

2

Rupture and Continuity in Political and Legal Processes

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Introduction

The nature and forms that the struggles for independence in former colonial territories assumed are factors which heavily influenced the political configuration of new states. In formulating their development strategies, these states, as a rule, adopted one of two attitudes: they either favored elements offering structural continuity with the former ruling nations or, conversely, imposed significant and deep ruptures with any links to the past.

In the case of Mozambique, the fact that the struggle for freedom had assumed the nature of a ‘prolonged popular war’ and that FRELIMO¹ had progressively incorporated into its ideas “the destruction of all vestiges of colonialism and imperialism, in order to eliminate the system of man exploiting his fellow man, and to build the political, material, ideological, cultural and social basis of a new society”,² determined the predominance of elements of rupture, especially those relating to the nature of political power and its ideology, the integration of economic and military areas and the strategic options relating to foreign policy (Moita, 1985:504). In spite of this, both in the political and in the legal and judicial spheres, there were large areas where very little changed, or, where, if changes had taken place, they were only felt at a formal or *institutional* level. For example, we shall see later that the composition, organization and functioning of the courts and the other organs dedicated to the administration of justice were profoundly altered, but the essential nucleus of the standard system that these bodies were called upon to implement remained practically the same, with continuity clearly favored as a solution.³

In order to make it easier to understand our analysis of the evolution of the political and judicial systems over the course of the last twenty-eight years, we have subdivided this historical period into four main phases:

1. 1974-1975 – the phase of the Transitional Government, extending from the time when it took office on September 20, 1974 to the proclamation of independence on June 25, 1975;
2. 1975-1978 – From independence to the approval of the first Law on the Organization of the Judiciary, Law n° 12/78, of December 2nd;
3. 1978-1992 – the phase of the “construction of the political, economic, social and cultural basis of socialism” and of the so-called *Popular Justice* which, for purely descriptive reasons, we have extended to include the year of the Peace Agreement and judicial reform;
4. 1992-2002 – from the Peace Agreement to the present day.

1. The Transitional Government and the Preparations for Independence (1974-1975)

The indigenous regime introduced into the colonial legal-political order at the beginning of the *Estado Novo* (the *New State*)⁴ constituted one of the structural elements of Mozambican society prior to independence. In the words of Narana Coissoró, the Statute of the Indigenous Populations of the Provinces of Guinea, Angola and Mozambique, approved by Decree-Law n° 39.666, of 20 May 1954, “established [...] a clear distinction between ‘citizens’ and ‘indigenous populations’, although they were all considered Portuguese nationals”, subjecting the latter to “the ‘protective paternalism’ of the state, while denying them civil and political rights in relation to institutions of European origin” (Coissoró, 1966: 3).⁵

Under the terms of this Statute, the indigenous populations⁶ would in fact be ruled “by the customs and usage of their own respective societies”, this meaning “compliance with usage and customs [...] limited by morality, the dictates of humanity and the higher interests of the free exercise of Portuguese sovereignty” (Articles 3 and 1 respectively). For a long time, therefore, they were subject to the jurisdiction of the private courts,⁷ and access to the law courts was reserved for the non-indigenous populations (whites, those of mixed race, Indians and ‘*assimilados*’).⁸ Even after the hurried reforms at the beginning of the sixties,⁹ this situation did not alter significantly.

In fact, the end of the distinction between citizens and indigenous populations would reveal itself as an important formal measure, with obvious *de jure* implications, but with a reduced practical effect, since it was very limited in its *de facto* application. The field of labor relations provides perhaps one of the most illustrative examples of this: although forced labor and corporal punishment were abolished and the ex-native populations could then choose freely who they wished to work for, reality has come to show that racial discrimination was not eliminated

from the urban labor markets and that, until almost the end of the colonial era, black Mozambican workers never benefited from the same unemployment benefits, pension schemes, integration into the trade unions or legal minimum wage that Portuguese workers were entitled to (Penvenne, 1995; O’Laughlin, 2000: 23; Covane, 2001). Industrial statistics from the mid-sixties also show that the wages the Portuguese earned in the manufacturing industry were seven times higher in the district of Lourenço Marques,¹⁰ and eleven times higher in other districts in the colony, than the wages the Mozambicans received in the same circumstances (Rita-Ferreira, 1967-1968: 346).

As far as the administration of justice is concerned, although the reorganization of the parish and municipal courts had some effect, the fact remained that the basic functions of the judiciary continued to be amalgamated with those of the administration. The law determined that the duties of a second class municipal judge should be carried out “[...] as inherited functions by the registrars of the [...] civil registry in the respective municipality or locality” (Article 11, n° 1, of Act n° 48.033 of 11 November 1967), but when it emerged that the majority of municipalities and local areas had no available registrars, colonial administrators ended up exercising these duties (n° 3 of the same legal precept). An identical solution was adopted in relation to the small claims courts judges (*juílgados de paz*) (Article 16).

This concentration of duties within the person of the administrator was, in the end, an important means of political control in rural areas. As Rui Baltazar reported,¹¹

The colonial administrator held [...] in his hands all the tools necessary to secure and maintain colonial exploitation. The administrator supervised the economic sectors (from the distribution of land to the exercise of trade); he ensured the recruitment of forced labor for the plantations, public works or for emigration; he collected taxes; he was responsible for security; he distributed favors and judged and punished of his own free will. (1978: 31)

In this way, with the exception of positions in half a dozen of the first-class municipal courts which were very rarely filled, it was only on a larger territorial level (the actual provincial law courts) and at the level of the Appeals Courts that the system, in principle, possessed career magistrates with formal guarantees of autonomy and independence in relation to executive power. Even so, these positions were difficult to fill and operate. Rui Baltazar again, describing the state of the courts during the final period of Portuguese colonial rule in Mozambique:

Cases were piling up in the court registry offices and the judicial machinery responded only with great difficulty to those it was expected to deal with, [and then only] in the service of the dominant class and interests. In addition, foreign magistrates – for whom the monopoly on judicial posts was reserved [...] – were

also in short supply. It became increasingly difficult to recruit the personnel required to ensure the normal functioning of the judiciary from amongst the citizens of the colonizing country. In fact, in various provinces in our country, long before 1974, there were no judges or public functionaries. Even in the capital there were problems filling all the posts that had been created and which had to be occupied by career magistrates. The repressive machinery in general, and the judicial machinery in particular, were witnessing signs of rapid decadence and decay.

After 25 April 1974 the exodus of foreign magistrates serving in Mozambique accelerated to such an extent that when we reached the Transitional Government, out of the 75 existing positions, the number of magistrates appointed amounted to 25.

When, in accordance with the Lusaka Agreement,¹² the Ministry of Justice was created, you could say we found ourselves in a favorable position, as it was necessary to deal with the problems of justice practically from scratch. (1978: 32)

The organization of the judiciary, designed to serve the interests of the bourgeoisie and the colonial bureaucracy, therefore reproduced the general crisis which heralded the end of the regime.

With its economy weakened by, amongst other factors, the exceedingly high costs of maintaining a war which had to be fought on three African fronts (in Angola from 1961, in Guinea-Bissau from 1963 and in Mozambique from 1964), a set of highly unfavorable international circumstances which had led to diplomatic isolation within the United Nations, an army comprised of soldiers who were becoming increasingly aware of the use being made of them by the political powers (Correia, 1985: 550), and increasing internal challenges led by the movements and political forces of the democratic opposition, Portugal approached the end of its long colonial cycle in the mid-seventies (Fortuna, 1985). The most direct cause, the 'detonating factor' in the process of decolonization, was the *coup d'etat* of 25 April 1974 in Portugal, at a time when "recognition of independence for the colonies [...] appeared historically necessary, ethically imperative, obligatory in the light of the law of the international community, militarily advisable, and altogether urgent" (Moita, 1985: 506).

In Mozambique, the formal beginning of this process was represented by the swearing in of the Transitional Government, for which provision had been made in the Lusaka Agreement, and which was composed of eleven members: three appointed by the Portuguese state and eight by FRELIMO. The political conditions created by ten years of war and the abrupt retreat of the colonials¹³ enabled the liberation movement to maintain control of the mechanisms for the transfer of power and prepare the way for extending its ambitious project for the revolutionary

transformation of society—designed and tested in the so-called ‘liberated areas’¹⁴—to the whole of the country.

