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PLURALISM, LAW AND CITIZENSHIP IN MOZAMBIQUE:

MAPPING THE COMPLEXITY

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Pluralism, Law and Citizenship in Mozambique: Mapping the Complexity[1]

Abstract: Despite the significant amount of literature on legal pluralism in Africa, few are the studies that have been carried out in Mozambique. This paper explores the specifics of legal plurality in the country, where three 'major' sources of law can be identified – the European legal culture (Dutch-Roman), the indigenous African and the Islamic. By legislation the European was made the general, the reference culture of Mozambique. However, the indigenous African and the Islamic culture remain very much alive.

The Portuguese modern colonial project in Mozambique was based on the establishment of modern law as a pillar of state administration. This project sought to recast Mozambique in terms of the Western imagination, and was part of a re-ordering of the world in European terms. However, despite the dramatic changes that have occurred in Mozambique since independence, some thirty years ago, it is patent that colonial relationships persisted beyond the formal end of colonial rule. Thus the 'post', in 'post-colonial' is not synonymous with the 'past', with a redundant break with the colonial past. This relationship is quite visible and conflitual in the legal field. It is also the goal of this paper to discuss the weight of the legacy of the connections that once bound Mozambique as a colony and Portugal as the colonial metropolis.

The debates on law in Mozambique, as in many other places of the continent, appear to involve a clash between customary law and the modernizing ambitions of the post-independence state. An adequate conceptualization of the 'customary' is, therefore, necessary to understand the politics of law reform in modern Africa.

Introduction

"*The official courts speak a foreign language*". This phrase is suggestive of the local reflections upon the role of the state in contemporary Mozambique. This short sentence, pronounced by a female community leader, points out clearly the community perception of continuity between the colonial and the post-colonial, thus bringing back the question that the declaration of formal independence – although important – was not synonymous with a radical break with the colonial legal culture (Santos, 2006a: 47).

The epistemological privilege granted to modern law remains instrumental in suppressing other forms of legality and, at the same time, the subaltern social groups whose social practices were informed by such practices. To speak of cultural diversity implies speaking of a diversity of knowledges. This is particularly evident in Mozambique, where the modern legal landscape is crossed over by multiple juridical traditions, including African indigenous and Islamic legal cultures (Meneses *et al.,* 2003). During most of its short history,[2] the Mozambican state has pursued a nation-building policy that seeks to eliminate or make invisible the diversity of forms of social regulation, a reflex of the cultural diversity of the country. With the introduction of multipartidarism in the early 1990s, the debates on the plural nature of the legal structure present in the country have gained a new dimension (Santos and Trindade, 2003). The most visible element of this debate is probably the 2004 Constitution, which recognizes (art. 4) the multicultural nature of the Mozambican society and, therefore, legal pluralism. However, more pragmatic efforts from communities and other grassroots instances to incorporate the multiple experiences of social regulation – mostly unwritten forms of dispute resolution and social control practiced by local institutions[3] – into the formal, official legal court system have not been successful. A careful analysis of the political changes in the legal field (Santos, 2003, 2006a; Meneses *et al*, 2006) indicates that the constitutional adjustments serve the state aims of extending the official rule of law and state authority into peripheral areas, rather than expressing the efforts of the state to accommodate the claims of sub-state groups towards recognition of the legal diversity present in the country.

Conflict resolution, the administration of justice, as a sign of maladjustment, of individual and social imbalance, is the object of ambiguous and fluid representations, constructed as practices of knowledge and the exercise of power. The denial of diversity remains a constitutive and persistent remembering that the end of colonialism as a political relation did not bring about the end of colonialism as a social relation. While the political dimension of colonial intervention has been widely criticized, the burden of the colonial epistemic monoculture remains widely accepted as a symbol of development and modernity.

Modern law – brought about by the colonial state – regulated relations between non-indigenous people, as well as relations between non-indigenous and indigenous people. The frontiers of civilization and social order were established by Europeans, whereas the

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[2] Mozambique became independent in 1975.
[3] The term *institution* is here taken to refer to sets of rules, norms, or standards that regulate political action. On this interpretation, bureaucracies and religious institutions, for instance, count as institutions.

natives symbolized barbarism and social disorder. In Mozambique, as elsewhere in the colonized world, people were disciplined and communities distributed in the name of law and order. The colonial state came to symbolize the imposition of a monocultural legal framework, upon a region where legal plurality was a broader reality, that cannot be fully acknowledged if one remains anchored to the colonial classification that divided the legal structure between 'modern law' and the 'customary' or 'traditional law'.

This paper aims at engaging in a distinctive critical exploration of the conceptual assumptions that govern the West's modern knowledges – especially its disciplinary and disciplining knowledges – about the non-Western world, specifically in the field of conflict resolution in Mozambique. Initially this paper briefly provides a theoretical framework of legal pluralism, with some critical ideas on the importance of the colonial encounter. The concept of 'legal pluralism' is itself an item for debate. Although I address some of the forms and interpretations of legal pluralism further on, for the time being, legal pluralism is used to refer to a legal system that recognizes different legal orders in a single political unit (Santos, 1995: 114). The middle section of the paper provides the context of the Mozambican experience of plurality of legal orderings, highlighting, in an historical perspective, the meanings of the concepts of conflicts and of facts used in distinct legal contexts. Finally, the article discusses some of the contradictions and implications in the relations between the official and the other systems of conflict resolution. Although the 'other' legal systems play, without a doubt, a strong role in justice administration in Mozambique, one has to evaluate their role in current social and political orders. This final section of the paper offers some conclusions in light of the implications of current legal development in Mozambique.

A Note on Research Methodology

In terms of methodological approach, this article reflects research carried out both in urban and rural contexts. Part of the interviews was carried out under the scope of the project already mentioned on justice administration in Mozambique.

Until recently, the majority of research on 'other' instances of conflict resolution has focused on the customary as a symbol of the 'other law' present in remote rural areas of the African continent. The presumed justification for the remoteness of the research was to study 'unspoiled' authentic forms of the customary – customary law that was supposedly practiced as it has been for centuries. The assumption was that the efficacy of customary law rested upon the moral legitimacy of the codes shared by the ethic group; the same researchers would

also assume that people would resort to the customary in the absence of Western modern law in rural remote areas. Therefore, it does not come as a surprise that in the early 21st century researchers continue to go to remote areas of Mozambique, seeking to study 'uncontaminated' customary systems of conflict resolution, thus continuing to perpetuate each other's myths (e.g., Dava, Macia and Dove, 2003; Kyed and Buur, 2006).

The field data discussed in this paper refers to the period between 1995 and 2006. Documental data were gathered in libraries and research institutions. The major sources of information, however, are interviews and participatory observations of multiple instances involved in the resolution of conflicts, such as judges from official courts, community judges, community political and religious leaders, etc. Interviews were semi-structured and interactive. Together, the interviews and the observations provided important material on the way in which people perceive the role of law and the scope of application of justice in a multicultural context.

1. Legal Pluralism and the Colonial Encounter

The concept of the rule of law has philosophical, procedural, and normative dimensions. In an ideal sense, all citizens are subject to the same law, all have equal recourse to a court of law, and all have a right to be judged based on reason. In this sense, the myth of the nation-state rests upon the idea of the state as the sole source of legitimate law.

The notion of 'law' should not be limited to state, international and transnational law, but should be used to refer to all those objectified cognitive and normative conceptions for which validity for a certain social formation is authoritatively asserted. Law becomes manifest in many forms, and is comprised of a variety of social phenomena. When a society provides more than one viable source of law or legal order, legal pluralism is present (Santos, 1977). Constellations of legal pluralism may include legal systems, unnamed laws and religious laws. The phenomenon of legal pluralism is, therefore, concomitant with socio-cultural pluralism, and pluralism of knowledges. Co-existing bodies of law may cover different geographical and political spaces and longer temporal periods than are formally acknowledged. Inter-system demarcations also vary in complex ways in their form and in the uses to which social actors put them. Legal orders (and not only state laws) recognize or do not recognize other orders in varying ways, these constructions having potentially some influence on social actors, the nature and extent of which are empirical questions.

In spite of Mozambique's profound cultural diversity, the modern independent state enforced the "ideology of legal centralism" (Griffiths, 1986: 3). The legal reform that accompanied the revolutionary years after independence aimed at creating a homogeneous legal culture as the state law, uniform for all citizens. The legal reforms, striving to abolish the colonial difference between citizen colonizers and colonial subjects, displayed simultaneously an unsympathetic attitude towards the plurality of the existing legal cultures, as we will discuss further on.

A good analysis of theories of legal pluralism is given by J. Griffiths (1986), who distinguishes between weak, juristic or classic legal pluralism, on one hand, and strong or new legal pluralism on the other. The former approaches legal pluralism in the light of state law whereas the latter focuses on social groups developing their own legal systems within the boundaries of a state, but with no formal model for the structure of legal order, or where the model is in formation.[4]

It is generally recognized that in all societies additional (normative) modes of ordering, with their own mechanisms of conflict resolution, co-exist alongside state law (Santos, 1984). In this context, legal pluralism represents a very useful way of thinking about the legal as well as about discourses about the legal, as a window to understand social structures, both from an internal (Mozambique) and an external point of view (general theory).[5] For the purpose of this paper, I chose to follow Santos approach, that is, to "acknowledge the need to ground the plurality of legal forms theoretically" (1995: 403), thus pointing to the shortcomings of empirical-positivistic legal pluralism that is content simply to 'describe' from a distance. Therefore, to study the plurality of legal systems means being attentive both to the plurality of norms, and especially to the ways in which they are organized in and around practices. This unequivocally requires the study of the influence of the colonial encounter upon the constitution of the legal topography in Mozambique. Many of the presumably 'strong' theories of legal pluralism are as weak as their classical counterparts in that they seek to discover and describe legal orders. The shared empirical approach is a much stronger criterion to go by than the rather contingent association with state law. Santos's picture of legal

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[4] Legal pluralism is a widely discussed topic in sociology and anthropology of law. There is an extensive literature in which different positions are explored. For an overview of the debate on legal pluralism see Griffiths, 1986; Merry, 1988; Santos, 1977, 1995; Chanock, 1998; Adelman, 1998; Benda-Beckmann, 2002; Melissaris, 2004.

[5] There is lack of common understanding with regard to the nomenclature on other justices, both academics and activists being inconsistent in their use of terminology: local, informal, unofficial, traditional, folk, customary, community, popular, alternative, are some of the most common adjectives used. All these adjectives reflect social constructions whose difference is constructed and marked in contrast to the state.

pluralism (1995; 2006a) portrays a cluster of interpenetrating legalities, which regulate all instances of our lives and correspond to our knowledge of the world. As this knowledge changes, so do the forms of regulation we experience.

Many researchers support the idea that the origins of African legal pluralism lie pretty much in the colonial experience.[6] This proposition originated the idea of 'juridical dualism', that is, the idea that in colonial and independent African states two major legal systems co-existed and struggled: the modern and the customary, running parallel to one another with only limited, prescribed interaction (Griffiths, 1998: 133).

However, societies that fell under the rule of colonialism where not monolegal prior to the modern colonial encounter/intervention. Colonial intervention became one more source of legal order that became prominent because legal monism – the idea of a single unified non-western system – provided colonial rulers with a more familiar legal platform.

Colonizing authorities understood that the structure of legal authority and the creation of cultural hierarchies were inextricably intertwined; however, the extent and nature of legal control over the 'new' colonial territories and subordinate peoples were quite diverse. Throughout the world the strategies of colonial rule included aggressive attempts to impose new, exogenous legal systems. More frequently, however, one observed conscious efforts to maintain existing norms with minimal change as a way of preserving the social order. "It does not require a great deal of […] insight", noticed Malinowski, "to recognize that authority can best be wielded by those who […] are regarded as the legitimate rulers" (1945: 138). The contact zone between colonizers and colonized included "accommodation, advocacy within the system, subtle delegitimation, and outright rebellion" against the imposition of new legal codes (Benton, 2002: 3). As a result of the colonial encounter legal cultures and distinctions got changed, and new relationships established, as competing colonial authorities coupled their jurisdictional claims to representations of their superiority in relation to indigenous colonized groups. Among colonizing groups, arguments over different perceptions of law and accusations of contamination by 'local' indigenous norms also took place.

