NON-STATE FORMS OF CONFLICT RESOLUTION: OPPORTUNITIES FOR IMPROVING CRIMINAL JUSTICE – A CASE STUDY OF COMMUNITY COURTS IN MOZAMBIQUE

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by

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Abstract

The Mozambican criminal justice system faces two main challenges, namely lack of access to justice for all and deplorable prison conditions. Judicial courts are distant and expensive; legal terminology is incomprehensible to the majority of people; and prisons are overcrowded. Mozambicans continue to rely on different normative systems, other than state justice, to resolve their disputes. Recognised mainly as informal, these non-state mechanisms have always been considered as closer, cheaper and faster than judicial courts. However, the literature on legal pluralism and the state has historically ignored the role that they play in criminal justice.

Given this background, the thesis examines the limitations of legal pluralism and how the past shaped and continues to shape the particular relationship of the state with community courts in relation to criminal justice. The study makes use of materials derived from exploratory work in the Mozambican capital city of Maputo, including focus group discussions, individual interviews, access to case files, and various other empirical observations.

The thesis analyses the functioning of community courts. The discourses and practices on criminal justice of these courts are most usually seen as situated within Eurocentric dominant political discourses about the nature of access to justice and punishment. Through a postcolonial analysis, however, the thesis aims at identifying community courts as forms of local knowledge; it explores the legal and practical obstacles and opportunities that community courts provide to improve access to criminal justice for petty crimes and ultimately their impact on the condition of prisons.

The thesis shows that the revision of the community courts' law presents an opportunity to broaden the competence of the courts to include criminal cases punishable with imprisonment up to three years. Because of this, petty crimes would go through the state criminal justice system and more cases would be resolved at the community level. Community courts are trusted by the people and make use of a form of restorative justice. They reach decisions through mediation; assess the socioeconomic causes of a case; involve families and communities when needed; and apply alternatives to imprisonment.

A shift of the state's mainstream attitude to community courts in relation to criminal justice is now needed – a move away from Eurocentric discourse and towards the recognition, in practice, of local knowledge.

Keywords: Non-state mechanism of conflict resolution, Mozambique, legal pluralism, postcolonial studies, community courts, criminal justice

Declaration

I declare that *Non-State Forms of Conflict Resolution: Opportunities for Improving Criminal Justice – A Case Study of Community Courts in Mozambique* has not been previously submitted in whole or in part and will not be submitted by me for a degree at any other university.

I further declare that this is my own work in design and execution, and that all the materials relied on have been properly acknowledged.

Signed by candidate

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Abbreviations

ACJR	African Criminal Justice Reform
AMETRAMO	Association of Traditional Healers *(Médicos Tradicionais de Moçambique)*
CCLA	Centre for Comparative Law in Africa
CEPAJI	Centre for Research and Assistance to the Informal Justice *(Centro de Pesquisa e Apoio à Justiça Informal)*
CESAB	Study Centre Aquino de Bragança *(Centro Estudos Aquino de Bragança)*
CFJJ	Legal Training Centre *(Centro de Formação Jurídica e Judiciária)*
CSMJ	Higher Council of the Judiciary *(Conselho Superior da Magistratura Judiciaria)*
CSO	Civil society organisations
DANIDA	Danish Development Program
DNAJ	National Directorate of the Justice Administration *(Direcção Nacional da Administração da Justiça)*
DPJ	Provincial Justice Directorate *(Direcção Provincial da Justiça)*
FAO	Food and Agriculture Organization
FRELIMO	Mozambican Liberation Movement *(Frente de Libertação de Moçambique)*
GAMFVV	Office for the Assistance to Children and Family victims of domestic violence *(Gabinete de Atendimento à Família e Menores Vítimas de Violência Domestica)*
IDLO	International Development Law Organization
IPAJ	Legal Aid Institute *(Instituto de Patrocínio e Assistência Jurídica)*
LDH	Human Rights League *(Liga dos Direitos Humanos)*
MJACR	Minister of Justice, Constitutional and Religious Affairs *(Ministério da Justiça, Assuntos Constitucionais e Religiosos)*
NGO	Non-governmental organisation
OAM	Bar Association *(Ordem dos Advogados de Moçambique)*
OJM	Organization of the Mozambican Youths
OMM	*(Organização dos Jovens Moçambicanos)*
OREC	Organization of the Mozambican Women *(Organização das Mulheres Moçambicanas)* Organization for Conflict Resolution *(Organização para Resolução de Conflictos)*
UNDP	United Nations Development Programme *(Programa de Desenvolvimento das Nações Unidas)*
RENAMO	Mozambican National Resistance *(Resistência Nacional de Moçambique)*

SERNAP	National Correctional Service *(Serviço Nacional Penitenciário)*
UEM	University Eduardo Mondlane *(Universidade Eduardo Mondlane)*
UNICEF	United Nations Fund for Children
WLSA	Women and Law Southern Africa

Chapter 1
Introduction

For those that study legal pluralism as a social phenomenon, a useful caution is in order. One must avoid falling into either of two opposite errors: the first error is to think that state law matters above all else (as legal scholars sometimes assume); the second error is to think that other legal or normative systems are parallel to state law (as sociologists and anthropologists sometimes assume). For those interested in studying law and society, what matters most is framing situations in ways that facilitate the observation and analysis of what appears to be interesting and important (Tamanaha, 2008, p. 410)

1.1 Background and rationale for the study

In the last 20 years, judicial courts and prisons in Mozambique have faced persistent challenges.[1] Since the 1990s, academic research, reports by national and international non-governmental organisations (NGOs) and media in general have paid attention increasingly to the high cost of access to judicial courts and of prison overcrowding.[2]

There are no judicial courts which operate across all districts of the country;[3] there is only one judge for every 80,000 people, an insufficient number to respond to the increasing people's conflicts; and the majority of Mozambicans understand neither legal terminology nor the functioning of the justice system.[4] Imprisonment is regarded as the most effective punishment

[1] For information on challenges faced by judicial courts, see REFORMAR-Research for Mozambique (2018) 'Mozambique Thematic Report on the Implementation of the ICCPR in relation to criminal justice in preparation for the Civil Society Submission to the United Nations Human Rights Committee', *REFORMAR-Research for Mozambique*. Available at: https://reformar.co.mz/publicacoes/moz-iccpr-criminal-justice-reformar.pdf (accessed 1 January 2020). See also REFORMAR-Research for Mozambique (2019) 'An Assessment of Some Aspects of Judicial Integrity in Mozambique', *REFORMAR-Research for Mozambique*. Available at: https://reformar.co.mz/publicacoes/an-assessment-of-some-aspects-of-judicial-integrity-in-mozambique.pdf (accessed 1 January 2020). For information on challenges faced by the prison system, see Cezerilo, L. (2013) *Um Olhar Para as Janelas da Esperança*. 1ª Edição. Alcance Editores: Maputo; Lorizzo, T. (2012) 'Prison reform in Mozambique fails to touch the ground. Assessing the experience of pre-trial detainees in Maputo', *South Africa Crime Quarterly*, 42, pp. 29-38. Available at: https://bit.ly/3HNQqJW (accessed 11 September 2019).