It was necessary to establish priorities, particularly as the available resources were not particularly abundant. The strategy adopted was therefore directed towards achieving three main objectives: a) the first, to be carried out immediately, consisted of guaranteeing that the period of transition to independence proceeded in an orderly and peaceful manner, in accordance with the established agreements; b) the second, a medium-term goal, represented the creation of suitable instruments to gradually endow the country with the structures and human resources essential for its development, in accordance with major planned options to be defined by the Government after independence,¹⁵ c) the third, which would take place over a prolonged period of time (as the conditions required for reforms to be introduced had not yet been created), aimed to ensure that the inherited institutions functioned as normally as possible in order to prevent their collapse, which could have created a dangerous institutional void.

In terms of the first objective, legislative provisions were adopted with the aim of repressing each and every act that threatened the social peace and economic progress of Mozambique. Some of the most significant of these were:

- Decree-Law n° 8/74 of 2 November, which punished the promulgation of false or tendentious news liable to affect public law and order, paralyze economic or professional activity, require the intervention of the authorities or in any other way cause unjustified public alarm;
- Decree-Law n° 11/74, of the same date, which considered crimes against decolonization to be all those covered by the Penal Code and, in subsequent legislation, that obstructed or endangered the process of decolonization as stipulated by the Lusaka Agreement, and established severe punishments for such crimes;
- Decree-Law n° 12/74, also of 2 November, which established that detainees suspected of committing crimes against decolonization would not benefit from the provision of *habeas corpus*;
- Decree-Law n° 16/75 of 13 February, which permitted state intervention in small or large-scale businesses when they ceased to make a normal contribution to economic development and satisfy collective interests.

Some very important decisions of the Transitional Government formed part of the spirit of the second strategic objective, such as the creation of a commercial and issuing Central Bank, (the Bank of Mozambique, whose Organic Law formed part of Act n° 2/75, of 17 May), or the appointment of a Research Committee

to assess the need for expert skills in Mozambique, not only at state level and in the various services provided by public organizations, but also in private companies.¹⁶ A specific concern had, in fact, already been manifested in this area by the first Provisional Government in Portugal which emerged after the Revolution of 25 April, that it was “urgent to train specialists qualified in the various areas of the law, in order to replace the progressive draining away of overseas magistrates and jurists and to prepare groups of leaders for the foreseeable stages of the future” (preamble to Decree-Law n° 299/74 of 4 July). This diploma, which had introduced baccalaureate and degree courses in Law at the then University of Lourenço Marques,¹⁷ had not, however, been regulated, and the Transitional Government therefore decided to complete the task. Thus, the terms of Decree-Law n° 7/75 of 18 January established a First Cycle, which lasted two years and corresponded to a baccalaureate. It was obtained by passing in the requisite subjects and also in History of the National Liberation Struggles in the Portuguese Colonies (taught in the Faculty of Letters) and Legal Medicine (taught in the Faculty of Medicine). The decree also established a Second Cycle, which also lasted two years and corresponded to a degree in either Private Legal Sciences or Public Legal Sciences, according to the options chosen.

However, the formation of specialist staff and a state bureaucratic apparatus in Law or other specialist areas was, by nature, too slow a process for the urgency with which the positions left empty by the colonial functionaries needed to be filled. Therefore, it was necessary to call into public service citizens who, although they did not have the appropriate qualifications, identified with the social and political project defined by the country, had some academic training and displayed qualities of wisdom and good judgment. Various pieces of legislation therefore appeared defining special regulations for this area, such as:

- Decree-Law n° 7/74 of 17 October, which allowed functionaries from other public services or individuals of recognized merit to be nominated to serve in the administration or secretariat of the Civil Administration Services;
- Decree-Law n° 14/74 of 12 November, which established the necessary internal requirements for suitability for serve on the staff of the secretariat of the General Attorney’s Office, the Judiciary Police, the Prison Services, and the Government Registry, Notary and Identification Offices, for which individuals could be nominated if recognized as possessing the necessary aptitude for carrying out these functions, regardless of whether they possessed the current legal requirements for the positions or not;
- Decree-Law n° 27/75 of 1 March, which authorized for nomination as Inspectors and Deputy Inspectors of the Judiciary Police individuals over 21 years of age who had completed their general secondary

education or basic secondary education or equivalent, respectively, provided that they possessed the genuine qualities to carry out the work.

In this way the third objective referred to in the definition of priorities for the work of the Transitional Government was implemented.

2. From Post-Independence to the Reform of the Organization of the Judiciary (1975-1978)

The period immediately following the proclamation of independence was characterized by a radicalization of discourse and political action directed against the structures inherited from the colonial period. *Revolutionizing the state apparatus* was one of the fundamental tasks appointed to the Government during the first session of the Council of Ministers, which met from July 9 to 25, 1975.¹⁸

Priority was given to the development of rural areas in all sectors of state activity. This, by necessity, implied the abolition of the *'regedorias'*, which were considered feudal structures, collaborators with the colonial regime and incompatible with popular power. "Destroying the structures of the past is not a secondary task and it is not an 'ideological luxury'. It is a condition for the triumph of the Revolution", argued the document from the Council of Ministers.

As a political strategy to ensure the intended rural development, it was decided to create community villages (*aldeias comunais*), where it was assumed that the inhabitants — supporting each other with their own resources and using collective means of production — would, in the short term, improve their living conditions. At the same time, this form of organization would facilitate the provision of the material, technical and scientific resources which the Party¹⁹ and the Government were trying hard to supply.

Financial resources, therefore, were directed to the sectors considered a priority in the process of 'national reconstruction': education, health, agriculture and defense.

In education, efforts were concentrated on combating illiteracy and enlarging the network of schools in order to benefit increasingly larger numbers of Mozambicans. In order to allow the Government to exercise direct and immediate control over the education system, private education was nationalized and brought within the state system.

In health care, working from the assumption that "the practice of private medicine constitutes a form of exploitation which uses illness as a means of making a profit", it was established that all private clinics were to be nationalized and a National Health Service created. This would be responsible for planning medical and sanitation services and ensuring medical support for all citizens, without discrimination, with priority given to preventative medicine and to the rural areas.

Taking agriculture as a base and industry as a dynamic and decisive factor, the Government directed its economic policies towards eradicating underdevelopment and the system of human exploitation, thus giving a concrete meaning to the principle enshrined in Article 6 of the 1975 Constitution. The Ministry of Agriculture was provided with two main objectives: firstly, to guarantee to improve the living conditions of the people, in particular the rural masses, by providing a qualitatively and quantitatively adequate diet and secondly, to support the industrial sector with agricultural raw materials.²⁰

In the sphere of national defense, it was established that the tasks to be developed should be closely linked to the process of the economic and social reconstruction of the country, thus ensuring the popular character of the Army through its direct participation in production and close contact with the masses. To achieve this proposal, it was established that a National Service for Defense and Reconstruction should be created.

Consideration of the problems of administration and justice verified that access to the courts during the colonial period had been a minority privilege, that legal language was difficult for people to understand and could only be interpreted by resorting to specialists and that the penal system adopted by the law did not take into due consideration the need for the re-education of offenders and their reintegration into society.

Seeking to make the best use of experiences acquired during the armed struggle for liberation, the Council of Ministers therefore decided to undertake a progressive elaboration of new laws that would serve as an instrument for national unity and the defense of the Mozambican Revolution. This was accomplished by adopting a policy of simplifying the language of the law and launching campaigns to explain its content in order to popularize it, and by giving priority to the re-education of offenders, in collaboration with the Ministry of the Interior and the Ministry of Justice. The existence of private advocacy was also considered incompatible with the existence of a popular system of justice.

In the months that followed, various legislative provisions were adopted with the aim of concretizing these policies. Out of all the legislation approved during this phase, special mention should be made of the following:

- Decree-Law n° 4/75 of 16 August, which banned the practice of advocacy and the functions of legal consultant, solicitor and judicial or extrajudicial attorney as liberal professions. A National Service for Legal Consultation and Assistance²¹ was created, subordinated to the General Attorney's Office²², and new procedural rules were introduced, aimed at making it easier for all parties to put the procedures which affected them into practice;

- Decree-Law n° 5/75 of 19 August, which placed all activities concerning the prevention and treatment of illnesses, as well as the training of health care staff, within the exclusive domain of the state;
- Statute n° 12/75 of 6 September, which banned private education and brought all education under the control of the state;
- Decree- Law n° 21/75 of 11 October, which created the National Service of Popular Security²³ which was given powers to order and carry out any investigations, searches and arrests it considered necessary, proceed with the necessary requisitions, institute legal proceedings, detain individuals and decide a suitable outcome for them, namely by sending them to the appropriate police authorities, courts or re-education camps;
- Statute n° 25/75 of 18 October, which brought the Judiciary Police — soon to become the Criminal Investigation Police — within the structures of the Ministry of the Interior, in order to “avoid the dispersal of authority and to ensure the coordination and efficiency [...] of public services of the same type, and with identical objectives”.

