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Traditional Authorities in Mozambique: Between Legitimisation and Legitimacy

Abstract: This paper discusses the study of informal structures of conflict resolution present in Mozambique (both in rural and urban contexts), associated with the debate on the (re)emergence of *traditional authorities* and *customary law* in the postcolonial landscape of justice administration. Recent studies on the role of alternative conflict resolution mechanisms in Mozambique have provided two main lines of argument for explaining the persistence of this 'traditional' element: one, on the '(re)traditionalization' of Africa, claims that contemporary political crises must be analyzed through the recycling of older local beliefs and institutions; the other one argues that the 'modernity' of African politics explain recent policies, seen here as emerging from the constraints of modernity and 'globalization', triggering new contexts and new dynamics. The research results discussed here suggest that far from being reminiscent of ancient realities, or recent inventions answering entirely new needs and new functions, these power structures have a long history in Africa, a factor that raises the question of the adequacy of the use of analytical categories such as 'traditional' and 'modern' while analyzing contemporary legal structures in the continent.

1. Introduction

This paper attempts to shed light on the situation of *traditional authorities* in Mozambique. The research data analysed here was gathered within the framework of a research project on the contemporary situation of Justice administration, coordinated by both Professor Boaventura Sousa Santos – Coimbra University, Portugal – and Supreme Court Judge João Carlos Trindade, from Mozambique. The main objective of the project (initiated in 1996) is to promote an empirically sound

and dynamic understanding of the relationships between the multiple judiciary instances present in the country, in the context of cultural transformations in Africa. Therefore, the data analysed in this paper results from monitoring over 40 community courts and other alternative instances of conflict resolution in Mozambique. This work included direct observation of court sessions, interviews, the analysis of processes (whenever possible) and archive data analysis.

The working concept of the project – the understanding of the Mozambican state as a heterogeneous state – takes a broad view of law, including local/indigenous customary practices, religious law, as well as state civil law and enforcement institutions and processes, in order to envision an innovative view on human rights, which draws on local, cultural, and legal norms and institutions, and priorities set by local, national and international structures.

This presentation will hopefully contribute to current debates on the processes of state formation in Mozambique throughout the last century. In particular, the emphasis will be on the nature of the relationship between base institutions inherited from the colonial period and those established by the different governments in the post-independence period.

The first part examines relevant aspects of the colonial experience and introduces elements that were key to the context in which the post-independence Mozambican government tried to institute a clear and decisive break with the legacy of the colonial State, and construct a socialist order based on the growth and consolidation of *popular power*. Later on, this article briefly examines the processes of state formation and socio-political change that occurred in the country over the last three decades, with the objective of highlighting the lines of continuity between the rural power structures at the end of the colonial period and those which predominated in the post-independence period as a result of Frelimo's efforts to revolutionise social relations within the country. To that end, the article focuses on the results of the ongoing research with regard to the role of the local community authorities in the resolution of social conflicts. The goal is to create an ample basis for discussing the specifics and commonalities regarding the creation of traditional authorities, and their contemporary setting and function in southern Africa.

2. The creation of a plurality of legal orders

Mozambique is an African state lying in the southern hemisphere. It is a large country, with a population of approximately 19 million, almost all native Africans, belonging to several ethnic or linguistic groups. Until the onset of Portuguese colonisation, toward the end of the 19th century, the various peoples that made up Mozambique did not live under a single political authority. They existed as independent entities, with various forms of political and social organisation: some were kingdoms with centralised governments; others existed mainly as headless units, the largest political units being the tribes or chieftaincies.

The transition to the 20th century became synonymous with the implantation of colonial rule, symbolising a critical period of radical changes that brought about the Mozambican political reality. The different economic and political strategies applied by the colonial state in Mozambique resulted in important changes to the organisation of power (and where and for whom this power operated).

The colonial system imposed on Mozambique was profoundly racialised. Perhaps its most notorious trace was its composite nature, espousing both assimilation and the principles of indirect rule. The *indigenato* regime – imposed formally in the 1920s[1] – was the political system that subordinated Mozambicans to leaders of communities described as tribes or clans. The construction of traditional/common law therefore arose as an integral part of this process of subordination and domination, out of which the colonial state emerged (Young, 1994; Gentili, 1999). Political control under the colonial state was highly concentrated, while the administrative control was much more selective and decentralised. Thus, in rural settings, the colonial state agreed that administration would be carried out by local, traditional authorities, applying a private, customary law for the resolution of problems in local societies, whereas in urban areas, civilians (mostly Portuguese colonists) operated predominantly under the rule of law.

[1] The *indigenato* regime lasted until the early 1960s. However, the end of this regime did not extend the rights of citizenship to most Mozambicans, nor lead to important reforms of the local administration, or contribute to the strength of the legitimacy of the colonial regime. It was more of a make-up reform, at a time when the struggles for national liberation were already spreading in the Portuguese colonial territories.

Simultaneously, the division between indigenous and non-indigenous was reinforced with the introduction of the concept of assimilation. As second-class citizens, the assimilated (Blacks, Asians, and people of mixed origin) had identification cards, which differentiated them from the mass of workers who possessed an indigenous identification card (*caderneta indígena*).

In ideological terms, the colonial system was a dualistic structure that attempted to oppose the different forms of governance, legal systems, land possession, and labour regulations (Mamdani, 1996). The colonial state guaranteed the existence of an official, modern legal system for citizens (i.e., for the colonisers and the *assimilated*). The state would issue birth certificates and identity cards to citizens. Citizens could use these documents to register goods (e.g., land) under their names, and could appeal to state courts to resolve legal conflicts. Civil identity was, therefore, the identity of the civilised citizen; the only one who retained political and civil rights. On the other hand, indigenous rights were defended by traditional authorities through traditional law.[2] Because indigenous identity was outlined along regional ancestral lines, it was defined mainly on the basis of ethnic criteria.

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

After independence, political-legal cultures as diverse as the Eurocentric socialist revolutionary culture, or the Eurocentric capitalist democratic culture, were added to the extant mix of legal orders (Santos, 2003: 65). These *new* cultures added new elements to the resources available locally. These previous resources were remnant structures from earlier periods in the life of the state, some of which, although legally suspended for a while, had continued to survive sociologically (such being the case of the so-called *traditional authorities*).

As Santos points out (Santos, 2003: 55), if, during colonial times, it was relatively easier to distinguish, in terms of legal pluralism, between the main legal orders concerned – colonial law on one hand, and native or indigenous common law

[2] Yet, and especially since the 1950s, a great amount of Africans would migrate to the big Mozambican cities, settling in the neighbourhoods of *caniço*, where *traditional*/*informal* forms of conflict resolution would still predominate, together with a strong police control (Rita-Ferreira 1967-1968).

on the other – this distinction became increasingly blurred in a postcolonial context. Indeed, the contemporary landscape of Mozambique constitutes what Santos calls a heterogeneous state (Santos, 2003), composed of a mosaic of legal hybrids, reflecting a mixture of elements of different legal orders (official/state law, common law, various religious laws, etc.). At the same time, in the field of conflict resolution, innovative legal entities are created out of such mixtures.[3]

In sum, and as we shall further address, this landscape of legal hybrids is a condition present not only at the structural level of the relationship between the different legal orders, but also at the level of the legal behaviour, experiences and representations of citizens and social groups, a phenomenon Santos describes as *interlegality* (Santos 1995: 473).