[2] See Mozambican 2018 report on Human Rights Practices from the United States Department of State. Available at: https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/mozambique/ (accessed 4 January 2020). See also the extensive work conducted since 1990 by the national CSO, Human Rights League (*Liga dos Direitos Humanos*, LDH), on the Mozambican criminal justice system. See also news on the challenges of the criminal justice system from the major national newspapers *Noticias*, *Savana* and *O País*, collected at the following link: https://bit.ly/3g8s9Cw(accessed 4 January 2020).

[3] Tribunal Supremo (2021) Relatório Anual dos Tribunais Judicias 2020, p. 32. Available at: https://bit.ly/3oe3Lnn (accessed 9 April 2021). According to the 2020 report of the Supreme Court all the districts of the country had a judicial court. However, 23 courts are still not operational.

[4] See the work of REFORMAR–Research for Mozambique available at www.reformar.co.mz. See Ordem dos Advogados de Moçambique (2019) *Relatório dos Direitos Humanos 2017*. Maputo. Courts at the continental level face similar challenges to what courts in Mozambique face at the country level. See Asante, R. (2017) 'Why justice in Africa is slow and unfair – Justice delayed and denied', *The Economist*, 1 July. Available at: https://www.economist.com/middle-east-and-africa/2017/07/01/why-justice-in-africa-is-slow-and-unfair (accessed 9 September 2018).

that courts can resort to and is frequently also used for petty crimes,[5] while the overcrowding of prisons has remained, in the last five years, at about 200 per cent.[6] In 2017, about 36.7 per cent of prisoners were serving sentences of less than a year for petty crimes, such as theft, robbery and assault.[7] Recidivism has also rapidly increased,[8] due both to the inability of the prison system to rehabilitate and reintegrate primary offenders and to the absence or weakness of family and social support structures.[9] These problems underline the importance of rethinking the functioning of the current Mozambican criminal justice system and moving from a retributive to a more effective restorative model of justice – for all criminal offences but specifically petty crimes.[10]

Meanwhile, millions of people daily resolve various civil and criminal conflicts through non-state systems.[11] Conflicts arising from the use of land are mainly solved through non-state mechanisms rather than judicial courts, as are disputes between neighbours over property demarcation, theft of cattle in rural areas, and, in the most urbanised areas, theft of personal property and domestic violence. From the north to the south of the country, communities thus

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[5] See statistics from the World Prison Brief. Available at: http://www.prisonstudies.org/map/africa (accessed 12 September 2018). In 2000, the Mozambican prison population was composed of about 8,000 people, whereas it increased to 16,000 in 2012 and almost 20,000 in 2019. In 2019, prison overcrowding was more than 200 per cent. See also Oppler, S. (1998) *Correcting Corrections: Prospects for South Africa's Prisons*. Institute for Security Studies. South Africa. Giffard, C. and Muntingh, L. (2006) *The effect of sentencing on the size of the South African prison population*. Open Society Foundation. South Africa. Available at: https://bit.ly/3L0PzYD (accessed 11 January 2020). Jefferson, A. M. (2012). 'Conceptualising confinement: Prisons and poverty in Sierra Leone', *Criminology & Criminal Justice*, 14(1), pp. 44-60. Nyaura, J.E. and Ngugi, M.N. (2014) 'A Critical Overview of the Kenyan Prisons System: Understanding the Challenges of Correctional Practice', *International Journal of Innovation and Scientific Research*, 12(1), pp. 6-12.

[6] See information from the REFORMAR's Open Letter on the impact of the State of Emergency within the sector of criminal justice, to the Mozambican President. Available at: https://reformar.co.mz/publicacoes/carta-aberta-impacto-estado-de-emergencia-1.pdf/view (accessed 4 April 2021). The Human Rights Report of the Bar Association stated that, in 2017, Mozambique had a prison population of 18,185 prisoners, with the official capacity of the prison system being 8,188 – or 221 per cent of the prison occupation level.

[7] According to data from the Mozambican National Correctional Service (*Serviço Nacional Penitenciário*, SERNAP), the prison population was about 18,800 people (December 2017). Among the sentenced people, 2,500 people (13%) were serving sentences of between one and two years' imprisonment, mainly for theft and assault.

[8] Muntingh, L. and Redpath, J. (2016) 'The socio-economic impact of pre-trial detention in Kenya, Mozambique and Zambia'. University of Western Cape: Dullah Omar Institute. *Africa Criminal Justice Reform*, December 2016. Available at: https://bit.ly/3ue8yJx (accessed 11 January 2020). See also Muntingh, L. (2002) 'Tackling recidivism: What is needed for successful offender reintegration', *Track Two: Constructive Approaches to Community and Political Conflict*, 11, pp. 20-24. Gaum, G., Hoffman, S. and Venter, J. H. (2006) 'Factors That Influence Adult Recidivism: An Exploratory Study in Pollsmoor Prison', *South African Journal of Psychology*, 36(2), pp. 407-424.

[9] Cezerilo, L. (2013).

[10] Petrovic, V., Lorizzo, T. and Muntingh, L. (2020) 'Alternatives to Imprisonment in Mozambique. The implementation of community service orders', *REFORMAR-Research for Mozambique*, March 2020. Available at: https://reformar.co.mz/publicacoes/tsu-moz-english.pdf/view (accessed 18 April 2021). See also Andrews, D. A. and Bonta, J. (2010) 'Rehabilitating criminal justice policy and practice', *Psychology, Public Policy, and Law*, 16(1), pp. 39-55. Fletcher, G.P. (2000) *Rethinking Criminal Law*. Oxford University Press. Bazemore. Garland, D. (2001) *The Culture of Control. Crime and Social Order in Contemporary Society*. Oxford University Press.

[11] Chirayath, L., Sage C. and Woolcock, M. (2005) 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems', *World Bank Resources*. Available at: https://bit.ly/335RHx5 (accessed 13 January 2020).

rely on what, over the last three decades, scholars have referred to variously as unofficial, popular, hybrid, customary or alternative dispute resolution, the traditional justice system, or simply community mechanisms for conflict resolution.[12] In practice, these mechanisms include courts, traditional authorities and healers, religious institutions, and civil society organisations (CSO).