In February 1976 the Central Committee of Frelimo held its eighth session in Maputo. It took stock of the first months of government and undertook an exhaustive analysis of the internal situation of the country. Considering that they were passing through a particularly sensitive moment involving “the intensification of the class struggle, as a direct consequence of the state-level consolidation of the power of the worker-peasant alliance and the first revolutionary measures”, the order of the day was to unleash a “General Political and Organizational Offensive on the Production Front” (Frelimo, 1976: 36). From amongst the various resolutions passed, we highlight the following:

- *Resolution on the Structures of State Machinery* – announcing the characteristics that the new structures (the representative Assemblies and their executive organs) would have at each level and the provisional rules for their composition, hierarchy and functioning, in relation to the principle of democratic centrism;
- *Resolution on the Community Villages* – establishing a set of principles to be respected during the process of structuring, establishing and organizing production and labor, as well as the conditions for the founding of the community villages;
- *Resolution on Education* – indicating the organizational forms which should be introduced into educational establishments and literacy programs already under direct state administration, so that they would be able to realize their social function and the revolutionary task allocated to them;

- *Resolution on Health* – defining the guidelines for orientating the political and organizational battle in the health sector;
- *Resolution on Justice* – conveying the fundamental political orientation underlying the nature and form of the legal system to be adopted by the country. At one point the document states that:

It is imperative at this moment to destroy colonial-capitalist law and its judicial structure as part of the destruction of the entire state colonial-capitalist machinery in Mozambique. The new judicial system must express the power of the worker-peasant alliance and reflect the dictatorship of the exploited majority. Its sources of inspiration must be:

- a) The experiences of the struggle for national liberation
- b) The experiences of the class struggle
- c) The revolutionary experiences of other peoples

The organization of the Popular Courts will be as follows:

- I. The Supreme Popular Court
- II. The Provincial Popular Court
- III. The District Popular Court
- IV. The Locality, Community Village and Neighborhood Popular Court

In order for all the courts to be truly popular, on a local level they will be entirely composed of non-professional judges, chosen from amongst members of the Party, the FPLM²⁴ and the Mass Democratic Organizations. In the other Popular Courts, professional judges who are trained for their duties and nominated by the central organizations will, whenever possible, be employed, in addition to non-professional judges. Both will attend training and refresher courses and seminars periodically (Frelimo, 1976: 121).

This line is repeated consistently, both on the occasion of the Third Frelimo Congress (February 1977)²⁵ and during the First Session of the Popular Assembly (in its provisional form²⁶), in August/September of the same year. Within this legislative organ, Resolution n° 3/77 of 1 September, on the Land Law, Nationalizations, and on the Popular Courts was approved, establishing “[...] that the organs of the state will take the necessary measures to accelerate the process of the creation of a revolutionary judicial system, namely through the creation of Popular Courts, from local to national level, subordinate at each level to the respective People’s Assembly”.

In compliance with the accepted political line, the Ministry of Justice concluded its draft bill for the Law on the Organization of the Judiciary

and made it available for public debate just as the first students were graduating from the Faculty of Law at Eduardo Mondlane University.

The first elections for the People's Assemblies were held at the end of 1977.²⁷ *Poder Popular* (Popular Power) consolidated its position in the various territorial hierarchies within the country.

In April 1978, around twenty newly qualified graduates from the Faculty of Law, joined by some of the most experienced judicial officials, were organized into brigades and dispatched throughout the country. The recent graduates had had experience in local political mobilization campaigns since 1974, as well as in preparatory activities for the General Elections. For about four months, in public meetings held in factories, *machambas* (family farmlands), government offices, army barracks, villages, residential areas and other conglomerations, they moderated debates and collected contributions to add to the draft bill. Simultaneously, in each of the eleven provinces, they prepared to open two pilot popular courts on an experimental basis, one at district level and the other local.

In August of the same year, a national seminar in Maputo brought together the members of the provincial brigades, judges, attorneys and senior staff from the Ministry of Justice to synthesize the proposals collected from these public debates. It was the first great reckoning of the revolutionary experiences of justice – from the time of the struggle for national liberation in the liberated zones, to the experience within the local *grupos dinamizadores* (dynamizing groups)²⁸ after independence - and an unrivalled moment for collective reflection on the need to widen the rupture with the colonial system and make the administration of justice better suited to the new social and political conditions in the country. Out of it came the final version of the bill, which the Permanent Commission of the Popular Assembly would adopt in its December session later in the year, under the title of the Law on the Organization of the Judiciary.²⁹ Finally, a legal foundation had been established for the creation of popular justice.

3. The Rise and Fall of the Socialist Experience (1978-1992)

In accordance with our chronology, the phase following the establishment of the People's Assemblies and the adoption of the Law on the Organization of the Judiciary corresponds to the rise and rapid decline of the project for building socialism in Mozambique. It covers the whole of the eighties and extends until the reforms of 1992, which were anticipated in the 1990 constitutional revision.

It is therefore worth defining two sub-periods within this phase: one which corresponds to the concretization of the socialist development strategy, or top-down planning, and another which coincides with the first years of the liberalization of the economy, or outside-within planning, to use the term coined by António Francisco (see chapter 4).

The first sub-period is characterized in political terms by a progressive ‘hardening of the regime’ as the South Africa-backed³⁰ war of internal destabilization intensified, and in judicial terms by the widening and consolidation of the network of popular courts.³¹

It was, understandably, an era of profound contradictions and ambiguities. Alongside measures to provide full and effective democratization of the state bodies, including those concerned with the administration of justice, some political decisions were announced and some legal measures approved which were amongst the most repressive of the entire revolutionary process.

The authenticity of Mozambican popular democracy was evident in the voluntary participation of millions of citizens in government activities of a wide-reaching social nature – such as national vaccination campaigns,³² literacy and adult education programs, elections for People’s Assemblies and others, – or in grassroots organizations, such as the local *grupos dinamizadores*, the mass democratic organizations (OMM,³³ OJM,³⁴ OTM,³⁵ and the socio-professional organizations), the popular militias, the agricultural and consumer cooperatives and, of course, the popular courts.

Various procedural mechanisms were introduced into the judicial system and new epistemological attitudes proposed which aimed to secure and widen this participation, including:

- a collegiate of all the courts;
- the participation of lay judges in the district and provincial popular courts, on the same level as the professional judges and as their equals;
- the composition of grass-roots popular courts, in which non-professional judges, directly elected by the community, could intervene exclusively and judge “according to good sense and justice, taking into account the principles which preside over the building of a socialist society”;³⁶
- greater interaction between the courts and the community, by hearing trials, in cases of a criminal or social nature, in the areas where the disputed events occurred;
- the chance for all parties to act for themselves in their particular cases, without the need obtain a legal mandate³⁷;
- a new attitude towards the law and the way in which it interacted with the social and cultural environment in which it was implemented (Baltazar, 1978: 38).

The most radical, and therefore the most unpopular, political decisions adopted included the so-called ‘*Operation Production*’ and the various campaigns of the

'Political and Organizational Offensive', as well as the following legislative provisions:

³⁸

- Law n° 2/79 of 1 May, better known as the Law on Crimes against the Security of the People and the Popular State, of which the main innovations to the legal system were the introduction of the death penalty (Article 6, n° 1, paragraph d) and n° 2), and the equating of complicity in a crime with the actual commission of a crime (Article 4) and attempted or frustrated attempts at committing a crime, with actual crime (Article 13);
- Law n° 3/79 of 29 March, which instituted the Revolutionary Military Court, a special court designated as the only body for judging crimes against the security of the state³⁹;
- Law n° 5/82 of 9 June – the Law of the Defense of the Economy – which also equated crimes actually committed with those which were frustrated or attempted, and accomplices or recipients with the authors of crimes, in addition to refusing bail, suspended prison sentences or their replacement by fines for certain crimes;
- Law n° 5/83 of 31 March, which introduced the sentence of whipping to punish the authors, accomplices or recipients of certain serious crimes, whether committed, frustrated or attempted, since it was considered that the punitive measures employed until then had not been adequate to deter a crime wave;
- Law n° 10/87 of 19 September, which introduced alterations to various precepts of the Penal Code, making the sentences for violent crimes against persons more severe.

The direction and management of the entire judicial system remained heavily centralized within the Ministry of Justice, in accordance with the powers authorized by Presidential Decree n° 69/83 of 29 December. As a general rule, management was exercised by means of directives, which could be sent directly from the Ministry or through the Higher Court of Appeals and the General Attorney's Office.

