Part III

The Administration of Justice: Characteristics and Performance

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Methodological Issues

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When discussing the African state or African law, we run the risk of making false generalizations: it is assumed that, since they are in the same continent, the social and political practices of the different countries have more in common with each other than they do with countries in other continents. The situation of some of these countries is used as a reference point and identical characteristics are attributed to all other countries. Africa has been the object of abstract and homogenizing characterizations which have converted the differences and specificities of each country into unimportant details (Mudimbe, 1988, 1994). It is certainly true that almost all of the African countries have been subjected to the same historical experience: European colonialism. But there are also specific internal differentiations within this experience and a lack of attention to these also risks creating spurious generalizations in relation to colonialism. The truth is that eurocentric social sciences, by uncritically taking English and French colonialism as their reference points, have created a unit of continental analysis which is eventually imposed on smaller analytical units, whether state or local, as if they were miniatures of a broader picture. This analytical procedure is still employed today, and is often justified by the homogenizing pressures of hegemonic globalization. This is, however, only part of the story. The social sciences produced in Africa have also favored the continent as the privileged unit of analysis, even when only one given society or region is being studied. In recent years this analytical procedure has also been justified in terms of the processes of globalization, though viewed from a different perspective – that of resistance to

hegemonic globalization. It is necessary to determine what the specific African characteristics are and what realities they contain, in order to produce emancipatory alternatives on a continental scale. These concepts, whatever their verisimilitude, do acquire a certain 'grain of truth' by transforming themselves into political and scientific common sense and, as such, they should be taken into consideration. The question of specific African characteristics and 'Africanness' is, to a great extent, a product of discourses that convert the description of certain African characteristics into uniquely African justifications of social practices and politics. The challenge we had to face, therefore, was to organize a research project whose analytical and methodological framework allowed for an understanding of the specific features of the multiple socio-legal realities at work in Mozambique.

The research conducted as part of this project enabled us to amass an enormous amount of new data, both on the official courts and on the unofficial mechanisms of conflict resolution in Mozambique. The theoretical and analytical frameworks underlying the research have already been discussed in previous chapters, but a short account of the difficulties the project faced allows for a broader understanding of the options that were favored and of the decisions we made.

Amongst the many other difficulties that the researchers involved in the project had to confront and overcome, the fact that the research team involved two nationalities should be emphasized. It was our aim to test out a new model of collective scientific work involving a team from two countries with two coordinators, one from each country, and a research team also consisting of researchers from both countries. This organizational model was more advanced than the conventional model of international research, and obviously it created new and more complex challenges. We felt that in this way the learning process would be richer, both for the Mozambican and the Portuguese researchers. It was also important to establish effective collaboration between the people and the institutions of both countries, which was to continue beyond the scope of the project.

Given the breadth of the field of analysis, the methodologies had to be adapted to the features of each of the subfields. Amongst the difficulties we had to confront and overcome, we would like to underline the following: the absence of official quantitative data that might give credibility to the exclusive reliance on quantitative methods; the chaos of the judicial archives, where they existed, and the consequent difficulties with the requisite documentary analysis; the enormous logistical difficulties and difficulties with access to the more remote areas of the country where we intended to carry out systematic observation and interviews. It should be added that the project did not restrict itself to simply coping with some of these difficulties but, on the contrary, attempted to overcome them, not only for the benefit of the project but also for the benefit of the country hosting it. Various seminars were held with magistrates, for example, with the aim of making them more aware of the importance of collecting statistical data and supplying them with the technical means to improve the process of record-keeping. In this and in other areas, the research was conducted

according to the principles of action research, which constituted an additional and complex factor. As a result, the research contributed towards improving the quality of the statistical information currently being produced in Mozambique.

