, these courts did not come to represent an autonomous legal order, but came to configure a state legal pluralism.

### An Entirely 'Popular' and 'Traditional' Justice: the Reasons for an Ominous Failure

Immediately following Independence, the plan of the Cape Verdean state to create a 'New Law' that integrated both revolutionary and colonial law as well as ancestral legal practices and customs (traditional law) laid the ground for an emancipatory 'legal miscegenation' in the country.<sup>9</sup> However, the state failed subsequently to incorporate such uses and customs into official law, under the erroneous argument that, unlike the situation in other African countries, there was no traditional law. This exclusion led not only to a failure of the emancipatory scenario, but also to the emergence of a hegemonic and exclusionary 'legal miscegenation' shaped by colonial and revolutionary law. Moreover, colonial law soon initiated a counter-revolution, led by the legal class (magistrates, lawyers and jurists) from the colonial period, that contrived to relegate revolutionary law to the margins of the state legal system, where it was represented solely by the TZs. After the change of the political regime from a one-party to a multiparty system, in 1991, the counter-revolution emerged victorious and legal pluralism collapsed, making way for the official state legal monism that has been in force to the present date.

This current situation is consistent with the idea that "[the] Cape Verdean political class resorts, even in times of dispute, to foreign models and paradigms to mobilise its action. The exclusion of foreign models is always partial and is done by the introduction of other, also foreign, models" (Anjos 2006: 25). The case of revolutionary law in relation to the colonial law is proof of this situation in the context of a hegemonic globalisation of Western modern science that underlies this phenomenon.

After independence, the Cape Verdean state decided on two major objectives in terms of justice: to include the 'national legal practices and customs' in the constitution of the new state law and to extend 'popular participation' to all spheres of justice.<sup>10</sup>

<sup>9</sup> It must be mentioned that said 'ancestral legal practices and customs' were already the result of a prior and double historical 'miscegenation': between the different legal practices brought from the different geographic and cultural realities of the African continent by slaves, and between these practices and those brought by the European colonisers.

<sup>10</sup> In the early 1970s, before Cape Verde's independence, the state officially had two District Courts (one in the city of Praia and the other in Mindelo), which were subordinate to the Lisbon Court of

### The integration of 'practices and customs'

The first step towards achieving the integration of 'national legal practices and customs' in the constitution of the new state law involved the creation of the Centre for the Collection of National Legal Practices and Customs (*Centro de Recolha, Usos e Costumes Jurídicos Nacionais* – CEJURI), in 1976. The purpose of this Centre was to "[...] collect and compile information on the practices and customs in the country that contain legally relevant rules and conducts for the social practices of our People" (article 1).<sup>11</sup> This data collection represented a preliminary phase in the creation of a source for the law to be constituted (*Revista do Ministério da Justiça* 1976: 77). However, in my view, this intention was already confronted with a difficult article contained in the Law on the Political Organisation of the State (*Lei Sobre a Organização Política do Estado* – LOPE), a constitutional norm which was approved by the People's National Parliament on 5 July 1975 and remained in force until the country's first Constitution was approved, in 1980. The article in question (Article 22) stipulated that "[t]he Portuguese legislation in force on this date shall remain transitionally in force in all that does not contradict national sovereignty, the present Law, the remaining Laws of the Republic and the principles and objectives of the PAIGC." At the '1<sup>st</sup> Meeting of Legal Experts from Guinea and Cape Verde', held in 1976, the first president of Cape Verde, Aristides Pereira, justified this article as follows:

Whereas one of the State Programme's aims is to put a stop to unfair social relations through appropriate legislative measures, it was also obvious that the resolution of the various kinds of conflict and of issues concerning public administration could not be reliant on the opinions or subjective criteria of every person. These are the reasons behind the imposition of the principle, first in the wording of the proclamation of independence of the Republic of Guinea-Bissau and subsequently in the law on the Political Organisation of the State of Cape Verde, that the Portuguese laws in force in both countries on the date of ascension to full sovereignty would continue to be in force, unless they were inconsistent with the sovereignty or the principles and objectives of the Party (*Revista do Ministério da Justiça* 1976: 57).

In Cape Verde, the following factors all contributed to the constant enforcement of inherited colonial legislation by the class of jurists and magistrates, comprising mostly individuals from the colonial state: (1) the ambiguous nature of the expression "[...] in all which does not contradict national sovereignty, the present Law, the

Appeal, as well as Municipal Courts located in the municipalities (*Revista do Ministério da Justiça* 1979: 24).

<sup>11</sup> Ordinance 10/76, of 17 April.

remaining Laws of the Republic and the principles and objectives of the PAIGC" (art 22.); (2) the firm control over this article 22 by the National Justice Council (*Conselho Nacional de Justiça* – CNJ), the highest justice body at the time; and (3) the delay in the approval of the new Constitution. The enforcement of colonial legislation was not an exception within the former CONCP (Conference of Nationalist Organisations of the Portuguese Colonies), since all states elected similar principles and objectives for their primary law. This implicit acquiescence by the regime prompted a lack of interest in the collection of domestic 'legal practices and customs' envisaged with the creation of the aforementioned Centre.

At the meeting referred to above, the first president of the CNJ, Raul Querido Varela – an experienced and conservative magistrate who had worked in the legal bureaucracy of other Portuguese colonies, such as Mozambique – defended that it was the responsibility of "[...] jurisprudence, whenever possible, to make use of the current legislation in force and give it new relevance. Only when such legislation lacks the flexibility required to support the renewal impact of the principles of the new society, will recourse to article 22 of the Law on the Political Organisation of the State be officially legitimised" (ibid.: 155). He further reinforced this belief is with the statement that one could and should "[...] to a large extent avoid deciding openly against the legislation in force, in deference to legal certainty, since the legal system in force contains principles, notions and institutions that, serving as exhaust valves, free the system from what it contains that is disagreeable and hostile to our concept of justice" (ibid.: 155).