Directive n° 3/83, of 6 June can be cited as an example of the first instance. It was intended to “endow the courts with the operational means to guarantee that the offensive taking place [in the state residential area, managed by the APIE⁴⁰] realized its objectives, developed in other cities and took root”. Another example is Circular n° 3/84 of 2 June, which concerned procedures for granting parole to prisoners who fulfilled the legal requirements. Typical examples of the second instance are the Directives of the Court of Appeals n° 3/81, of 25 November, which considered the disposition of Article 18 of the Penal Code⁴¹ ‘revoked’ whenever it impeded the punishment of anti-social conduct which offended ‘socialist values and principles’, and n° 1/82 of 27 February, ordering the courts,

in cases submitted for their consideration and in derogation of what had been established both in the Civil Code and the Civil Procedure Code, to immediately apply the general principles enshrined in the Act on Family Law in relation to contested and uncontested divorce cases, *de facto* union (legal recognition, dissolution and impediments to marriage) and polygamy. In addition, there was the Joint Directive of the Court of Appeals and the Attorney General's Office n° 1/86 of 14 April, on the handling of criminal cases arising out of the context of the so-called '*Operação Chapa Cem*'.⁴²

From the second half of the eighties onwards, due to a combination of highly unfavorable internal and external factors,⁴³ the political leadership began to confront the need to take a new line on its global development strategy.⁴⁴ The redefinition of alliances and international alignments had already been set, since at least 1982.⁴⁵ It is within the framework of this new foreign policy that the 'Agreement on Non-Aggression and Good Neighbor Relations', otherwise known as the N'Komati Agreement, signed with apartheid South Africa in March 1984, must be understood.

An integral part of the country's repositioning was also the decision to adhere to the Agreements established at the United Nations Monetary and Financial Conference held in Bretton Woods, New Hampshire, on 22 July 1944 and, consequently, to comply with the programs of structural readjustment defined by the World Bank and the International Monetary Fund.⁴⁶ The launch, in January 1987, of the Economic Rehabilitation Programme (PRE), served as a counterpart for obtaining the necessary credit for the recovery of an economy devastated by war and the other previously cited factors. The PRE represented adherence to a new ideology which would soon dominate in the entire world: neo-liberalism. With subsequent measures including the liberalization of prices, the reduction of the budget deficit, the privatization of state companies, monetary contraction, the raising of interest rates and drastic cuts to social spending, the country was set definitively on the course of a capitalist market economy (Anderson, 1996: 12). This initiated the second sub-period of the phase under analysis.

As a rule, this new economic model corresponds to a political superstructure based on multiparty representational democracy and tripartite state power and so the way had to be paved for the constitutional reforms that the circumstances dictated. Alongside the intensification of diplomatic efforts aimed at ending the long armed conflict in which the country was floundering, a series of legal and institutional measures were passed which had the clear aim of, on the one hand, facilitating this end and, on the other hand, winning the confidence of the core countries and international humanitarian organizations. Mention should be made of the main pieces of legislation that emerged at the time:

- Law n° 14/87 of 19 December, which declared "an amnesty for crimes against the Security of the People and the Popular State which had provision

- in Law n° 2/79 of 1 March, committed by Mozambican citizens who have, in any way, fought against, or promoted the use of violence against the Mozambican People or State, inside or outside national territory, provided that they surrender themselves voluntarily” (Article 1, n° 1);
- Law n° 15/87 of 19 December, which offered a pardon to the authors of crimes against the security of the state who had, by their behavior, “revealed a willingness to peacefully reintegrate themselves into society and redeem themselves through socially useful work” (preamble to the law);
 - Resolutions n° 9, 10, 11 and 12/88 of 25 August, in the Popular Assembly, which ratified the African Charter on Human and Peoples’ Rights, the Convention on the Transfer of Sentenced Persons, the OAU⁴⁷ Convention governing Specific Aspects of Refugee Problems in Africa and the Additional Protocol to the Geneva Convention on the Status of Refugees, respectively;
 - Law n° 4/89 of 18 September, which revoked Law n° 5/83 of 31 March (the Law on whipping) and granted pardons to those sentenced to prohibitions or limitations on residence, as well as sentences of whipping which had not yet been carried out.

In the same context, the decision was finally made to found and put into operation the organs at the head of the judicial system – the Supreme Popular Court and the General Attorney’s Office⁴⁸ – as foreseen in the Constitution and in Law n° 12/78 of 2 December. Through Presidential Decrees n° 22, 23, 24 and 25/88, of 17 October, the Chief Justice and the Deputy Chief Justice of the Supreme Popular Court and the Attorney General and the Deputy Attorney General were nominated.⁴⁹ Law n° 6/89 of 19 September defined the organic statute of the General Attorney’s Office.

The pace imposed by the internal process of capitalist economic reconstruction and the precipitation of events in East Europe leading to the downfall of the socialist regimes had, as was expected, a decisive influence on the changes taking place in the political and ideological superstructure. Constitutional reform, which had begun as a series of limited proposals with the simple aim of adapting Fundamental Law to the realities of the market economy – or, in the words of the deputies of the Popular Assembly, “to make it more suited to the new challenges of establishing a national consensus on the normalization of the life of the country”⁵⁰ – finally gave way to the approval of an entirely new Constitution.

From the political regime to the system of government and from the catalogue of basic rights to the organization of the judiciary, the 1990 Constitution had very little in common with that of 1975.

With the new constitutional framework approved and with the PRE proceeding within the regulations laid down by the BWs institutions, it was now necessary,

on the one hand, to proceed with a reform of ordinary legislation in order to make it compatible with the new principles and norms of the Constitution and, on the other hand, to ‘encourage’ the negotiators who, through the mediation of the Community of St. Egidio in Rome, were seeking to launch the longed-for Peace Agreement.

To a certain extent, this is a possible explanation for the promptness with which certain legislation considered ‘politically expedient’ was drawn up and approved. Here is an incomplete list of the main standard acts approved in 1991/92:

- Law n° 6/91 of 9 January – which established the regulations that should be obeyed when exercising the right to strike;
- Law n° 7/91 of 23 January – which established the legal framework for the formation and activities of political parties;
- Law n° 8/91 of 18 July – which regulated the right to free association;
- Law n° 9/91 of 18 July – which regulated the exercise of the freedom to meet and demonstrate;
- Law n° 18/91 of 10 August – which established freedom of the press;
- Law n° 19/91 of 16 August – which defined and sentenced crimes against the security of the state;⁵¹
- Resolution n° 5/91 of 12 December – which ratified the International Covenant on Civil and Political Rights adopted by the United Nations General Assembly on 16 December 1966;
- Resolution n° 6/91 of 12 December – which ratified the Second (optional) Additional Protocol on Civil and Political Rights with the aim of abolishing the death penalty;
- Law n° 23/91 of 31 December – which regulated the exercise of trade union activity;
- Law n° 26/91 of 31 December – which authorized the provision of both for-profit and not for-profit private health care services by individuals or collectives.

Equally, in the area of economics and finance, important new legislation was produced during this period, of which the following merit attention:

- Law n° 15/91 of 3 August – establishing rules for the restructuring, transformation and repositioning of the business sector of the state, including the privatization and transferal – with financial compensation – of companies and other production units;
- Law n° 24/91 of 31 December – liberalizing insurance and reinsurance activities;

- Act n° 28/91 of 21 November (complemented by Act n° 20/93 of 14 September) – defining the means of transfer or privatization of companies, establishments, installations and financial institutions owned by the state;
- Law n° 28/91 of 31 December – establishing the legal framework for credit institutions.

Of specific interest to the system of the administration of justice are Law n° 10/91 of 30 July, which approved the status of judicial magistrates and Laws n° 4, 5 and 10/92, all of 6 May, which concerned the functioning of the community courts, the organic statute of the Administrative Court and the organic statute of the judicial courts, respectively.

Among the various changes that these laws brought to the organization of judicial power, there are two which, due to their significance and implications for the future, should be highlighted: the creation of autonomy for the courts and attorney's offices in terms of their executive powers, and the removal of the community courts from the formal judicial system.

In effect, the Organic Law of the Judicial Courts - issued in accordance with the new constitutional framework - established in Article 65 that “direction of the judicial apparatus is exercised by the Chief Justice of the Supreme Court and by the Judicial Council”.⁵² It was the responsibility of these organs, therefore, to, on the one hand, issue instructions and directives of an organizational and methodological nature – intended to ensure the good functioning and efficiency of the work of the courts – and, on the other hand, to make fundamental decisions concerning the development of judicial activity, the improvement of judicial institutions, budgetary matters, administrative management and other concerns (see Article 69 of Law n° 10/92). In the same way, Law n° 6/89 of 19 September had already established that “the General Attorney's Office enjoys autonomy in relation to the various state organs [...]” and must “without threatening judicial confidentiality [...], present information annually on its activities to the Popular Assembly” (Article 2, n° 1 and 3).