These multisided legal contests were central to the creation of colonial rule. Colonial interactions were synonymous with unequal and multiple contacts among distinct legal systems; as a result, the location of political authority was not uniform across the colonial world. A peculiar characteristic of the modern colonial system was the use of law to connect

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[6] There is a wide body of literature on this subject. See, for example, Moore, 1992; Mamdani, 1996; Darian-Smith and Fitzpatrick, 1999; Vaughan, 2005; Santos, 2006a, Comaroff and Comaroff, 2006.

different parts of the empire, laying the basis for broad exchanges among politically and culturally distinct socio-cultural structures. Analyzing the specifics of colonial and neocolonial situations Hooker (1975: 2) defined legal pluralism as the existence of "multiple system of legal obligation […] within the confines of the state". Departing from the notion that law is a set of consistent principles, the author endorsed the idea that they were valid for the whole population because they emanate from a single source: the authority of the state. This conception of legal pluralism reports to a situation where plural legal bodies were not equal among themselves; rather they were hierarchical structures, mirroring the profound racial organization of the colonial world.

Another perspective is the one espoused by Gluckman, who sought to defend the comparability between African and western legal thought. However, Gluckman's claim of universalism (1955), based upon the canon of western law, annihilates the possibility of a comparative process among different legal systems on an equal footing, a factor that, once more, draws the attention to the fact that juridical plurality is not synonymous with equality among legal cultures. As a result one witnesses an abyssal fracture (Santos, 2007: 45), between the plural character of the society and of the rules that it generates on the one hand, and the monocultural character of the formal juridical rule on the other. Indeed, legal pluralism was, and remains, fundamentally a political issue, evident in the structure of the modern African state.

1.1. The System of Indirect Rule

A key feature of the modern colonial system was the promotion of a model of government founded upon state-centered legal pluralism. Colonialism – by forcefully joining together different peoples and cultures to form 'overseas' territories – needed a narrative of legibility of legal knowledge to justify statehood. This was achieved partially by imposing a general codification system and other state-based legal reforms from the end of the 19th century. This process demanded the construction of artificial binary divisions, between state (meaning central) and non-state legal authorities, between modern and traditional, official and non-official, formal and informal legal structures.

Indirect rule is usually described as centralized control through local elites. In the words of one of the theorizers of this system of governance, Margery Perham, "conquer[ors…] made use of the institutions of the conquered" (1934: 321). In practical terms, it resulted in a close interdependence between the modern colonial administration and local 'traditional' leaders.

From above, the state aimed at creating an image of a monolithic and purposeful institution; on the other extreme, one had 'the tribes', defending their experiences and knowledges and challenging the monoculture of the state, in a permanent and dynamic interaction.

However, we should bear in mind that ruling indirectly "was neither new nor peculiarly British" (Gifford, 1967: 352). The British applied a similar approach in Malaysia as early as the 1870s, and they began to implement the basic elements in administrating India a full century before their late-19th century African expansion (Fisher, 1991). Earlier on, forms of indirect rule were also present in the early modern Iberian colonial occupation of the Americas (Patch, 1994).

As a philosophy of rule, indirect rule certainly reached its height in British colonial Africa during the first half of the 20th century. Its main protagonists repeatedly acknowledged that it was a policy dictated by circumstances, by the "principle of proceeding from the known to the unknown" (Matthews, 1937: 433). Even what Lord Lugard – who apparently coined the term – did at best, to borrow from Margery Perham, "was to turn a rather widespread expedient into a carefully elaborated system" (1965: xl). Read, while analyzing indirect rule, stated that it applied "only at the […] level of local administration […] for these were the traditional forms of government" (1972: 262). Subjacent to this statement is an effort to discard the 'white man's' responsibility in Africa.

Indirect rule relied more on the internal authority vested in local institutions; direct rule (re)created local institutions in ways that made their authority dependent upon the state, as an institution imported from outside. Thus, 'legitimacy', in the first instance, was effected from within, and, in the second instance, from without. However, the lines were easily blurred. Yet, whether the rule was direct or indirect the goal was the same: to give local effect to the center's rules.

1.2. The Creation of the Customary

Colonialism divided the population between citizens and subjects; between those ruled by modern law and those who applied 'traditional', customary law for the resolution of problems in local societies. This mode of ruling gave rise to a bifurcated state. Based on British colonial realities Mamdani pointed out (1996: 18) that "indirect rule signified a rural tribal authority. It was about incorporating natives into a state-enforced customary order", where the tribal authority concentrated the administrative, judicial and executive power. In this process, custom was reduced to and crystallized into 'customary law'.

This means that the implantation of a modern state administration depended upon the modification of 'other' customs as a primary mode of governance. The colonial state did so principally through the state's recognition of such diverse authorities as the tribal chiefs, and the incorporation of these authorities within the authority structure of the state, now transformed into 'local' authorities, *vis-à-vis* a the official modern administration. Just as western legal systems were crafted out of their own distinct world views, customary law was, in the words of Moore, "a framework of organizations, relationships, and cultural ideas, a mix of principles, guidelines, rules of preference, and rules of prescription, together with conceptions of morality and causality, all of them completely intertwined in a web of ordinary activities" (1985: 43).

The nation-state is the prime example of an institution that expresses its reach in territorial terms. Borders and maps, administrative outposts and other representatives of the nation state such as official courts, schools, etc., convey a territorial representation of the state. Scott (1998) points out how the logic of the emerging modern state was to make space, people and resources legible in order to govern. However, while territorial delimitation, national identity and legibility may be institutionalized to correspond to nation states, the latter's monopolies on these processes remained precarious, especially in colonial spaces.[7]

Central to confirming the colonial politics was the cultural significance of legal boundaries and the hierarchy among them. The state was organized as a mesh of political spaces, partially occupied by distinct tribes. The efficacy of colonial rule depended upon the capacity to establish the sovereign's rights to rule. Controlling human territoriality was essential to the process. Tribes – as spatial abstractions – were conceived to have distinct legal cultures. The distinct political structures present in the African continent were, at the end of the 19th century, transformed into 'traditional authorities', applying 'customary law' over specific territories. The tribal leadership was delineated in terms of tribal membership. Traditional definitions of jurisdiction by tribal allegiance were mixed with an artificial jurisdiction measurement based on territory.[8]

Since 'customary' law was defined as the law of the tribe – and a tribe, in turn, as a group with its own 'customary' law –, there was not one 'customary' law for all natives, but

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[7] Scott uses the term 'legibility' to describe the hierarchical structuring of the state, that is, the coercive practice of abstraction that renders the state' subjects and domains more evident, and organized according to an administrative legible structure (1998: 4).

[8] Contrary to the state jurisdiction, territorial jurisdiction had (and still has) less significance at the local level because territory is not married to customary law. In other words, personal (tribal) jurisdiction remained central, and the territorial jurisdiction secondary.

as many sets of 'customary' laws as there were said to be tribes. Also, from a multiplicity of institutions that carried out governance in 'traditional' Africa – administrative chiefs, hereditary leaders, elders' councils, age groups, gender groups – a single institution, that of administratively-appointed chiefs, was privileged as the traditional institution whose interpretation of custom should hold sway over that of every other institution in 'tribal' society. To create a 'customary' power was thus not as much to privilege a particular custom, as it was to privilege a particular authority. The customary became thus defined from above, constructed by those in power. In Ranger's words (1988: 250), "what were called customary law, customary land-rights, customary political structure and so on, were in fact all invented by colonial codification".[9] The very point of indirect rule aimed at confronting the custom analytically, reworking it to be utilized by the state. Traditional law came to symbolize the 'African' local side of the law,[10] a fact used to legitimize and reinforce the need of colonial law as the superior form of social organization (Weber, 1978).

The dominant legal code, ruling with colonialism, became modern law. Because colonial law did not emerge on a legal vacuum (Snyder, 1981; Chanock, 1998), legal pluralism was one of the pillars of colonial indirect rule in Africa, a fact that led Lord Hailey (1957) to affirm: "A chief is not a chief if he has no court".

1.3. Post-independent Legal Pluralism

The use of 'traditional authorities' by modern independent states brings into consideration continuities in political culture after the breakaway from formal colonial dependency, and, perhaps most importantly, continuities that have influenced understandings of political morality and the rightful exercise of public authority. Postcolonial societies are strongly based on development regimes constructed under colonial rule, regimes that inherited the colonial inclination to excise politics from economic and administrative practice.

The preeminent role of formal, court law in the post-independence period draws attention to the tension resulting from the persistence of a westerncentric definition of the modern state. The contradiction between other, 'traditional' forms of justice administration

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[9] In the debate on the future role of customary authorities in the region, most of those who strongly oppose their re-integration into local administrative structures interpret them in the light of tradition as arbitrarily fixed and often invented (e.g., Vail, 1989). On the other side, a group of scholars sees them as expressions of custom, that is, dynamic, flexible, and locally legitimate (e.g., Williams 2004; Oomen, 2005).

[10] In this context the term 'African' is used specifically to refer to the black population. Although it is recognized that this term can be used to identify white persons who have been born in the African continent, it is felt that the term 'black' used under colonial rule still carries a racist connotation.

and the modern state, which was part of the colonial infrastructure of representation, continued in the post-independence period. Explanations as to why Africa is seeing a resurgence of tradition are varied (Englebert, 2005). As analyzed above, early and somewhat instrumentalist approaches have interpreted the return of the customary as a deliberate invention or reinvention of tradition for purposes of fitting in with existing patterns of administration and governance, for retaining power and attracting resources. These approaches have been seminal in showing that the institution of chieftaincy is both adaptable and negotiated (Pels, 1996; Van Dijk and van Rouveroy, 1999; Williams 2004; Oomen, 2005).

Several studies on legal pluralism as a source of conflict between tribes in post-independence contexts provide important insights on the pitfalls of a simplistic approach to this subject. This research has underlined the complex historicity of social constructions both at the level of identity choices and of ideological formulations, showing how ethnicity has been both an instrument of conflict against, as of co-operation with state power.

In Botswana, Wrebner (2004) and Nyamjoh (2006) have described in detail longstanding contests of citizenship and nationhood. Wrebner describes in detail the roots of the ongoing ethnic dispute. At independence, the approved constitution contained clauses "which fixed continuity in tribal citizenship […] but even more, reaffirmed the constitutional inequality of subject communities. Still upheld in the constitution was the colonial state's distinction between principal tribes […] and lesser or minority tribes, whose rulers as sub-chiefs could be elected members" (2002: 677). To define indigenous peoples as 'the first people' fixed in specific territories betrays the reality of flexible and changing identities resulting from a variety of political, cultural, and historical factors. While such strategic essentialism may be useful in redressing injustices collectively experienced 'as a colonized people', it falls short of providing for theorizing pre- and post-colonial identities as complex, negotiated and relational experiences. In Botswana, post-independence nation-building has meant the privileging of large scale over small scale indigeneity. As the pursuit of nation-building increasingly fails to justify the sacrifices made in its name, individuals and communities become more vocal about the inequalities such sacrifices have engendered or exacerbated. In this process, legal cultures and identities become spaces of struggle, the very reaffirmation of resistance against the monopoly of the state over the rule of law.