This conservative and colonial position taken by the CNJ was mildly criticised at the time by a jurist working for the Ministry of Justice, Luís Mendonça, who considered that "[...] the CNJ's 'cautionary Jurisprudence', avoiding *contra-legem*, using norms of uncertain legality from the Portuguese legislation, contrasts with the audacity and the flexibility of the lower courts in favourably resolving citizens' interests, without resorting to arbitrary or suitable verdicts, which are always reprehensible" (Mendonça 1978: 83). Taking a revolutionary stand, Mendonça further states:

[What] moves us is a question of principle, of unconditional acceptance that a national popular culture requires a 'complete decolonisation' [...], through the elimination of all colonial, political, economic and social structures and, consequently, legal heritage [...]. The interpretations of past law, according to the present requirements (teleological interpretations), the reformist leaks, the breaches in the colonial legal system in which a spirit of regeneration is growing, the grafting of African law, or vice versa, all these milder conceptions delay or turn away such purposes (ibid.: 86, translated from Portuguese).

Conversely, Mendonça corroborates the cooption of colonial legislation in favour of the new state, based on the need to avoid a legal void. Simultaneously, he attempts to eliminate the colonial legal heritage by 'Cape-Verdising' the legislation. Thus, he

does not accept the emancipatory re-use of colonial legislation as something legitimate or, to paraphrase the Angolan author Luandino Vieira (2004), as a 'war trophy'. The real problem is not the existence of colonial and revolutionary law in the legal miscegenation, but rather their dominance over and the exclusion and prohibition of the black African legal inheritance.

At the '1<sup>st</sup> Meeting of Ministers of Justice of Angola, Cape Verde, Guinea-Bissau, Mozambique and S. Tomé e Príncipe', the Cape Verde government acknowledged that the CEJURI, established three years earlier, had "never really worked" and that it was "[...] the very policy of the Ministry of Justice that, despite its eagerness to learn, collect and use traditional laws, temporarily relegated this intention to the background in benefit of a relatively broad, distinctly modern and progressive legislative task" (*Revista do Ministério da Justiça* 1979: 52).<sup>12</sup> The first among the reasons given for this non-prioritisation was the consideration that "establishing Customary Law in legal acts, based on oral tradition, after indentifying the scope of intervention and influence of the colonial authorities, and eventually of the jurisprudence, as well as of the economic process of colonisation is, in short, the [...] major difficulty a serious and thorough work must grapple with" (ibid.: 54). Secondly, we emphasise the idea that, instead of being an agent of economic progress and the social and cultural life of Cape Verde, the 'traditional law' may prove to be an obstacle hereto.

Thus, in *property law*, where there may be obstacles to a rational valuation of the land, as well as in *family law*, where the status of women and children, the dowry system, etc., may obstruct popular mobilisation, maintain retrograde and obsolete relationships of domination [...] The national reconstruction, the intensification of decolonisation, and the struggle for the liberation of national productive forces, may impose (we believe they do) the removal of certain rules from the traditional law. And there should be no doubts or hesitation in doing it. The African people are not anthropological reserves, pastures for ethnologists from all of Europe (ibid.: 56-57, emphasis in original).

Obviously, the idea presented in the first explanation must be stressed, since it is impossible to recover the pure traditional law that confronted the colonial state law. What was defined by the occupiers as 'customary law' is the result of invention and construction emanating from the colonial collision, and the flaws, adjustments and unequal interactions within this collision are the key elements in any recovery or

<sup>12</sup> For these reasons, the CEJURI was ultimately terminated and its functions entrusted to the *Direcção-Geral de Estudos, Legislação e Documentação* (DGELD) which, according to article 8, paragraph e) of the Organic Law of the Ministry of Justice, "[...] is particularly responsible for inventorying the practices and customs in the Country that are relevant to the lives of our People, in order to consider them in the formulation of the Cape Verde law" (*Revista do Ministério da Justiça* 1984: 170-1).

reinvention process of an emancipatory nature (Ranger 2008; Santos 2006a; Meneses 2004).

The second reason reveals the epistemological damage caused by 'classic' legal anthropology, whose colonial vision of legal pluralism prevented the acknowledgement of the overlap, articulation and crossover of different forms of law. Because that interaction was so intense, according to Boaventura de Sousa Santos, one cannot "speak exactly of law and of legality, but rather of interlaw and interlegality" (Santos 2002: 205). To Santos, these concepts form the "phenomenological counterpart of legal pluralism"; and the study of the dynamics, transformation, interconnection and reciprocal influence between the different plural legal spaces are more important than examining the different legal areas in an isolated manner (ibid.: 205). In several cases, this impediment not only allowed the new regimes to disguise other unmentionable goals under the cloak of deepening 'decolonisation', but also provided for the export and enforcement of the hegemonic and western principle of Rule of Law.

Nevertheless, what is important to stress is the swift transition that took place from the 'legal practices and customs' playing a central role to them taking on an accessory and lateral position in the new law to be established in Cape Verde. Assuming the priority given to 'written law', the Ministry of Justice considered that the conciliation of 'customary law' with the former required its 'modernisation' and that, with this adjustment, the conditions would be created for "[...] a *real* fusion between modern Law and traditional Law, representing the true *common Law* of the Cape Verdeans" (*Revista do Ministério da Justiça* 1979: 57-58, emphasis in original).

After a few more years, this Eurocentric vision reduced the so-called practices and customs to a position of complete marginalisation and dismissal, with the argument that, after all, traditional law did not exist in Cape Verde. Cape Verde's specificities within the African landscape are now blatantly used for that purpose. It is argued that in Cape Verde, contrary to the reality in other African countries, where there were several traditional and customary laws, "[...] there are very few sectors of social life dominated by traditional law". This, it was argued, was due to the history of social formation in the archipelago, which was populated "by slaves from the west coast originating from a wide range of ethnic groups (Wolof, Serer, Lebou, etc.), who naturally were unable to reproduce their social dynamics". Thus, it was further argued, "[the] non-existence of a structured traditional law with which to confront the coloniser's law is explained by the absence of a favourable and dynamic social fabric" (Mendonça 1982: 157). Sharing this opinion of Mendonça, David H. Almada, the then Minister of Justice, sought to justify the superiority awarded to colonial and revolutionary laws (i.e. the 'modern' laws) at an 'International Conference on Customary Law', stating that:

Modern law is, above all, a conquest of humanity and increasingly an instrument of development, stability, justice and peace among Men, and to that extent, Cape Verde subscribes to it. Basically, in the legal order that is being

established, the Cape Verdean legislator selectively applied modern Law and simultaneously promoted the fusion, the synthesis of that law with the principles contained in the customs of our People (Almada 1984: 171).

