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

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### **Introduction**

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

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

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

### 1. The Customary Law Systems in Mozambique

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

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

### 2. The Land Law and the Legal Structures of Mozambique

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

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

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

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

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

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

### Conclusion

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

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

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

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

### Notes

- 1 The vast majority of the Mozambican population lives in rural areas (77%, according to the 1997 Population Census).
- 2 By rural family we mean the smallest unit of production, consumption and distribution of the African rural societies.
- 3 In Mozambique, about 90% of married people are married according to customary law.
- 4 For a discussion of the fabric of community justices in Mozambique, see chapters 10 and 11.
- 5 The law that established community courts (Law no. 4/92) was the law no. 19/97. of 1 October first step toward the recognition of local norms and customs in the legal, formal structure. However, it differs from the Land Law in that, it (i) only applies to community courts, and (ii) defends the principles that these norms and customs should be mutually enriched, recognizing state law and the superior form of law.
- 6 See Mondlane's reflection (1997) on alternative means for resolving conflict, by resorting to common law forms of mediation, conciliation and reconciliation of parties.
- 7 Among the countless initiatives under way, one movement, called the *Campanha Terra* (Land Campaign), has emerged as a catalyst. It was an initiative of civil society, involving around 200 NGOs, churches of all denominations, associations, cooperatives, public and private research institutions, and other civil society organizations. The Land Campaign reflected civil society's contributions to securing the land tenure of rural populations, acting not only at the level of conceptualization, but also in disseminating information among rural populations, the private sector and state institutions. In less than two years, more than 15,000 people voluntarily spread the text of the new Land Law through theatre, short courses, cartoons, video cassettes, audio cassettes, music, newspapers, posters and pamphlets, using 20 national languages.