Wrapping up this section, legal pluralism remains a useful concept to get hold of the complexity of social reality, when looked upon from the point of view of its 'normative' character. However, because it is not an all-encompassing concept, it does not seek to be the

ultimate and complete explanation of the law and society relationship. As Franz von Benda-Beckmann emphasizes, "the concepts of 'law' or 'legal pluralism' are only a part of our wider conceptual and analytical tools" (2002: 39), calling the attention to the importance of concepts such as modernity, indirect rule, state, colonialism, customary, identity, citizenship to capture the complexity of the Mozambican legal topography. These concepts need to be considered as part of a broad intercontinental area of contacts in which cultural inventiveness, synthesis and adaptation take place, both reflecting and altering power relations.

2. Mozambique – the Emergence of the Colonial Legacy

The topography that the Europeans encountered in Mozambique was not empty. These were political landscapes, where space and power were claimed, and also highly contested. Until the onset of modern Portuguese colonial state, the various peoples that constitute Mozambique existed as independent entities, with various forms of political and social organization.

The manipulation of ethnic sentiment was a strategy employed by most colonial regimes on the continent. However, the specificity of the Portuguese administration in Mozambique has remained somehow veiled, and, for this reason, requires a more detailed analysis.[11] The transition to the 20th century became synonymous with the implantation of the modern colonial rule, marked by the Portuguese attempts to re-work the structures of power they encountered. Adding to the diversity present in the country, this colonial encounter produced an often-uncontrollable complexity to East African politics.

The colonial enterprise used the notion of 'tradition' quite deliberately to legitimize colonial policies of indirect rule, and to help consolidate the authority of the Portuguese-appointed 'traditional' leaders through whom this rule would be exercised. As I mentioned above, customary law was not invented in a vacuum; rather, pre-existing flexible principles were transformed into fixed norms, applied in the name of the chiefs and their traditions, thereby effecting a hidden transformation of 'traditional law' itself. Thus the difference between genuine traditional authorities and invented, colonially appointed 'traditional' authorities was created and it has existed ever since.

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[11] As Thomas Hodgkin (1957: 33-48) astutely observed in a classic summation, the philosophical underpinning of British colonialism was empiricism, while a Cartesian predilection influenced French colonial policy. However, although distinct in their policies – with France defending universal citizenship via assimilation, and Britain directly appealing to ethnic ideals – both systems ruled based on the redeployment of native institutions.

2.1. The Customary – Legal Pluralism or Legal Dualism?

The creation of the customary was a central part of the process of subjection and domination, an intrinsic part of the colonial state. From the late 19th century, the legal distinction between citizen and subject, between native and non-native, set the basis for the structuring of the colonial capitalist system that developed in the country. The goal was to avoid any sort of reflective questioning over the ambiguous nature of the colonial relationship. Therefore, a basic requisite was the categorization of heterogeneity, the production of 'tribes'. The new ethnic entities were installed over the geo-political map of Mozambique, and became ruled by African institutions – the leaders of chieftainships.

The colonial powers' interest in promoting local institutions was both expedient and necessary in the absence of a unified system of state administration. This became the state's conundrum: the colonial state's interest in centralizing control was limited by its dependence on decentralized means – the 'other', now 'local', traditional authorities.

Under the Portuguese colonial system, the act of naming someone 'indigenous' came to symbolize, simultaneously, the imposition of a 'native', local identity, bounded by arbitrary physical and cultural geographies, while making room to distinguish the civilized colonizing population as European, non-indigenous, non-local. To be local meant to be outside the real achievements of progress and civilization, personified by colonial Europe. Over the course of the Portuguese colonial history, the dominant justification for the imposition of a modern state apparatus was grounded on the '*missão civilizadora*':[12] the need to graft 'higher civilization' upon other, primitive African realities. Early architects of indirect rule in Mozambique (Santos and Meneses, 2006) commonly promoted a vision of a colonial state with the exclusive right to articulate and enforce the rules to be applied within the territories claimed; in parallel, they devised legal means of merging customary authority with the authority of the colonial central administration. The recognition of cultural difference meant the establishment of unequal relations among citizens and colonial subjects. Questioning the possibilities of ruling the multicultural reality present in Mozambique, Eduardo da Costa cast doubts on the possibility of direct rule: "Can men of different customs, with quite often antagonistic instincts, from diverse civilizations, be considered equal before the law? […] Equality before the law produces the greatest possible inequality of conditions. […] Therefore, for the time being, our colonies require the existence of, at least, two civil and political statutes: one

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[12] Civilizing mission, in English.

European, the other, indigenous" (1901: 590).[13] This opinion became dominant in Portugal after 1910, following the implantation of the Republic. The *Organic Law of the Civil Administration of the Colonies* proclaimed the policy of 'legal dualism' as a pillar of the ruling colonial system (art. 18):

> whenever in the uses and traditions of the races, tribes or other indigenous groups subsist notions or the practice of private institutions, […] aiming at deliberating in common, or at conveying, in one way or another, the opinion or will of the indigenous in the governance or administration of their collective interests, these institutions must bee maintained and improved, to guarantee the development of the territory and the general administration of the colony".[14]

Civil rights were a domain restricted to the citizens (colonizers); indigenous populations had access to formal justice only when entering a conflict situation affecting directly the interest of the colons. The separation of power is openly stated by Sampayo e Mello, for whom "the colonizing State will obtain no advantage by replacing the indigenous private law by European law, the latter usually inadaptable to the indigenous institutions of the family, property, inheritance, etc., that it is important to preserve" (1910: 154). In the same lines, the author defended the colonial state's control over penal justice "since is undeniable that the Europeans should be the only ones to punish, to demonstrate that they are the only ones with the power to rule" (1910: 178).

Acting and adjusting to local specificities of Mozambique, the colonial system struck the core of community autonomy: the control of lands and labor force, by challenging the chiefs' autonomy and making them increasingly dependent upon the state. Examples of the chiefs' thinning autonomy are manifested in the strict control colonial authorities maintained over title succession, the number of title-holders, and chief rights.[15] The institution of the *régulado* (chieftainship), produced by the Portuguese, sought to co-opt these influential figures into their centralized system of administration.

In practical terms the Portuguese administration gradually turned the *régulos* (chiefs) onto Janus-face personages, acting both as government officials and local authorities. For example, in the context of the *Overseas Administrative Reform* (1929)[16] the *régulos* formally became part of

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[13] The translations from Portuguese into English are my own.
[14] *Lei Orgânica da Administração Civil das Colónias* (Law n. 277, approved in 1914).
[15] The Portuguese colonial administration did not incorporate any of the 'real' traditional authorities from pre-colonial times.
[16] Decree-law n. 23.229, of November 15th, 1929; in 1933 this reform was incorporated into the Portuguese Constitution.

the administrative system; this legislation also recognized the existence of a single *régulo* for each of the 'traditional' territorial units that composed each *'circunscrição'*.[17]

The *régulos* were subordinated to colonial administrators, with whom they administrated the *régulado* – the territory under his/her administration.[18] The monopoly now granted to the *régulo* was a new reality in Mozambique, where, up to then, the political and administrative authority was characterized by a complementarity among different leaderships in a given region, in terms of forms, hierarchies and functions. In colonial times, although some of the local chiefs (*régulos*) were of 'noble' lineages,[19] several other people appointed by the colonial authorities often lacked traditional legitimacy.[20] In modern colonialism, established *régulos* paralleled other local authority structures – e.g. *xhés*, traditional healers, etc. – quite often competing with them.

In order to keep their position, these traditional chiefs depended on the support of the colonial power. But simultaneously, colonial authorities depended on traditional authorities to make their rule effective and legitimate. In practice, *régulos'* allegiance to the colonial government was a paradox regarding the interdependence between colonial administrators and local chiefs, similar to the one Gluckman identified in his study of the Zulu Kingdom in South Africa: "while [the colonial] government requires the chiefs to support its measures, the people expect their chiefs to oppose them" (1940: 48).[21]

The whole institution of the *régulado* was part of the Portuguese native policy that came to be known as the *Indigenato*[22] directed to the extraction of labor and taxes. In short, both the colonial institutionalization of *régulado* and the formalization of *Indigenato* contributed to social transformation in Mozambique.

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[17] The lowest administrative unit in rural areas.

[18] Until the administrative reforms of the early 1960s, the Portuguese colonial administration recognized a few women as 'traditional authorities' (*Law of the Overseas Administrative Reform* – Decree-Law n. 23.229 of December 28th, 1933). Later on, administrative reports from the 1960s revealed the persistence, in a more 'informal' way, of several women – endowed by a strong legitimacy inside their communities – identified as 'traditional leaders', mostly in matriarchal northern Mozambique (Bonate, 2006).

[19] The administrative reforms of the 1930s formalized the hierarchies of chieftaincies, resulting in the three-tiered division between the *regedorias* (*régulados*), *grupos de povoações* (ruled by *cabos de terra*) and *povoações*.

[20] This became visible especially in situations of open conflict, when traditional chiefs would oppose the colonial authorities. In these situations lineage traditional chiefs were replaced with more prudent individuals.

[21] In many cases, where and when it was possible, *régulos* actively resisted colonial rule. In other instances *régulos* engaged in different forms of passive resistance.

[22] The first Statute of the Indigenato (equivalent to the Native Codes in neighboring British colonies) was approved with the force of law in 1926 (*Estatuto Político, Civil e Criminal dos Indígenas de Angola, Moçambique e Guiné* - Decree n. 12.533, of October 23rd, 1926). The Statute was renewed several times, until it was revoked in 1961.

2.2. Traditional Authorities – The Specificity of Mozambique

The colonial system became a means of incorporating native subjects into the arena of colonial power. Since 'traditional' Africans were inhabitants of the countryside, 'customary law' came to mean the rural space of the colonial rule, as one sees in most of the literature written on this subject. In Mozambique, the modern cities constructed from the early 20th century had a significant number of African populations, inhabiting urban townships. The native populations of the townships – from different ethnic backgrounds – were under the direct rule of an administrator, who counted on the assistance of *régulos*. The existence of 'urban' *régulos* is a peculiar feature of the Portuguese colonial administration.

As Rita-Ferreira illustrated for colonial Lourenço Marques,[23] the city's native townships were ruled by two local *régulos*. The continuity of power was therefore doubly broken, in terms of both the chiefs' lineage and the territorial organization (Rita-Ferreira, 1967/68). Here, more visibly than elsewhere, the traditional authorities (and the norms they applied) were a colonial construction, produced by the colonial power relation. Because the populations ruled by these 'urban' *régulos* had multiple origins, the process of traditionalization did not occur or was incomplete, and so the identities, practices, and authority in matters of custom remained flexible and diffuse. As one of the inhabitants of Maputo reported "the régulo decided what he knew was the best in that moment. He needed to keep people in peace".[24]

Lourenço Marques was not an exception; similar cases have been described for other Mozambican urban contexts, both in colonial and contemporary times (Meneses *et al.*, 2003; Jossias, 2004; Santos and Meneses, 2007), thus challenging the assumption that traditional authorities were a feature characteristic of the past, pristine African rural environments.

In urban contexts, and according to several of those holding responsibility for 'customary affairs', the procedures, rules, and fines they administered were established through a negotiation between Portuguese and these new 'native' authorities, in order to overcome the potential anarchy. *Régulos* considered their own authority to settle disputes to be a power ultimately backed by the civil, police, and military authorities. They did not articulate a sense of 'customary' as something distinctive, autochthonous, locally derived, or essential to local identity. Since the expectations associated with rule among the colonial subjects were relatively light, the Portuguese had no need to 'discover' or record customary practices or traditional law.

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[23] Currently Maputo, the capital of Mozambique.
[24] Interview with Mamã Noémia, Maputo, October 14th 2006.