However, this synthesis never did take place. Currently, the discourse of most lawyers, jurists and magistrates in Cape Verde, regardless of their political preference, has not changed in that regard. For example, Carlos W. Veiga, the former Prime Minister of Cape Verde (1991-2000) in the Movimento Para a Democracia (MPD) government, a former militant and leader of the PAIGC-CV, as well as a lawyer, confirms that:

[...] in truth, there is no legal pluralism in Cape Verde; we do not have a set of customs and traditions with legal force to be able to say we have a binding system of rules alongside the formal system. What we may have is one or other rule such as, for example, the irrigation rule in S. Antão or in the interior of Santiago, or the rule of partnership in coffee plantations in Fogo (Field Logs 2010: 15).<sup>13</sup>

In the same vein, Vera Duarte, former officer at the Ministry of Justice's Direcção-Geral de Estudos, Legislação e Documentação (Directorate General of Research, Legislation and Documentation – DGELD), whose main assignment was to 'prepare an inventory of the customs and traditions in the country,' considers that the modern revolutionary law included in the Code of TZs is the one that 'truly' reflects the traditional or local Cape Verdean law, which is different from the laws of African peers.<sup>14</sup>

The failure to gather information on the 'national legal practices and customs' was due not only to the preoccupation with safeguarding against a possible 'revolution' or a 'traditional' legal counter-revolution, but also to the lack of financial and human resources available – particularly to the CEJURI and the DGELD – to carry out the proposed task. After Independence, the country's huge economic difficulties required the scarce funds to be concentrated in more priority human needs. This factor, alongside the colonial view of the traditional law, contributed to the persistent use of the 'colonial library' rather than the carrying out of detailed historical, sociological and anthropological work of collecting oral testimonies and observing customs and traditions. This situation further supported the hegemony of both the colonial law and the recently imported revolutionary modern law. The expected inclusion of the "principles contained in the customs of our People" (Almada 1984: 171) in the new law was never invested in, and was only superficially experienced in the preparation

of the Code of Area Courts and of the Statute of Area Court Judges, approved in 1977<sup>15</sup> and 1979<sup>16</sup>, respectively.

This superficiality was noted by Santos (2002) during the research he carried out on popular justice in Cape Verde, in 1984, at the invitation of the government. In describing the organisation of popular justice, Santos notes that it aimed at broad participation of local communities in the performance of justice, seeking, wherever practicable, to include "local law (customs, respectable and respected practices)" (Santos 2002: 193). This process was made easier by the fact that the People's Court judges were laymen and members of the communities, and also that "the written law regulating the courts' activity was vague and full of breaches" (ibid.: 193). Conversely, Santos asserts that the inclusion of 'local law' in the application of justice was, in some cases, complex because of the process used by the state and by the party to select the judges. When young people were selected, based on their 'understanding' of the state and party's objectives, it "[...] sometimes created tension within the local communities, who felt that dispensing justice should be left to the older, wiser and more prudent community members." (ibid.: 193). Santos further concludes:

A deeper examination of this discrepancy allowed me to conclude that I was facing a situation of interlegality, i.e. of a complex relationship between two laws – state law and local law – using different scales. For local communities, particularly rural ones, local customs were considered local law, a large-scale legality, tailored to the demands of the prevention and resolution of local disputes. For the State, local law was an integral part of a broader network of social and political facts, including the demands of State consolidation and the establishment of a socialist society; the union of the legal system; the political socialisation, etc., etc. On this smaller scale, local law was an integral part of state law and, therefore, a specific instrument of social and political action (ibid.: 193-4).

### Popular justice: from whom and for whom?

As previously noted, the state's second ambition was to extend 'popular participation' to all spheres of justice. In effect, in the preamble of Decree-Law 33/75 of 16 October, which approved the Juridical Organisation of the Republic of Cabo Verde (*Organização Judiciária da República de Cabo Verde*), the Government established that "[...] more courts should be created and their future arrangement should be different, taking into account the People's active participation in the administration of justice". The National Justice Council (*Conselho Nacional de Justiça*) and the Area

<sup>13</sup> Interview held on 10 April 2007.

<sup>14</sup> Interview held on 12 April 2007.

<sup>15</sup> Decree-Law 8/77, of 12 February. This code was altered by Decree-Law 153/79, of 31 December.

<sup>16</sup> Decree-Law 16/79, of 3 March.



Justice Councils (*Conselhos de Justiça de Zona*), or Area Courts, were established and the "people's advice for the different judicial echelons" came into effect (Decreto-Lei n.º 33/75). In the planned arrangement, the National Justice Council would have six People's Advisors (*Assessores Populares*) (article 31), the Regional Courts would have forty (article 14), and the Sub-Regional Courts would have sixteen (article 21). For the Area Justice Councils (Area Courts or Grassroots People's Courts), article 26 stipulated that: "[...] each judicial area shall have an Area Justice Council, comprising five members elected annually, from among citizens of good repute", and that "[...] until elections are held, the members of the Area Justice Council shall be appointed by local popular meetings".

Despite the fact that those in political power had announced and confirmed their intention to extend popular justice to the other echelons of justice, the appointment of People's Advisors to the courts did not take place above the Area Justice Councils. Popular justice was therefore limited to grassroots level. This situation contrasts with that of other former Portuguese colonies in Africa, where People's Advice was effectively implemented. In Cape Verde, the situation remained unchanged after the institutionalisation of 'popular justice' in the country's first Constitution in 1980. Not even the approval of the *Organização Judiciária da República de Cabo Verde*<sup>17</sup> by the People's National Assembly led to the appointment of Advisors. This Law, however, introduced some changes in relation to Decree-Law 33/75. In addition to the change of name from National Justice Council (*Conselho Nacional de Justiça*) to Supreme Court of Justice (*Supremo Tribunal de Justiça*) (article 5), it stated the intention to freeze the appointment of People's Advisors. Article 53 stipulated that "[the] Government shall regulate all matters concerning the appointment of People's Advisors through a Decree-Law [...]". Article 54 closed off by stipulating that "[the] Government shall, through a decree, determine the date of commencement of activities of the People's Advisors in the different Courts", and that "where People's Advisors have not begun to exercise their duties, the Courts shall continue to operate in the manner they do at present."