Given the model adopted, it was neither possible nor appropriate to define the analytical framework of the project in great detail at the time when the project was initially proposed and the funds were requested. Most of the theoretical and analytical concepts underlying the project were arrived at through teamwork as the research group started the preparation of the fieldwork. Some important guiding ideas were identified and later converted into the general working hypotheses presiding over the research work: the administration of the judiciary had to be analyzed, as part of the process of consolidating and deepening the transition to democracy; the fact that Mozambique is a plural society in terms of the legal and judicial systems that provide normative government of the daily life of the population and the fact that this sociological pluralism had to be central to the research, even when not officially recognized; the fact that the research had, at all costs, to maintain its independence in relation to the government and the existing political forces, whilst at the same time listening to all of them.

Accordingly, one of the central topics was the analysis of the relationship between the state and the plurality of systems of law which, whether officially recognized or not, regulate conflict and social order in Mozambique. The idea of the modern state assumes that each state has only one system of law and that the unity of the state is based on the unity of the legal system. Sociologically speaking, however, various legal systems operate within the same nation-state and the state legal system is not even always the most important in terms of governing the daily life of the great majority of citizens. Such disjuncture between political and legal forms on the one hand and political and legal practices on the other, is probably more visible in Africa nowadays than anywhere else and has cultural, political, legal, economic and social ramifications. Such disjuncture has multiple impacts on state action and legitimacy, on the operation of the official legal system, on the relationships between political and administrative control, on the mechanisms of conflict resolution operating in society, on the legal and institutional frameworks of economic life and on the social and cultural perceptions of politics and legality.

Contrary to one of the limitations of legal studies – the tendency to analyze law and justice in isolation, as if they existed hovering over society and untouched by it – , we sought to pay specific attention to socio-legal conditions in Mozambique. In fact, it was judged to be particularly important to increase the stock of information and macro-sociological characterization of the society to clarify the articulation between legislative law and the courts, on the one hand, and the normative needs and resolution of conflicts experienced by society, on the other. Therefore, the project embodied a broader concept of law that was not just limited to official, state law, but instead considered Mozambican society as legally and judicially plural.

We are living in a world of legal hybridizations, a condition which Mozambican state law itself cannot escape. The new hybrids are legal phenomena that mix heterogeneous entities, operating through a disintegration of forms and retrieval of fragments, giving rise to new constellations of meaning. The mixture involves not only heterogeneous legal elements and time-spaces, but also heterogeneous legal durations and degrees of embeddedness. This legal hybridization does not only exist on the structural or macro level of the relationship between the different legal orders. It also exists on a micro level, that is, on the level of the legal behavior and representations of citizens and social groups. The concrete 'legal personality' of citizens and social groups is increasingly composite and hybrid, incorporating several different representations. This new legal phenomenon is described by Santos as *interlegality* (1995: 473), meaning the multiplicity and combinations of legal 'layers' which characterize everyday legal life. As the phenomenological counterpart to legal pluralism, interlegality does not mean the mere juxtaposition of different legal orders and cultures but also the porosity between them, leading to constant transitions and trespassing, of which individuals and groups are often only vaguely aware, if at all. According to the situation and context, citizens and social groups organize their experiences around official state law, customary law, local community law – which may be guerrilla law or paramilitary law in countries under civil war – or different kinds of global law – from international human rights law to transnational labor contracts – and, in the majority of cases, according to complex combinations of these different legal orders.

In order to avoid uncritically importing models of analysis, the research was undertaken using several dichotomies that we sought out to help define the contours of our study. Situations involving hybridization and interlegality challenge conventional dichotomies to the extent that legal practices frequently combine the opposite poles of the variables and contain an infinite number of intermediary situations. Even so, on an analytical level, the dichotomies are a good starting point, as long as it is clear from the outset that they will not provide an end point.

The conventional dichotomies considered most relevant to an analysis of legal plurality in Mozambique are the following: official/unofficial, formal/informal, traditional/modern, monocultural/multicultural. In addition, there is the variable trichotomy: local/national/global.

In the modern state, it is up to the state to dictate the criteria to define what is official and what is not, and the criterion has been, in the overwhelming majority of cases, that of the state itself. In other words, official law and justice are those types of law and justice produced and/or controlled by the state. In this dichotomy, the unofficial is everything that is not recognized as being of state origin. It may be prohibited or tolerated; most of the time, however, it is ignored.