Another particular aspect of Portuguese colonialism is the fact that Mozambique did not experience a formal consignation of all the 'native populations' into territorially well-defined tribes; what was characteristic of the Portuguese colonial regime was the use of 'tribal chiefs', usually identified on the basis of 'cultural-linguistic' traits (the 'lineages'), to administrate the indigenous populations.[25] This question is particularly sensitive, since the differences were not only regional/ethnic; they were also due to membership of specific religious groups. Northern Mozambique – particularly along the coast – is predominantly Muslim, and the Muslim leadership historically incorporated Islamic authority and chieftainship into one (Bonate, 2006). In more southern regions, other religious groups (Protestant, Catholic) also became part of the complex web of conflict resolution institutions. As yet, the socio-legal dimensions of this fact have not been fully evaluated. Therefore disputes over ethno-cultural and religious boundaries and their representations in law became struggles over the nature and the structure of political authority.

The colonial state came to symbolize the imposition of a monocultural legal framework. In short, with modern colonialism, the modern forms of power were assumed by the colonial state, whereas the local administration of justice was entrusted to traditional authorities.

Formally, and with the implantation of the *Indigenato*, from the early 20th century on, three broad classes of people lived in the territory of Mozambique: the citizens, mostly colonizers, with full Portuguese citizenship rights and living under the state civil law; the natives, living under invented African customary law; and the very small category of '*assimilados*'– blacks or people of mixed race origin – citizens of inferior status, who had fulfilled the requirements of having incorporated the Portuguese civilized values.[26] Judicial courts were for the use of citizens (including '*assimilados*'), whereas indigenous populations, until the revocation of the *Indigenato*, had only access to 'private courts' (Trindade, 2006: 32-33).[27]

Law and justice administration became, together with many others, a technology of domination. Under the broader goal of '*missão civilizadora*', traditional institutions of conflict resolution were seen as essentially transitory by Portugal, and it was expected that they would wither away as the indigenous population was gradually 'civilized'. This partially accounts for

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[25] As a result, only towards the end of colonial presence did the Portuguese authorities produce the first 'ethnic' maps of the 'overseas province' (early 1970s).

[26] It indicated that these '*assimilados*' had incorporated civilizational references into their behaviour and were on the way to becoming full Portuguese (Santos and Meneses, 2006).

[27] As established by the *Regulation of the Private Indigenous Courts* (*Regulamento dos Tribunais Privativos dos Indígenas* – Legislative Diploma n. 37, of November 12th 1927), these courts were presided over by an administration officer, assisted by two local indigenous authorities.

the fact that customary codified laws were never introduced in Mozambique,[28] compared with the realities in neighboring British colonies. There, the customary courts functioned on the basis of institutionalized 'written' customary law,[29] while the Mozambique practices were what one might call 'living' customary law, that is, the practices and customs of the people in their day-to-day lives. As a result, both the Portuguese administrators and the *régulos* retained the possibility of adjusting the 'traditional' to respond to different situations, providing in the course of specific decisions nuanced interpretation of the law. This specificity of the Portuguese rule accounted for the fact that chiefs' courts were never formalized in Mozambique.

Until the early 1960s, when with the strengthening of anti-colonial movements the struggle for national liberation erupted in the three of the Portuguese African colonies – Guinea-Bissau, Angola and Mozambique –, the overwhelming majority of Africans were not citizens, and effectively had no civil rights. The Decree[30] that abolished the *Indigenato* regime in Mozambique was a strong blow against the foundations of the legal political duality of indirect rule. This Decree justified the concept of dual ruling, arguing that the colonial state acted on the best interests of the African native populations, by guaranteeing the presence of a plurality of cultures, and associated traditional institutions of a diversified system according to the structure of each traditional group. Seen from above, from the perspective of the colonial state, a dual administrative system was in place, transcribed, in the language of law, in 'civil' law and 'indigenous' law. Seen from below, from the perspective of the communities, the picture was somehow different, revealing the growing presence of the locally available instances of conflict resolution. In ascribing political identity to Africans through native authorities, the Portuguese administration bequeathed ethnical, regional and racial oppositions to independent Mozambique. In sum, what better characterizes the Portuguese colonial system is paradox, uncertainty and diversity.

3. Pluralism in Post-independent Mozambique

Together with the modern European continental legal tradition, there is a wide variety of legal institutions in Mozambique, reflecting the multicultural reality of the country. A detailed

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[28] That is, there were a few anthropological and socio-legal studies carried out on this subject, but they were never transformed into formalized legal codes. This is discussed at large in Santos and Meneses, 2006.
[29] Many consider this 'official' customary law, enforced by courts, to be a distortion of customary law as practiced before colonialism.
[30] Decree n. 43.893, of September 6th, 1961.

analysis of Mozambican policy towards law calls for a re-evaluation of the significance of Mozambique's colonial past for its contemporary state formation and legal development, raising doubts on the oft-implied contrast between a rational and stable colonial system and an irrational and unstable postcolonial era (e.g. Chabal, 2002). Indeed, the value of such a distinction is quite ambiguous, since "colonial Africa was much more like post-colonial Africa than most of us have hitherto imagined. And its dynamics have continued to shape post-colonial society" (Ranger, 1996: 280). In this section I will seek to pin down the continuing importance of Mozambique's institutional colonial inheritance in the present institutions.

In 1975 Frelimo, the leading nationalist movement took over the power from Portugal.[31] With independence, a broad consensus was established, for political, economic and cultural purposes. However, contrary to what happen in several neighboring countries, this consensus required a sudden rupture: breaking with the legacy of the colonial past required putting an end to chieftainship. For the sake of national unity, so it was widely agreed, sacrifices had to be made. At its most extreme, the tendency was fundamentally against legal pluralism. The nation-state would be a centralized state, and it would extend basic rights to citizens equally. One-nation advocates held that the making of a nation-state required the more or less gradual fading away of the tribe, at least as a corporatist political community mediating between the individual and the state.

The first years after independence came to be characterized as an era of 'neocolonialism', in which the dominant problems were the economic, rather than political, continuities with the colonial past (O'Laughlin, 2000; Francisco, 2003). Underdevelopment and dependency theorists depicted Africans as "objects of outside manipulation", and consequently overlooked the extent to which Mozambican leadership had molded the institutions they had inherited (Bayart, 1993: 3). The conflation of economic and political self-determination resulted in a systematic underestimation of the importance of domestic political institutions and the ability of Mozambican actors to engage with existing structures of domestic and international power.

An exception is the study on justice administration coordinated by Santos and Trindade (2003). The study showed that only a very narrow segment of the population would appeal to the official, state-oriented judicial system to try to solve their problems. These results are in

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[31] Up to 1990, Mozambique had a single party political system, led by Frelimo. Even after the introduction of a multiparty system in 1990, Frelimo has remained the main political force in the country, having won all the presidential and legislative elections.

consonance with other studies in the continent that have confirmed the profound interference of the colonial encounter on the creation of customary law.

3.1. Suppressing Legal Pluralism? The Early Post-independence Years

The first Mozambican constitution declared Frelimo the political vanguard force in the country.[32] During the first years of independence, Frelimo sough actively to build a nation-state. In the eyes of Frelimo their victory legitimized all the practices that had been in place in the liberated areas during the war. For Frelimo's leadership, the war of liberation was not an end in itself, but the founding act of a new, revolutionary nationalist culture, ruled by the people. In this context, independence symbolized the rupture with the colonial legacy, including the state structure and its discriminatory practices. The philosophical approach behind this policy called for the 'dismantling of the state', the 'destruction of traditional and obscurantist ideas', as a basis for the creation of a new nationalist culture, the *Sociedade Nova* (Machel, 1985: 105-106; Vieira, 1979: 12-15). In Frelimo's conception, the holder of this new Society was unequivocally described in political discourses as the *Homem Novo* ('New Man'), freed from the remnants of past traditions.

From the very first moment of independence, the political doctrine identified the customary institutions as historical remnants of the colonial past.[33] They were depicted as feudal remnants, which could not survive the onslaught of the liberated energy of popular masses lead by the party vanguard. In the words of Samora Machel (1975), the first president of Mozambique, the new independent state had to be democratic, unitary, non-racist and non-tribalistic. Therefore, the political call was to eradicate the colonial state's instruments of domination: "the army, the police, the administration, the courts, the laws" (Monteiro, 1976: 14). The persistence of colonial institutions was seen as stalling the construction of the new society, which called for the "dismantling of the state[34], the annihilation of its structures and methods" (S/a, 1976: 42). The decisions of the 8th Session of Frelimo's Central Committee (1976) clearly called for the destruction of the "colonial-capitalist law and its judicial structure as part of the destruction of the entire state colonial-capitalist machinery", to be replaced by a new judicial structure reflecting "the power of the worker-peasant alliance" and

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[32] Articles 2-3, 8 and 11 of the 1975 Constitution. The principles of democratic centralism were strengthened in the amendments introduced in 1977, when Frelimo transformed itself into a Marxist-Leninist party. These principles were abandoned in the late 1980s, when the party adopted a social-democratic orientation.
[33] Frelimo disregarded the fact that many *régulos* resisted colonialism and actively supported Frelimo during the liberation struggle.
[34] In Portuguese, '*escangalhamento do estado*'.

"the dictatorship of the exploited majority", whose inspiration drew strongly on the experiences from the liberation struggle (Frelimo, 1976: 121). On this basis, changing the mentality underlying colonial and customary structures – a threat to the Frelimo's unity policy to 'build the nation' – was defined as one of the new state's fundamental objectives (Trindade, 2006: 36).[35]

Conformity with the rules established in Frelimo's political program was also used at the outset for identifying the Mozambican population in terms of those 'creating the new society' in communal villages and state farms, and those who preferred to remain fixed to traditional culture. The latter were viewed as backward looking and superstitious, and therefore not belonging to Mozambicanity. All activities considered to cause internal divisions based on cultural factors – such as religion, ethnic or regional identity – were declared illegal, because in direct conflict with the nation-building process. This intolerance contrasted with the prevailing policy during the nationalist struggle, when a more cultural approach to resistance was deemed acceptable.

Characteristic of the dominant ideology during this time was the fact that scholars ignored some of the main questions that, in legal terms, people were posing, especially, how law would address their social problems, such as conflicts due to the presence of multiple systems of land ownership, inheritance, alimony, witchcraft accusations, etc. Worse still, it did not consider the fact that the vast majority of the population seldom used the formal laws and official justice institutions. Rather, most of these issues were described as an impediment to national unity and to the project of liberation: pernicious evidence of the traditional, obscurantist past.

The process of Frelimo's institutionalization as the vanguard party, which took place in 1977 (3rd Congress of Frelimo) shows a remarkable ideological continuity with colonial 'native' policy. The Portuguese discourse of civilizing nationalism was now replaced with a Marxist-Leninist civilizing nationalism. Both discourses motivated a formal, dualistic political segregation and, at the same time, provided means for legitimizing that segregation.

Indeed, if the Portuguese claimed that it was Africans' cultural deficiency that justified Portugal's '*missão civilizadora*' and the subsequent subalternization of traditional society, Frelimo was claiming that it was the people's excess of culture of a traditional kind that justified the vanguard's modernizing interventions. Frelimo's alienation from its African social basis prevented it from imagining how indigenous cultural practices might act as bases

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[35] Articles 4, 26 and 36 of the 1975 Constitution.

for social transformation within an evolving national political-economic context. It furthermore created blindness to the possibility, and increasing actuality, of errors and misguided actions, not only in terms of the state's authoritarianism, but also its technical incompetence, inadequate planning and preparation. Local forms of political-economic instrumentality were therefore ignored, which eventually led to alienation and (both passive and active) resistance among the very population that was meant to benefit from Frelimo's program. Frelimo simply assumed that the appeal of indigenous authority and social organization would dissipate when the people were given a (supposedly) rational, scientific alternative. Thus, for Frelimo, socialist modernization was understood mainly in terms of raising consciousness and extending technical skills and knowledge (Meneses, 2003), the very denial of a dialogue with local cultural expressions.