Whereas at domestic level the measures taken aimed at eliminating the possibility of putting the People's Advisors into effect, at international level attempts were made to justify the successive postponements of their establishment to peers from former Portuguese African colonies. At the '2<sup>nd</sup> Meeting of Ministers of Justice of Angola, Cape Verde, Guinea-Bissau, Mozambique and S. Tomé e Príncipe', held in Cape Verde

<sup>17</sup> Law 3/81, of 2 March. One year prior to the approval of this Law, Decree-Law 43/80, of 14 June, determined that "[the] people's advisors shall be recruited from among Cape Verde citizens of good standing" (article 1). The decree further stipulated, in the same article, the requirements to be met by advisors and, particularly, it established that the position "is not subject to being excused" (article 7), and that "the position of people's advisor is held for a non-renewable period of two years" (article 10).

from 22-26 November 1983, the speech given by the Minister of Justice was, in view of what has already been mentioned, notoriously ambivalent:

We must, however, clarify that people's advice in our Courts is still not a *de facto* reality in CAPE VERDE. We strongly emphasise: The decision made by our regime, [...] on the principle of Advisors' intervention is clear and unequivocal. However, we also know that introducing people's advice is a step that entails considerable thought, since it requires certain preconditions to be established, otherwise the entire apparatus (the Courts), whose actions in Cape Verde are very important to the daily life of citizens, could fall apart. And the truth is that the intervention of people's advisors in the Courts will most certainly encourage a structural and intense change in the entire judiciary. This requires reformulation of laws, operating schemes, work locations and resources, premises and mindsets. It will entail a battle that will not be simple, against open or concealed, objective and subjective, and psychological difficulties that will crop up along the way. Most of all, it is vital that no sudden actions or missteps are taken. Because, if it is not done at the correct time, once all the prerequisites are in place, we will not have resolved any problem at all; rather, we will certainly have created several others, to the detriment of the good and prompt administration of Justice, which will turn into regressions. In Cape Verde, these conditions have not yet been created. It is solely for this reason, then, that we have not yet put into practice the intervention of people's advisors in the Courts. However, methodical work is being carried out with a view to creating conditions for the effective participation of the Masses in Justice administration bodies, as quickly as possible (*Revista do Ministério da Justiça* 1984a: 46-7).

In the opinion of the President of the Supreme Court of Justice, Benfeito Mosso Ramos:

The fact that 'popular justice' was limited to the TZs clearly illustrates the difficulties in establishing the aforementioned popular justice in Cape Verde. It seems to me that it has remained at grassroots level because it was easier to accept the existence of a grassroots conflict resolution body. I don't know if you realise this, but in the early years of the post-colonial State, in the transition from the 25<sup>th</sup> of April to independence, the existing justice and conflict resolution structures were practically all dismantled; there were *cabo-chefes* and *regedores*, and there was a void and that void was filled by the TZs, you see? And so that vacuum, to a certain extent associated with popular enthusiasm at the time, the new ideas, the revolution, etc., etc., helped to achieve and to reinforce acceptance of the idea of the TZs. But when one talks about classic justice, i.e. in the regional and sub-regional courts, an undeclared resistance can be noticed. The fact that, in over fifteen years of the PAIGC/CV regime,

despite the declaration that justice was built on a popular basis, etc., etc., but that it never actually rose above the level of grassroots courts is, in effect, an important aspect of the experience of Cape Verde (Field Logs 2010: 114-28).<sup>18</sup>

When questioned about the reasons for such resistance, Ramos said:

I don't know whether there is sufficient scientific evidence to support what I am about to say, but I think that the ideological resistance to the initiative of popular justice beyond grassroots level was stronger. Or rather, there was not enough support; the judicial/legal technicians who, at the time, also formed opinions were not given the necessary support to accept any idea of popular justice at those levels which, traditionally, were always filled not by laymen, but by technicians. Because even the technicians were well-educated; because even on the islands where there was no qualified judge, Justice was administered by the municipal administrator. This was a person of authority, someone with an academic background and this produced a kind of acceptance; or it was someone with minimum education, trained for the duties invested in him. So, putting in laymen with no legal training whatsoever and who were probably poorly educated, to administer justice at a level above grassroots level, would probably not have been accepted; I don't mean by the general population, but by the public opinion specialising in the field, i.e. jurists and the more informed public (ibid.).

Thus the aforementioned notion is confirmed that the small bureaucratic bourgeoisie in control of the state apparatus, particularly the legal community as a whole, would discourage the initial intention of the single party to embed revolutionary law in the higher echelons of justice. The leading figure in this measured counter-revolution, this community – essentially composed of magistrates and lawyers and originating from the colonial period – was imbued with modern/colonial legal traditions which functioned as a “blocking force”. The single party could not easily work against it, not only because of the lack of human and financial resources, but also due to the increasing preference of its own leaders for the modern/colonial side of the legal mix, to the detriment of the modern/revolutionary side.

For the petty bureaucratic bourgeoisie, the issue of Popular Advisors did not arise solely from the standpoint of the justice operators – included in this social class – who feared losing the privileges that came with their hegemonic position. It also arose from the perspective of the customer of justice institutions. The elite was not keen on the existence of ‘popular justice’ in, let us say, ‘elite justice’, because it was considered a social and moral discredit. This attitude toward cases judged by individuals from the more ‘popular’ or disadvantaged areas of society was also extended to the TZs.

<sup>18</sup> Interview held on 20 April 2007.

Popular justice as a heuristic category, from a formal perspective, refers to trials carried out by common citizens from subordinate social strata (e.g. workers, peasants and petty bourgeoisie), who are not invested with the civil duty to prosecute. From a material perspective, popular justice refers to a judgement of conscience, free from any technical or normative grounds that are constitutionally required of professional magistrates working in official or classic courts (Maia 1996). It is this concept that is established in the competencies of the TZs, stipulated in article 45 of Decree-Law 33/75:

1. It is the responsibility of the Area Justice Council to: 1. Always seek to reconcile the parties. 2. Judge civil cases [...] according to the rules of equity and prudence, taking into consideration the predominant mindsets and sensibilities in the locality [...]
4. Judge according to the rules of equity and prudence, taking into consideration the predominant sensibilities and mindsets of the locality, the offence, the derogatory statements and other crimes against honour, honesty and against public morals, when the corresponding sentence does not exceed six months.