In rural Mozambique, the majority of disputes are resolved by non-state mechanisms of conflict resolution.[13] Approximately 85 per cent of the population follow non-state methods of dispute resolution. Seventy-five per cent of land issues in rural areas are resolved through alternative mechanisms to those provided by the state justice system.[14] In addition, the use of non-state mechanisms in the most urbanised cities (where the main state institutions of the justice administration are based) has recently caught the attention of the scholarly community, as is evident in the literature published on the topic.[15] Non-state mechanisms have demonstrated great resilience over different historical eras and during periods of both institutional silence and dynamism.[16] They have always been considered as not only cheaper and faster than the judicial courts, but also as closer to the people inasmuch as they use the same languages and demonstrate an understanding of tradition.[17]

Non-state mechanisms exist within a broad context in which they function alongside other dispute-resolution mechanisms and the state justice system and where they interact with the

[12] Chiba, M. (1993) 'Legal pluralism in Sri Lankan society: Towards a general theory of non-western law', *Journal of Legal Pluralism and Unofficial Law*, 33, pp. 197-212. Bastos, F. L. e Fernando L. (1961) 'A recolha e a codificação do direito costumeiro vigente na República da Guiné Bissau', in Bastos, F. L. (ed.) *Estudos em homenagem ao Prof. Doutor Jorge Miranda*. Coimbra, 1, pp. 697-722. Bennett, T. (2006) 'Comparative Law and Customary Law', in Reimann, M. and Zimmermann, R. (eds.) *The Oxford Handbook of Comparative Law*. Oxford. Buur, L. (2006) 'New Sites of Citizenship. Recognition of Traditional Authority and Group-based Citizenship in Mozambique, *Journal of Southern African Studies*, 32(3), pp. 56-82. Coissoró, N. (1987) 'O Direito Costumeiro Africano na Legislação Portuguesa (1954-1975)', *Estudos Políticos e Sociais*, XV (1-2), pp. 25-37. Diogo, F. do Amaral (2008) 'Uma articulação entre o Estado e as Autoridades Tradicionais? Limites na congruência entre o Direito do Estado e os Direitos 'Tradicionais' em Angola', *Estudos Comemorativos dos 10 anos da Faculdade de Direito da Universidade Nova de Lisboa*. Coimbra: Almedina, 1, pp. 715-753. Marques-Guedes, A. (2007) 'The State and "Traditional Authorities", in Angola. Mapping issues, in Marques-Guedes, A. and Lopes, M. J. (eds.) *State and Traditional Law in Angola and Mozambique*, pp. 15-67. Hinz, M. and Mapaure C. (2009) *Search of Justice and Peace. Traditional and Informal Justice Systems in Africa, Legal pluralism and interlegality: The role of community justices in Mozambique*. Berlin: Verlag. Max, G. (1997) 'Concepts in the comparative study of tribal law', in Nader, L. (org.), *Law in culture and society*. 2nd Edition. Berkeley and Los Angeles: University of California Press Lda.

[13] Chirayath et al. (2005).

[14] Ibid.

[15] Araújo S. (2014) *Ecologia de Justiças a Sul e a Norte. Cartografias Comparadas das Justiças Comunitárias em Maputo e Lisboa*. Tese de Doutoramento. Universidade de Coimbra.

[16] Meagher, K. (2007) 'Introduction: special issue on informal institutions and development in Africa', *Afrika Spectrum*, 42(3), pp. 405-418. Available at: http://nbn-resolving.de/urn:nbn:de:0168-ssoar-362035 (accessed 13 September 2018).

[17] Wojkowska, E. (2006) 'Doing Justice: How informal justice systems can contribute. Oslo Governance Centre', *The Democratic Governance Fellowship Programme*. Available at: http://www.albacharia.ma/xmlui/bitstream/handle/123456789/30535/0280Doing_Justice__How_informal_justice_systems_can_contribute_(2007)7.pdf?sequence=1 (accessed 10 January 2020).

state in different ways.[18] The parallel existence of non-state mechanisms and the state is generally recognised and referred to as 'legal pluralism', a term coined by Vanderlinden in 1971 and meaning 'the existence of different mechanisms that apply to identical situations'.[19]

For more than 40 years, though, the literature on legal pluralism has paid attention to civil matters rather than to criminal conflicts, focusing on the important role that the existing non-state mechanisms play in civil justice but ignoring their potential contribution to state criminal justice systems worldwide.[20] The dichotomy between civil and criminal cases is easily visible at the quantitative level in the sheer number of articles published as well as in the general approach taken by the scholarly literature. Articles that focus on civil matters in the existing journals on legal pluralism form a clear majority in comparison to those that deal with criminal cases.[21] In addition, in the number of articles that do deal with criminal matters, the approach taken reinforces a characteristic that is central to legal centralists: the assumption of the monopoly of the state in criminal matters.[22] All the characteristics above apply both to international and Mozambican literature.[23]

Community courts are exemplary instances of non-state mechanisms for conflict resolution which, in the resolution of both civil and small criminal disputes, function in parallel with the judicial courts.[24] According to the most recent (2017) official data, there were about 2,500 community courts in Mozambique, with each one serving about 11,200.[25] The judges of the community courts speak the local vernacular and are situated closer to the people than the state courts. They are more affordable than the judicial courts and adopt a restorative approach that contrasts with the adversarial approach of the state courts. Community courts involve victims,

[18] Chirayath, L., Sage C. and Woolcock, M. (2005). Available at: https://bit.ly/3IPI8lo (accessed 13 January 2020). Araújo S. (2014) *Ecologia de Justiças a Sul e a Norte. Cartografias Comparadas das Justiças Comunitárias em Maputo e Lisboa*. Tese de Doutoramento. Universidade de Coimbra.

[19] Vanderlinden, J. (1971) 'Le pluralisme juridique: essai de synthèse', in Gilissen, J. (ed.) *Le pluralisme juridique*. Bruxelles: Université Libre de Bruxelles, p. 23.

[20] See, for example, the extensive literature published in the following journals: *Journal of Legal Pluralism and Unofficial Law, Annual Review of Law and Social Science, Journal of Law and Society, Journal of Latin American Studies, Journal of African Law, Social and Legal Studies*. Many are the articles on access to land and property; women's access to family justice; and the relationship between religious norms and state laws. See authors such as Woodmann, Benda-Beckmann, Meinzen-Dick, Unruh and Knight.

[21] Of 600 articles published by the *Journal of Legal Pluralism and Unofficial Law*, less than one-sixth are on criminal matters. See the exhaustive literature produced by the *Journal of Legal Pluralism*. Available at: https://commission-on-legal-pluralism.com/journal (accessed 20 June 2021).

[22] See, for example, Donovan, D. and Assefa, G. (2003) 'Homicide in Ethiopia: Human Rights, Federalism and Legal Pluralism', *The American Journal of Comparative Law*, 51(3), pp. 505-552; Rautenbach, C. and Matthee, J. (2010) 'Common Law Crimes and Indigenous Customs: Dealing with the Issues in South African Law', *Journal of Legal Pluralism*, 61, pp. 109-144; Dambe, B. J. and Fombad, C. M. (2020) 'The stock theft act and customary courts in Botswana: justice sacrificed on the altar of expediency?', *Journal of Legal Pluralism*, 52(1), pp. 65-81.

[23] See, for example, authors such as Trindade, José, Araújo, Meneses.

[24] De Sousa Santos, B. e Trindade, C. J. (2003) *Conflito e Transformação Social: Uma Paisagem das Justiças em Moçambique*. Oporto: Afrontamento.