3.2. "Kill the Tribe to Build the Nation": The Banning of Traditional Authorities

The first Constitution of Mozambique (1975) declared the end of legal pluralism as a means of annihilating the presence of discriminatory 'customary' practices, symbols of colonial "traditional oppression and exploitation structures and their related mentality" (art. 4). The application of this article, intended to promote equity before the law among all citizens, brings back the question of continuity with the colonial past. In Mozambique, the search for a definition of 'other justices', in light of the evident diversity and heterogeneity of practices, has to be inscribed in the social order resulting from the process of colonization of knowledge itself – what turns these processes and institutions into an object is simply their non-recognition by the state and its institutions.

Frelimo members conceived themselves as the competent arbiters of the path to 'modernity' for a 'backward' 'traditional' society. This juxtaposition of the modernizing agency of Frelimo (the state ruler) and a 'backward' population set up a hierarchical ordering in which the state embodied the very notion of authority. Since rival authorities (*régulos*), dissidents, peasants and workers were not considered sufficiently competent ideologically to participate as nationalist subjects, they could only be included in the party's internal dialogue as objects. Thus alternate publics based on ethnicity or local languages became unrecognizable from the universal and unitarian perspective of a vanguardist public. All Mozambican subjectivities were reducible to a (idealized) binary opposition, much as had been the case in colonial times. Located at one extreme was the tradition-bound but homogeneous category of peasant, homologous to the colonial native, considered backward, and in need of assimilation;

at the other pole, the ideal of the *Homem Novo* tendered by Frelimo, an abstract category homologous to advanced, civilizing Portuguese of the colonial era. All concrete individuals were implicitly particularistic, partisan or self-interested to the extent they diverged from this latter ideal. "[We] had no hesitation in acting against tribalists, racists and regionalists. We killed the tribe to give birth to the nation" (Machel, [1977] 1985: 77).

Soon after independence the warrior-*cum*-nationalist myth came to divide those who had fought in the liberation struggle from everyone else in Mozambican society. Under the category of lesser citizens were several representatives of traditional authorities. The first Electoral law, approved in 1977, established clearly these boundaries, when the individuals declared as having been involved in "colonial structures of oppression", were prohibited from running for political office.[36]

Following this political approach, in 1978 traditional rulers and religious authorities – conceived to be 'against modern rationality' – were formally abolished, as part of a project to radically reform the colonial government.[37]

Mozambique defined itself, from the first Constitution, as a secular state. With independence, Frelimo's policies perceived African chieftainship and Islam as two separate fields: Islam was viewed as an 'organized faith' similar to Christianity, while chieftainship was understood to represent African traditional authority. In the late 1970s, in the context of the struggle against 'traditionalist' practices, a wide variety of social practices and beliefs were abolished; this included ceremonial rituals fundamental for the affirmation of legitimacy and authority of chieftainship. It also meant the banning of religious practices, including Islam. With this, Muslim chiefs of northern Mozambique lost another pillar of their power, that of Islam. The banning of these chiefs meant, in many places, outlawing the application of Shari'a (Bonate, 2006: 140-141).[38] Traditional leadership was replaced by *grupos dinamizadores*, and local elites associated with the colonial administration were stigmatized.

3.3. Enlarging the Legal Network – the *Grupos Dinamizadores*

During the first decade after independence, it became practically impossible to speak of social differences other than the obvious differences between colonial-colonialists and oppressed, rich and poor. In legal terms, the banning of traditional authorities (at least formally) can be

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[36] Article 14 of the Electoral Law of 1977 (Law n.1/77, of September 1st).
[37] Decree n. 6/78, of April 22nd 1978.
[38] This ban did not last long; in the early 1980s Frelimo reconsidered the ban on religious congregations and several of them were allowed to perform their social and beneficent activities.

seen as one of main measures undertaken to outlaw any form of divergence from 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 Dinamizadores* (dynamizing groups). These instances of popular organization never knew any juridical formulation, but have, since them, been present in the political legal structure of Mozambique.

A *grupo dinamizador* was formed by eight to ten people, chosen by a show of hands during the public meetings of urban neighborhoods, workplaces, or local communities throughout the country. One of the goals of this measure was to erase the geopolitical map of the customary in the country. All of those accused of collaboration with the colonial regime were excluded as a matter of principle. Headed by a secretary, the *grupos dinamizadores* came to take on a wide range of functions, which partially covered those which had, up to that point in time, been carried out by the traditional authorities: social issues, legal questions, policing, security, administration and regulation. In a more general way, it was hoped that the *grupos dinamizadores* would introduce Mozambican citizens to the political history and political priorities of the new government.[39]

In 1977, during Frelimo's 3rd Congress, it was decided to turn the movement into a Marxist-Leninist vanguard party. The broad mass of the population was to be incorporated into the political process and given contact with the Party through mass democratic organizations under the control and tutelage of the party, such as the Organization of Mozambican Women (OMM[40]), *grupos dinamizadores*, etc. With Frelimo changing from a nationalist movement into a party-state structure, it was decided to separate functions of the party-state at the base (party cellules) and of the *grupos dinamizadores*; however, in practical terms, the promiscuity between these structures came to be reinforced.[41] For example, secretaries (an increasingly prominent local political figure) would, quite often, accumulate political and administrative tasks (Chichava, 1999; Meneses *et al.*, 2003).

Ideological measures were, however, accompanied by increasingly pragmatic action by local administrators and Frelimo party cadres, who often interpreted the Marxist orientations very flexibly, or simply disregarded them. Because the *grupo dinamizadores'* secretaries

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[39] Popular vigilante groups were also formed to assist the *grupos dinamizadores* and were supported by militias that reported to the Frelimo-appointed administrator. These militia groups sometimes got involved in the resolution of conflicts, involving mostly physical of violence or verbal abuse.

[40] *Organização da Mulher Moçambicana* – OMM in Portuguese.

[41] The *grupos dinamizadores* were transformed into local administrative structures, as urban settings and large rural villages were divided into neighborhoods. Each neighborhood was ruled by a secretary– the neighborhood and village secretaries – but the designation '*secretary of the Grupo Dinamizador'* remains widely accepted.

would frequently be ignorant both about local legal culture and state law, the solution found was to resort to 'old' traditional authorities, a local source of legal knowledge and legal legitimacy. In fact, the 'traditional authorities' did not vanish. Downgraded to a lesser rank by the state, their activity and public political intervention remained locally important, both in urban and rural contexts. As several studies carried out on this subject have revealed, traditional authorities sometimes even became integrated into local institutions (Geffray, 1991; Dinerman, 1998; Meneses *et al*, 2003). In the field of law, *de facto* pluralism was a typical state of affairs in many areas despite official insistence on the unitary official legal model (Gundersen, 1992: 273-274; Santos, 2006a: 64).

3.4. Between Custom and Modern Law: the Community Courts

Since independence, official courts have remained inaccessible to most of the population, for multiple reasons. Most of them are concentrated in urban areas, and use predominantly Portuguese – the country's official language – and written procedures, in a country where many are illiterate and do not understand Portuguese. Other reasons include the insufficient supply of legal advisors for the poor, and the slowness of the judicial process, due in part to the scarcity of judges (Pedroso, Trindade, José and Santos, 2003: 531, 568).

Because traditional authorities had been banned and the *grupos dinamizadores* and mass democratic organizations could only solve some of the social conflicts, the Mozambican state sought to overstep this limitation in access to official justice. The solution found in the early revolutionary years was to encourage a symbiosis of the 'progressive' forms of the customary with more democratic principles of justice. Therefore, some of the 'traditional' practices were translated into the new institutions of popular justice – the people's courts,[42] operating both in urban townships and rural settings (Sachs and Honwana Welch, 1990). With the introduction of this new court system the state was seeking to maintain some coexistence among the multiple legal systems present in the country (Gundersen, 1992; Trindade, 2006). The Mozambican state knew that in order to be recognized as a legitimate authority, the new judicial structure had to be anchored, at least to some extent, in the everyday life of both rulers and subjects alike, as a guarantee of the unity of the Mozambican citizens (Preamble to Law n. 12/78). People's courts – later on transformed into 'community courts' – meted out a

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[42] Law n. 12/1978 of December 2nd. This law established the Popular Judicial Courts led by both professional jurists and lay judges. The latter were elected locally and were called to arbitrate according to common sense and good will. Back then, the popular courts were an integral part of the judiciary, a fact that dramatically changed in the 1990 constitution.

sort of popular justice, between the formal, official justice and common law (Santos, 2006a: 56; Gomes *et al.,* 2006: 214).[43]

The community courts are part of official law and justice, albeit the law defines them as operating outside the formal justice system,[44] 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" (Preamble to the Act). The Preamble also states that the community courts have been created so that they can "enable citizens to resolve minor differences within the community, contribute towards harmonizing the diverse practices of justice as well as enriching rules, uses and customs and lead towards a creative synthesis of Mozambican law".[45] The community courts transformed themselves into a highly complex hybrid institution in which revolutionary, traditional and community political-legal cultures combined, and in which, eventually, the only absent culture was the one which supposedly had become the official legal and political culture, the western democratic culture (Santos, 2006a: 54-59).

Because community courts represent a source of authority and legitimacy separate from that of the national administration, it does not come as a surprise that the Mozambican state has never regulated the law that institutionalized these courts (Gomes et al., 2006: 2005).[46] The very transition from popular courts to community courts was not a pacific one. Indeed, the law that institutionalized community courts determined that the judges of the local and neighborhood courts – i.e., from 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 neighborhood structures or by the direct intervention of

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[43] The Mozambican Constitution of 1990 abandoned the judicial system of 'Popular Justice' and created a new judicial organization, where the lower level courts, that ruled according to the Constitution and the local customs and norms, became separated from the formal court system. Thus, the community courts created by Law nº 4/92 (of 6th May) remained outside this judicial organization. The main objective of these courts was to fill, at the base level, the void created by the formal closure of popular courts (Trindade, 2006: 45-46; Gomes *et al*., 2006: 203).

[44] Therefore, they depend on 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 some 1,700 community courts, served by more than 8,500 community judges.

[45] However, one should point out that Law 4/92 only makes reference to customary law in its Preamble, without any further allusion to it within the corpus of the law itself. Furthermore, this law does not provide any room for appeal from the side of formal justice, although specific situations of appeal have been detected. Finally, the Law, in a sense, formalizes 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 of law.

[46] A law proposal to regulate the activity of the Community Courts was submitted in 2005 to Frelimo's Government, but no legal regulation has yet been approved.

the ruling party, Frelimo, even where new courts were created. This fact has led to the political polarization of community justice, where community courts are considered instruments of Frelimo and the traditional authorities instruments of Renamo.[47]

The disorderly situation of community courts in Mozambique deserves a closer look. Indeed, it does not come as a surprise the fact that most of these courts, even those dominated by loyal Frelimo cadres, tended to uphold 'customary' norms rather than transform them, since those rules were the ones that corresponded to the local exigencies of reintegration and appeasing. However, from the perspective of the State, these ancient practices were to be supportive of the formal court system until the ancient practices had vanished, with the spread of a formal legal system into the most recondite areas of the country.

3.5. Witchcraft Accusations and the Limits of Modern Law

In Mozambique, as is the case in many African countries, the threat of witchcraft is very difficult to tackle, as one feels exposed to intangible forces, not knowing exactly how they work and where they originate.[48] This feeling of insecurity helps to explain the desperate attempts to expose the culprits, forcing them to confess what nobody could have observed directly. In the context under analysis, witchcraft suggests the manipulation by malicious individuals of powers inherent in persons, spiritual entities, and substances to cause harm to others (Meneses, 2000; 2006). But official law seems unfit to deal with this problem. As noted by one *régulo*, "when we send cases of witchcraft to be resolved in the courts, they say that there is no basis [evidence]. We count on the help of the healers to detect these cases."[49]

Witchcraft and accusations of evil-doing may correspond to various social situations of unease, quite often associated with the violence and insecurity that accompanied the rapid political and social transformations the country underwent over the last 15 years. Historical conditions that yielded an ambiguous mix of possibility and powerlessness, of desire and despair, of mass joblessness and hunger amidst the accumulation, by some, of great amounts of wealth associated with the introduction of a new liberal economic strategy, greatly

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[47] The non-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 an important political force in Mozambique.