Being the only sphere in which popular justice was applied, TZs rarely definitively settled cases involving members of the elite referred to earlier, who did not identify with the action of the TZs – even though, in principle, such action was faster, cheaper and closer. This was due not only to the official ranking of the courts – i.e. the TZs were under the administrative jurisdiction of the district courts and only prosecuted petty civil and criminal cases – but also to the fact that the state had stipulated the possibility of appealing the decisions of the TZs in the official courts, the Regional Courts.<sup>19</sup> This state resolution addressed the concerns of individuals from a section of society that has the (financial) means to use this feature to avoid the unimpressive ‘label’ of being condemned by an area court, and to increase the possibility of having the conviction reversed by the Regional Courts, where their knowledge and resources wield greater influence.

Basically, two coexisting types of justice can then be identified in practice: that of the TZs, reserved for the resolution of minor disputes within the so-called ‘masses’, which is directed and applied by the masses, but controlled by the Party-State; and

<sup>19</sup> On the one hand, article 10 of the aforementioned *Código dos TZs* established that “[under] no circumstance is the normal competency of the area courts to be removed”, aiming to safeguard cases in which elements of the more favoured social strata refused to be judged by a people’s court, thereby maintaining the symbolism of the TZs’ ‘authority’. However, on the other hand the *Código dos TZs* weakened this same image of TZs’ authority by stipulating, in article 48, that “recourse shall have an effect of suspension and the accused shall be released on bail while waiting for the decision of the Court where the sentence was appealed.” This is also found in article 46 of the Decree-Law 33/75, which states: “The decisions of the Area Justice Council may be appealed to the Court of the region, which shall give a definitive sentence”.

the justice of the Regional Courts, for large and small cases presented by the more favoured social strata of the Cape Verdean society and provided by professionals from the legal community.<sup>20</sup>

In conclusion, faced with the concept of 'people's court' it is possible to draw on Foucault (2008: 39), who suggests that "[a] court, regardless of the type, is not the natural expression of popular justice, in fact, it is quite the contrary; historically its function is to reduce it, dominate it, suffocate it, re-writing it within the characteristic institutions of the State apparatus". He further notes that even the people's revolutions were unable to break away from the original formal requirements of bourgeois justice.

### From the abolition of people's courts to the dominance of colonial state law

The abolition of the TZs was the final blow to the remaining presence of local law in the justice system which, by including those courts, had shaped a certain state legal pluralism. The abolition took place in 1991, following the replacement of the single party regime with representative democracy in Cape Verde. Since legal pluralism was neither respected nor recognised in the country, the only officially acknowledged law from that time and onwards was state law, inherited to a large extent from colonial law. The existence of legal pluralism was, therefore, politically countered by what can be seen as the of victory of the slow counter-revolution of colonial modern law, which had begun soon after independence.

Just like local jurisdictional authorities – the *regedores* and *cabo-chefes* – had been abolished in the previous period, with the establishment of a multi-party system in Cape Verde the state abolished the TZs. This shows that the state in Cape Verde is endowed with relatively strong modern institutional resources, which even led to it being labelled a 'Creole Leviathan' (Silva 2001). These resources are the basis for the incipient or no recognition of the legal diversity of the country and for the subalternisation of legality forms outside the state.

The structures of TZs did not persist informally, although alternatives for conflict resolution at local level began to emerge in other structures related to, for example, municipal power and the activities of local associations that proliferate throughout the entire country. The local associations are managed by former members of TZs and other older local structures like the Neighbourhood Committees and the People's

<sup>20</sup> It must be noted that this is informed by the modern/colonial concept of law, produced by this community or by legal professions and institutions that aim to make state legal ideology hegemonic. By insisting on legal consecration, categorisation and proficiency, this ideology is a form of self-knowledge that approves and has power over the social power of the legal community and of the social classes assisted by them with a greater or lesser degree of independence. On this subject, see for instance Santos (2002: 206).

Militia. Their establishment was encouraged by successive local and central governments and by the parties, which sought to use and control them politically.

Given the scenario described, the fundamental challenge is to identify the possible continuities and ruptures in relation to local or traditional justice and popular or revolutionary justice, in a setting of non-institutional recognition and apparent absence of informal structures. In the present period, where the aforementioned 'Leviathan Creole' appears as totalitarian, the challenge is to find alternative or traditional local political legitimacies that coexist with the state, whether used or not by the state, and that underpin the idea that political and legal alternative forms are hidden underground. We are faced with a modern state that ignores the particularities of the respective African, European and Cape Verdean elements, which nonetheless are within the field, integrated, for example, in local government, where the informal and formal mix.

### Conclusion:

#### The Struggles of Emancipatory Legalities in Cape Verde

The fact that, after independence, most states in Sub-Saharan Africa 'adopted' new models – the 'development model' in the 1960s and '70s, the 'liberal model' in the '80s, and the 'regulatory model' or 'neo-liberal model' in the '90s and beyond – instigated the co-presence of a plurality of state configurations. These configurations are embedded in the legacies and influences from each historical period and state model, including the legacy of the pre-colonial state. In other words, what really characterises most sub-Saharan African states, more than just the import of state Eurocentric arrangements during the post-independence period, is the existence of a plurality of states' features where those endogenous features with pre-colonial roots articulate and mix with the features of different Eurocentric states, which were first enforced during colonisation and later imported during the post-independence periods.

However, it must be mentioned that the current plurality of state orders in sub-Saharan Africa is not merely a heritage of violent, conflicting and complex contexts of colonisation, which not only continued after independence but were reinforced through the aforementioned imports of the Eurocentric state. It was also due, in my view, to the 'pragmatism' of the elites of these states. Given the high price paid for some attempts to increase the process of state homogenisation, the elites were compelled to 'accept' the plurality within official borders, though without formally recognising it.<sup>21</sup>

<sup>21</sup> Efforts to expand state homogenisation are exemplified by the emblematic programmes of *Authenticité* in Congo-Kinshasa and *Ujamaa* in Tanzania, which led to the almost complete destruction of these countries (Scott 1998; Varela 2005).

Against this background, it is easy to appreciate the strong presence of legal pluralisms in countries hosting state pluralities.<sup>22</sup> Meanwhile, traditionally, the manner in which these states and their western colleagues deal with such plural realities is diverse. On the one hand, after determining the possibility of taking advantage of the different forms of law or legal orders, many states in sub-Saharan Africa have even come to encourage expert studies of these realities, in order to use them for their own 'governance' objectives. The fact that these realities do not, in principle, threaten 'national sovereignty', explains this position, since these forms of law are found within the state's borders – even if those borders are merely formal and only internationally recognised.