However, the system of analysis developed internationally, with regard to the subject of legitimisation of authority, assumes a net division between the traditional and the modern sphere of legal power. In this sense, it is important to evaluate the implications of the modern/traditional dichotomy of the concept of authority. A modern conception of the meaning of authority[4] considers traditional authorities to be pre-modern, due to their steadfast belief in the sanctity of tradition since time immemorial. The legitimacy of this authority is guaranteed by those who govern according to such traditions. On the contrary, rational authority – a modern type of authority – is defined as that which acts through socially sanctioned structures.

This matter requests a careful evaluation of the qualifiers *traditional* and *modern* regarding the extreme heterogeneous landscape of judicial orders existing in Mozambique (Santos, 2003: 62). In terms of contemporary conflict resolution, the notion of *traditional* is used to make reference to practices and knowledge with a long historical presence, as opposed to the modern judiciary; the former does not have an equal footing with the new legal structure that began to be introduced into Mozambique less than two centuries ago.

[3] As we shall discuss further on, the ongoing legal reform aiming at recognising *alternative* mechanisms of conflict resolution is taking place in a complex and conflictive context, where several distinct legal rationalities coexist: remnants of the Portuguese colonial legal codes, socialist oriented policies, customary law, various religious systems and Western constitutionalism.
[4] See Weber, 1964: 159.

3. The web of legal orders in post-independence Mozambique

In 1975, with Independence, the country adopted a Westernised constitution,[5] with a parliamentary system of government. It also provided for an independent judiciary with the power to review acts of both the legislature and the executive. However, as the Frelimo's[6] governmental goal was to achieve the level of development presented by the West, the recognition of ethno-cultural differences was seen as a wrong political move, as a path to the advance of internal regional fractions; at the same time, many of the local African traditions were regarded as backward, conflicting with the route towards development.

In legal terms, the banning of traditional authorities (at least formally) right after independence can be seen as one of main measures undertaken to outlaw any form of divergence with the role to be played by the modern state in terms of justice administration. They were to be replaced by a collective structure – the *Grupos Dinamizadors* (GDs) – dynamising groups working throughout the country.[7] Headed by a secretary, they came to take on a wide range of functions, which partially overtook those which had, up to that point in time, been carried out by the traditional authorities: addressing social issues, legal questions, policing, security, administration and regulation. This was seen as a condition for the construction of the Mozambican nation, as article 4 of the first constitution of Mozambique (approved in 1975) expressed clearly the need to eliminate "colonial and traditional structures of oppression and exploitation and the accompanying mentality".

In a more general way, it was hoped that the GDs would introduce the political history and political priorities of the new government to Mozambican citizens.[8]

[5] In November 1990 a new constitution was approved, establishing in the country a multi-party system, the separation of executive, legislative and judiciary powers, and the introduction of a market economy. In 2004 a new constitution was approved, introducing, for the first time, the recognition of legal pluralism in the country (Art. 4).

[6] Frelimo was the movement that conducted the struggle for national liberation. After Mozambique's independence from Portugal, Frelimo underwent a process of political transformation, and was established as a party in the late 1970s. After the introduction of a multi-party system, in the early 1990s, Frelimo has won both the presidential and legislative elections, thus being the party in power (in 2005).

[7] The GDs were groups of eight to ten people, chosen by a show of hands during the public meetings of urban neighbourhoods, workplaces, or local communities throughout the country. All of those accused of collaboration with the colonial regime were excluded on principle.

[8] Popular vigilante groups were also formed to assist the GDs and were supported by militias that reported to the Frelimo-appointed local administrators.

During the first decade after independence, it became practically impossible to speak of social differences other than the obvious differences, between colonists and oppressed, between rich and poor. Reference to other forms of difference – be they cultural or even ethnic – would be condemned as endeavouring to spread regional divisions throughout the country.

Literate people were almost inevitably part of Frelimo's attempt to extend the modern state into rural environments.[9] Their power came from a form of knowledge that denigrated the *traditionalism* of the tribal chiefs and the *obscurantism* of their rural culture (Roesch, 1992: 472; Geffray, 1990: 34-44, 78-80). Characteristic of the dominant ideology at that time was the fact that scholars ignored some of the main questions that, in legal terms, people were posing; mainly, how law would address their social problems, such as the conflicts due to the presence of multiple systems of land ownership, inheritance, alimony, witchcraft accusations, etc. Rather, most of these issues were described as an impediment to national unity and to the project of liberation: pernicious evidence of the traditional, obscure past.

This political decision had a profound effect in the country, where, as elsewhere in sub-Saharan Africa, the making of customary law became a symbol of the *traditional*.

The essence of the colonial system, thus, was based on the existence of a traditional ruling system, upon which the colonial administrative and judicial system exerted its action. In colonial Mozambique, local, traditional chiefs were closely linked to the colonial system. Although some of the local chiefs (*régulos*[10]) were of noble lineages, several other people appointed by colonial authorities often lacked traditional legitimacy.[11] At the same time, the positions to which they were appointed were either created by the colonial administration, or had been so corrupted by its demands to collect the hut tax, raise the labour force and regulate the forced production of agricultural products, that they no longer represented

[9] That is, the assumption of free and equal rights to citizenship in the country.

[10] The *régulo* (chieftain) was institutionalised, in colonial times, as the lowest component of the administrative colonial system, working under the control of the local administrator. The *régulo*'s position was passed down from generation to generation, according to a hereditary system. Thus, where such a position still exists, its legitimacy derives from family lineages going back to pre-colonial times. The *régulo* embodies different functions of power: legislative, judicial, executive and administrative.

[11] Indeed, whenever these traditional chiefs opposed the colonial authorities in one way or another, they were replaced with more prudent individuals.

legitimately autochthonous patterns of authority, but rather the co-optation of complex ruling mechanisms.

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

A careful study of the customary clearly shows an attempt to preserve the social fabric, through the social construction of tradition, law and ethnicity, throughout the impositions of the colonial system. For Mamdani, this system of indirect rule – a characteristic of the British colonial administration in Africa – established a *decentralised despotism* as the British learned to marshal authoritarian possibilities in the native culture (Mamdani, 1996: 23). However, at the same time, in a game of mirrors, one has to pay attention to the role played by local actors, as people continually reinterpreted and reconstructed tradition in the context of broader socio-economic changes. As Spears notes, "far from being created by alien rulers, tradition was reinterpreted, reformed and reconstructed by subjects and rulers alike" (2003: 4).

Thus, tradition emerged as a multi-dimensional landscape, as interactive historical process, the antithesis of the *static* colonial state.