[25] Centro de Formação Jurídica e Judiciária (2017) *O Funcionamento dos Tribunais Comunitários e sua Interação com os Palácios de Justiça*. Maputo.

perpetrators and other stakeholders that have either a direct or indirect interest in the matter.[26]As a result, mediation is the preferred mode for the restoration of peace and harmony.[27]

Since their establishment in 1992, however, community courts have gradually been abandoned by the state, especially so with regard to criminal matters.[28] In this respect, the Mozambican state's approach to community courts and criminal matters is similar to the approach the Portuguese took towards non-state mechanisms of conflict resolution during their colonisation of Mozambique.[29] The Portuguese ignored local mechanisms of conflict resolution, instead adopting a Eurocentric approach that prioritised the application of European laws.

The post-colonial Mozambican state has thus proved unable to accept the important role that community courts can play for the state criminal justice system as a form and expression of community-based knowledge. As De Sousa Santos observes,

> local resistances … open up a window towards a broader critical evaluation of knowledge as situated and socially constructed, a perspective that allows for a more comprehensive 'translation' and comparison among all knowledges (including scientific knowledge) on the basis of their capacities for the fulfillment of certain tasks in social contexts drawn by particular processes (including those that are associated with scientific knowledge).[30]

In this recognition of local resistances, De Sousa Santos – alongside thinkers such as Gayatri C. Spivak – challenges the Eurocentric approach by applying postcolonial lenses to all the different sectors of society.[31] In contrast, the Mozambican state approaches criminal justice through Eurocentric lenses, such that it is the Portuguese Penal and Criminal Procedure Codes that continued to regulate people's lives even after formal decolonisation until recently.[32] Similarly, Meneses reminds us, alternative approaches to criminal justice (that is, different to that of the state justice system) are described as customary, alternative, informal, tribal,

[26] De Sousa Santos, B. e Trindade, C. J. (2003).
[27] Ibid.
[28] In 2006, the Mozambican Legal Training Centre submitted a proposal to Parliament aimed at regulating Law 4/1992. The proposal was never discussed. In the time since the author conducted fieldwork for this research, community courts have often been recognised, through ceremonies, by the justice administration, mainly in the capital city of Maputo. In Maputo, they also receive materials such as pens and papers to conduct their work. The recognition occurring in Maputo and material's distribution does not commonly happen in other parts of the country. This will be discussed in detail in Chapter V.
[29] Cabral Pereira, A. A. (1925) *Raças, Usos e Costumes dos Indígenas da Província de Moçambique*. Imprensa Nacional Lourenço Marques.
[30] De Sousa Santos, B., Nunes, J.A. and Meneses, M.P. (2007) 'Opening Up the Canon of Knowledge and Recognition of Difference', in De Sousa Santos, B., *Another Knowledge is Possible. Beyond Northern Epistemologies*. Verso: London, p. XL.
[31] Spivak, G. C. (1988) 'Can the subaltern speak?', in Nelson, C. and Grossberg, L. (eds.) *Marxism and the Interpretation of Culture*. Macmillan Educatio: Basingstoke. De Sousa Santos, B., Nunes, J.A. and Meneses, M.P. (2007) 'Opening Up the Canon of Knowledge and Recognition of Difference', in De Sousa Santos, B., *Another Knowledge is Possible. Beyond Northern Epistemologies*. Verso: London.
[32] The Portuguese Penal Code, which has been in place in the country until 2015, harks back to 1886, while the Criminal Procedure Code, dated 1932, preceded the new code that entered into force in December 2020.

traditional, and 'second-class' knowledge.[33] Such description undermines the importance of local knowledge in community courts.

This is in spite of the fact that article 4 of the 2004 Constitution of Mozambique does officially recognise the importance of local knowledge, and gives constitutional acknowledgment to legal pluralism as 'the existence of different mechanisms that apply to identical situations'.[34] The article provides that '[t]he State recognises the different normative and dispute resolution systems that co-exist in Mozambican society, insofar as they are not contrary to the fundamental principles and values of the Constitution'.[35]

The article restates what is known as the 'repugnancy clause'. This entails the recognition of different normative orders within the borders of the Constitution and reminds the limitation by the colonial state of the traditions and customs followed by the local population, during colonial times.[36] Although the current clause differs from the colonial one, which was discriminatory in principle, it risks perpetuating the bias towards mainstream choices with regard to criminal justice.[37] Indeed, governments and policy-makers still refer to access to justice as access to state justice.[38] Despite new legal thinking which sees imprisonment as a last resort solution,[39] state judges continue to apply imprisonment as the standard solution in the criminal justice system.[40] In addition, state judges demonstrate considerable resistance to translating the constitutional recognition of legal pluralism into practice. Those who have studied abroad (often at Western universities) find it challenging to apply their own local knowledge when on the bench. But the curricula of those who attend Mozambican law faculties, and who were trained as judges at the Legal Training College in Mozambique, are based largely on Eurocentric approaches to criminal justice.[41]

In the last decade, penal legislation in Mozambique has undergone several reforms. In 2014, the new Penal Code removed criminal jurisdiction from community courts so that the state retained legal monopoly on criminal matters.[42] In 2020, though, a revision to the Penal Code returned criminal jurisdiction to community court (as provided by the law on community courts, Law 4/1992). It is in the context of this legal change that this thesis demonstrates some of the opportunities that community courts have for playing a more constructive role in dealing with

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[33] Meneses, M. P. (2010) 'O "indígena" africano e o colono "europeu": a construção da diferença por processos legais', *e-cadernos CES,* 7, pp. 39-93. Available at: http://journals.openedition.org/eces/403 (accessed 13 January 2020).

[34] Vanderlinden, J. (1971), p. 23.

[35] The English translation of the Mozambican Constitution. Available at: https://bit.ly/3teDM2n (accessed 18 January 2021).

[36] Article 138 of the 1951 Constitution of the Republic of Mozambique. Available at: https://dre.pt/application/conteudo/153753 (accessed 16 January 2021).

[37] Coissoró, N. (1987), pp. 25-37.

[38] See the decision in the Penal Code to remove criminal matters from the jurisdiction of community courts.

[39] See articles 85 to 104 of the Penal Code, which introduced alternatives to imprisonment. This novelty shows a legal shift in the criminal justice system from a retributive to a restorative approach to criminal justice. Among the different alternatives, community service shall be applied to crimes punishable with a prison sentence up to three years.

[40] Petrovic, V., Lorizzo, T. and Muntingh, L. (2020).

[41] The current curriculum of the Legal Training College has no modules or courses on legal pluralism. At the faculties of law of various universities, students do not study the topic of legal pluralism.

[42] The Penal Code entered into force in 2015 and, as noted above, removed criminal matters from the jurisdiction of community courts.

lesser criminal conflicts by being accessible to communities and enabling them to take greater ownership of such conflicts than the judicial courts allow. The new opportunities for community courts to stop imprisonment for minor criminal offences – and thus reduce people's exposure to the state criminal justice system and the effects of imprisonment – are best understood through postcolonial lenses.