The scenario that applies to the formalisation of different states' features is different. Acknowledging the existence of a plurality of state forms could, ultimately, endanger the legitimacy of the international state system and its Eurocentric domination by the western members (Varela, 2005). This hegemonic resistance constitutes a real waste of the rich and boundless possibility to navigate between the various forms of law (communitarian, national, global) and the different kinds of 'statehood', considering that, in many cases, loyalty to the nation-state, the community and the world may not be mutually exclusive (Okafor, 2001).

From what has been illustrated, it is important to raise questions about the current state of those forces that oppose the growing process of hegemonic globalization of the principle of Democratic Rule of Law. However, in Cape Verde as in other countries with working-class inspired Parties – generally also Single-Parties or 'Party-States'<sup>23</sup> – the task of counter-hegemonic, alternative or joint governance actors is not easy. This is not only because of the internal and external impediments, but also because of the complexity and assortment of situations. In this country, the main focus of these opposing social movements on the ground involves 'transforming' the Cape Verdean state into a partner in the efforts to acknowledge the plurality of legal orders that exist in the country. The fact that the state has relatively strong institutional resources will allow it, under the current domination of neo-liberal governance, to perform the role of meta-regulator. That is, the state may be the entity responsible for creating space for legitimate non-state regulators. This may happen as the state has not been deprived of the role as regulator, contrary to what has happened with most states in the Global South.

Thus, on issues of the strategy and positioning of social movements in relation to the states, I believe that the assertion of Santos (2003) that the latter should be seen in some cases as "brand new social movements", using pragmatism as the guiding

<sup>22</sup> For an analysis of the discussion of alternative forms of state, or alternative forms of political organisation that depart from the hegemonic model of modern western states, see for instance Varela (2005).

<sup>23</sup> The PAIGC, which was followed by the PAICV, is catalogued in this manner by Silveira (1998).

principle, applies entirely to the case of Cape Verde. Santos further mentions that "whereas in some situations confrontation is justified, in others collaboration is advisable. And in others still, a combination of the two is appropriate. What is important is that, at each moment or in each struggle, the movement or organisation in question has clear and transparent justification for the option implemented, in order to preserve its independence." (Santos 2006: 392). In my view, in the case of Cape Verde, given the current outlook of the state, the actors that are motivated to recognise the internal legal diversity do not necessarily require a direct confrontation with the state, but rather a strategy to fight for the control of the state's power as a meta-regulator. In the medium and long-term, they struggle to transform the state's institutional model, with the aim of not only achieving recognition of legal diversity, but also of opening up a space to legitimise other struggles that have greater emancipatory potential.

In Santos' view, the crisis of the modern legal utopia of the Global North that erupted in the late 1960s – which aimed at the contradictory reconciliation of democracy (as social redistribution) and capitalism – may allow for what he refers to as 'subordinate cosmopolitan legality and politics' to open gaps in neo-liberal governance. Such politics begin with:

[...] political and legal struggles guided by the concept that it is possible to question political and legal practices and structures through alternative political and legal principles. This includes a vast confrontational field of politics and law in which I differentiate two fundamental processes of counter-hegemonic globalisation: global collective action, which operates through the articulation of transnational local/national/global connection networks; and the regional or national struggles, whose success leads to their reproduction in other places or to networking with ongoing parallel struggles elsewhere (Santos 2006: 372).

It is known that such a utopia was impossible to apply in the Global South, not only because many southern states were still colonies exploited by Europe, even during the decade of their strength in the 1950s – and even in those countries that had already achieved independence in the 1950s, representative democracy was and still is largely of low intensity, because of its high degree of exogenous character – but also because of the kind of capitalism practiced in both the colonial era and after independence, which is essentially extractive and exploitative. Moreover, the level of violence and destruction was also considerably higher compared to the Global North. Thus, I concur with Santos' idea that, for subordinate cosmopolitan legality, "it is not worth trying to revitalise the modern legal utopia or inventing a new one" (ibid.: 399). For this new form of political and legal space to achieve greater penetration in the Global South, it is necessary that the "[...] solution [...] [be found] in a critical realist utopia whose pragmatic move may involve legal mobilisation as part of a political mobilisation of a broader type" (ibid.: 399).

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## NOTES ON THE CONTRIBUTORS

**Francisco Alar** is a lecturer of Sociology – selected themes for police officers – at the Academia de Ciências Policiais (ACIPOL), Maputo. He is concluding his PhD programme in the area of Public Policy and Management at the Institute of Social Studies of Erasmus University Rotterdam, in The Hague, The Netherlands. He has worked with police and crime issues from different angles: first as a journalist, later as a lecturer and currently as a researcher in the field of policing and police management. He has a Masters degree in Policy Studies with specialisation on Social Policy from the universities of Fort Hare and Zimbabwe, in a course conducted by the Southern African Institute for Policy Studies – SARIPS, Harare. His undergraduate university training is on Educational Psychology by the Universidade Pedagógica of Maputo.

**Peter Albrecht** is a PhD researcher at the Danish Institute for International Studies (DIIS) and the Copenhagen Business School, focusing on local-level implementation of security sector reform (SSR) in Sierra Leone. Previously he was Governance and Conflict Adviser in the UK's Stabilisation Unit and Senior Programme Officer in International Alert's Peacebuilding Issues Programme, focusing on SSR in the Balkans and West Africa. Peter has worked for the UN Mission in Kosovo, the Kofi Annan International Peacekeeping Training Centre in Accra, Ghana, and the Danish Institute for Foreign Affairs. He holds an MSc in Nationalism and Ethnicity from the London School of Economics and Political Science (LSE) and an MA Research Degree in Anthropology and Ethnography from Aarhus University, Denmark.

**Sara Araújo** is a researcher at the Centre for Social Studies and a PhD student in the Doctorate Program "Law, Justice, and Citizenship in the Twenty First Century", at the University of Coimbra, Portugal. Her dissertation is on access to justice and community justices, a comparative study of Portuguese and Mozambican realities. She was part of the Permanent Observatory for the Portuguese Judiciary and has been a member of the bi-national research team for the Revision of the Judicial Organisation of Mozambique. Since 2003, she has been carrying out field research in several Mozambican provinces. She concluded her Masters degree with the dissertation "Legal Pluralism and Access to Justice. The role of community justices in Mozambique", which was awarded the Prize Agostinho da Silva by the Lisbon Academy of Sciences.