Specifically, in the Mozambican colonial context, and despite being punished by the colonial state, the chieftaincy and related institutions were an important factor in terms of cohesion and cultural identity, which legitimated authority and regulated relations among the population by administering the local situations of conflict that emerged. Far from conveying an unchanging past, tradition undergoes continual

renewal as new concepts are brought in or old concepts readjusted according to changing realities. Tradition is then composed of fixed principles and fluid processes of adaptation that regulate societies. In colonial times, the *régulos* represented the consolidation of judicial, legislative and administrative authority at the centre of the state. In order to keep their position, these traditional chiefs depended on the support of colonial power; but, simultaneously, colonial authorities depended on traditional authorities to make their rule effective and legitimate.

Under the Portuguese, the *régulos*[12] were the repositories, administrators and judges of customary law, the rules that governed colonial social, political and economic relations. In sum, from a political resource for renegotiating the social status and access to resources, the customary was transformed into a set of enforceable rules that froze its status and restricted access to it.

In a situation where traditional problems were, by law, to be resolved under the customary rules (but where no codification of these rules was ever officially accepted), both the Portuguese administrators and the *régulos* retained the ability to adjust traditions to answer different individual situations. In sum, the administrative and judicial power of the colonial state was quite limited, and it became subject to local discourses of power that this state neither fully understood, nor controlled.[13]

What gives tradition, custom and ethnicity their coherence and power is the fact that they lie deep in peoples' popular consciousness, informing them of who they are and how they should act. Yet, as discourses, traditions, customs and ethnicities are

[12] In 1944 the *régulos* and their assistants, the *cabos de terra* were given the status of administrative assistants. Gradually, these traditional titles lost some of their content and the *régulos* and *cabos de terra* came to be viewed as an effective part of the colonial state, remunerated for their participation in the collection of hut taxes, recruitment of the labour force, and agricultural production in the area under their control. To exercise their power, traditional authorities had their own small police forces (and resorted to physical punishment). Yet, the *régulo* did not act individually, but rather as a type of catalyst of opinions, such that a case was presented not only to the chief, but also to his counsellors. The sentence was produced after hearing the opinion of the *b'andlha'*, i.e. the assembly of prominent members of the local community. Indeed, physical force was insufficient to guarantee the legitimacy of their actions. To that end, traditional authorities had to appeal to the support of the local lineages (to which they frequently did not belong, as mentioned above) to negotiate the demands of the colonial administration and find solutions to emerging conflicts.

[13] Despite this linkage with the colonial administration, several are the examples that refer to the dual role of some *régulos,* who used their privileged positions to impose programs to improve the life conditions of their populations; in other situations, they made a decision to directly confront the colonial system, or to flee to neighbouring countries. The responses of the local authorities to the national liberation struggle were many: there were those who supported the guerrillas of the Frelimo (with food, logistic support, etc.) and those who maintained an attitude of collaboration with colonial authorities. Yet those who supported the Frelimo guerrillas were only modestly compensated after independence.

continually reinterpreted and reconstructed as regulated improvisations, subject to their continued intelligibility and legitimacy. Thus, the postcolonial state, in order to be recognised as a legitimate authority, knew the new judicial structure had to be anchored, at least to some extent, in the everyday life of both rulers and subjects alike. A new legal framework, to be accepted as legitimate, has to bear a resemblance to the legal corpus upon which it has been built. This is the challenge that, since 1975, has been posed to the state.

In the political-legal sphere, the dominant discourse, seen as a means of contributing to development, mirrors the genre of peripheral postcolonial states aspiring to modernisation. Both the natives and the civilised are given fixed ideological meanings, resulting in the impossibility, in terms of socio-legal theory, of connecting different legal systems from the perspective of *interlegality*. This became particularly problematic during the last stage of the colonial presence in Mozambique. The result of the attempt to apply indirect rule to a colonial process where the colonising power was – in terms of social, economic and political intervention – quite fragile, produced a hybrid system of traditional authorities. On the one hand, these chiefdoms – whether *original* or adapted – represented a guarantee of continuity for the functioning of the communities; on the other hand, they constituted the bases of colonial administration within the local setting. In this sense, the customary represented a safety cushion between the communities and the agents of the colonial administration, who were entrusted with resolving various administrative, economic and legal problems, and allowed for a more or less harmonious relationship between the two. Despite being modified under pressure from the colonial entity, in a certain sense the actions of the traditional authorities continued to be seen as local in origin, and as the result of a profound familiarity with the feelings, existing norms and language of the communities. These were the factors that permitted and legitimated their actions.

However, the ideological campaign of Frelimo during the period of the nationalist struggle for independence, as well as throughout a large stretch of the post-independence setting, was aimed at reinforcing the dualist nature of the system: the citizens as oppressors and the indigenous as the true Mozambicans. Yet, the socio-political and legal fabric appears much more complex at the height of independence in Mozambique. Despite the continued importance of coercion and colonial administrative control, there was no binary structure in the country as

advocated by Frelimo. In the post-independence period, this policy has prevented the recognition of the existence of a plurality of interactions among distinct socio-legal fields, since the dominant discourse (and praxis) only allowed this interaction to occur either as confrontation of legal orders, or as competing, rival legal systems. In both cases, one legal order would emerge as the dominant, the remaining ones being classified as subaltern, peripheral. However, as Santos suggests (Santos, 2003), complementarity, cooptation, convergence, assimilation, suppressions, junctions, are just some of the many possibilities under which interlegal interactions may take place. Hence, how much of the discussion regarding the modernisation of the legal structure in Mozambique indeed allowed for a successful empowerment of Mozambicans? Aren't they, instead, through recourse to the fixity of the traditional *vis-à-vis* the modern, promoting the impossibility of contacts between distinct systems of social regulation?

The initial process, of incorporating the newly independent postcolonial states into the family of nations, resulted in a process of reinforcement of the differentiation between the so-called universal legal framework and the local, traditional legal frameworks. The Mozambican postcolonial state emerged in a context where both chronological and territorial differentiation were achieved by a unitary compulsion that aimed to cover over differences, insisting upon the homogeneity of the future, and not assuming the existing socio-legal heterogeneity. The *other* cultures, viewed as *inferior* under the colonial order, now, in a postcolonial setting, (re)emerged as backward in the dominant legal discourse (Carilho, 1995; Lundin, 1998). In terms of legal systems, this approach justified the dominant presence of an official legal system, built upon the principles of Western rationality.[14]

Indeed, the continuity of the principles of Western rationality, in the social ordering of Mozambique, resulted in a sequence of attempts (Santos, 2003) to integrate the traditional indigenous instances under a dominant legal rationale,

[14] The absence of recognition of the aims of local communities by the *modern* state was one of the main reasons that led Renamo to carry out a long civil war that ravished the country for more than a decade. In 1992, Frelimo's government and Renamo signed a peace agreement, a fact that allowed for political and social stability in the country. Meanwhile, Renamo transformed itself from a movement of resistance into a political party, thus becoming a central political force in Mozambique. Although there are many more political parties legally organised in the country, their political expressions are quite small and unsuccessful, as their non-noticeable results during the two major elections reflected. The peace process was followed by an Amnesty Act (15/92) aimed at avoiding confrontational situations after the peace agreement, in a situation which resulted in more than a million people dead and economic damages estimated at about 10 billion US dollars.