1.2 Research questions

This thesis investigates the functioning of community courts in Mozambique's capital, Maputo. The main research question examines the opportunities that community courts have for demonstrating their important role for the state criminal justice system in Mozambique. The argument is structured around the four questions that are addressed in the chapters of this dissertation:

- What are the limitations of the scholarly literature on legal pluralism, and what possibilities do the insights of postcolonial studies have for criminal justice?
- How has the past shaped, and how does it continue to shape, the relationship of the Mozambican state with non-state mechanisms of conflict resolution in relation to criminal justice?
- What are the legal and practical obstacles for community courts in seeking to improve access to criminal justice for petty crimes and to address the poor condition of the prison system?
- What are the legal and practical opportunities for community courts in seeking to enhance access to criminal justice for petty crimes and to improve the poor condition of the prison system?

1.3 Contribution of the study

The study seeks to help overcome three significant gaps in the existing scholarly literature. The first is a gap in legal pluralist thinking about criminal justice. Since the advent some 40 years ago of the theory of legal pluralism, scholars in the area have focused on civil matters such as land and property issues; family problems related to conflicts involving women and children; and disputes about religion.[43] Little attention has been given to criminal justice matters, as if legal pluralists were afraid to challenge the monopoly the state seeks to retain over such matters. Chapter 3 will present a detailed account of the limitation of the literature on legal pluralism with regard to criminal justice matters.

A second gap in the literature on legal pluralism concerns the urban setting. The literature has tended to focus exclusively on rural areas, though some more recent research has started to examine the role of legal pluralism in areas where the state institutions are concentrated.[44] This

[43] See the exhaustive literature produced on these topics by the *Journal of Legal Pluralism*. Available at: https://commission-on-legal-pluralism.com/journal (accessed 20 June 2020).

[44] See Araújo S. (2014) *Ecologia de Justiças a Sul e a Norte. Cartografias Comparadas das Justiças Comunitárias em Maputo e Lisboa*. Tese de Doutoramento. Universidade de Coimbra; Araújo S. (2012) 'Por uma ecologia de Justiças: Um estudo Rural e Urbano da Pluralidade Moçambicana', in Kyed, H.M., Borges Coelho, J.P., Neves De Souto A. e Araújo, S. (org.) *A Dinâmica do Pluralismo Jurídico em Moçambique*. Centro de Estudos Sociais Aquino de Bragança. Maputo, pp. 113-134. In

study aims to show how community courts in the urban setting of Maputo can play a constructive role in dealing with criminal conflicts by being more accessible to communities and enabling them to take ownership of conflicts. In so doing, the community courts effectively challenge important aspects of the state justice system (particularly the dominance within it of Eurocentric approaches to criminal justice) and address the issue of overcrowding of prisons.

The third and final gap concerns the role of legal pluralism in Portuguese-speaking African countries. While an extensive literature (in English) on legal pluralism is available on Anglophone and Francophone Africa,[45] much less has been published about Lusophone Africa, with most of such literature available only in Portuguese. This means the scholarly literature on legal pluralism in Lusophone Africa is restricted largely to Portuguese speakers. The present study seeks to help alleviate this restriction. As a fluent speaker of Portuguese, I was able to engage with the local and Portuguese literature and integrate it in the findings of this study.

1.4 Definition of concepts

Customary law, tradition and non-state mechanisms of conflict resolution

The terms 'customary law' and 'tradition' are used interchangeably (as are 'uses' and 'customs').[46] For this study, the theory of Hobsbawm and Ranger is used: the ideas of customary law and tradition are understood as constructions of colonialism used to maintain social control in the colonised countries.[47] Colonialists have reinvented the customary to accommodate a particular set of discriminatory rules. This starting-point is important not only for analysing the colonial period but also for showing how the terms 'customary law' and 'tradition' have been used in different historical periods. In fact, since the various struggles for independence, the terms have likely been represented as backward categories. However, upholding the importance of tradition in various sectors, from politics to religion, from literature to culture, is vital for the future of the society.[48] It has been crucial in this study not only to be accurate in the definitions, but also to identify the warning signals the same definition can hide. For these reasons, the term 'non-state mechanisms of conflict resolution' is preferred so as to avoid the inherent assumptions and associations of the terms 'customary law' and 'tradition'.

Petty crimes

The term 'petty crimes' is used throughout this thesis to refer to criminal offences such as theft, assault, and simple physical violence.[49] The adjective 'petty' is never used to diminish the

regard to Angola, see Gomes, C. e Araújo, R. (2012) *A Luta pela Relevância Social e Política: Os tribunais Judiciais em Angola. Luanda e Justiça: Pluralismo jurídico numa sociedade em transformação*. Volume II. Almedina: Coimbra.

[45] See the extensive work published by the Commission of Legal Pluralism. Available at: http://commission-on-legal-pluralism.com/nl/home (accessed 19 September 2018).

[46] White C. M. N. (1965) 'African Customary Law: The Problem of Concept and Definition', *Journal of African Law*, 9(2), pp. 86-89. Available at: https://bit.ly/3obyEcd (accessed 5 January 2020).

[47] Hobsbawm, E. and Ranger, T. (2012) *The Invention of Tradition*. Cambridge: Cambridge University Press.

[48] Shils, E. (2006) *Tradition*. Chicago: University of Chicago Press.

[49] Article 13 of Law 29/2009 defines a perpetrator of domestic violence as 'anyone who voluntarily violates the woman's physical integrity using or not any instrument and who causes any physical damage …'.

significance of the impact that these criminal offences have on their victims or their consequences for people's lives. The terms are simply used to help think through the custodial sentence that the state criminal justice provides for such crimes and the possibility of its limitation. This thesis suggests that communitarian and restorative forms of justice may be more suitable as a response to crimes such as these and that these forms of justice can be provided by community courts.

1.5 Limitations of the study

I encountered various limitations in conducting this study. The first was that of language: lacking proficiency in both Changane and Ronga (the local languages of Maputo), I was unable to obtain first-hand accounts of the hearings of the community courts. Although Italian by birth, I am fluent in Portuguese, which meant I was able to conduct the fieldwork for this research in the official language of the country. Similarly, the focus group discussions and interviews I conducted with the community court judges were in Portuguese (the official national language of the country), and this allowed me the possibility of following the responses of the judges and their discussions. In addition, the President of the Commission representing the Maputo community court judges (who accompanied me during the fieldwork) helped me with the translation and interpretation from Changane/Ronga to Portuguese and vice versa.

A second limitation of the study is my insider-outsider status with the participants of the study: people working either within the Mozambican state justice administration or the non-state mechanisms for conflict resolution. Kanuha refers to insiders as researchers who 'conduct research with populations of which they are also members', and who consequently share identity, language, and experiences.[50] By the same token, my 'outsiderness' may have the positive value identified by Marks when, with regard to her own research on the police, she cites a remark by the National Commissioner in Durban: 'We need outsiders like her to show us the things we don't see.'[51]

At times, I used to feel like, and be treated as, an insider by people working within the Mozambican state justice administration, as if I were a Mozambican working within the criminal justice system. In point of fact, over the last 15 years I have worked professionally in the criminal justice sector, variously as a practising lawyer for the Legal Aid Institute in Maputo, as a researcher for Africa Criminal Justice Reform at the Dullah Omar Institute of the University of the Western Cape, and as a Director of REFORMAR-Research for Mozambique, an organisation working on human rights applied to criminal justice through research, training and advocacy.[52] During these years, I enjoyed good relationships with many different actors working within the justice system. My academic qualifications, together with my comparative work-experience, helped others see me as a qualified and well-trained professional and as someone who could bring knowledge to the sector.