**Odair Bartolomeu Barros Lopes Varela** is a teacher and researcher, and is responsible for coordinating the degree course in International Relations and Diplomacy at the Institute for Law and Social Sciences (ISCJS) of Cape Verde. He also collaborates with other institutions of higher learning in that country. He is a partner member of the Council for the Development of Social Science Research in Africa (CODESRIA), based in Senegal. Funded by the Calouste Gulbenkian Foundation, he holds a doctorate in Sociology (Post-colonialism and Global Citizenship) from the Center of Social Studies at the Faculty of Economics, University of Coimbra.

**Markus Böckenförde**, is a Program Officer for the Constitution Building Programme at International IDEA, Stockholm, Sweden. Before joining IDEA, he was the Head of the Africa Projects and a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law (MPIL) in Heidelberg (2001-2008). In 2006-2007, he was seconded by the German Foreign Office to the Assessment and Evaluation Commission (AEC) in Sudan as its legal expert. The AEC has been mandated to support and supervise the implementation of the Sudanese Comprehensive Peace Agreement. From 1995-1997 he was research assistant to Justice Professor Steinberger, the German delegate to the Venice Commission (Council of Europe's advisory body on constitutional matters). Böckenförde holds a law degree and a PhD from the University of Heidelberg and a Master of Laws degree from the University of Minnesota as well as the equivalent of a Bachelor degree in political science (University of Freiburg). He has been involved in the Constitution Building processes of Sudan and Somalia, working together with the pertinent constitutional assemblies, and has been otherwise involved in the processes in Afghanistan and Nepal. He has published widely in the area of constitutional law and constitution building and is the co-author on several Max Planck manuals used as training materials for Max Planck projects. He has worked as a consultant for UNDP, GTZ, the German Foreign Office, the Konrad Adenauer Foundation and the Friedrich Ebert Foundation.

**João Paulo Borges Coelho** is an historian and novelist. He holds a PhD in Social and Economic History from the University of Bradford, UK. An associate professor at the Department of History, Eduardo Mondlane University, he is the Scientific Director of CESAB and founding member and Mozambique director of the Southern Africa Defence and Security Management Network (SADSEM). His research interests include regional politics, conflict and security in Southern Africa and the Indian Ocean, state resettlement schemes and philosophy of history, particularly related to power and memory.

**Fernando Florêncio** is professor of Social Anthropology in the Department of Life Sciences at the University of Coimbra. He has a PhD in African Studies, at ISCTE – University Institute of Lisbon. His research has focused on the role of traditional authorities in local state formation in Africa, including their relationship with (and participation in) local political arenas, and on pluralism in the administration of justice and the formation of states governed by the rule of law. The main basis for his research has been long-term fieldwork among the vaNdau populations in Mozambique and the oviMbundu populations in Angola. He has published *À Procura dos Mambo vaNdau. Estado e autoridades tradicionais em Moçambique* ("In Search of the Mambo vaNdau. State and traditional authorities in Mozambique" –2005), and several chapters in books, including "No Reino da Toupeira. Autoridades tradicionais do M'Balundu e o Estado angolano" ("In the Kingdom of the Mole. Traditional authorities of M'Balundu and the Angolan state" – 2010). He coordinated a major research project on the Social Dynamics in the Structuring of Political Spaces in

Rural African Contexts, funded by the Fundação para a Ciência e a Tecnologia. Since 2010 he has been deputy coordinator of the project Reconciliation and Social Conflict in the Aftermath of Large-scale Violence in Southern Africa: the cases of Angola and Namibia, funded by the Volkswagen Foundation and implemented under the institutional leadership of the Arnold Bergstraesser Institut at the University of Freiburg, Germany. In 1995-1997 he was Head of the EU Human Rights Mission in Rwanda. Florêncio has published several articles on the genocide, the latest being "Uma História de Violência sob as Brumas dos Virunga. Morte e poder no Ruanda" ("A History of Violence beneath the Mists of the Virunga. Death and power in Rwanda" – 2011).

**Paulo Granjo** is an anthropologist, researcher at the Social Sciences Institute of Lisbon University and invited professor at the New University of Lisbon. From 1999 to 2006 he was visiting professor at Eduardo Mondlane University in Maputo. His research covers Portugal and Mozambique. He has studied employment and hazards at Mozal (a large aluminium smelter in Mozambique), the tensions around the Family Law, the 'traditional' concepts and practices of divination and healing, the memory of traumatic events, and public violence – namely the lynchings and riots. He has published several papers and the books *Lobolo em Maputo* ("Lobolo in Maputo") and *Um Amor Colonial* ("A Colonial Love"). He has two books forthcoming on Mozambique, one focusing on ritual protection treatments, and the other on the social management of uncertainty in several fields of urban life. He is honorary member of AMETRAMO, the Mozambican association of traditional healers.

**Anne Griffiths** is professor and holds a personal chair in the Anthropology of Law at the School of Law, Edinburgh University. Her research focuses on anthropology of law, comparative and family law, African law, gender, culture and rights and juvenile justice. Her most recent publications include *The Power of Law in a Transnational World: Anthropological enquires* (2009); *Spatializing Law: An anthropological geography of law in society* (2009) and *Mobile People, Mobile Law: Expanding legal relations in a contracting world* (2005), co-edited with F. and K. von Benda-Beckmann. Over the years she has held visiting appointments at various institutions, including Senior Research Fellow, International Research Centre on Work and the Human Lifecycle in Global History (IKG), Humboldt University, Berlin (2010-2011), Distinguished Visiting Professor, Faculty of Law, University of Toronto, the Max Planck Institute for Social Anthropology, Halle/Saale, Germany, The International Institute for the Sociology of Law Oñati – Gipuzkoa, Spain. The University of Texas at Austin, School of Law and the Southern and Eastern African Regional Centre for Women's Law at the University of Zimbabwe. She is currently a member of the Executive Body of the Commission on Pluralism, a branch of the International Union of Anthropological and Ethnological Sciences, of which she was President from 2003-2009. Her current research, funded by the Leverhulme (2009-2010) is on the Gendered Dynamics of Land Tenure in Southern Africa.