The formal/informal variable relates to the structural aspects of the legal orders in operation. A form of law and justice is informal when it is dominated by rhetoric and when, therefore, both bureaucracy and violence are absent or only marginal. The opposite configuration defines the formal. In the modern state, formality arises out of bureaucracy. In its ideal form, bureaucracy is a way of reducing the complexity of

social reality by reducing the infinite variety of interactions and practices to a stylized set of models for actions and sequences. Historically, bureaucracy has not been the only source of formality. In pre-modern societies other methods of reducing complexity predominated, such as ordeals and ritual. Today religious formality and magical formality still exist in social fields not penetrated by bureaucratic formality. There are also hybrid types of formality in which the bureaucratic element blends with the religious or magical element.

The traditional/modern variable relates to the origins and historical duration of law and justice. The traditional is that which is believed to have existed since time immemorial, in which it is impossible to identify with any accuracy the moment or the agents of its creation. Conversely, what is called modern is believed to have existed for less time than the traditional and its creation can be identified in terms of time and/or author. This variable, as we shall see later, is the most complex of all. Contrary to the previous variables, the traditional/modern variable relates to social representations of time and origins, which are always difficult to identify. Moreover, according to the differences in power between the social groups which support each of the poles of the dichotomy, traditional power may be just as much a creation of modern power as modern power is a creation of traditional power.

The monocultural/multicultural variable relates to the cultural universes in which the different laws and systems of justice occur.[1] There is mono-cultural legal plurality whenever different laws and justices belong to the same culture and, conversely, there is multicultural legal plurality whenever the diversity of laws and justice correlates with important cultural differences.

Finally, there is the aforementioned trichotomy: local, national and global. This variable is seemingly obvious, as it refers to the spatial or territorial sphere of the laws or systems of justice in operation. In fact, however, these spheres are so defined because of the absolute priority granted to the national sphere by Western political and legal modernity.

As these definitions clearly show, the variables are partially superimposed. For example, the official tends to be formal, modern, monocultural and national, whereas the unofficial is often informal, traditional, multicultural and local. Yet these superimpositions are only partial and may occur more frequently in certain situations than in others. In addition, cultural or political contexts may determine that one particular socio-legal diversity is formulated in terms of one dichotomy or another. For example, in Latin America indigenous law and justice, although considered ancestral, is more commonly analyzed in terms of the monocultural/multicultural variable than the traditional/modern variable. In Africa, a diversity that differs only slightly from this – the existence of customary law and the traditional authorities side by side with the modern Western-centric legal system – is more often constructed, both academically and politically, within the sphere of the traditional/modern dichotomy.

Taking this set of variables or dimensions as starting points, we will briefly describe the three main topics around which the research was organized: the official judicial system, the community courts and the traditional authorities.

For this purpose, periods of extensive fieldwork took place in the city of Maputo, starting in 1997.[2] Fieldwork in the provinces was carried out between 1998 and early 2000.[3]

1. The Official Judicial System

In the domain of the official judicial system, quantitative methods prevailed although they were combined with qualitative methods. The methodology employed in this area of research was both intensive and extensive. It covered the extensive gathering of quantitative data from the lower courts (the district and provincial courts), the gathering and processing of legislation, a detailed analysis of case proceedings and other documents including press cuttings, the observation of trials, and interviews with specialist informants, legal actors (professional and lay/elected judges, lawyers, legal staff, representatives from the General Attorney's Office assisting the Public Prosecution Service, the justice officials, etc.) and non-legal actors (economists, business people, leaders of associations, administrators, etc.).

Inadequacies in the official statistics available (provided by the Department of Statistics of the Supreme Court) already identified by other researchers (Dagnino *et al.,* 1996), were one of the greatest difficulties we had to overcome. Faced with this situation, and taking into particular account the discrepancies in statistics recorded in certain years, it was necessary to gather samples of additional information that would enable us to confirm trends in the case flow and proceed with characterizing closed cases. This allowed us to obtain a profile of the different variables in civil and criminal justiceas well as in juvenile justice in the provincial courts and in some of the district courts.