without acknowledging the fact that the existing differentiation in terms of rights is the result of specific historical and contemporary experiences. This sort of *amnesia* enables the Western-based legal narrative to remain ever-present, without ever being questioned for the bias provoked against the plural arena of socio-legal orders. As before, during the post-independence period, the native peoples were viewed as uncivilised, without sufficient legal sophistication for their normative systems to be part and parcel of the new national legal order. The thought-provoking results of a research project carried out regarding the heterogeneous nature of the Mozambican state, as one of its main characteristics, pointed out the fact that only a very narrow section of the population would appeal to the official, state-oriented judicial system to try to solve their problems (Santos & Trindade, 2003). Instead of building a new legal order based on the realities present in the country, the contemporary Mozambican legal framework may be described as one that establishes overall supremacy over other competing modes of rationality, which are either silenced or appropriated as a subaltern resource the dominant model can use. It is our opinion that an autocratic approach to consolidating national unity only results in the amplification of cultural differences and identities, as we have been observing.

Indeed, it is fundamental to distinguish between political strategies aimed at creating consent, and those aimed at creating a sense of obedience. The former calls upon the question of legitimacy, whereas the latter may result in acquiescence or resistance to the decision made. For the first option to be effective over time, power has to be transformed into some kind of legitimate authority; otherwise its exercise becomes self-destructive.

Sensible to this situation, in 1996, Act 9 was produced as an amendment to the Constitution of 1990, creating local authorities under the administrative protection of the state. Recognising these local authorities as an indirect form of state administrative organisation, this Act recognises the need for the government to maintain its responsibility for administering the entire country, opening up towards forms of indirect intervention through decentralised administration. Article 188(1) defines, specifically, the ambit of action of these authorities, expressing them as "to organise the participation of the citizens in finding a solution to community problems, to promote local development, to strengthen and to consolidate democracy, within the framework of Mozambican State unity".

Some of the most intense debates on issues related to the proposition of a wider decentralisation have been around the issue of representation and local authority. Who constitutes the *communities* that are to face new powers ranging from land tenure issues, natural resource management, and dispute-settlement to tax collection? The possibility that chieftaincies would be given some power, after having been abolished in the immediate post-independence period (Cuahela, 1996; Dinerman, 1999), prompted political conflicts, as a range of contenders for local power stepped forward to make a claim.[15]

The place of non-official instances of conflict resolution at local level – both in rural and urban contexts – became part of this discussion. This remains one of the specifics of the contemporary Mozambican system of justice administration – the presence of alternative conflict resolution mechanisms based upon the local communities, both in rural and urban settings. In neighbouring countries, where the indirect rule system was dominant, the traditional remains the preferred domain of the rural setting, *vis-a-vis* the urban context, where community means or official judiciary mechanisms prevail. It also explains the current process of reorganisation of the Judiciary in Mozambique, aiming at proposing a more ample setting for the regulation of conflicts in the country, based on a *justice of proximity*, culturally sensitive to the social reality of the country. As in other contexts on the African continent, it is critical to recognise that although negotiation, mediation, and conciliation are being promoted as *alternatives* in Western societies, they are not completely new. All legal orders, whether based on customary or state institutions, rely, to varying extents, on the same basic procedural modes to handle disputes: avoidance, coercion, negotiation, mediation, arbitration, and adjudication. In addition, people in diverse societies use multiple "mechanisms to handle disputes at a

[15] The distance between the government's political discourse and its practices partly explains the legitimacy crisis that the Frelimo faced at the local level in the 1980s. Several authors have approached the issue as an attempt to clarify the issue of the State and the customary in Africa. For some, such as Mamdani (1996), the cause of the current weakness of the Frelimo, of its absence of legitimacy in the countryside, lies in the anti-democratic impositions of the Marxist regime. Back then, the Frelimo party, the State and the GDs had been transformed into institutions so interlaced at the base level – in terms of members and functions – that it became impossible to distinguish one from the other. Other scholars, drawing from experience collected in the field, claim that part of the responsibility should have been attributed to the lack of support in rural zones (i.e., the lack of authority in the countryside), especially due to the abolition of the *régulos* and of local institutions of authority (Geffray, 1990; Dinerman, 1999). Finally, scholars such as O'Laughlin (2000) defend that the interpretation of the political choices made by the young Mozambican state has to be analysed within the broader framework of cold war, when the country had to face the pressure from apartheid South Africa and racist Rhodesia.

local level, including peer pressure, gossip, ostracism, violence, public humiliation, witchcraft, and spiritual healing" (Castro & Ettenger, 1996: 7).

The current research indicates that it is possible to detect the development of dynamic legal hybridisations in Mozambique – hybridisations that accept the modern model of law, even creating space for its action. Seen from this angle, the vitality of traditional normative systems reflects the difficulties of a state legal body, which appears unable to achieve its objectives. The hybridisation of legal orders reflects the diversity of knowledge present, by no means fixed in space and time, as so often is imputed to traditional values.

Because *other* political, judicial and administrative instances have been developing and adjusting to contemporary situations, they result is an innumerable array of metamorphoses in the socio-legal field. The fundamental question to be posed is how the dynamics of hybridisation of these legal orders have developed, and which forms they have acquired. Two mains instances embody these moments of hybridisation: community courts and the traditional authorities, reinstated through the Decree 15/2000, passed by the Council of Ministers. Due to their composite character, their performances are quite difficult to fit under a common canon. Nonetheless, a short description is here presented.

4. The legal hybrids in Mozambique[16]

Whilst internal legal pluralism occurs within official law and justice, community justice works outside the official domain. Although this field is quite vast in Mozambique, I will shortly describe two sub-fields: community courts and traditional authorities, both present in rural and urban settings.

If, during the early years of Mozambique, a new attitude towards justice, revolutionary and popular, was experimented with in the form of popular courts, it was later on abandoned (Trindade, 2003). In the postcolonial period, the presence of

[16] For an in-depth analysis of the characteristics of state heterogeneity and of legal plurality in Mozambique, see Santos, 2003; an overview of the contemporary multicultural legal plurality is discussed in detail in Santos, 2002.

a plurality of legal systems remains unrecognised by the formal court system.[17] In fact, because the former constitution (1990) stated that "under no circumstances may the courts apply laws principles which are contrary [to it]",[18] community courts – the *successors* of popular courts – were disengaged from the official judicial system.[19] Regarding the increasing pressure towards the recognition of traditional authorities, from 2000 on what we have seen is a process of choosing of local leadership by community residents.[20] The recognition of local leadership (represented both as secretaries of neighbourhoods/villages or resilient traditional chiefs) by communities is to be legitimised by the state.