At other times, I felt like a complete outsider, as just one Italian among the many other foreign researchers who are usually in the country for some fieldwork before returning to their home

[50] Kanuha, V. K. (2000) '"Being" native versus "going native": Conducting social work research as an insider', *Social Work*, 45(5), pp. 439-447.
[51] Marks, M. (2004) 'Researching Police Transformation. The ethnography imperative', *British Journal of Criminology*, 44(6), p. 886.
[52] See the website of the organisation at the following link: www.reformar.co.mz.

universities, and as someone working in the male-dominated field of criminal justice (itself a sector often confused with state security). In Mozambique, criminal justice (and particularly with regard to prisons and policing) historically has been a sensitive field, one not readily open to academic research and with the data for its study not publicly available. Most people working in the criminal justice system are male, and it is extremely rare to see a woman in a position of power. Consequently, doing research as a woman in this field was challenging, but fortunately several people in the National Penitentiary Service offered assistance and encouragement, and reminded me how valuable an outsider's perspective could be.

The study focuses only on Maputo, the most urbanised city of the country. Eysenck reminds us that while individual case studies might not prove anything in particular, they remain a source of important material.[53] Maputo is where main state justice institutions are concentrated. This study shows how in Maputo, notwithstanding a Eurocentric approach to justice, non-state mechanisms of conflict resolution such as community courts are working to improve access to criminal justice in ways that eventually will ameliorate some of the many problems in the prison system. This study draws attention to urban settings, and consequently addresses a significant lacuna in the literature on the topic.

The thesis does not engage with either the broad human rights-based approach to non-state mechanisms of conflict resolution, nor the gender perspective of these mechanisms. Neither does it involve the voices of the final beneficiaries of community court decisions. These are beyond the scope of the thesis and are topics for a different study.

Furthermore, the theoretical framework used to write this thesis, namely legal pluralism, has its own limitation when applied to criminal justice. The Mozambican state has historically had a monopoly on criminal matters. Thus, it is impractical to rely on a strong legal pluralism approach to criminal justice (by using non-state mechanisms of conflict resolution that work independently of the state system). Instead, postcolonial studies and their understanding of how to decolonise the approach that states have on criminal justice provide more practical solutions to the challenges of the criminal justice system. Consequently, in addition to a weak form of legal pluralism, this study also presents a postcolonial analysis of community courts, in which the central aim is to show how deploying local knowledge can contribute to future criminal justice reforms.

1.6 Thesis outline

The thesis is divided into six chapters. Chapter 1 introduces the subject of the thesis by providing the background and rationale for the study. Several key concepts used throughout the thesis (such as customary law, tradition and non-state mechanisms of conflict resolution) are defined; the research questions are outlined, and the limitations of the study are presented.

Chapter 2 presents the research methodology, research design and research methods, and discusses questions of research ethics. Desktop research was conducted in Lisbon and Maputo; fieldwork was done in Maputo through focus group discussions. Case files and empirical

[53] Eysenck, H. J. (1976) 'Introduction', in Eysenck, H. J. (ed.), *Case studies in behaviour therapy*. London: Routledge, p. 5.

observations of community court hearings were analysed together with the results of a series of individual interviews with stakeholders.

Chapter 3 reviews the theoretical framework used to conceptualise this study. The first part of the chapter offers a critical analysis of the limits of the dominant discourse of legal pluralism (as applied to criminal justice), while the second part examines the challenge postcolonial studies poses to Western supremacy in knowledge production and the legitimation of the mainstream approach to criminal justice. It considers the recognition of other knowledges to delegitimise the mainstream discourses applied to criminal justice, such as the definition of access to justice as access only to judicial courts and punishment mainly as imprisonment.

Chapter 4 examines the historical context of the state's approach to non-state mechanisms of conflict resolution in relation to criminal justice. A first part highlights the main issues facing the justice system with regard to access to justice and the state of the prison system. The second focuses on the history of non-state mechanisms for conflict resolution (with regard to criminal justice), moving from the colonial period, across the struggle for independence and into the post-independence period, and closing by analysing the state's current approach to legal pluralism. This chapter shows how the past shaped and continues to shape Mozambique's current approach to criminal justice.

Chapter 5 adopts a postcolonial-studies framework to show both some of the obstacles to and possibilities for the community courts in seeking to improve access to an effective criminal justice system for all as well as improving the carceral system. The chapter mainly analyses the functioning of community courts in the capital city of Maputo. The first part presents an overview of community courts in Mozambique and analyses the legal framework governing the courts. The second part describes in some detail the functioning of community courts in Maputo. This draws mainly on fieldwork conducted in the capital between January 2015 and February 2017. It shows where the community courts function, the characteristics of cases brought to the courts, as well as details of the proceedings and sentencing. Comparative analysis between the functioning of the community courts and judicial courts is made, with this based on the most recent data available on the state courts. The last part of the chapter looks at the relationship that community courts have both with state and non-state institutions.

Chapter 6 presents the conclusions of the thesis and its recommendations.

Chapter 2
Research Methodology

2.1 Introduction

This chapter deals with the methodology and methods used to conduct the research for the thesis. The characteristics of a qualitative exploratory research, and the reasons for selecting the capital city of Maputo, are discussed in the first part of the chapter.

To conduct this thesis, the author collected primary data through focus group discussions with judges from the Maputo community courts and interviews with judicial judges and prosecutors, representatives of CSOs, and development actors funding programmes related to non-state mechanisms of conflict resolution. Empirical observation was undertaken of hearings by community courts, and case files were accessed. Secondary data were collected and analysed through a literature review on the topic of non-state mechanisms of conflict resolution. In addition, the study was enriched with bibliographical materials found in various historical archives in Portugal and Mozambique.

These research methods are discussed in the second part of the chapter, while the third and final part examines the ethical considerations arising from the research.

2.2 Research methodology

2.2.1 A qualitative exploratory study

There is very little research that directly examines non-state mechanisms of conflict resolution from the standpoint of criminal justice reform.[54] Much of it focuses on rights-based approaches and the interrelationship between non-state mechanisms of dispute resolution, citizenship and democracy.[55] In addition, studies on non-state mechanisms of conflict resolution focus on civil disputes rather than criminal ones.[56] This focus creates the possibility for exploring how

[54] Bennett, T. (2006). Acton, T. (2005) 'Conflict Resolution and Criminal Justice – Sorting out Trouble; Can legislation resolve perennial conflicts between Roma/Gypsies/travellers and "national majorities?"', *Journal of Legal Pluralism*, 51, pp. 29-49. Damren, S. C. (2002) 'Restorative justice: prison and the native sense of justice', *Journal of Legal Pluralism*, 47, pp. 83-111. Rautenbach, C. and Matthee, J. (2010), pp.109-144.