Due to the timetable established for the completion of the project and the budget available, it was not possible to cover the entire geographical area of the country, except in terms of a broad characterization of provincial litigation, in collaboration with the provincial judges. It was therefore necessary to select the provinces and districts in which fieldwork could take place, which was done according to the following criteria: ethnic-cultural diversity; geographical location (particularly in terms of the coastal/interior variable); density of population; approximate volume of cases; existence/non-existence of courts; historical-political importance (see map 5.1).

2. Community Courts

In relation to the community courts, the combination of quantitative and qualitative methods was even more intense. For the first research project, the study on community justice included information relating to a total of 34 courts distributed over six provinces. The fieldwork took place between February 1998 and March 2000.[4]

Map 5.1: Regions Covered by Research (1997-2004)

North – the province of Cabo Delgado (the districts of Mueda, Chiúre, Mocímboa da Praia and Pemba-Metuge); Nampula province (Nampula city and Angoche district);
Center – the province of Tete (the districts of Cahora Bassa, Angónia and Moatize); the province of Sofala (the district of Dondo); the province of Manica (Macossa district); the province of Zambézia (the district of Alto Molócuè, Pebane and the city of Quelimane);
South – the province of Maputo (the districts of Namaacha and Moamba); Maputo city (which holds the status of province) and the province of Inhambane (the district of Zavala, Homoíne, Maxixe and Vilankulo).

Given the number and distribution of the community courts, it was necessary to limit the number of courts observed to one or two per district and also to reduce the number in which the most detailed observations took place. Therefore, from amongst the courts observed, it was only possible to prolong the observation period and gather the information which would enable us to understand their structural and functional characteristics with some degree of certainty in 13 of them. These were the community courts of the neighborhoods of Mafalala, Xipamanine, Minkadjuíne, Inhagóia A (Maputo city), Liberdade (Inhambane city), Munhava Central (Beira city), Cerema, Inguri A, Angoche sede, Johar and Mussoriri (Angoche city) and Boila-Nametória (Angoche district, Nampula) and Maimio (Mueda district, Cabo Delgado).[5]

During the course of the fieldwork we came up against two great difficulties. The first was the fact that the central administration held no records of either the numbers or the names of the community courts in operation. The information received from

the Ministry of Justice mentions the presence, early in 2004, of about 1,740 community courts functioning in Mozambique, 15.4% of which were created after 2000. There are about 8,300 judges assigned to these courts, if the statistics from the Ministry of Justice are correct[6]. Even at a local level we were faced with a serious lack of information on the part of the judicial and administrative authorities in relation to the community courts.

The second difficulty had to do with the problem of communication, since the researchers were not always fluent in the national languages of Mozambique. To overcome this difficulty translators had to be used, which required some preliminary preparation.

In order to determine which community courts were active in each district, it was first necessary to gather information from specialist informants. The following methods were used to collect this data: systematic observation, unstructured interviews and documental analysis. So far, in total, over seventy trials have been observed using systematic observation.

In the courts where systematic observation was employed, the presiding judges and the majority of other judges and participants in the court were interviewed. In these community courts it was also possible to interview the parties involved. In addition, we held interviews with the social actors who were most involved in the activities of the community courts, as well as with members of the *grupos dinamizadores*,[7] the heads of administrative sections, police stations and members of Ametramo,[8] and with specialist informants, namely religious leaders and presidents of community associations.

In terms of documentary data, there was an effort to create the most representative sample possible of case proceedings. In order to do this, we relied on the help of the presiding judges of the community courts, who made sets of proceedings available to us for random selection, photocopying or, when there were no other technical means available, copying them in their entirety. The information was collected by filling in a form that identified the cases, which was specifically designed for this purpose.