With the creation of these two organs, the Ministry of Justice — which, as we have seen, under the previous law had exercised full management of the system⁵³ - was virtually reduced to a coordinating and information-providing role.⁵⁴

As for the removal of the community courts from the formal judicial system, this resulted from a strict interpretation by the legislature of Article 161 of the 1990 Constitution. Under the terms of this precept,

1. The aim of the courts is to guarantee and reinforce legality as an instrument for the stability of the law, to guarantee respect for the laws and to ensure the rights and liberties of citizens, in addition to the legal interests of the different organs and entities in official existence.

2. The courts educate citizens in voluntary and conscious compliance with the laws, thus establishing just and harmonious social relationships.
3. The courts penalize violations of the law and decide litigation in accordance with the law (our emphasis).

Considering that the community courts decide cases “with impartiality, good sense and justice” (see Article 2, n° 2, of Law n° 4/92) and not according to what is established by law, it was concluded that they neither could nor should form part of the judicial system, but should become organs of justice “for the purposes of reconciliation or the settling of minor disputes” (see Article 63 of Law n° 10/92).⁵⁵

If, as previously stated, the intense legislative activity of the single party Assembly of the Republic, which concentrated on some of the most basic democratic rights and liberties, can be seen as part of the ‘pressurizing’ (in a positive sense) strategy brought to bear on the peace negotiators, we are then forced to conclude that it was very successful. On 4 October 1992, the Agreement between the Frelimo Government and Renamo was finally signed in Rome, putting an end to the armed conflict that had lasted for nearly two decades.

4. From the Peace Agreement to the Present Day (1992-2000)

The final phase in the historical period under analysis corresponds to the replacement of a logic of armed confrontation with a logic of political confrontation without the use of violence – the materialization of the structural and institutional changes planned at the end of the previous phase and of the relative economic growth, within the conditions imposed by hegemonic globalization.

It is therefore natural that, after the Rome Peace Agreement, new legal frameworks emerged to regulate the so-called ‘transition to democracy’ in areas such as the legitimization of political power, incentives for investment in the economy or the consolidation of the rule of law. The following legislation serves as examples:

- Law n° 2/93 of 24 June – establishing the criminal investigation judges;
- Law n° 3/93 of 24 June (the Law on Investments) – defining a basic and uniform legal framework in the Republic of Mozambique for the process of making national and foreign investments eligible to benefit from the guarantees and incentives provided under the law;
- Act n° 12/93 of 21 July – approving the Tax Benefits Code;⁵⁶
- Act n° 14/93 of 21 July – approving the Regulation of Law n° 3/93 of 24 June (the Law on Investments);
- Act n° 18/93 of 14 September – approving the Regulation of Industrial Free Zones;

- Law n° 4/93 of 28 December – establishing the legal framework for holding the first multiparty general elections;
- Law n° 6/94 of 13 September – creating the Institute for Legal Assistance and Representation (IPAJ);⁵⁷
- Law n° 7/94 of 14 September – creating the Mozambique Bar Association and approving its statutes;
- Act n° 39/95 of 2 August – approving the statutes of the Investment Promotion Center;⁵⁸
- Law n° 2/97 of 18 February – defining the legal framework for the establishment of local autarchies;⁵⁹
- Law n° 7/97 of 31 May – establishing the legal regime for the state administrative protection to which the local autarchies are subject;
- Law n° 8/97 of 31 May – defining the special regulations which govern the organization and functioning of the Municipality of Maputo.

After the political openings created by the adoption of the 1990 Constitution of the Republic and the end of armed conflict, the non-governmental organizations (NGOs) also emerged. The most significant of these were the ones that had as their aim the defense and promotion of human rights – whether the so-called first generation rights or those of the second and third generations – and that formed part of the embryonic Mozambican civil society.⁶⁰

In the political sphere, the general elections of 1994 and 1999 and the local elections of 1998 were the most significant and relevant events during the historical period under analysis. Although dozens of parties and coalitions have emerged since the beginning of the nineties, the most recent trend is towards a progressive political polarization of Mozambican society.⁶¹

The process of political and administrative decentralization, begun in 1991 with the launch of a government program to reform the local organs (PROL), has also assumed fundamental importance. Decentralization, a controversial issue on which it has not been easy to obtain the necessary political consensus,⁶² is seen by many as an empowering element in economic and social development, an answer to regional and inter-regional imbalances, a factor in the re-legitimization of the state and an important instrument for bringing peace and democracy to Mozambican society (Faria and Chichava, 1999: 3; Soiri, 1999: 5).

Designed to press forward with the reform of the local administration system through the creation of new organs – each with its own legal character and endowed with administrative, financial and patrimonial autonomy – the PROL included the elaboration of a diagnosis and in-depth studies into legal, administrative and financial areas, infrastructures and the environment. These studies later served as the basis for the elaboration of Law n° 3/94 of 13 September on the institutionalization of municipal districts (approved by the Assembly of

the Republic while still under single-party status), which represented the first regulatory instrument of decentralization. There are those who believe that the objectives and principles enshrined in this legal document contain the ideal format for broader democratic decentralization (Soiri, 1999: 6), defined by James Manor (1997: 7), as a mixture of fiscal and administrative decentralization (deconcentration) and democratic decentralization (devolution of power).⁶³

This law, however, would not be implemented, because the regulatory legislative bills which were to follow it and which had already been drawn up after the general elections of 27-29 October 1994 (and therefore in a new multiparty political context), were vehemently contested by Renamo and the UD⁶⁴ – the opposition forces in parliament – and created serious rifts within the Government party (Faria and Chichava, 1999: 4). The conflict which this created and the debate on the constitutionality of these bills for legislative approval finally led to the delaying of the municipal elections which should have established the new local organs of power.

It was therefore decided to proceed with a timely review of the Constitution (Law n° 9/96 of 22 November). In addition to altering some precepts relating to the chapter on ‘Local Organs of the State’, a completely new title was introduced into the Fundamental Law, Title IV, with the epigraph ‘Local Power’, which made provision for the existence of local government, the aim of which was to “organize the participation of citizens in resolving their own problems within their communities, promote local development, and deepen and consolidate democracy, within the framework of the unity of the Mozambican state”.⁶⁵

This constitutional amendment determined significant changes in the philosophy underlying the aforementioned Law n° 3/94. Once again, in the midst of great controversy and party political dispute, another law outlining the local organs (the aforementioned Law n° 2/97 of 18 February) would soon be adopted, backed by the votes of Frelimo and the UD. Renamo boycotted not only the vote on this law – which expressly revoked the previous law – but also the elections themselves, which took place in June 1998.

Table 2.1 (taken from Faria and Chichava, 1999: 6) indicates the main differences between the two documents to which we have referred:

Table 2.1: Differences in the Legislative Frameworks Relating to Local Power

Law n° 3/94	Law n° 2/97
Administrative division into 128 rural municipal districts and 23 urban municipal districts.	Creation of local government authorities, subdivided into (urban) municipalities and (rural) settlements. Cities, towns, villages and settlements (544) now eligible for local government status. The 128 districts governed by local administrative organs remain outside the scope of local power and consequently come under central administration.
Direct election by secret ballot of the three municipal organs: the municipal President-Mayor (Administrator in the rural zones), Assembly and Council.	Direct election by secret ballot of the President (Mayor) and the Municipal Assembly. Half the members of the municipal Council are appointed by the President and half are members of the Municipal Assembly.
Clear enumeration of the functions and services of local governments (including public safety, the use of land and the water supply, among others).	Functions of local governments reduced to essential matters (such as the use of land) and depend on the existence of local financial resources.
Clear definition of the prerogatives and powers of the central and municipal administrations.	Organs of central administration represented in the territorial jurisdiction of the local government. Possibility of their control of, and participation in, local government (dual administration).

Table 2.1: Differences in the Legislative Frameworks [contd.]