Among the aspects that distinguish the practices of legal hybrids from those of official, codified law, we must refer to some essential aspects: while the first is normally consensual and seeks to avoid the escalation of situations of conflict, the second is based on the individual and seeks to resolve situations of dispute. This situation is associated with another important phenomenon: non-official justice does not operate in an individual way. Because it deals with a system that attempts to regulate and avoid problematic situations within a certain group, the authorities (either the *régulo* and his counsellors or the community court judges) cannot risk losing the support of their social base, the community. Hence, the prominent members of the community act as counsellors, and the population as evaluators, of the appropriateness of the final decision. This fact is, in our opinion, one of the ancillary characteristics of informal law. Because it is not codified according to written and more rigid principles, it is synonymous with a type of justice applied at the service of specific situations, where the circumstances and facts concretely determine the specific form of each resolution.

Another important aspect is the fact that the former use predominantly local languages and codes of reference, while the latter apply a sophisticated legal

[17] Although, as mentioned earlier, the current constitution acknowledges the plurality of legal orders in the country. It should also be pointed out that this new constitution recognizes, for the first time, the figure of the 'traditional authority' (Art. 118).
[18] Article 162.
[19] The ongoing process of legal reform seeks, among other objectives, to re-introduce the community courts in the formal court system.
[20] The Ministerial Decree 107-A/2000 defines the forms of articulation between state organisms and community authorities (in the light of the Decree 15/2000). Article 1 defines community authorities as "the people who exercise some sort of authority in a specific community or social group, being the case of traditional chiefs, secretaries of neighbourhood or village, as well as other leaders legitimated as such by their communities or social groups".

language in Portuguese, exogenous and even more foreign to most of the population.[21]

4.1. *Community courts*

During the early revolutionary years, and while searching for a symbiosis of the *progressive* forms of the customary with more democratic principles of justice, some of the traditional practices were translated into newer institutions of popular justice, the people's courts – working both in urban townships and rural settings.[22] The postcolonial state knew that in order to be recognised as a legitimate authority, the new judicial structure had to be anchored, at least to some extent, in the everyday life of both rulers and subjects alike. People's courts meted out a sort of popular justice, allowing, for example, for accusations of witchcraft to be brought to these courts. People's courts were later on transformed into community courts[23] – another embryonic form of hybrid justice, between the formal, official justice and common law (Gomes *et al*., 2003).

A strong continuity is present between people's courts and community courts. From the courts that have been under study,[24] it is clear that most of them keep using the same facilities, and a staff of judges, from popular courts; thus, the community courts transformed themselves into highly complex hybrid institutions in which revolutionary, traditional and community political-legal cultures combined and in

[21] Less than 40% of the Mozambican population uses Portuguese as their first or second language, although the language of the official courts is Portuguese. One problematic aspect is translation, since official legal language is not expressed in the mother tongue or normally used by the majority of people; together with the *foreign* court procedures, the official justice is hardly accessible, user-friendly, or even fair to most people in the country.

[22] The creation of the popular courts, after independence, sought to selectively co-opt traditional cultures, in order to make them serve the revolutionary culture. Considered to be "a weapon permanently aimed at the class enemy, the reactionaries and the traitors, saboteurs of the economy and unscrupulous exploiters, criminals and outlaws throughout the country", these courts were considered a guarantee of the unity of the Mozambican citizens (Preamble to Act 12/78); back then, the popular courts were an integral part of the judiciary, a fact, as mentioned already, dramatically changed in the 1990 constitution. The new constitution implanted an independent judicial power from the legislative and executive. The creation of a self-governing body of the judiciary – the Higher Council of the Judiciary, the separation of the community courts from the formal judicial system and the creation of the Constitution Council – are the most significant constitutional changes brought about in 1990 to the judiciary (the constitution of 2004 has brought about some relevant changes, that are not analysed here). See Sachs & Honwana Welch, 1990.

[23] Act 4 of 1992.

[24] Since 1996, 42 community courts have been studied, from the southern, central and northern regions of the country, some of them periodically revisited.

which, eventually, the only absent culture was the one which supposedly had become the official legal and political culture, the Western democratic culture.[25]

The community courts are part of the official law and justice, although the law defines them as operating outside the formal justice system,[26] as a type of community justice for which increased study and value is proposed, bearing in mind the ethnic and cultural diversity of Mozambican society.[27] The Preamble to Act 4/92 also states that the community courts have been created so that they can "enable citizens to resolve minor differences within the community, contribute towards harmonising the diverse practices of justice as well as enriching rules, uses and customs and lead towards a creative synthesis of Mozambican law".[28]

They are, therefore, obviously concerned with cases of resolving litigation in which local, community and common law applies, or, in short, unofficial law. Hence, *ancient* practices were transformed into new forms of community justice, recognised as important both in rural and urban environments.

By and large, community courts handle minor civil cases, such as the ones relating to a variety of family matters – including land disputes, housing issues, etc. (35%).[29] This is followed by theft, debt, injuries, physical aggression and cases of

[25] Although the Act 4/92 (of May 6) determined that the judges of the local and neighbourhood courts – i.e., the popular courts – would continue to exercise their functions until the first elections for judges of the community courts were held, these elections never took place. In the absence of any regulatory system to set up the rules of recruitment, these replacements were made from within the same socio-political environment as that of the previous judges: from neighbourhood structures or by the direct intervention of the ruling party, Frelimo (Gomes *et al*., 2003), even where new courts were created. This fact has led to the political polarisation of community justice, where community courts are considered instruments of Frelimo and the traditional authorities instruments of Renamo. See Santos, 2003.

[26] Therefore, they depend upon the Ministry of Justice, and do not fall under the supervision of the official court system. Although the data is not very reliable, there seems to be in the country over 1,600 community courts working, 15.4% of which were created already after the year 2000 (the data refers to 2004).

[27] Preamble to the Act.

[28] However, one should point out that the Act 4/92 only makes reference to customary law in its Preamble, without any further allusion to it within the corpus of the Act itself. Furthermore, this Act does not provide any room for appeal from the side of formal justice, although specific situations of appeal have been detected, as we mentioned. Finally, the Act, in a sense, formalises the dissociation of customary law from the formal justice system. Thus, the only *legal* interstice that allowed for the development of a legally sanctioned hybrid system between the formal and the informal, between the customary and the official, was cut out, limiting strongly the active production of a more unitarian perspective towards law.

[29] One should point out the absence of reliable data on the number of cases these courts handle. Since orality is the leading form of expression, associated with the absence of financial support, few are the courts that maintain a written record of their activity, especially over a long time period.

witchcraft suspicion.[30] With regard to criminal cases, they can handle only petty crimes that do not warrant imprisonment as a penalty. These courts are a space in which individual actors, through their interactions, produce shared meanings and common structures of domination and subordination. This is in opposition to the official judicial system, still dominated by judges who do not share the same moral universe as the people they act upon.