[55] Santos de Sousa, B. e Trindade, C. (2003). Meneses, M.P. (2006) 'Law and Justice in a Multicultural Society: The Case of Mozambique', *CODESRIA*, pp. 63-88. Meneses, M.P. (2009) 'Pluralism, Law and Citizenship in Mozambique', *Oficina do CES*, 291. Meneses, M.P. (2007) 'Poderes, direitos e cidadania: o 'retorno' das autoridades tradicionais em Moçambique', *Revista Crítica de Ciências Sociais*, 87, pp. 9-42. Corradi, G. (2011) 'Access to justice in Pemba City: How exploring women's lived realities with plural law uncovers programmatic gaps', *Journal of Legal Pluralism*, 64, pp.1-27. Corradi, G. (2012) 'An Emerging Challenge for Justice Sector Aid in Africa: Lessons from Mozambique on Legal Pluralism and Human Rights', *Journal of Human Rights Practice*, pp. 1-23. Bräuchler, B. (2010) 'The revival dilemma: reflections on human rights, self-determination and legal pluralism in eastern Indonesia', *Journal of Legal Pluralism*, 62, pp.1-42.

[56] Locher, M. Steimann, B., Upreti B.R. (2012) 'Land grabbing, investment principles and plural legal orders of land use', *Journal of Legal Pluralism*, 65, pp. 31-63. Farran, S. (2011) 'Navigating Between Traditional Land Tenure and Introduced Land Laws in Pacific Island States', *Journal of Legal Pluralism*, 64, pp. 65-90. Fournier, P. (2012) 'Halacha, the 'Jewish State' and the Canadian Agunah: Comparative Law at the Intersection of Religious and Secular Orders', *Journal of Legal Pluralism*, 65,

community courts can play a role in improving the Mozambican criminal justice system. While it remains unknown whether such improvement can be achieved, existing research has identified three relevant characteristics in these courts:[57] they are cheaper, faster and closer to people than judicial courts.[58] The thesis, therefore, aims at understanding whether the speed, proximity and affordability of community courts continues to be a factor and whether there are other reasons for which community courts can strengthen access to justice for all and challenge the deplorable condition of the carceral system.

Creswell stresses how difficult it is to define a qualitative study.[59] Over the years, in fact, literature has been privileged to comprehend what qualitative study can achieve rather than agreeing on a fixed definition.[60] Denzin and Lincoln, however, state that

> [q]ualitative research is a situated activity that locates the observer in the world. It consists of a set of interpretive, material practices that make the world visible. These practices transform the world. They turn the world into a series of representations, including fieldnotes, interviews, conversations, photographs, recordings and memos to the self … This means that qualitative researchers study things in their natural settings, attempting to make sense of, or interpret, phenomena in terms of the meanings people bring to them.[61]

Taking into consideration the characteristics of community courts, a qualitative exploratory study is useful because it 'provides significant understandings of a situation around which we want to gain experience'.[62] This study will then have relevance for academic and policy-maker audiences alike. Policy-makers could increase their awareness and develop a clearer understanding of the role of non-state mechanisms of conflict resolution for the state criminal justice system, while academics might be provoked to pursue further studies, perhaps on a larger scale, so as to formulate more specific theories about criminal justice reform. In addition, given that the role of Mozambican non-state mechanisms in criminal justice is comparable to other Portuguese-speaking African countries such as Angola and Guinea Bissau,[63] this research could help governments develop more coherent policies on the role non-state mechanisms of conflict resolution can play in the state criminal justice sector in other countries.

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pp. 165-204. Molokomme, A. (1990- 1991) 'Disseminating Family Law Reforms: Some Lessons from Botswana', *Journal of Legal Pluralism*, 30-31, pp. 303-329.

[57] De Sousa Santos, B. e Trindade, C. J. (2003).

[58] Ibid.

[59] Creswell, J.W. (2007) *Qualitative inquiry and research design: Choosing among five approaches*. Second Edition. California: Sage, p. 73.

[60] Ibid.

[61] Denzin, N. K. and Lincoln, Y. S. (2005) *The Sage handbook of qualitative research*. Third Edition. Thousand Oaks, CA: Sage, p. 3.

[62] Kumar, R. (2014) *Research Methodology: A Step-by-Step Guide for Beginners*. Los Angeles: Sage, pp. 195-199.

[63] For Guinea Bissau, see Bastos, F.L. (2011) *Direito Costumeiro vigente na Guiné-Bissau. Relatório Final do Projecto de recolha e Codificação do Direito Consuetudinário vigente na República da Guiné-Bissau*. PNUD-UE-Faculdade de Direito De Bissau. For Angola, see Marques-Guedes A. (2008) 'Uma articulação entre o Estado e as Autoridades Tradicionais? Limites na congruência entre o Direito do Estado e os Direitos 'Tradicionais' em Angola', in Freitas do Amaral, D. (ed.) *Estudos Comemorativos dos 10 anos da Faculdade de Direito da Universidade Nova de Lisboa*, 1, pp. 715-753. Marques-Guedes A. (2007), pp. 15-67.

Case studies are a mode particularly suited to exploratory studies,[64] as it will be shown below when explaining why the case study of the city of Maputo was chosen. Data collection in case studies involves gathering in-depth information. For this thesis, detailed information was collected through focus groups and interviews with the judges of community courts as well as various actors working in the criminal justice system.

An exploratory study such as this does, however, have some limitations. The findings of exploratory studies do not represent the population at large, so the results cannot be generalised.[65] On the other hand, the specificity of case studies can help understanding the complexity of explorative studies.[66] To strengthen this study, a quantitative element was introduced. During the fieldwork, between 2015 and 2017, the author visited 21 community courts, more than half of the total number of 38 courts in the capital city. By visiting all these courts, she was able to conduct focus group discussions with about 150 judges (each court usually has between three to five judges) and collect first-hand information on the functioning of the courts and experiences of the judges.

2.3 Rationale for selecting Maputo as a case study

Eysenck maintains that case studies enable us to generalise and to investigate hypotheses. He suggests that 'sometimes we simply have to keep our eyes open and look carefully at individual cases – not in the hope of proving anything, but rather in the hope of learning something'.[67] Case studies produce rich descriptive data and provide a good basis for a qualitative study such as this thesis.

The selection of Maputo, the capital of Mozambique, was dictated by three main factors. First, the issues faced by the state criminal justice system are more pronounced in the capital than elsewhere. The city, for example, has regularly had the highest number of prisoners in the country. In 2019, about 5,000 people in a total prison population of 20,000 were incarcerated in the five prisons of the capital city.[68] The Provincial Penitentiary Establishment of Maputo (*Estabelecimento Penitenciário Provincial de Maputo*), which has an official capacity of 800 people, hosted more than 3,000 inmates in April 2021, representing an overcrowding rate of about 400 per cent.[69]

Secondly, Maputo is a place in which the main state justice institutions are concentrated,[70] and where the number of community courts has rapidly increased over the last five years (from 20 to about 40), and this despite the fact that Maputo has the lowest proportion of community courts.[71] Through a case study of Maputo, the thesis aims at exploring community court

[64] Creswell, J. W. (2007), p. 73.
[65] Kumar, R. (2014).
[66] Creswell, J. W. (2007, p. 75.
[67] Eysenck, H. J. (1976) 'Introduction', p. 5.
[68] Data available at: https://www.prisonstudies.org/country/mozambique (accessed 30 June 2020).
[69] Information available at: https://bit.ly/3qaxoHJ (accessed 30 April 2021).
[70] The High Court, the City Court, and five District Courts are based in Maputo, as well as the Administrative Court and Labor Courts. The Ombudsman (*Provedor de Justiça*) and the Human Rights Commission are also based in the capital.
[71] Data collected during the fieldwork conducted between 2015 and 2017.

opportunities that can be used to improve access to criminal justice for all, and ultimately alleviate conditions in prisons.