Law n° 3/94	Law n° 2/97
Budgetary, fiscal, patrimonial, planning and organizational autonomy.	Administrative, fiscal, patrimonial and organizational autonomy. Local government administration subordinated to the principle of 'unity of political power'.
Provision for budgetary support in the GSB. ⁶⁶	Provision for budgetary support in the GSB.
Traditional authorities integrated into local consultation and decision-making processes (namely in the arbitration of conflicts and in matters relating to the use of land).	Participation of the traditional authorities substantially limited and subject to ministerial regulation.
The right to form an Association of Municipalities.	No reference to the right of municipalities to form an association.
The principle of gradualism: gradual establishment of municipalities based on socio-economic and administrative conditions and on minimum infrastructures.	The principle of gradualism. The law on the creation of local governments (drawn up, discussed and approved later) limits the number in the first phase to 33.
Legal and financial guardianship of municipalities by the Ministry of State Administration and the Ministry of Finance, respectively.	Legal and financial guardianship of municipalities by the Ministry of State Administration and Ministry of Finance respectively. The law on state administrative guardianship over local governments (drawn up, discussed and approved later) determines that this may be delegated to provincial governments.

Many observers and specialists who have analyzed the path followed from the adoption of this law in 1994 up to the first local government elections in 1998 consider that there has been a clear regression, from the point of view of making the process of decentralization more democratic (Soiri, 1999: 7). The biggest critics point to the fact that, on the one hand, Law n° 2/97 applies to a restricted number of cities and towns previously defined as local government authorities – and consequently leaves out the great majority of the rural population and a significant part of the resources that enable local governments to secure their own autonomy – and, in addition, does not take communities into account or promote any form of involvement for the traditional authorities.

Even so, it is generally admitted that, in spite of its limitations, the current policy of decentralization “is a positive step forward towards greater democratization and political openness” (Faria and Chichava, 1999: 8).

The declaration of the government’s intention to advance with a vast program of reforms to ensure “the rationalization and modernization of public administration, with the aim of making ongoing improvements to the quality of the services offered to citizens” met with the same expectations. With this objective in mind, an Inter-Ministerial Commission for the Reform of the Public Sector⁶⁷ was created by Presidential Decree n° 5/2000 of 28 March and was presided over by the Prime Minister. Its objectives were:

- a) To elaborate and propose a global reform policy for the public sector;
- b) To ensure the coordination, management and implementation of reform, namely by facilitating the interaction and harmonization of programs from several sectors;
- c) To promote and guarantee the integrated participation of all the services and civil society in reducing bureaucracy, and in the simplification, modernization and professionalization of public administration.

This commission is supported by a technical unit, the UTRESP,⁶⁸ which is responsible for ensuring the integrated planning, coordination, articulation and supervision of the reform programs and projects.

In terms of structural reforms to the economy, policies aiming to reduce inflation and macro-economic imbalances are generally agreed to have had positive results. However there is also concern that, in terms of human development, the country is still far from achieving satisfactory results. According to PNUD⁶⁹ indicators, more than half the population in Mozambique live below the poverty line, less than 40% have access to state health care services and only about 46.5% are literate (UNDP, 1999, 2004).⁷⁰

As for the Judiciary, the reforms initiated by Laws n° 4 and 10/92 of 6 May consequently led to the almost total abandonment of the community courts, due to a lack of clarity with regard to their institutional position and a general rising crisis in formal official justice (the courts, attorneys, legal assistance).⁷¹

An Inter-Ministerial Commission for Legal Reform was also instituted which, amongst other sub-commissions, included one in charge of the preparation of the Family Law (approved in 2004⁷²) and one for the Penal Procedure Code and the Civil Code. The revision of the Commercial Code was entrusted, under contract, to a consortium of specialists, and is awaiting approval. The Commission is also preparing bills on the inheritance law and on fiscal and customs litigation.

More recently, recognition that professional training is a priority for all sectors of the administration of justice has led to the creation of the Centre for Legal and Judicial Training.⁷³ This Center has developed its activities not only in the training and empowerment of judges, prosecutors, justice officials and assistants, legal staff, public defenders and other sector employees (e.g. court registry offices, members of the Criminal Investigation Police, etc.) but also in carrying out research into common law systems for resolving litigation and promoting and leading the national debate on Mozambican law.⁷⁴

5. Concluding Notes

The three decades which have passed since Mozambique became independent have been intersected by two contradictory processes of political, economic and social transformation.

One, typically revolutionary, took place during the Cold War period and therefore in an international context of confrontation between two antagonistic systems. It determined a break with “the traditional structures of colonial oppression and exploitation and the mentality underlying them”,⁷⁵ and adopted central planning and administration of the economy as a development strategy.

The other, typically reformist, unfolded at a time in which the Cold War had given way to a period of *détente* and neo-liberalism had become the hegemonic model of development. It is now proceeding with the implementation of programs of structural adjustment, deregulation and the liberalization of the economy, as determined by a conference of the multilateral agencies usually known as the Washington Consensus.

As quite profound processes of change, their evolution was neither linear nor peaceful, since they were subject to the dialectics of social transformation itself and the conjunctures in which this unfolded. In our description of the political-economic options and the legal contours which emerged in each of the stated historical periods, different types of situations may be detected: a) the ruptures of the revolutionary period with the colonial period, which are still valid today; b) the ruptures of the

revolutionary period, undone by neo-liberalism and replaced with the previous *status quo*; c) the ruptures of the neo-liberal period with both the preceding periods.

Perhaps the clearest example of a political decision of the first category concerns the ownership of land. The regime established under Article 8 of the 1975 Constitution,⁷⁶ which represented a break with the situation prevailing under colonial law, maintained its continuity in Article 46 of the 1990 Constitution⁷⁷ and strongly influenced the debates surrounding the process of drawing up a new Land Law (Law n° 19/97 of 1 October).

In terms of the judicial system, in spite of the reforms brought in by the new Organic Law, the full panel of courts was maintained as well as the participation of (elected) lay judges, which had been an innovation of Law n° 12/78.⁷⁸

The second category of ruptures can be illustrated by two examples among many: in the economic sphere, the mutation between market economy/centrally planned economy/market economy and, in the judicial sphere, the permitting/banning/permitting of private advocacy.

Examples from the third category of rupture include the single party/multiparty or subordination/autonomy (of the administration of justice system in relation to the executive) dichotomies, wherein the single party system and subordination are common to both the colonial and the revolutionary periods.

At the beginning of this chapter it was said that the ruptures in the legal and judicial system which have occurred from independence to the present day were essentially institutional. The observations woven into our analysis of the various stages of the periods outlined, show, in fact, that the fundamental politics and philosophies of official (or state) law remained unchanged during the historical period under analysis. Underlying them are a dogma and a rationality which essentially correspond to the liberal matrix of the modern state, the main ideas of which are the theory of tripartite power, the sacredness of the principle of legality or the rule of law, the reactive and retroactive nature of the function of the judiciary and the logical-formal subsuming of facts to norms as the method of applying the law (Trindade, 1997). There is, however, a structural continuity which is reflected in other spheres of the legal order, namely in codified law – some of which has been in force for over a century⁷⁹ – and in the division of the judiciary, which itself has always followed the territorial division of the administration.

Notes

- 1 FRELIMO stands for *Frente de Libertação de Moçambique* (Mozambican Liberation Front) – which transformed itself into a political party after independence.
- 2 See '*Decisões do Conselho de Ministros*' (Decisions of the Council of Ministers), *Boletim da República*, 1st. Series, n° 15, 29 July 1975.

- 3 For which, the principle enshrined in Article 71 of the 1975 Constitution (which corresponds to Article 305 of the present 2004 Constitution) was of fundamental importance, establishing that “All previous legislation which contradicts the Constitution is automatically revoked. Previous legislation which does not contradict the Constitution remains in force until such time as it may be modified or revoked”. For a commentary on the issues raised by the implementation of this principle, see Dagnino (1980: 15).
- 4 See Legislative Diploma n° 162, published in the *Boletim Oficial* n° 22, 1st. series, 1 June 1929.
- 5 According to Marcelo Caetano, quoted by Braga da Cruz (1988: 66), the indigenous populations were “Portuguese subjects subject to the protection of the Portuguese state without being part of the nation, whether this is considered as a cultural community (since they lack the requisite assimilation of culture) or a political association of citizens (as they have not yet won citizenship)”. For an update on the debate on the indigenous system as an instrument of oppression and exploitation and its influence on post-colonial politics, see the critique by Bridget O’Laughlin (2000) of Mamdani’s book *Citizen and Subject* (1996a) and this author’s response (2000).
- 6 Considered to be “individuals of the Negro race or their descendants who, having been born or having permanent residence [in Guinea, Angola or Mozambique], do not yet [possess] the education and individual and social habits deemed necessary for the full application of the public and private law pertaining to Portuguese citizens” (Article 2 of the Statute).
- 7 See the *Regulamento dos Tribunais Privativos dos Indígenas*, (Regulations of the Private Tribunals of the Native Populations), approved by Legislative Diploma n° 37 of 12 November 1927. Article 3 establishes that

the private tribunals of the indigenous populations will consist of an administrative authority from the main town in the district, municipality, fiscal or administrative area, who will act as chief judge, assisted by two indigenous assessors of the highest level and authority within the district, one nominated by the governor of the district and the other chosen by the Committee for the Defence of Native Populations. Both will serve for two years and will have the right to meals and a monthly payment, to be decided by the Governor General.