Because community courts are not part of the formal judiciary, they are not supported either technically or materially by the district courts.[31] Under these circumstances, our ongoing research has detected a wide variety of models for the way in which the community courts function. Lacking, in general, institutional support, and being part of a wide web of instances of conflict resolution (that sometimes complement each other, or, in other cases, compete among themselves) – ranging from the police and the local political cadres informally performing judicial functions, to the traditional authorities and religious organisations – the community courts rely on themselves and their skills for improvising, innovating and, in the end, reproducing themselves. Some remain very active, others are moribund; some beat the competition offered by other institutions involved in dispute resolution, while in others additional instances are called upon to assist the court in the decision process. Some are constantly involved in litigious cases, whilst in others community members rarely resort to them; some function within an official, formal atmosphere, whilst others assume an unofficial, informal character (Gomes *et al*., 2003). Some operate within a revolutionary logic, placing political loyalty above everything else, whilst others have fully internalised the new times and the pragmatism demanded by the needs of the community for peaceful survival; some seek to affirm their autonomy in relation to the local administrative authorities (for example, the local GDs' secretaries, themselves an administrative hybrid), the religious authorities and the traditional authorities, whilst others are totally subordinate to the administrative authorities and assume a multicultural character, resorting to the traditional authorities in many cases, such as when dealing with witchcraft or family problems.

[30] As we shall examine below, community courts, following the tradition of popular courts, tend to appeal to support from AMETRAMO (Mozambican Association of Traditional Healers) to solve the cases involving accusations of witchcraft practice.
[31] Although recognised by law, the activity of community courts has not been regulated up to now.

As Santos's analyses show, a small minority of community courts communicate with the district courts,[32] however sporadically and informally. For instance, the district courts make use of the community courts and the traditional authorities in order to ensure that court summonses are complied with. In addition, they have developed forms of *division of legal labour* in terms of which family matters, for instance, are referred to the institutions of community justice. In this context, the police often take on the function of distributing litigation amongst the different institutions, according to the agreed-upon informal rules of jurisdiction.

Therefore, this creative *synthesis* of Mozambican law is very hard to classify in terms of typology of functioning,[33] except for the fact that it operates under very precarious circumstances, and indeed, outside the law. The absence of a formal legal structure perceived and accepted throughout the country has produced the reproduction of other mechanisms of social regulation, such being the case of traditional authorities.

Finally, one should mention that the Decree 107-A/2000 defines the articulation between community courts and community chiefs. Article 5(b) outlines one of the tasks of these authorities as "the articulation with community courts, wherever they are present, in the resolution of small conflicts of a civil nature, based upon the local uses and customs, within the limits established by law", clearly recognising the existence of a complex network of interactions in the areas of local administration.

4.2. *Traditional authorities*

Amongst all the entities involved in community justice, the traditional authorities and their law have, for a long time, been the most significant. A particular trait of this form of customary law and justice is the presence of a plurality of cultural and symbolic universes – given that what counts as traditional varies from

[32] Since community courts are not part of the formal judiciary, there is no *formal* structure of appeal to the official courts from the decisions of the community courts. Once one of the parts does not agree upon the decision of the community court, it is free to appeal to the formal judicial court. However, in the official courts the case is filed as a *new* one, since there is no formal connection between these two instances of conflict resolution. The district courts represent the lower echelon of the judiciary system. In the revolutionary period, the district courts, then called popular district courts, were the bridges between the law courts and the base popular courts, establishing both complementary and competitive relationships with the latter.

[33] In the courts analysed, the percentage of female judges is low – about 20%. The judges, whether men or women, tend to be over 40 years of age.

community to community, from ethnic group to ethnic group and also from one historical period to another – but all of these are distinct from the Western symbolic and cultural universe which dominates in official law and justice. Traditional law and justice therefore raise two very complex questions, the question of what is traditional and the question of what counts as multicultural.

The legal abolition of traditional authorities, early in the process of construction of a postcolonial state, proved to be a complex political and social problem for the Frelimo government. To begin with, there were no resources to deploy the new political-administrative structures throughout the whole country, and where they were deployed they were not automatically accepted by the populations. As a result, the traditional authorities continued to rule under different forms and conditions. Both the popular courts and the GDs resorted to them in search of guidance and legitimacy. In the process, some *régulos* became judges of the popular courts, deciding the cases on the basis of traditional law and justifying their decisions in terms of revolutionary legality (Santos, 2003; Meneses *et al*., 2003).

The non-acceptance, from below, of a state structure mirroring the colonial one, led to an increased resistance and opposition – from community members – towards the excesses of power demonstrated by the new leaders (Geffray, 1990; Dinnerman, 1999). This fact, combined with the state's docile compliance with neoliberal impositions from the mid-1980s onwards, fuelled the process by which the traditional became a way of claiming an alternative modernity. The current government has been trying to neutralise the hostility of traditional authorities, co-opting them by granting them some kind of subordinate recognition and participation in local administration both in rural and peri-urban areas. This process has found its strongest imprint in the already mentioned Decree 15/2000.[34] Prompted by the Mozambican Ministry of State Administration, the two-step process of recognition of

[34] Also, one must be aware of the fact that the position of the main political parties regarding the customary remains undefined. Opinions vary from a critical conception (which views traditional authorities as a retrograde institution poisoned by anti-democratic practices and with only a vestigial presence on the ground) to a more positive conception (which recognises the uniqueness of the these authorities as an expression of a social and religious power bearing the guiding protection of ancestors, which confer on the customary a certain privilege with regard to other local organisations). While traditional institutions are normally identified with Renamo, which sought support throughout the civil war by defending the prominence of traditional leadership, nowadays this is not the case. For example, regarding witchcraft, Frelimo and Renamo seem to share a common perspective of fear, which results in non-recognition as part of the state system. Both parties resent the role of this leadership since traditional authorities may stand in the way of their plan of enhancing centralised political action.

local leaderships (initial identification and recognition of the local leader by the community, followed by the formal, official legitimization by the State) had resulted, by mid-2003, in more than 13,500 legitimately indicated leaders from rural and urban communities. Of these, about a thousand and an half (about 10.7%) had been, by then, begotten by the state as the official leaders.[35]

A significant part of the recognised chiefs up to now are members of the customary leadership. A word of caution is necessary here, since, following the colonial standards, most of the studies conducted on the subject tend to insist on the role of the *régulos*, forgetting the enormous array of entities present, who are considered legitimate and are legitimised from below by the communities that recognise their authority.[36] Local notables, such as traditional healers, local religious authorities, heads of lineages, and heads of production, are also part of the concept of *local authorities*, despite the fact that their political importance seems to be less visible. Another aspect to bear in mind is the fact that the traditional authorities and their means of dealing with social problems are not confined to the strict ambit of law; rather, they embrace several other sectors of social life.

Finally, it should be acknowledged that these authorities, although mentioned as pivotal to the regular administration of their communities, are not recognised by the government as part of the state, which raises some questions regarding appeal from decisions, democratisation of power, etc.[37] However, since this is a new

[35] Among the local authorities elected/chosen by communities one finds not just *régulos* and other *traditional* structures, but also secretaries of neighbourhood or village (i.e., the former GD secretaries, remnants of a power structure introduced by Frelimo after independence to replace customary institutions). Today, due to their notable reputation for wise ruling, they are elected through a process where they compete with other institutions of local power. Among the recognised leaders, some are women, although in a very small proportion. After returning to some districts by mid 2004, we observed that the process of recognition of these authorities had been fully achieved.