**Victor Igreja** is a postdoctoral research fellow at the Institute for Social Science Research at the University of Queensland (Australia). His multidisciplinary and comparative research focuses on health, legal, political and religious aspects in post-conflict Mozambique and East Timor. He also has research collaborations with the Centro de Estudos Moçambicanos e Internacionais (Mozambique), the Danish Institute for Human Rights (Denmark), Chr. Michelsen Institute (Norway) and INCORE – International Conflict Research Institute (University of Ulster, Northern Ireland).

**Carolien Jacobs** holds a PhD in Social Sciences and a MSc in International Development, both from Wageningen University, the Netherlands. For her PhD research she was a member of the project group Legal Pluralism of the Max Planck Institute for Social Anthropology in Halle, Germany. Her research focuses on the role of religion in disputing processes in Mozambique. After obtaining her PhD, she continued at the Max Planck Institute as a postdoctoral research fellow, working on religion and the problem of order in Southern Africa.

**Helene Maria Kyed** is a researcher at the Danish Institute for International Studies. She has a MA (Hons) in Social Anthropology and a PhD in International Development Studies. Kyed has extensive research experience within the field of legal pluralism, including long-term fieldwork in Mozambique on the state recognition of traditional authorities and the interaction between state and non-state justice and security providers. In particular, Kyed has addressed the political implications of state-non-state engagements, and addressed theoretical questions concerning competing forms of sovereignty, social ordering and claims to authority. Current research also engages with the topic of community policing in Mozambique and Swaziland. Kyed has published several articles on these topics and co-edited three books: *State Recognition and Democratization in Sub-Saharan Africa. A new dawn for traditional authorities?* (Palgrave-Macmillan 2007), *State Recognition of Local Authorities and Public Participation: Experiences, obstacles and possibilities in Mozambique* (Ministry of Justice, Mozambique 2007) and *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform* (Rome: IDLO 2011).

**Maria Paula Meneses** is a senior researcher at the Centre for Social Studies, University of Coimbra, integrating the Research Group on Democracy, Citizenship and Law. She holds a PhD in Anthropology by Rutgers University (USA) and a MA in History from St. Petersburg University (Russia). Her current research interests include colonial fractures and the post-colonial debates, identity processes and conflicts, the relationship between state and 'traditional authorities' in the African context, legal plurality and the role of official, patriotic history and memory within contemporary identity debates. She has participated in various research projects, having just finished one on Witchcraft and Modernity in Mozambique: Questioning Power, Law and Policies, and another one on legal plurality in urban contexts, using Luanda, Angola as a case study. Her work has been published in journals, books and reports in several countries, including Mozambique, Spain, Portugal, Senegal, the United

States, England, Germany and Colombia, among others. Recent publications include *Law and Justice in a Multicultural Society: The case of Mozambique* (Dakar, CODESRIA, 2006, together with Boaventura de Sousa Santos and João Carlos Trindade). She co-edited, with Boaventura de Sousa Santos, a volume on "Epistemologies of the Global South" (*Epistemologias do Sul* – 2008), integrating contributions of scholars from Africa, Asia, Latin America and Europe.

**Vitalina do Carmo Papadakis** holds a Law degree from the Faculty of Law, Eduardo Mondlane University. She is a judicial magistrate since 1998, and at present is a judge at the Supreme Court of Appeal in Maputo. She is a trainer at the Centre of Juridical and Judiciary Training and President of the Mozambican Association of Judges.

**Amelia Neves de Souto** is a senior researcher at the Centre for African Studies at Eduardo Mondlane University and at the Centre for Social Studies Aquino de Bragança. She has a PhD in Institutional and Political History, at Universidade Nova, Lisbon, Portugal. Her current research focuses on Colonial History (political, institutional and military) especially in its latest phase and the transitional period (1960-1975), on regional integration in Southern Africa, and on history, memory and identity. Currently she is involved in a research project on "Mass Violence in Mozambique". Her recent publications include: "Mozambique in the Decolonization Period (1973-1974): What decolonization?", In Augusto Nascimento, Aurélio Rocha and Eugénia Rodrigues (eds.): *Mozambique: Historical and regional relations with CPLP countries*. Maputo: Alcance Editores, 2011, pp.183-226; "Women's Economic Empowerment, Associative Movement and Access to Local Funding." Maputo: CEA, UEM, 2010; and "Caetano and the Decline of the Empire: Administration and colonial war in Mozambique during the marcelism (1968-1974)". Porto: Afrontamento, 2007.

**João Carlos Trindade** is a retired Justice of the Supreme Court of Mozambique. He served as Provincial Attorney in 1977-78 and as a senior judge from April 1978 to June 2009. During the first multiparty general elections, in 1994, he was the Judge-President of the Electoral Court. In 1999 he founded and became the first Director of the Legal and Judicial Training Centre, where all the country's judges and prosecutors are trained. He taught Penal Procedure and Mozambique Law History in the Law School of Eduardo Mondlane University. He is a founding member of CESAB, currently serving as Deputy Director and senior researcher. He is also an associate researcher at the Social Studies Centre of the School of Economics of Coimbra University, Portugal.



Access to justice and security are of core concern to the majority of Mozambicans, not least to those who inhabit the country's poor areas. Since the end of the civil war, in 1992, the state police and the judiciary have undergone comprehensive reform efforts as part of the country's democratic transition. However, despite massive government and international investment in the formal state institutions, many challenges remain in terms of ordinary citizens' access to justice and public safety. In fact, in most situations the majority of Mozambicans turn to customary and community-based institutions to have their disputes and crimes resolved, and in worst-case scenarios they 'take the law into their own hands'. Justice is frequently dispensed by traditional authorities, community courts, village secretaries, community policing actors, civil society organisations and traditional healers. At times they do so in collaboration with the state police and the courts, and at other times in competition with them. In fact, much of what goes on in practice is highly informal.

These dynamics of legal pluralism is the central topic of this edited volume. The book contains a richness of empirical case studies on state and non-state mechanisms of justice and public safety across Mozambique, as well as insights from Angola, Sierra Leone and Cape Verde. It links the empirical insights to wider theoretical and policy-related questions. The point of departure of the book is the official recognition of legal pluralism in the 2004 Constitution of the Republic of Mozambique, which makes Mozambique a rather unique case globally. The book contributes to a critical discussion of this constitutional commitment – and its practical and political implications – based on solid historical, sociological and anthropological research into the everyday dynamics of legal pluralism.

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