[48] The colonial administration in Mozambique, in order to avoid being portrayed as sponsors of witchcraft, never formally accepted the existence of witchcraft practices, and allowed 'traditional' courts to conduct trials against assumed witches. Traditional authorities were even allowed to deal with charges of witchcraft, if they did not involve accusations of murder (Meneses, 2000)

[49] Interview with Régulo Santaca. Santaca, May 1995.

exacerbated the fear of witchcraft, for people felt unprotected (Comaroff and Comaroff, 1999: 283; West, 2001; Geschiere, 2006).

The subject of witchcraft unambiguously indicates the presence of two elements: beliefs and action. Accusations are made and action is taken; thus, the beliefs and action reinforce one another. So the question that those afflicted must address in relation to this sort of misfortune is less what has caused this suffering than who is responsible for the suffering. To treat the malaise of witchcraft is to struggle with the witch by mystical or social means, or both. That is, either the malevolent powers are combated by occult or spiritual means or the individual responsible is identified, induced to retract the evil powers, and punished (or cleansed and redeemed). Because the official legal means made available by the Mozambican state are usually ineffective in situations dominated by the 'invisible' (accusations of witchcraft), people believing themselves to be under attack at any one time may visit a traditional healer, seeking to find the source of their troubles, how to take counter-measures.

After independence traditional healers expected greater openness "now that the country was finally ours,"[50] but that did no happen. In colonial times they had been tolerated, but their role in 'proving' the presence of witchcraft practices was never formally acknowledged by law. With independence, legislators, following an approach that was also present in neighboring countries, regarded witchcraft as a merely imaginary offense and tried to impose this view on the majority of the population. Rather than punishing the witches, all those who tried to defend themselves against witches were threatened with prison sentences, and the healers were persecuted (Meneses, 2006b: 79-80). This situation was changed only in the late 1990s, with the formalization of the several associations of traditional healers, especially the Association of Mozambican Traditional Healers (AMETRAMO).

Nowadays, in vast areas of the country healers continue to perform their role as expert witnesses to help solve the problem of how to establish evidence against witches. Traditional healers keep their role in administering justice: as intermediaries between community courts or traditional authorities and the local population, they take control over the final decision of the case (Meneses *et al.,* 2003; Gomes *et al*., 2006). Indeed, because the detection of the 'witch' has to happen *post factum,* the figure of the traditional healer, whose power and knowledge legitimize his/her decision regarding the responsibility of the culprit, remains central. Therefore, a large hybrid fringe of legal instances – representing non-state instances

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[50] Personal interview with M. Zimba, a traditional healer. Maputo, March 2000.

in which traditional healers are recognized as key elements in 'detecting' traces of evil presence – continue to be the instances that can act against and punish witches.

3.6. The Resurgence of the Customary

The non-acceptance, from below, of a state structure mirroring the colonial one led to an increased resistance and opposition towards the excesses of power played by the party-state leadership. 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 (re)claiming the formal recognition of legal pluralism to show distance *vis-à-vis* the government.

As mentioned earlier, Frelimo was not able to dismiss traditional chiefs, who had continued to exist (Geffray 1991; Dinnerman 1998). 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 2006a; Meneses *et al.*, 2003).

With the rapid spread of the civil war in the mid-1980s, Renamo started to challenge the notion of traditional authority as a 'backward' and 'feudal' institution. As a means of attracting support from local populations, during the civil war, Renamo reinstalled *régulos* in the areas under its administration. *Régulos* were instrumental in providing young men to join Renamo's army. They also collected taxes and performed rituals to 'protect' and encourage Renamo soldiers in the battlefields (Wilson, 1992; Meneses *et al.*, 2003; Gonçalves, 2005).

Realizing the social importance of this group, Frelimo gradually reinstated traditional authority. In 1989, the ban on traditional healing was lifted. After the signing of the peace agreement in 1992,[51] which ended the civil war with Renamo, Frelimo recognized that traditional authority could powerfully influence voter behavior in the first democratic election of 1994. Several studies carried out in Mozambique in the 1990s (Alexander, 1994; Dinerman, 1998, 2004) showed that the local state officials' conceptions of future governance drew on the colonial experience – local chiefs were perceived as the state's apolitical subordinates.

From 1991 to 1997, the government, through the Ministry of State Administration, undertook research on traditional authorities.[52] If Renamo (and other opposition parties)

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[51] Mozambique's peace agreement of 1992 required the recognition of existing traditional authorities. "The Government undertakes to respect and not antagonize the traditional structures and authorities where they are currently de facto exercising such authority, and to allow them to be replaced only in those cases where that is called for by the procedures of local tradition themselves" (art. 9(§ f) of the General Peace Agreement for Mozambique (Protocol V) assessed on June 15th, 2007 at <http://www.usip.org/library/pa/mozambique/ mozambique_10041992_p5.html>).
[52] This theme is analyzes in more detail by Kyed and Buur, 2006: 571-572.

demanded the immediate and unconditional recognition of customary institutions as authentic representatives of Mozambican cultural identity, Frelimo was more cautious in meeting formally with customary authorities and negotiating their integration into the governance system. By recognizing the hereditary privileges and pluralist notions of law the customary authority symbolized both a return to the past in terms of an unscientific world of 'tradition' and negation of modern unitary citizenship (West and Kloeck-Jenson, 1999).

The goal of the research commissioned by the Ministry of State Administration[53] was to identify 'truly' traditional authorities that had not been tainted by colonial and postcolonial party politics (Lundin, 1998); in parallel, the government sought to acquire sound information upon which to develop a legal framework for articulating the activities of traditional authorities within the broader state structure. As depoliticized spheres of personal trust and community-based networks, traditional authorities emerged in this project as homogeneous groups, representing "the whole community, beyond political differences, embodying the will of all the people, and not excluding anybody" (Cuahela, 1996: 11). This idea of tradition contributed to mistakenly portray the communities as historical survivals of original cultures that had managed to survive – in a more or less pristine condition – the colonial intrusion.

After a turbulent period of discussion, in 2000, the Mozambican government passed a Decree[54] that recognized the diversity of 'other' authorities present at local level. This included traditional authorities, considered under a broad expression, that of 'community authorities'.[55] Although the Mozambican State claimed a radical cut with the colonial past, this Decree clearly reified a depoliticized and timeless idea of the African community and traditional authority, described now as 'community authorities'. The goal of this Decree was to identify "the true chief"[56] as the interface between the State and the community.

Like similar regulations in other African countries, Decree 15/2000 is ambiguous in numerous aspects. Those ambiguities reflect, in part, the government's need to incorporate in a uniform law different forms of traditional rule and social organization existing in Mozambique. Article 1 of the Decree clearly states that "community authorities are the traditional chiefs, neighborhood and village secretaries and other leaders who have been legitimized as such by the respective communities". The very definition of '*community*

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[53] The Ministry in charge of community authorities.
[54] This piece of legislation was passed by the Council of Ministers without public discussion in the Assembly. By excluding political opposition from the process a critical consensus building function was missed and no common basis of reference was established.
[55] Decree 15/2000 of June 20th 2000 and Diploma 107-A/2000 of August 25th 2000.
[56] Interview with an Administration officer in Angoche, August 27th 2004.

authorities' seeks to encompass a wide variety of political institutions (from pre-colonial times to post-independence) that a given community finds legitimate. This provision reveals Frelimo's attempt not to repeat the mistakes of the past, namely, generalizing for the whole country and not paying due attention to local political realities.

The practical process of formal recognition of 'community authorities' took over by mid-2002, almost two years after the Decree was approved. By 2003 about 13,500 leaders had been legitimately indicated from rural and urban communities. Of these, about 1,500 (about 10.7 percent) had been, by then, recognized by the state.[57] Ethnographic fieldwork conducted in different parts of Mozambique shows that chiefs have not been always popular in their areas (Alexander, 1994; Meneses *et al.,* 2003; Gonçalves, 2005). In fact, the available data on the process of community leadership legitimation indicates that a significant number of former party/state secretaries have been elected for the position of community leaders, particularly in the southern region of Mozambique where invariably more former party/state secretaries than chiefs were elected. The statistics available for 2003 suggest that 43.5 percent of the elected leaders were secretaries, mainly of neighborhoods (that is, from peri-urban townships). By the end of 2006 the picture was somehow different. The overall number of legitimized chiefs had risen to 18,950, but, due to an increasing number of legitimized 'secondary' chiefs,[58] the percentage of secretaries had fallen to 17.6 percent.

Subsequent legislation[59] establish in a more precise way the distinction between traditional authority and secretaries, thus reducing the existing myriad institutions to a double category – the local representatives from colonial times and the leadership introduced by Frelimo. The former are "people that assume and exercise leadership according to the traditional rules of their community", while the latter are "people that assume leadership by being chosen by the population of the neighborhood or village to whom they belong" (art. 1 of Diploma 80/2004). In a word, the difference is in the process of selection, either by direct elections (in the case of secretaries) or 'ancestral' legitimacy and knowledge (in the case of traditional authorities). The diploma refers still to a third category (not present in the reports from the Ministry of State Administration) *of other legitimized leaders*: people that exercise some economic, social, religious or cultural role accepted by the *social group* to whom they belong.

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[57] Among the recognized leaders, some are women, although in a very small proportion.

[58] Such as '*cabos de terra*', '*tinduna*', etc.

[59] Such as Ministerial Diploma 80/2004 of May 14th 2004, regulating the articulation between autarchies and community authorities, and Law 11/05 of June 10th 2005, regulating the functioning of local state organs. It should also be pointed out that the 2004 Constitution recognizes, for the first time, the figure of 'traditional authority' (art. 118).

Law 11/2005 reinforces the special status of traditional authorities and secretaries. This Law defines as 'special rights' of these authorities "to be recognized and respected as representatives of their local communities; to participate in local councils; to participate in official ceremonies locally organized by administrative state authorities" (art. 108), thus implicitly calling for the inter-community legitimacy of these leaders to act as a support of state decisions at the local level. This is explicitly acknowledged in articles 106 and 107,[60] which define the duties of these community authorities. These articles enlarge the scope of the interaction between the state and these 'local authorities', which includes activities in support of state action in the area, work activities in common areas, conflict resolution and support of community courts, collecting taxes, information regarding traditional marriages, etc.

If the legislation seeks to subsume the diversity of community authorities into two categories – the secretaries and the traditional authorities –, the reality presents us with a patchwork of structures involved in justice administration at the community level.[61] These authorities differ from region to region, and their prestige and legitimacy depends more on individual influence rather than on established systems or legal orders. Similarly, customary law 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 base-level party organizations, and finally according to the relative strength and implantation of alternative community structures of conflict resolution such as community courts, religious structures, NGOs, etc. In short, tradition and political legitimacy are historically situated, they are cultural constructs subjected to continuous reworking

In rural areas in particular there is a societal appeal to 'return to the traditional'. This reality, coupled with a growing activism on the part of traditional authorities to intervene more broadly in conflict resolution points to an ongoing resurrection of customary systems in Mozambique and to the historical, social, and cultural importance of customary law.

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[60] These duties are quite similar to the ones established in Decree 15/2000. The Law also stresses that these leaders are entitled to: display the symbols of the republic; to wear their official garment; to be paid a subsidy depending on the amount of taxes collected by them (art. 110).

[61] One should point out that the question of religious authorities is not easy to deal with, due to the diversity of religious beliefs as well as to the intertwined character of the secular and the religious at local level.

3.7. The Local State Administration

In the early 1990s, the Frelimo's government passed the first of a series of laws[62] intended to create the legal basis for the administrative reform at the core of the decentralization process.