[36] However, and according to Article 1 of the Decree 15/2000, "under the terms of the present Decree, the community authorities are understood to be the traditional chiefs, the neighbourhood or village secretaries and the other legitimate leaders recognised as such by their respective communities", opening up the floor for a broader understanding of the figure of a local leader.

[37] As the preamble to the Decree 15/2000 carefully establishes, the community authorities are recognised within the realms – and, therefore the limits – "of the process of administrative decentralisation, bettering the social organization" of local communities and improving the terms of their participation in public administration. Article 2 states that "in carrying out their administrative functions, local organs of the state will interact with the community authorities, by listening to opinions on the best way to mobilise and organise participation from the local authorities, in the design and implementation of economic, social and cultural plans and programmes, designed to benefit local development". No political effect, particularly in terms of participatory democracy, is recognised in these processes of listening and interaction. Because they are not recognised as part of the state, these *community* authorities are not entitled to salaries paid by the state. Instead, the state

process, few data are available regarding potential areas of conflict and means of solving problems of increasing autocracy.

This process of *official* recognition of traditional authorities, and the claim of a *return to the traditional roots*, says little about the traditional rule in action. It varies according to the region, to the prestige of the leader, to the relative penetration of the state institutions, to the kinship relationships among traditional authorities, state administrators and grassroots party organisations, and finally to the relative strength and implantation of alternative community structures of conflict resolution such as community courts, religious structures, NGOs, etc.

The ongoing research aims at defining the specifics of traditional power in a postcolonial context. As Santos points out (2003), the main difference, in relation to the colonial period, lies in the fact that the state seeks to neutralise the traditional authorities, not only through strict separation between political and administrative functions, but also through the integration of traditional authorities in a broader set of local government, involving base-level administrative structures and even the political-administrative hybrids. The colonial state, on the contrary, emphasised the specificity of traditional authorities in order to justify the racialisation of state and society. Specificity meant natural inferiority of traditional authorities in relation to modern colonial rule, of African culture in relation to Western culture, of indigenous peoples in relation to colonial citizens.

If, in the 1990s, the most visible sphere of activity of traditional leaders were religious or spiritual ceremonies to promote peace, the situation today points to a broader intervention, which is particularly sought for whenever the other local authorities are unable to resolve problems and conflicts.[38]

In instances of conflict resolution, traditional authorities intervene in a wide range of issues. They are particularly important in evaluating problems of access to

allows them to retain up to 5% of the percentage of the taxes collected by them among the community members, as a form of supporting their activities.

[38] This climate of cooperation among the members of this web of legal and administrative instance does not prevent the interveners from remembering past grievances and from voicing them when deemed appropriate. *Régulos* and other notables were intimidated and humiliated by former subjects who came to occupy party secretary positions within Frelimo, or by other higher level state and party authorities (Geffray, 1990). Several traditional authorities (*régulos*, healers, etc.) referred, during the interviews, to the political persecution they suffered due to political motivations and the climate of animosity towards them. As a result, up to the late 1980s, many were arrested or even deported to the northern provinces to be "re-educated through labour action" to become new human beings (Meneses *et al*., 2003; Meneses, 2004).

land, family matters, debt, bodily harm, damage to property, health/sickness, witchcraft and petty theft. In all these matters, the traditional authorities are a key node in a network of institutions that may include the district or even the provincial courts, the police, and local, political and administrative agencies. Sometimes they are the first venue sought for by the parties, in other times they function as appeal institutions, and in yet other cases they provide advice, or evidence in cases being dealt with by other institutions. In disputes before the traditional authorities, the *régulo* is normally not the first to hear the case (Meneses *et al.,* 2003). In most cases analysed, he was presented as the highest instance of appeal in the customary.[39]

The observation of the hearings, as well as the study of several cases solved by traditional authorities, has attested to the fact that one of the great strengths of this form of justice is its immediate, public, collective, face-to-face, and relatively transparent character (Meneses *et al*., 2003). The hearings normally take place in the *régulo's* house, in the large terrace in the front area. The frequency of these hearings varies. There might be certain days selected for the hearing, or they might occur when people solicit the help of the *régulo*. The dispute resolution is dominated by rhetoric and orality. The language used is normally the local language of the parties – predominantly the national languages – with no need for translation. Portuguese seems to be used only rarely. The participation of the *régulo* and of his associates is central. The *régulo* (and occasionally his council of wise people – *madoda*) sits at a table, on a more elevated plane. The parties are seated on a lower level, either in the front or on the sides. The audience sits on benches or mats, while the *régulo* leads the hearing. After the session is opened, the person levelling the complaint and the accused normally make their case. Because the sessions are open to the public, the members of the audience are normally invited to participate by presenting their explanations of the problem.[40] The *madoda* also offer their appraisal of the conflict.[41]

Once the matter has been presented and the problem evaluated by the parties, the *régulo* and the *madoda* deliberate. In most cases, the *régulo* tries to obtain a

[39] The cases are presented to the lower instances of administration, embodied in the *cabos de terra*, *tinduna*, *sapandas*, *fumos*, etc., and only sent on to the *régulo* if they are unable to resolve them.
[40] This is a quite important part of the process of conflict resolution. Indeed, adults are allowed to question witnesses and give their opinion on the case.
[41] We have not found any case, in the regions we surveyed, of a woman being a *régulo*. However, a sizeable number of traditional healers are women. Among the counsellors of the *régulo* there are normally one or two women.

consensus from both parties in order to maintain social equilibrium. Whenever an offence has been committed and must be punished, the forms of sentencing applied by the *régulo* vary, ranging from admonitions to the parties, to physical punishment (*chambocadas*,[42] etc.) and fines.[43] One of the great strengths of these institutions of community justice is that justice is immediate, public, collective, face-to-face, and relatively transparent, and is based on local knowledge, which is flexible and always re-worked in the context of a debated and contested reality.[44] That is why traditional notions of justice[45] should be viewed as one way of evaluating a person through their own eyes, where the power to discredit and defame function within traditional codes of honour and dignity.

The analyses of several cases presented to traditional authorities lead one to understand that the absence of formality in these forms of community justice have the advantage of fomenting community participation; once both parties to the dispute are heard, the issue is discussed in an open debate, thereby permitting various views to be aired and allowing the community members to question the parties on any aspect that may be considered relevant to the dispute. However, any final solution depends ultimately on a consensus between the conflicting parties, as the ultimate objective is to restore harmony within the community by reaching a compromise. In general, the appropriate sentence is determined in accordance to a majority vote of the *court* and sentences are applied in the spirit of reconciliation and re-education.

The relationships between the traditional authorities and other local authorities are intense and complex, not always free from conflicts or tensions. Many of the *régulos* send matters of divorce to the community courts, and serious crimes – such as homicide – to the police.

[42] A form of physical punishment consisting of blows administered by a heavy wooden object, called *chamboco.* Although prohibited by law, corporal punishments appear to be still practiced. Several *régulos* showed nostalgia for these sanctions: "In the old days the authority took action. The person was tied up and beaten. Now the authority can't beat people any more" (Personal interview with the *régulo* Phata, September 1998). In the case of the *régulo* Luís, in the outskirts of Beira city, he had a cell in his headquarters.

