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Conclusion

**Boaventura de Sousa Santos,
João Carlos Trindade and Maria Paula Meneses**

In recent decades the interest generated throughout the world in the supremacy of the law and the judicial system is a political phenomenon of the greatest importance. Whether it is the product of internal dynamics or of high-intensity global pressures or even – more than ever before – the product of a combination of internal dynamics and global pressures, the reform movement is closely related to the emergence of a new form of state, which can be characterized as a post-Welfare State (in the core, developed countries) or a post-developmental state (in the peripheral and semi-peripheral countries, as in the case of Mozambique). It is a state that intervenes very little in the processes of social change, aims to be efficient and is dedicated to ensuring regulation of an economic and social life essentially based on the market and the private sector. This new model of development, which apparently enjoys a global consensus – leaving open the question of how solid this consensus is – is based on the idea that social change is no longer a political issue and that social inequality has to be accepted as part of a process of development that is basically impelled by the market. The supremacy of law and the primacy of the judicial system appear to be the ideal instruments for a depoliticized concept of social change. At the same time, representative democracy, stripped of its mechanisms for social redistribution, has been promoted as the political regime which best guarantees the stability, manageability and social legitimacy of the weak and efficient state and makes depoliticized capitalist social change possible. The supremacy of law and the primacy of the courts are converted into the main pillars of this political project, which we term low intensity democracy.

This democratic project is doubly vulnerable. Firstly, the historical experience of the core countries shows that democratic stability depends on a reduction in, or at least, the non-aggravation of, social inequality. However, this has been increasing

dramatically in recent decades. It is an open question when this increase will reach breaking point – the point beyond which turmoil will replace democratic stability. Secondly, the liberal democratic public sphere presupposes the existence of basic rules which guarantee equality for all citizens and a reciprocal responsibility on the part of the government in relation to them. However, in the neo-liberal model of development, social agents have emerged who are so powerful that they control political and economic activities and shape the laws or manage to alter them to suit their own interests. The principle of equality can thus be subverted beyond that which is politically tolerable. Moreover, at the same time that this model of development makes nation-states more responsible to international agencies and multinational corporations, it enables, or even forces, them to become increasingly less responsible to citizens. The combination of these two tendencies can contribute towards transforming democratic capitalist societies into shrinking islands of democratic public life afloat in a sea of despotisms.

The performance of the courts in peripheral and semi-peripheral countries depends, in part, on the level of economic and social development, which affects their working conditions in two main ways. On the one hand, the level of development affects the type and level of social and, therefore, judicial types of litigation. A rural society dominated by a subsistence economy does not generate the same type or volume of litigation as a heavily urbanized society with a developed economy. On the other hand, due to political changes in the peripheral countries, the consolidation of civil and political rights (or law) is embryonic but, nevertheless, superior to that of economic and social rights. This discrepancy is fundamental to an understanding of judicial performance in these countries and the difficulties of the struggle for independence from other powers.

The level of social and economic development alone does not explain the level and type of performance of the courts, since countries with similar levels of development reveal very distinctive judicial profiles. Attention must, therefore, be paid to other factors, one of these – perhaps the most important – being the dominant legal culture in the country, which is almost always articulated as a political culture. Legal pluralism and the concomitant subject of the plurality of instances of conflict resolution – the focus of this book – were the object of intense debate during the late 1980s, both in Africa and in other parts of the world.

The information available suggests that the propensity to initiate legal actions is greater in some societies than in others and these variations may, at least in part, be anchored culturally, since this propensity does not necessarily increase on a level with economic development. If, in certain societies, individuals and organizations demonstrate a clear preference for consensual solutions, or, at any rate, solutions obtained outside the judiciary, in others, the option of litigation is easily chosen. In addition to this, what also varies from country to country is the ability to adapt judicial supply to judicial demand. When this ability is totally absent, judicial supply does not cease to act on judicial demand. It continues to do so by discouraging it, thus increasing the discrepancy

between potential demand and actual demand. In some countries, a fall in demand for judicial protection in certain areas has no other justification than the lack of an incentive for demand, due to the poor quality of supply.

Faced with the current crisis in modern legal systems, whose more obvious symptoms are the slowness, inefficiency and lack of quality in access to justice and administration of justice, one should ask whether the answers should not incorporate a plurality of solutions – a combination of diverse dispute resolution mechanisms – respecting the proportionality of means to achieve goals and the equity of citizens with regard to their cultural differences. This process should be carried out bearing in mind the promotion of citizens' access to law and justice. In Mozambique, it would be incongruous not to make use of the several means of non-formal conflict resolution currently in place in society.

Our study has pointed out that the formal, official legal system in Mozambique is only a part of the legal system in the country. Supranational laws also exert an influence on its implementation, especially with regard to issues involving public law, including legal institutions and the legal profession, just as much as 'local' laws continue to influence the conduct of the majority of the Mozambican population. Indeed, our study has shown that in the vast majority of situations, before resorting to the courts, the parties involved in legal disputes try, whenever possible, to resolve matters through the unofficial and more accessible, more informal and less culturally distant bodies which ensure a satisfactory level of efficiency.

Community courts, in Mozambique, are a significant part in the whole system of alternative mechanisms of conflict resolution. Our research has shown that these courts, although suffering from a lack of human resources and other infrastructures, represent a body that promotes access to the law and to justice that is widely legitimized by Mozambican society.