Provision was also made for a Private High Court for Native Populations, with its headquarters in the colonial capital, to hear appeals against the decisions of the private indigenous courts. It consisted of the Governor General, who presided over it, a Chief Judge of Appeals, a representative elected annually by the Government Council from amongst individuals who had worked in local administration, and the Director of Native Affairs (*Director dos Serviços e Negócios Indígenas*).

- 8 Still within the terms of this statute, the *'assimilados'* were ex-indigenous people who had acquired Portuguese citizenship after proving that they satisfied the following conditions: a) they were over 18; b) they spoke Portuguese correctly; c) they exercised a profession, skill or office which provided them with enough income to support themselves and any members of their family who were in their care, or possessed enough private means to do the same; d) they were of good character and had acquired the education and habits deemed necessary for the full implementation of the public and private law pertaining to Portuguese citizens; e) they had completed their military service and were not registered as a deserter (Article 56).
- 9 The so-called 'Adriano Moreira Reforms', (Coissoró, 1966: 6) a legislative package approved on 6 September 1961 – after the first armed action against colonial occupation which took place in northern Angola – which included the abolition of the indigenous regime (Act n° 43.893), a review of the occupying regime and the concession of land (Act n° 43.894), the creation of *Juntas de Povoamento* (Settlement Boards - Act n° 43.895), the restructuring of the *Regedorias* (chiefdom councils - Act n° 43.896), the recognition of local customs and usage (Act n° 43.897), the reorganization of the *Julgados Municipais e de Paz* (Small Claims Courts and Municipal Courts - Act n° 43.898) and the Registry services (Act n° 43.899).
- 10 Currently including both Maputo Province and Maputo city.
- 11 Minister of Justice in the Transitional Government and in the first post-Independence Government (1975-78).
- 12 The Lusaka Agreement, signed by the Portuguese Government and FRELIMO on September 7th 1974, constituted the legal instrument and institutional platform which established the cease-fire and led Mozambique to independence the following year.
- 13 Already by 1973, 22,000 Portuguese had fled the colony (Verschuur, 1986, cited by Magode, 1998: 112). This number increased to around 100,000 between September 1974 and June 1975 (Gentili, 1999: 363) and continued to rise in the first years after independence. The majority of these people had occupied key posts in public administration and had controlled strategic sectors of the economy, such as the construction industry, the banking system, the small and medium-sized manufacturing industries, the fishing industry, the rural trade network and the large and medium-sized agricultural companies.
- 14 Areas in the interior of the territory, mainly in the regions of Cabo Delgado, Niassa and Tete, which, as a result of the struggle being advanced, had been removed from the control of the Portuguese colonial administration. Here alternative forms of political, economic and social organization had been

rehearsed which, after independence, were an inspiration for the Government's development strategies and programs.

- 15 In a message transmitted via Dar-es-Salaam (Tanzania) on the occasion of the swearing in of the Transitional Government, Samora Machel, the president of FRELIMO, indicated the following guidelines for the system of the administration of justice:

The judicial machinery should be reorganized so that justice is accessible and understandable to the ordinary citizens of our land. The bourgeois system involved the administration of justice in unnecessary complexity, a legal system that was impenetrable to the masses, a deliberately confusing and obscure language and at such a slow pace and such costs that it created a barrier between the people and justice. In short, the legal system that exists in our country serves the rich and is accessible only to them. The path we intend to follow is one of simplifying and accelerating the process of applying justice within the framework of new laws and regulations which the Transitional Government must now study, bearing in mind the existing situation and the gradual transformation which must be undertaken (Machel, 1983: 18).

- 16 See the Dispatch of the Prime Minister of the Transitional Government of 25 January 1975, published in the *Boletim Oficial* n° 13, 1st. series of 30 January of the same year.
- 17 The University of Lourenço Marques was later on renamed Eduardo Mondlane, after the first president of Frelimo.
- 18 See the reference in note 1.
- 19 By then Mozambique had a single party political system, led by Frelimo (the nationalist movement transformed itself into a political party, after independence).
- 20 See Article 25 of Act n° 1/75 of 27 June.
- 21 *Serviço Nacional de Consulta e Assisténcia Jurídica* (SNCAJ).
- 22 The SNCAJ would never effectively exist, due to a lack of regulation and lack of means. Later the National Institute for Legal Assistance (*Instituto Nacional de Assisténcia Jurídica* - INAJ) would be created to replace it. Its evolution into the current Institute of Legal Assistance and Representation (*Instituto de Patrocínio e Assisténcia Jurídica* - IPAJ) is analyzed in more detail in chapter 9.
- 23 *Serviço Nacional de Segurança Popular* – SNASP.
- 24 The Popular Forces for the Liberation of Mozambique, the national army (*Forças Populares de Libertação de Moçambique*).
- 25 See, in particular, the section entitled “*A edificação da Justiça Popular*” (“The Building of Popular Justice”), in Point 5 of the Report of the Central Committee to the Third Congress (Frelimo, 1977).

- 26 See Article 37 of the 1975 Constitution.
- 27 In accordance with the regulations established in Article 21 onwards in Law n° 1/77 of 1 September, deputies in the Locality and City Assemblies were directly elected by open ballot at meetings of eligible voters in residential areas and workplaces. In their first sessions, these Assemblies elected delegates to the District Electoral Conference from among their members and from among members of the Party structure, the FPLM, other defense and security organizations, the mass democratic organizations, the state institutions and the units of production. Following the same procedure, the District Assemblies elected their representatives to the Provincial Electoral Conference and, finally, the Provincial Assemblies elected – this time in a secret ballot – a total of 230 deputies to the Popular Assembly.
- 28 See note 34 in chapter 1.
- 29 Law n° 12/78 of 2 December.
- 30 On the role of the *apartheid* regime in destabilizing countries in the region, particularly Mozambique, see the Final Report of the *Commission for Truth and Reconciliation*, South Africa, Volume 2, Chapter 2, which can be consulted at <http://www.polity.org.za/govdocs/comissions/1998/trc/2chap2.htm> (assessed in September 2002). On the subject, see also Hanlon, 1991; Minter, 1998.
- 31 By 1985 11 provincial popular courts had been created and had begun functioning, including that of the City of Maputo, in addition to 60 district popular courts and around 700 local popular courts, incorporating approximately 4,000 judges altogether (*Justiça Popular, Bulletin* 10: 10).
- 32 For example, the National Vaccination Campaign, which ran from June 1976 to February 1979, enabled over ten and a half million Mozambicans to be vaccinated against smallpox, measles, tetanus and tuberculosis, thus covering a percentage of people never previously achieved anywhere else in the world (see the preamble to Ministerial Diploma n° 88/79 of 4 August, published in the *Boletim da República*, 1st Series, n° 90, 1979).
- 33 *Organização da Mulher Moçambicana*, (Mozambican Women's Organization).
- 34 *Organização da Juventude Moçambicana*, (Mozambican Youth Organization).
- 35 *Organização dos Trabalhadores Moçambicanos*, (Mozambican Workers Organization, the main trade union).
- 36 See Article 38, n° 2, of Law n° 12/78.
- 37 See Article 3 of Decree-Law n° 4/75, of 16 August.