Following the process of political decentralization, multiparty elections took place in 33 municipalities. In 2003, during the second municipal elections, and for the first time, other parties or party coalitions (that is, Renamo or Renamo in coalition with other parties) won control over five municipalities.[63] This victory brought to light a new dimension of the over-politicized nature of public administration, and had a decisive impact on the rich legal pluralism.

A close look at local municipalities allows us to observe the role these administrative instances play in terms of conflict resolution. In places where community courts are not present (and even where they exist) 'social problems' are brought before the neighborhood structures (section of social affairs).[64] In fact, they deal with land and house claims, domestic violence, petty theft, and other social issues. In order to address these problems, the municipalities network with other social and political institutions; in most of the country, the networking is profoundly marked by the old single-party/state structures, inherited from the previous period, and still in place while the new decentralized democratic structures gradually take over.

Following the 2003 elections, in the municipalities controlled by Renamo or Renamo coalition, the local level administrative structures, together with the 'informal' structures present (such as neighborhood secretaries, head of a block, head of ten houses, etc.) were replaced. As several of the new administrative heads stated,[65] the goal was to 'take over' the policy-making spaces at local level. In practical terms this process was permeated with party politics as local government officials sought to influence the election/recognition of community leaders in order to maintain and expand the ruling party's (Renamo) control in the municipality, *vis-à-vis* the central state ruling power – in Frelimo's hands. Such is the case observed in Beira and Angoche, where Renamo rules the municipalities. Following the political change, the local neighborhood structures were replaced, following the previous (Frelimo's) model of political partidarization of local administration.[66] Renamo militants replaced the previous Frelimo local administrative entities. This political replacement had

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[62] Law 3/94, of September 13th, 1994 (Law of municipalities); Law 2/97 of February 2nd, 1997 (Law of local autarchies); Law 8/03 of May 19th, 2003 (Law on local state organs), and Decree 11/2005, of June 6th, 2005 (Regulation of Law 8/03).
[63] Nacala, Angoche, Ilha de Moçambique, Beira and Marromeu.
[64] Interview with Julio Marinho, head of 10 houses in Nametória, Angoche district, October 9th, 2003 and interview with Fernanda Namikuto, Angoche city, August 26th, 2004.
[65] Interviews with Alberto Abudo and Salimo Assane, Directors of Autarchic Units in Angoche city, in August 2004.
[66] Interview with Régulo Luis, Beira city, November 7th, 2004.

profound effects. On the one hand, the structures in place to mediate and propose solutions for social conflicts were replaced; on the other hand, the networking that existed between neighborhood community courts, mass democratic organizations and other instances of mediation and conflict resolution was profoundly disturbed. Specifically in the case of Angoche city, Renamo's *Liga Feminina*[67] replaced Frelimo's OMM in mediating conflicts involving relations within the family, including family rituals (Santos and Meneses, 2007).

Another example involves community courts. Due to a highly politicized environment, conflicts emerged in the relations between the central government and the municipal government. Both in Beira and Angoche, community courts, for example, were perceived as being Frelimo's structures. When Renamo seized power, the new municipal leadership assumed the right to control the city community courts and to substitute the judges. Because these courts depend upon the central Ministry of Justice, to replace the judges locally became impossible. Caught amidst this conflict, in 2004-2005 several community courts in Angoche were deserted by the people (Santos and Meneses, 2007); in Beira city this situation led to the extinction of several community courts (Arthur and Mejia, 2006).

3.8. The Community Police

Conflicts (including violent crimes) and the means to control them are enduring problems for police and communities all over the world. Community policing, it should be noted, is an ambiguous concept that acquires diverse meanings in the minds of different actors and in different social circumstances. The very idea of community policing is not new. In the early revolutionary years militia groups were associated with *grupos dinamizadores*. The attractiveness of community policing is particularly relevant in contexts where there is no clear definition of what 'crime' is, and where a coordination and consultation between the community and the police allows for a better definition of security needs, for the implementation of ways of preventing and curbing crimes and of enhancing safety.

In 2000, this concept emerged in Mozambique, as part of a package of measures designed to improve security in contexts where crime is perceived to be out of control. At this time, most of the urban centers in the country were facing a rise in crime, especially within the capital city, Maputo.[68]

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[67] 'Feminine League', in English.
[68] The almost daily media reports of incidents of violent robbery, car-hijackings, and other violent crimes provide a glimpse of the crime situation in the country, having spread from the low-income peripheral areas to middle-class areas.

The perceptions of rising crime were also strengthened by the inefficiency of the security services, especially the police, in dealing with it. Recent reports on public lynching have pointed out that the majority of the victims of violent crime do not bother to report to the police because of the perception that the police and official justice are inefficient (Serra, 2006: 14-15; Madeira, 2007: 30-33). [69]

The (re)introduction of a system of community policing was aimed at "promoting the collaboration, complementarity and closeness between the police and the community,"[70] as a way of granting the participation and the cooperation of citizens with the state police in crime prevention.[71] Ideally, the community police councils are expected to produce reports on incidents of crime on a day-to-day basis and report them to the local administration or to the police, in case of a violent crime. In a sense, they are meant to act as an agency for monitoring crime and liaising with the official police.[72] However, these councils quickly became known as 'community police'. As reported by one of the member of the council community police in Angoche, "people are becoming aware of us, and seek us to solve problems. All the population is already afraid of the community polices."[73] Working in close articulation with the neighborhood administrative structures (secretaries), these community police forces initially, probably because of the fear they caused, sought to control some of the petty theft and daily violence involving community members.

However, these community police forces were quickly left to their own devices, which posed several problems. Most of the people interviewed mentioned that they were unemployed when they joined the 'community police'. To join this institution came to be understood as a means of getting some sort of payment. Simultaneously, although they are not allowed to carry guns, to use force, or to keep presumed offenders in custody, these dispositions are constantly violated. Recently, the headquarters of the state police in Maputo city accused several members of the councils of community police of contributing towards the rise of criminality. As this report states, members of community police devote most of their time competing with the police, seeking to arrest and neutralize criminals, instead of identifying and obtaining information on crime activities in the neighborhoods where they live.[74]

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[69] The subject of 'public' lynching has been widely debated in the newspapers over the last couple of years.

[70] Annual address of the President of Mozambique, Joaquim Chissano, to the national assembly, about the state of the nation: "The challenges to the construction and consolidation of the State". Maputo, April 10th, 2003.

[71] See *Notícias* of July 4th, 2003.

[72] Interview with E2, Nampula city, September 2003.

[73] Interview with Carlos Hassan, president of the community police in Angoche city, in October 9th, 2003.

[74] In *Vetical* (online Mozambican newspaper), of October 1st, 2007.

Community police councils are formally intended to develop democratic ways of preventing crime and a better management of policing. However, their activity comes short of these principles as conceptualized and implemented in Mozambique. Indeed, they represent a concentration of power in the hands of the Ministry of the Interior, whose action has been under strong criticism and public scrutiny. In Angoche, Nampula and Maputo cities, the interviews carried out in 2004 and 2005 revealed that there is no clear definition of what 'crime' is, since police themselves are regarded as major perpetrators of crime, and the composition of 'communities' is itself in dispute. In the words of one interviewee,[75] "we have these nuclei of police activity in this village. If anyone criticizes the government, they write it down in secrecy and send the information to the state police or to the court. And these people have to go and explain themselves to the police." While the people expect to be included in community police initiatives, as a means of discussing the daily crime problems and the role of the police itself, the official police use these initiatives mainly as an opportunity to develop an 'eyes and ears' mechanism for crime control.

As an alternative, in some neighbourhoods, people only invite the police in as a back-up, centring their protective activity on the community. Even in contexts where the community police is seen as playing a role in solving local conflicts, as observed in one of the neighbourhoods of Maputo city,[76] their members were not elected. Indeed, community police, as already mentioned, were created on a voluntary basis, but the legitimacy of their members is quite often not recognized by their community. In these cases, the line between vigilantism and community policing becomes tenuous, opening up the possibility of violence and social anarchy.

3.9. Other Legal Instances

Access to justice and protection of human rights are described as the central piece of the process of democratization. Since the 1990s, and coinciding with the end of civil war, the neoliberal turn of the policies of transnational development with the slogans of 'decentralization' and reaching out for civil society (NGOs) produced a dramatic rupture with the previous highly statist conception of how to rule the state. This change had two distinct implications. On the one hand, several NGOs and social movements such as the *Liga dos Direitos Humanos*,[77] *MULEIDE*,[78] *União Nacional dos Camponeses*,[79] and trade unions, have

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[75] Interview with E1, Nametória, Angoche district, October 2003.
[76] Interview with Ramos Macuácua and Rosita Tembe, members of the community police, Maputo, March 4th, 2004.
[77] *Mozambican League of Human Rights*.

been active in the democratization of access to law and justice, as several studies have explored (José and Santos, 2003; Arthur and Mejia, 2006). These NGOs deal with a very heterogeneous selection of cases and handle situations that extend beyond the legal sphere. On the other hand, the presence of these organizations also meant a strong obsession with 'community' and restoring 'local custom'. It became a veiled way of fostering, at local level, a strong presence of donor representatives (NGOs) while restraining state officials in their everyday exercise of authority (Meneses, 2003). Geschiere finds peculiar similarities between the colonial interference and the neoliberal defense of the customary: "for the colonial officials, chiefs, as representatives of the community, had to be groomed into reliable auxiliaries of the colonial bureaucracy. Neo-liberal developers […] rather seemed to be fascinated by the 'traditional' aspects of such chiefs, notably their sacred character, establishing their moral authority" (2007: 133). The process was not only permeated with contradictions coming from government directives but also fuelled local disputes for the recently introduced position of community leader. These post-independence policies resulted in eclectic and fluid local political arenas in which government appointed figures jockeyed for power with local officials of authority and resourceful NGOs.

3.10. Networking or Conflicts among Legal Instances?

Direct rule, introduced with independence, was founded on the assumption of a single legal order – the state order, ruling over the whole country. That order was formulated in terms of modern law, once again a remnant of the colonial period. With direct rule came the abolition of indigenous institutions and norms. From this point of view, to civilize was thus to erase tradition, and to modernize was to westernize. The social consequence of direct rule depended on the size and the significance of the population. Indeed, for the vast majority of the Mozambican population, modern law remained a foreign legal body, resulting, in 2003, in about 80 percent of the population seeking 'other' instances beside formal courts to solve their disputes, as the study directed by Santos and Trindade (2003) has demonstrated. In a word, although the state, during the first thirty years, sought to impose the monopoly of modern law, the majority of the population remained excluded from these civil institutions, and chose their own institutions.

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[78] *Women, Development and Law.*
[79] *National Peasants' Union.*

What is clear is the vibrant social pluralism in which traditional factors (ethnic, territorial, family, religious and occupational) remain important aspects in the construction of personal identity and social norms that are often of greater relevance to people's lives than the rules of state law (for example, in spheres such as land, inheritance and gender roles).

The data analyzed in this paper shows that the reality of legal pluralism continued to exist, now more obvious with the recognition of 'community authorities', which include traditional authorities, former members of *grupos dinamizadores*, neighborhood and village leadership, and other local leaders perceived as legitimate by the communities concerned. Religious leaders are an example of the latter category.

In spite of the long history of state intervention, people resort to existing conflict management forums – including traditional authorities –, opting for different locally accountable forums, according with the nature of specific claims. The diversity of institutions present is a good indication of the cultural diversity and heterogeneity of the proposed solutions to the disputes.