In addition to the community courts, other informal institutions – for example, a member of the family or a respected neighbor, the *régulo* (chieftain), a community organization, association or club, or even a professional, who might be a lawyer, a priest, a *xébhè* (Muslim priest), a social worker, a *nyànguà* (traditional healer), or a teacher, are all potential third parties and can function efficiently as such, depending on various factors. The choice has, above all, to do with the relationships between the parties in dispute, the social area of the dispute, the levels of socialization of both parties, the means of resolution and the means at their disposal to make the best possible choice. Economic, social and cultural factors of various types converge in the choice of a particular third party. Recourse to the judicial courts as the favored specialist entity for the resolution of litigation in contemporary societies therefore occurs within a range of various alternatives, to the extent that the lower court called upon to resolve the litigation is, sociologically, almost always an appeals court, that is, a means which is activated when all the other informal mechanisms used in the first attempt to resolve the case have failed. This factor is crucial in understanding judicial performance,

since it shows that this does not occur in a social void, nor does it signify a starting point for the resolution of the disputes it is called upon to judge.

As this book illustrates, various legal orders and systems of justice are in existence in Mozambique. Their complexity is based on the intense interpenetration or reciprocal contamination existing between these different forms of law and justice. Therefore, since the plurality of legal systems is so wide, it is difficult to analyze them all, and some were not studied with the detail they require. In this book, we present what we consider to be the most important outlines of the plurality of law in Mozambique. We have grouped these into two categories: internal legal pluralism, and community justice and the traditional authorities. Internal legal pluralism defines a situation of extreme heterogeneity within state law and therefore within political-administrative state action and regulation. While internal legal pluralism occurs within official law and justice, community justice and the traditional authorities work outside the official domain. They are the conventional field of legal pluralism. Within this, we can distinguish two main subfields: the community courts and the multicultural and multi-ethnic systems of justice or, to be more precise, the so-called traditional authorities.

The community courts in Mozambique today are very complex entities for dealing with the resolution of litigation and, as such, merit special attention in this research project. They are a hybrid institution in terms of some of the previously mentioned variable dichotomies. The community courts have taken up the human and institutional legacy of the popular courts of the revolutionary period, but not the formal organizational legacy, since, in contrast, they are not part of the legal system, nor are they supported either technically or materially by the district courts, the official base of the judicial system in the country. Under these circumstances, it is only to be expected that there is a wide variety of models for the way in which community courts operate. Lacking in human resources and all kinds of infrastructures, and in competition with other mechanisms for resolving litigation – ranging from the police to the local *grupos dinamizadores* and from the churches to the traditional authorities – , the community courts are entrenched within themselves and dependent on local skills for improvising, innovating and reproducing themselves, to the extent that there is an almost chaotic dispersal of their operations. Thus, today, the community courts form ‘a creative synthesis of Mozambican law’, except that they create this under very precarious circumstances which, if not quickly corrected, will in the near future threaten their very existence.

Amongst all the entities involved in community justice, the traditional authorities and their law¹ have for a long time been the most significant. In our view, the greater visibility of the traditional authorities is related to the weakness of the state in two main ways: by its administrative inability and by the loss of the legitimacy of state power. The identification of various debates centered on traditional authorities today – Africanness and the politics of identity, the dual legitimacy of the power and appropriation of the state, its specificity and its recognition – serve to reveal the

broad context in which the role of these authorities is discussed, as a mechanism for resolving litigation and as a pole for the creation and distribution of law and justice.

Therefore, our research comes out against the squandering of resources and experiences and in favor of capturing a wealth of legal resources that the developed world is trying to reinvent.

The question of spreading the legal offer to the whole country does not only depend on the human and financial resources (an obviously important issue) needed to guarantee to all citizens access to the official legal system. These circumstances have set the stage for the current debate on legal pluralism in Mozambique, a country that formally recognized its existence in the 2004 Constitution. It is our opinion that research, in association with the judicial system, must provide a forum in which the various legal discourses and theories can identify themselves and communicate with each other. The progressive and secure development of a genuine Mozambican legal system requires it to be formed at the point where the best legal practices in the country meet. This means giving due credit to African legal systems and African legal thought as a source for ideas, norms and local practices. Legal pluralism does not mean externally and clumsily trying to make state law more responsive by forcing it to open its eyes to other legal orders, but rather a radical rethinking of the way in which we perceive the law. This approach has laid the foundations for the current reform of the judiciary, initiated in Mozambique in 2003 under the supervision of the Centre for Legal and Judicial Training. The reform, seeking to address an understanding of the legal system in Mozambique as it exists today – a dynamically developing, complex system – combines research with the drafting of legislation.

The greatest challenge facing the legal system in Mozambique in the new millennium is therefore the issue of the legal incorporation – in terms of future development – of the components that will enable it to establish a truly unified legal system in the country.

We are certain that our readers will eventually draw other conclusions from our work that will form the basis of other proposals different from our own. Far from considering this a problem, we feel it is one of the more pleasing rewards of our work. If we have provoked a diversity of opinion and done so on the basis of reliable knowledge, we shall have contributed toward deepening the democratic debate in Mozambique. What better reward could there be?

Note

- 1 Traditional law, ancestral law, African customs and usage and common law are some of the terms currently used to define this.