[43] Our research indicates that the dominant form of sanction applied by community courts is fines, followed by community work (Gomes *et al*., 2003). See also Cuahela, 1996; Meneses *et al*., 2003.

[44] In contrast to the official, formal justice. The formal justice is extremely slow and removed from most of the population due to the hermetic nature of its design (Santos & Trindade, 2003). Also, there are very few practicing lawyers.

[45] Although this, too, has many negative implications (including flagrant discrimination against and disqualification of women, physical punishment, etc., which are unconstitutional).

When the case involves witchcraft accusations, the presence of traditional healers becomes central.[46] Traditional healers – part of the customary judiciary, especially in cases of witchcraft suspicion – are consulted because they speak the language of the local culture, they are speedy in their intervention, informal, not intimidating (since the customary law applied consists of rules and customs of that particular group or community), and accessible, in matters that formal justice has shown impotence in solving (Meneses *et al.,* 2003). At times the healers intervene and give a deposition in the hearings.

The ongoing research on the role of traditional medicine in contemporary Mozambique has shown that the power of the healers resides in their ability to identify existing social tensions, contradictions, and areas of mistrust, as well as possible antisocial hostilities that may manifest themselves as sickness, bad luck, or even death in the community. The process of identifying the witchdoctor, locating the agent of evil, and making him or her confess their actions, is also the process by which witchdoctors are cleansed of the burden of evil, thereby opening the door for the restoration of equilibrium and good health in the community. Many of the people interviewed stated that they would rather appear before these instances of conflict resolution than before a magistrate, exactly because they are familiar to them (Meneses, 2004).

In short, among the aspects which distinguish the practices of community justice from those of official, codified law, are the following critical ones: while the former is normally consensual and seeks to avoid the escalation of situations of conflict, the latter is based on the individual and seeks to resolve situations of dispute. This situation is associated with another important phenomenon: traditional justice does not operate in an individual way. Because it deals with a system that attempts to regulate and avoid problematic situations within a certain group, the traditional chief[47] cannot risk losing the support of the social base, the community. Hence, the prominent members of the community act as counsellors, and the population as evaluators, of the appropriateness of the final decision.

From the perspective of these hybrid legal community instances – traditional authorities or community courts – they have shown ready willingness to depart from

[46] The healer can be sought individually or the case can be sent to AMETRAMO, which will decide who addresses the case.
[47] As well as the community court members.

a *closed* concept regarding the interpretation of law (either official or customary), in order to produce socially compatible compromises and to guarantee social reproduction.

These forms of community justice – including both community courts, traditional authorities, etc. – should be seen as an *embryonic* form of justice representing the system being fought for, from below.

5. Conclusion

Summarising the broader topic of community structures of justice, in terms of acceptance and legitimacy, one clearly observes how notoriously difficult it is to define these terms. Legitimacy implies an acceptance of the *right to rule* of the authority concerned, and a compliance that is more or less voluntarily.

An analysis of the privileged role the state wants to play in the field of justice permits a better understanding of the ruptures and continuities in terms of the legal framework from the colonial to postcolonial times. By looking at who is authorised and/or favoured by the state, and what knowledge is tolerated or suppressed, recognised and even left unknown, it is possible to get a stronger and more profound idea of the logic of the state's actions. This implies analysing the fields of strength in terms of the social recognition of different categories of leadership present, in the complex interplay between competition and complementarities.

From the people's point of view, the picture is somehow distinct. People do legitimate the rulers they choose to appeal to, whether they are part of the official or the community arena of justice administration. In fact, normally, in terms of problem solving, traditional legitimacy is spontaneously associated with the *traditional authorities* and rational legitimacy with the modern lawyer, the latter in terms of his/her certification. The acceptance of traditional leaders depends on the loyalty and confidence of those who recognise them as the inheritors of wisdom and power to solve problems, to protect the interests of the group. This legitimacy – the recognition of their competence – is attested to by those who constantly request their help to solve problems and to accommodate new questions. Indeed, a *régulo* without

people seeking advice from him/her about social matters has about as much legitimacy as a lawyer who cannot defend his/her causes.

The paradox, which many insist constitutes an impediment to development – the persistence of *traditional* values – deserves careful analysis. Traditionalism can only be affirmed to the extent that it is distinguished from Western modernity by reaffirming the differences, although *tradition* itself is continuously fed by modernity. The crossover of various roles occurs at various levels: the state does not acknowledge traditional leaders as part of the state system while at the same time its functionaries have frequent recourse to them; the Law Schools do not recognise the knowledge of traditional leaders and do not teach customary law, while some lawyers do not hesitate to consult local leaders on relevant legal matters, as is even required in several Acts. This paradox is only an apparent contradiction: the norm established and imposed by the state is based on a legal and rational model of legitimacy. Seen from this perspective, the vitality of the justices in which the traditional authorities are located, mirrors (albeit inversely) the difficulties faced by an official justice that appears more and more unable to meet its objectives, given its distance from its subjects.

In the context of an increased demand for democratisation through community participation in the resolution of its problems, there needs to be a harmonisation between constitutional principles and the administrative organisation of the state, in terms of styles of action, cultural assumptions and the normative structures of traditional authorities, regardless of the form or guise that may have developed.[48] The analysis undertaken in this paper corroborates the fact that a legal hybridisation has long been developing in Mozambique; a hybridisation that even accepts the official modern legal model while creating the very space for its application.

The application of the principles of decentralisation and coordination constitutes a great challenge to the true nature of the existing Mozambican state. However, emerging behind the discourse of state decentralisation and deregulation is another parallel discourse of *just do it*. The tension between the transformation of the state, and the reaction of communities demanding that the state do something, has

[48] Here we follow Santos's suggestion, for whom democratisation is the whole social process through which power relationships are transformed into relationships of shared authority (2003). In view of this, there is no intrinsic reason why state law should be any less despotic or less democratic than non-state law.

produced new forms of hybrid structures of social control that can be analysed as a process, continuing from the past to the future: the (re)invention of a *modern* traditional power.

In any case, the competition for power and the overlapping of the different structures' spheres of intervention in the resolution of conflicts on the ground, is notorious. As one of our informants said during an interview, "people don't know where to resolve conflicts. Each person's role is not clearly defined".[49]

The landscape of justices in Mozambique is characterised as being made up by a series of institutions whose performance depends on the fluidity of the connections between them. The better these relative roles are defined, and the duties attributed to them by society in general and the communities in particular are fulfilled, the more efficient their performance will be and the more concrete citizens' rights and state interests will be.

Therefore, there is a growing awareness that all efforts must be made to ensure that access to a broader conception of justice becomes a reality for the majority of the citizens. This is no small task, but the experience in Mozambique shows that it is possible to give established, distinct systems of dispute resolution the opportunity to be a part of this process. As with all alternative remedies for a problem, each should be carefully analysed so as to formulate the best practical solution.

[49] *Régulo* Santaca. Personal interview (May 1995). Several traditional authorities interviewed during this research repeatedly addressed this problem.

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