3. Traditional Authorities

Because Mozambique is a multicultural society where several bodies are involved in the process of conflict resolution, we observed and conducted interviews with multiple social actors who were considered pivotal in maintaining the social fabric of communities through their mediation. Although the research was centered on the *régulados* (chiefdoms and chieftainships), we always started off with a broad concept of the traditional authorities which, in addition to these, included religious authorities, traditional therapists, *grupos dinamizadores*, presidents of community associations, etc.[9]

Generally speaking, research into the traditional authorities as bodies intervening in the resolution of litigation faced the same constraints and difficulties as those already mentioned in relation to the community courts: the difficulty in identifying the number and location of the *régulados* or local leaders and the lack of up-to-date

bibliographical information on lineage or genealogical origins; criteria for establishing legitimacy; relationships with the state administration, etc.

In the study of traditional authorities, qualitative methods predominated. The methodology employed was based preferentially on systematic observation and interviews. Observation took place in different parts of the country (the provinces of Cabo Delgado, Tete, Zambézia, Nampula, Manica, Sofala, Inhambane and Maputo). The method most frequently used was that of unstructured interviews of varying duration, due to the fact that the traditional authorities, like the other informal bodies for resolving conflicts, have particular days for *mab'andla* (public meetings to hear cases and deal with various matters of interest to the community). Due to this difficulty, very often the researchers could only use interviews as a research method. In some *régulados* (*e.g.* the régulado Luís, the régulado Cumbana) it was also possible to collect a variety of documentation which is not normally easy to obtain, not only because of the lack of a tradition of written records, but also because of an almost universal unwillingness to disclose information considered to be restricted.

In addition, several branches of *grupos dinamizadores* (including neighborhood secretaries) actively involved in conflict mediation were also studied, including the observation of several cases. The *grupos dinamizadores* were mostly studied in the 'caniço' areas of Maputo city (the neighborhoods of Minkadjuíne, Mafalala, Xipamanine, Jorge Dimitrov/Benfica) and Horta, in Angoche city.

Traditional healers, mostly organized around Ametramo, are normally called upon by the *régulos* and community courts and even by the police to solve cases involving suspicion of practicing witchcraft. During the research project, seven cases involving accusations of witchcraft solved by traditional healers were observed (cases referred by other bodies, such as the community courts, or cases where the litigants sought the assistance of the traditional healers directly).

Finally, religious leaders, such as xéhès, were also interviewed.[10]

In addition to the difficulties listed above, the fieldwork also faced other methodological and epistemological complexities: the precarious guarantee of objectivity afforded by the research methods; the relationships, which were always political in the broadest sense of the word, between the researchers and the populations being studied; team research work as a social process in itself – and one which was experienced intensely by the research team.

It was a very complex and rich learning process that allowed us to build up a complex map of the legal orders active in the country by avoiding the temptation to transplant foreign models – produced to analyze other situations – in order to interpret the situation in Mozambique.

Notes

1 For a more detailed analysis of the debate on multiculturalism and the law see Santos, 2002c.

2 The initial research project ran from 1996 to 2000. A new project, aimed at preparing the legal reform, was initiated in 2003.
3 For the second research project, field work was carried out in the Nampula and Manica provinces (2003-2004).
4 To date (2005) the project has studied over 40 community courts; 34 during the first project and 8 during the second project. Some chapters already refer to data gathered during the second phase of the research.
5 These courts were chosen taking the following factors into consideration: (i) proximity to the district capital; (ii) the institutional context, especially the networking between the community courts, *grupos dinamizadores* and traditional authorities.
6 Ministério da Justiça (2004). *Relatório ao X Conselho Coordenador*. Tete, 13-15 July 2004.
7 See note 34 in chapter 1.
8 *Associação Moçambicana de Médicos Tradicionais* – Mozambican Association of Traditional Healers.
9 A word of caution is needed here, since, following the colonial example, most of the studies conducted on the subject tend to emphasize the role of the *régulos*, forgetting the enormous array of other entities who are considered legitimate and are legitimized from below by the communities that recognize their authority.
10 The above-mentioned report from the Ministry of Justice states that in Mozambique there are 592 officially registered religions, structured around 125 religious organizations.