Decisions in this 'unofficial' network of legal cultures are made using local wisdom derived from local embeddedness. Decisions are taken and implemented very quickly, in sharp contrast to the state legal system that fragments testimony, delays decisions and then takes forever to implement them. It is worth repeating that this does not mean that they are just or fair, that they do not reflect unduly the power of local elites, or that they do not treat certain groups harshly.[80]

Legal pluralism of multiple systems of conflict resolution can result in a healthy legal competition. However, the rich network of dispute resolution mechanisms in place and operating cooperatively can be easily fractured. The politicization of the instances of conflict resolution – as witnessed in urban environments such as Angoche and Beira – may produce extreme competitiveness among instances. As a result, confused and powerless citizens are faced with a segmentation of the conflict management forums. Under these circumstances, cooperative coexistence is replaced by a competitive one and the people are led to choose between one of the components of the network. The proliferation of administrative and dispute resolution mechanisms rather than increasing the horizon of choices of the people diminishes it (Santos and Meneses, 2007).

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[80] Several authors have expressed a strong criticism towards gender discrimination. On this subject see, for example, Osório and Temba, 2003, and Arthur and Mejia, 2006.

4. Conclusion

Although legal pluralism has long been a concern of social scientists and legal scholars, it is fundamentally a political issue. During most of its short history, the Mozambican state has pursued a nation-building policy that seeks to eliminate or make invisible cultural distinctions, including ethnic diversity. Jurisdictional lines dividing legal authorities are the focus of struggle precisely because they signify other boundaries marking ethno-cultural and religious differences. The pattern of the relationships established among different legal instances has the power to change both the location of the boundaries and the very definition of the difference, including relations of subalternity. In post-independence Mozambique, the state policy prevented the recognition of the existence of a plurality of interactions among distinct socio-legal fields. The outcome has been the persistence of official modern law as the dominant, the remaining ones being classified as subaltern or peripheral.

Trying to overstep the antagonisms generated by the amnesiac attitude towards diversity, the 2004 Constitution recognized the multicultural nature of the Mozambican society. In a situation where the state was increasingly losing ground in terms of political legitimacy, achieving such authenticity involves recuperating and revaluing practices considered previously as local, popular or still traditional, because they enjoy greater popular legitimacy than the edicts of the state, and have persisted, in part, due to the geographic vacuum of state authority in many regions. Community members actively take part in the proceedings of community justice, interacting with familiar community authorities, resulting in a decision being negotiated among the parties involved in the conflict. By contrast, official justice is handed down unilaterally by a non-community member in a formal procedure in which the parties are passive subjects.

Seen from below, the efforts from communities and other grassroots instances to incorporate the practice of other, non-official, systems of conflict resolution and social control practiced by 'locals' into the formal, official legal system have not been successful.[81] On the other hand, a careful analysis of state interference in the process signals state aims at extending the official rule of law and authority into peripheral areas. This deconcentrating

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[81] In 2005, as the result of research and law production process, several bills were submitted to the National Assembly. Among other measures, these bills aimed at broadening the definition of instances 'officially' involved in conflict resolution, by (re)introducing 'community courts' in the formal judiciary. However, these proposals were not accepted. On this subject, see the UTREL site at http://www.utrel.gov.mz/IndexAssunto.htm.

policy,[82] rather than expressing the efforts of a radically different state to accommodate the claims of sub-state groups towards recognition of the legal diversity present in the country, evokes continuity with the monocultural legal structure inherited from the colonial period.

The plurality of instances of conflict resolution functioning in parallel with the state has been obscured by an oversimplified version of reality, described now as being mainly composed of state institutions and traditional authorities.

Here, some words of caution are needed. Traditional authorities represent a picture of coherent, widely understood and uncontested norms and procedures that have been passed down for generations, systems that have operated autonomously from the state, maintaining a cultural purity that must now be protected from any intrusion. However, this idealized vision obscures the reality of the traditional customary law system in the country. Indeed, many practices that local communities claim to be traditional were adopted quite recently, as a means to face new needs. Although the ancestry of customary law is often invoked to legitimize it, the authenticity of these new structures and norms comes not from their age but, rather, from their autonomous adoption in the absence of effective access to (or non recognition of) official, state justice.

For example, studies carried out on justice administration by traditional authorities quite often describe them as autocratic. Although the traditional authorities enjoy acceptance and respect, and still have the power of command among many local populations, their power is contested, especially when it comes to questions related to gender equality. As several studies have shown, traditional authorities tend to decide in ways that are sometimes against the constitution, by discriminating against women's rights to equality before the law. The process will accelerate as younger generations become more aware of their 'civil rights', encoded in Mozambican citizenship.

Another point to take into consideration is the intra community power differentials and conflicting interests. This internal dissent has increased since independence due to patterns of urbanization, and displacement due to war and migration. This situation is particularly important since the insistence on the myth that customary law is distinguished by tradition and consensus runs the risk of 'reifying' methods and customs particular to certain historical

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[82] Decentralization as deconcentration suggests the transfer of authority from the central government to other governmental institutions in a territorial hierarchy. However, in the specific case under study, deconcentration refers only to the relocation of official legal officers away from the capital. As a result, it strengths the centralized notion of a single legal system.

circumstances, and of reifying traditions which may no longer be in use, or which are no longer accepted by the entire group.

This brief analysis of the legal complexity of Mozambique illustrates the clash between a state-oriented, monocultural concept of justice, and the diversity of 'other' legal systems, sought after by the vast majority of Mozambicans, and quite often the only legal instances available. The implicit goal in linking the very terms of discourse in this paper – law, colonialism, ethnicity, nationalism – is to challenge the very episteme of 'civilization', the essentialist conception of ethnicity, via an instrumentalist nationalism, into a normative notion of democracy.

The significance and continued relevance of Mozambique's colonial legacy indicated here calls into question a crude labeling of political time that references a 'colonial' and a 'postcolonial' period to imply that one was radically different from the other. Instead, Mozambican history over the last three decades has been made up of many strands, all of which started and ended at different points, with little respect for the boundary implied by the distinction between the colonial and the postcolonial.

The return of tradition is simultaneously a legacy of the colonial past and a reaction to the postcolonial circumstance itself, that is, the colonial roots of the post-independence state. Culture, while seeking to mobilize collective interest, seems the only available protection against the overwhelming force of the market and a new ruling class. The modern state speaks the language of legality; in Comaroff's opinion "it is this spirit, this language, hegemonically retooled for the neoliberal epoch, that gives postcolonial nation-states their delicate sense of unity and coherence" (2004: 539).

The customary was not only a political institution, but also crucially a cultural one. This meant that culture was closely intertwined with politics in tradition, with the result that the colonial state's political interpellations had authoritative cultural support, and thus resonated much more effectively than if the chieftaincy had been exclusively political. This was a fundamental reason for the state's prescriptions being so successfully accepted by colonial populations, and why the colonial state insisted on identifying tribe with ethnicity, politics with culture. But this process was not one which went without contestation, as women, youth, the poor and other dominated groups within the particular identity often challenged (often in hidden ways) the definition imposed on them by the state in alliance with chiefs, men, the wealthy and other dominant groups.

The establishment of the modern/colonial system rested upon multiple creative destructions, often carried out on behalf of 'civilizing', liberating or emancipatory projects, which have actively sought to reduce the understandings of the world to the logic of western epistemology. The denial of diversity is a constitutive and persistent feature of colonialism, a feature that remains anchored in the current policies regarding law. The attempt to expand the modern state as a statement of equality before the law came to symbolize the denial of a dialogue with local cultural expressions. However, while the political dimension of colonial intervention has been widely criticized, the burden of the colonial epistemic monoculture of the law is still accepted nowadays as a symbol of 'modernity'. This idea goes against a certain orthodoxy that seeks to reinstate 'ethnically static' cultures of primordial origin as historical survivals of original local communities that have managed to resist colonial intrusion. Seen from the indigenous condition, the codification of customary law by the colonial system did not mean an end to flexible custom but the creation of an arena of relative local autonomy that lay beyond the 'civilizing' concern of the colonial state. This arena[83] became the main forum for intense local debates on social morality, advancement, and citizenship (Ranger 1993: 101-104; Benda-Beckmann, 1995; Santos, 2006b). In other words, the colonial domain of 'customary law' epitomizes a boundary between multiple epistemic systems, whose contact zones became arenas of intense debate.

Another important point to bear in mind is that, throughout the colonial and post-independence period, and seen from a bottom-up perspective, legal ideas and practices fail to follow the lines separating the different legal systems. This situation has been described by Santos as interlegality (1995: 473), thus calling our attention to the fact that legal cultures do not exist as separate realities. Contemporary Africa is composed of a mosaic of legal cultures whose role, functions and performances are quite difficult to fit into a common canon.

As in other countries, one of the greatest challenges facing democratic Mozambique today is that of incorporating populations claiming distinct group identities and cultural norms into a single polity governed by a constitution that reflects and affirms the identities and norms of all citizens. State action since independence has contributed to amplify legal pluralism because new instances and norms have arisen that hold on to former norms, re-organizing them, but not discarding them.

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[83] That still translates into modern dichotomies, such as official/non-official, modern/traditional, formal/informal, etc.

Thus, the call for decolonization is synonymous with unfreezing the radical potential for thinking from difference and towards the constitution of alternative local and regional worlds. Under this perspective, the subject of the colonial difference[84] is not an undifferentiated subject; there are differences in the way subaltern groups are objects of power and subjects of agency. African thoughts are rooted in indigenous, 'traditional' cultures, from which problematics and presuppositions are drawn. In order to make creative dialogue of possible meanings, one has to examine the way the concepts are embedded in specific African realities. To 'go native' does not mean to be against what is 'from outside', to be against cultural contacts, but against the seemingly unappeasable (that is, untamable) power of the foreign and the seeming inevitability of its dominance in the lives of the locals. It is a reflex against a single, hegemonic legal culture, aiming at perpetuating the ruling of the world through the imposition of a single normative socio-legal environment. To go native, in this sense, is to go indigenous, that is, to appropriate and rework ideas and practices, to make 'new' sense locally. In a sense, it is to translate the significant exogenous elements in terms of existing cultural values, norms and practices. Law as a space of epistemic struggle also takes place in Mozambique, where multiple legal systems interact and produce 'new', hybrid forms of social regulation.

At the same time, the analysis carried out in this paper contributes to broadening the theoretical discussion on the nature of the Mozambican state itself. As Santos clearly points out, both the official and the 'other' forms of justice administration are not autonomous or 'culturally pure'; rather, the nature of the Mozambican state is increasingly heterogeneous (2006a: 44).

Subject to historical critique, the concept of legal culture has to be contextualized. A close look into the relationships among the distinct forces and actors involved in the field of conflict resolution in Mozambique enables us to say that the legal field during colonial and postcolonial times needs to be analyzed as culture, where the legal emerges as an instrument of political control. Today the panoply of different political and legal cultures operates under conditions in which the state lacks the capacity or the political will to arbitrate their relative influence. It translates itself into a complex form of legal pluralism filled with spontaneous development and kept alive by social demand and creativity. However, the excessive

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[84] Colonial difference is understood here as a metaphor for a frontier, apparently invisible and most of the time unconscious, that separates modern legal knowledge from other legal cultures. Different perceptions about knowledge are used as an indicator of colonial difference. On this subject see Chatterjee, 1993: 14-35.

politicization of the public sphere risks the parallel coexistence of these different institutions and different philosophies in terms of conflict resolution.

To understand these conflicts as strategies of post-independence legal structure, one has to analyze how these legal cultures ontologically underpin contemporary legal practices and institutions. These analyses have to be carried out not just by those *from below*, but also by those that challenge historiographical *hierarchies of credibility* (Stoler, 1992) because they derive from other forms of knowledge production. The language of law becomes an important mechanism that allows the appearance of a state democratic culture. In short, in a post-independence context, the state reproduces the apparent universality of the law standards as a means of imposing a single order, highly politicized, within diversity. By instrumentalizing the language of legality, the Mozambican state regularly seeks to delineate the moral frontiers of civil society; to criminalize vernacular cultural practices deemed uncivilized, politics deemed primitive. In short, the Mozambican state faces a demanding challenge: how to regulate the coexistence of the monoculture of state law with the ethnic, cultural, religious and political diversity of the country.

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