- 38 ‘*Operação Produção*’ (Operation Production) was carried out following the decisions of the IV Frelimo Congress (Maputo, 26 to 30 April 1983), which adopted the slogan *Defend the Country, Defeat Underdevelopment, Build Socialism*. It involved political actions of a repressive nature, which aimed to forcibly remove to the most under-populated rural zones (in particular the northern province of Niassa) all those in the large cities who, “lived as delinquents, idlers, parasites, outcasts, vagrants and prostitutes”, in order to transform them, through productive work and involvement in the local community, into “useful elements of society, honest workers, citizens who fulfill their civic duties and responsible people, worthy of being accepted into society” (see the preamble to Law n° 7/83, of 25 December). The ‘Political and Organizational Offensive’, for its part, aimed to provide a “historic contribution to the Mozambican Revolution through the enrichment of Marxism-Leninism”, and was a method of work based on “the spirit of rigorous demands, maximum effort, efficiency, productivity, honesty and dedication”, through which the central organs of the Party and the state would make an ongoing assessment of the “process of building the new society and the new Mozambican man” (see Resolution n° 9/80, of the Popular Assembly, published in the *Boletim da República* n° 33, 1st Series, of 20 August 1980). In spite of their upright intentions, both processes in fact ended up by creating countless numbers of innocent victims, as was later recognized.
- 39 The Revolutionary Military Court consisted of five judges appointed by the Ministry of National Defense. The choice always fell on career soldiers, who had no legal training. Although the law established the principle of public hearings (Article 14), in this Court the hearings took place behind closed doors and there could be no appeal against their decisions (Article 3).
- 40 APIE – *Administração do Parque Imobiliário do Estado*, that is, the State Real Estate Management in charge of the nationalized real estate.
- 41 Which gave dispensation for the following:
- Analogy or the deduction of parity or majority reason is not admissible in qualifying any fact as a crime, without it also being necessary to verify the elements which essentially constitute the criminal fact as expressly defined in penal law.
- 42 A political campaign against speculation in the transport of people and goods.
- 43 Which included the following: intensified armed conflict between the government forces and Renamo; a long and persistent drought which exhausted the region, had irremediable effects on the whole of agricultural production, especially the family sector, and created a chronic dependence on the exterior for food; the failure of the rural development

- policies adopted; the intensification of the international economic crisis, whose repercussions were felt throughout the continent in a particularly dramatic way, to the extent that some consider the eighties a *'lost decade for Africa'* (M'baya, 1995: 62; Abrahamsson & Nilsson, 1996: i).
- 44 There is a vast amount of literature on the causes of the collapse of the socialist option in Mozambique. From amongst those authors who emphasize external factors (South African destabilization and a difficult set of international circumstances) mention should be made of Joseph Hanlon (1991), John Saul (1990), Bridget O'Laughlin (1992), Abrahamsson & Nilsson (1995). Authors such as Clarence-Smith (1989), Peter Fry (1990), Jean Copans (1990b), Michel Cahen (1996), and others prefer to emphasize internal factors (the denial of ethnic differences, the technocratic model of development, etc.).
- 45 Abrahamsson & Nilsson (1995: 104) note that in August of 1982, at a session of the Frelimo Central Committee, the decision was made to adopt a new foreign policy based on the principle of 'making more friends and fewer enemies'. This change occurred after the refusal of the former Soviet Union to provide greater economic and military aid to Mozambique and evident signs of a serious swing in Moscow's own foreign policy.
- 46 See Act n° 6/84, of 19th. September.
- 47 The Organization of African Unity was an international organization founded to promote unity, solidarity and international cooperation amongst the newly independent African states. It was transformed, in 2002, into the African Union (AU), aimed at promoting cooperation amongst the independent African countries.
- 48 Until then both the Higher Court of Appeals, created by Law n° 11/79 of 12 December – which replaced the former Appeals Tribunal – and the General Attorney's Office, whose structure had remained unaltered since the colonial period, had been functioning provisionally. Both organs had been charged with the exercise of some of the powers attributed by the Law on the Organization of the Judiciary to the Supreme Popular Court and the General Attorney's Office and, simultaneously, with creating the conditions to ensure these could begin to function.
- 49 The other judges in the Supreme Tribunal were shortly afterwards nominated in a dispatch from the Ministry of Justice, in accordance with the provisions in Article 14, n° 1, of Law n° 12/78.
- 50 See the "Motion for a Salutation to the Central Committee of the Frelimo Party, the Central Commission and the people of Mozambique", of 2 November 1990, published in the *Boletim da República*, 1st Series, n° 44, of 5 November 1990.
- 51 Much less severe than the previous law, it acknowledged the contents of Article 70 of the 1990 Constitution ("1. All citizens have the right to life. They have

the right to physical integrity and cannot be subjected to torture or cruel and inhumane treatment. 2. The death penalty does not exist in the Republic of Mozambique”) and subjects this special type of infraction to ordinary jurisdiction.

- 52 The Judicial Council is defined as “an organ directed by the Chief Justice of the Supreme Court, the function of which is to analyze and rule on fundamental issues relating to the judicial apparatus” (Article 66). It consists of the Chief Justice and Deputy Chief Justice of the Supreme Court, Justices, the Chief Judges of the Provincial Courts and the Secretary General of the Supreme Court (Article 67).
- 53 Nominating and discharging judicial magistrates and those of the General Attorney’s Office at all levels and exercising disciplinary action over them; determining the specialization of the courts and their respective sections and their commencement of operations; defining the selection criteria for candidates, rules for procedures and time limits for the election of non-professional judges; establishing the budgets for the different institutions, etc.
- 54 After the judicial courts and public prosecution became autonomous, the Ministry of Justice was left with part of the prison services, the Registry and Notary Public services, the IPAJ and the community courts. Later on, two more institutions were created which came under the supervision of the Ministry of Justice: a Law Reform Commission, recently transformed into a Technical Unit for Law Reform (UTREL) and the Centre for Legal and Judicial Training (CFJJ). This subject will be analysed in several other chapters in section 3 of this book.
- 55 We shall return to these issues in part 3 of the book.
- 56 Some of the provisions in the Tax Benefits Code were subsequently altered under Act n° 45/96 of 22 October.
- 57 The Organic Statute was approved by Act n° 54/95 of 13 December.
- 58 CPI – *Centro de Promoção de Investimento*, in Portuguese.
- 59 The municipalization process is part of broader political and administrative reforms that are being carried out in Mozambique (more on this subject below).
- 60 This subject is analyzed in more detail in chapter 9.
- 61 In the legislative elections of 1999, Frelimo obtained 48.5% of the votes, Renamo 38.8% and the remaining 10 parties and coalitions together managed no more than 12.7%. In 2004, Frelimo obtained 62% of the votes, while Renamo dropped to 29.7%.
- 62 Renamo and almost all of the other opposition parties refused to take part in the 1998 local government elections because they disagreed with the legislative package approved by the Frelimo parliamentary majority and the way in which the process of decentralization was being carried out by the government. The

number of abstentions reached the unexpected figure of 85.42%. In most of the 33 municipalities involved in the dispute, only the party in power stood for election. Even so, in the two largest cities in the country, Maputo and Beira, the citizens associations *Juntos pela Cidade* ('United for the City') and the *Grupo de Reflexão e Mudança* ('Group for Reflection and Change') achieved significant results, obtaining 25.6% and 39.9% of the votes respectively and electing 15 and 17 members to the corresponding Municipal Assemblies (AIM, 1998). In 2003 the second local elections took place; for the first time Renamo (sometimes in coalition with other parties) won 5 municipalities.

- 63 The difference between 'deconcentration' and 'devolution of power' lies in the fact that the former, in contrast to the latter, does not imply a definitive transfer of the authority of the central administration (the power of decision-making and execution) to the elected local organs.
- 64 The *União Democrática* (Democratic Union) – a coalition which existed during the first legislature.
- 65 See Article 188, n° 1, of the 1990 Constitution.
- 66 General State Budget.
- 67 CIRESP – *Comissão Interministerial de Reforma do Sector Público*, in Portuguese.
- 68 See Act n° 6/2000 of 4 April.
- 69 United Nations Development Program.
- 70 See also the *1999 UN Resident Coordinator Annual Report*, at <http://www.unsystemmoz.org>, as well as the data from the last census.
- 71 On this subject, see chapter 10.
- 72 Law n° 10/2004 of 25 August.
- 73 See Act n° 34/97 of 21 October.
- 74 See *Notas sobre a Formação Jurídica e Judiciária em Moçambique* (CFJJ, 2000). See also chapter 6 in this book, which contains more detailed information on the activities carried out by the CFJJ.
- 75 See Article 4 of the 1975 Constitution.
- 76 Which declared the following: "The land and the natural resources situated on and beneath the earth, in territorial waters and on the continental platform of Mozambique are the property of the state. The state decides the terms of its use and benefits".
- 77 Which states: "1. All ownership of land shall be vested in the State 2. Land cannot be sold or otherwise disposed of, nor may it be mortgaged or subject to attachment. 3. As a universal means for the creation of wealth and of social well-being, the use and enjoyment of land shall be the right of all the Mozambican people". Article 109 of the 2004 Constitution reads similarly, although it differs in point n° 2, which declares that "land may not be sold [...]" thus opening the possibility for private ownership of land.

78 Law and Justice in a Multicultural Society: The Case of Mozambique

- 78 With the new 2004 Constitutional reform, which introduced –among other changes – the notion of legal pluralism in the country, the need for a reform of the judicial system became more than obvious. The reform of the court system was initiated in 2003.
- 79 The Commercial Code dates from 1888, the Penal Code from 1886, the Penal Procedure Code from 1929 (although it only came into force in Mozambique in 1931), the Civil Code from 1966 and the Civil Procedure Code from 1961.