Finally, the author's working experience in the Mozambican capital over the last decade helped create crucial professional connections with people working within the justice administration. Similarly, the work she conducted as an associate researcher for the African Criminal Justice Reform (ACJR) unit of the Dullah Omar Institute at the University of Western Cape (on human rights in the Mozambican criminal justice systems), and more recently as the director of REFORMAR-Research for Mozambique provided excellent opportunities for better understanding and critically analysing the functioning of the criminal justice system, as well as engaging with reforms that could address the problems in access to justice and in prison conditions.

2.4 Research methods

2.4.1 Introduction

The initial phase of the study consisted of three months research in Portugal (May to July 2013). Through the Max and Lillie Sonnenberg Grant awarded to the author on 12 April 2013, and the cooperation between the law faculties of the University of Lisbon and the University of Cape Town, she was able to spend these months in Portugal, enriching her fieldwork. Proficiency in the Portuguese language helped her in the analysis of such literature. Thanks to the Centre of Legal Cooperation (*Centro de Cooperação Jurídica*) at the University of Lisbon, the author actively participated in the life of the faculty, attending lectures that were useful for her research and presenting the research to the students.

Through the authorisation of the Centre, I was able to access not only the libraries of the University of Lisbon and other universities in the country such as the University of Coimbra, but also institutions such as the Society of Geography (*Sociedade de Geografia*); the National Library of Lisbon (*Biblioteca Nacional de Lisboa*); the National Museum of Ethnology (*Museo Nacional de Etnologia*); the Institute of Tropical Research (*Instituto de Investigação Cientifica Tropical*), the Archive of Overseas History (*Arquivio Historico Ultramarino*), and the Tombo Tower (*Torre to Tombo*). These institutions contain an immense amount of materials, both pre-colonial and colonial (including original documents by missionaries, colonisers, travellers and anthropologists). Photocopies and digital copies of relevant materials were made for use on her return to the University of Cape Town in July 2013. While in Portugal, I also had the opportunity to interview various Portuguese academics and officials who had been employed by the colonial administration in Mozambique in the 1960s.[72]

Though an introductory phase of the fieldwork began in August 2014, the main part of the fieldwork in Maputo took place from January 2015 to February 2017. The thesis benefited from the general assistance provided by the good relationships maintained between the law faculties of the University of Cape Town and the University Eduardo Mondlane, both in Portugal and in

[72] Among academics, Paula Meneses, Paolo Granjo, Armando Marques Guedes, Ana Carvalho, João Pedro Campos, Esmeralda Martinez, and Dario Moura Vicente. See also the website of Bento Lopes, available at https://foreverpemba.blogspot.com, and its extensive bibliography on justice in Mozambique during the colonial era. Lopes was a colonial officer who worked for the administration of various cities and villages in Mozambique from the 1960s until 1974, when he fled before independence.

Maputo. The collaboration between the universities facilitated her residence in Mozambique for study purposes. The University Eduardo Mondlane assisted her in rapidly acquiring the authorisation from the National Directorate of the Justice Administration (*Direcção Nacional da Administração da Justiça,* DNAJ*),* the institution responsible for the community courts in the country, to conduct the study and gain access to the National Library and the Historical Archive of Maputo. I was also offered a space to study at the Faculty of Law where I could concentrate on the preparation of the fieldwork, data collection and analysis of such data.

In August 2014, the introductory phase of the fieldwork in Maputo began with a meeting with the DNAJ. While waiting for authorisation from the DNAJ to conduct the study, the author was able to hold an informal meeting with the President of the Commission (*Comissão*) of the judges of the Maputo community courts, explaining the details of her research. After official approval from the DNAJ, visits to the community courts were scheduled. Between January and August of 2015, I visited 21 community courts in six of the seven districts of the city of Maputo, as shown in Table 1.

N.	Neighbourhoods/name of court	N.	District of Maputo
1	Malhazine	1	Kamubukwana
2	Magoanine A		
3	Magoanine D		
4	Nsalene		
5	Inhagoia B		
6	25 de Junho		
7	Urbanização	2	Kamaxakeni
8	Mafalala		
9	Polana Canhiço B		
10	Unidade 7	3	Nhlamankulu
11	Chamanculo D		
12	Mikadjuine		
13	Mahotas	4	Kamavota
14	Albazine		
15	Costa do Sol		
16	Inguide	5	Katembe
17	Chali		
18	Incassane		
19	Chamissava		
20	Guachene		
21	Malhangalene B	6	Kampfumo

Table 1: Community courts visited in the six districts of Maputo

The President of the Commission representing the Maputo community court judges, who accompanied the author of the thesis during the fieldwork, scheduled the visits based on the availability of the judges. Focus group discussions were conducted with the judges of the community courts of the 21 courts visited, involving a total number of about 150 judges.

Interviews were held with representatives of the Ministry of Justice, Constitutional and Religious Affairs, the Maputo Provincial Justice Directorate (*Direcção Provincial da Justiça,* DPJ), the Legal Training Centre (*Centro de Formação Jurídica e Judiciária,* CFJJ) and the Legal Aid Office (*Instituto de Patrocínio e Assistência Jurídica,* IPAJ), respectively.

Interviews were also held with judges and prosecutors working in the six district judicial courts in Maputo as well as with CSOs such as the Centre for Research and Assistance to the Informal Justice (*Centro de Pesquisa e Apoio à Justiça Informal*, CEPAJI), Women and Law Southern Africa (WLSA), the Study Centre Aquino de Bragança (*Centro Estudos Aquino de Bragança,*

CESAB), Organisation for Conflict Resolution (*Organização para Resolução de Conflictos*, OREC), JUSTA PAZ, and the Human Rights League (*Liga dos Direitos Humanos*, LDH).

Finally, interviews were conducted with representatives of the United Nations Development Programme (*Programa de Desenvolvimento das Nações Unidas*, UNDP), United Nations Fund for Children (UNICEF), and the Danish Development Program (DANIDA).

2.4.2 Focus group discussions with judges of community courts

Twenty-one focus group discussions with the judges of the Maputo community courts were conducted through semi-structured interviews that aimed primarily at understanding the functioning of the court, its role within the state criminal justice with the judicial courts, and its relationships with other non-state mechanisms of conflict resolution.

When the courts were visited, groups of five to eight judges would gather to give an official welcome, and the discussions would take place either inside the premises of the courts or in the shade of a nearby tree, if no other gathering place was available.

Information concerning the geographical area in which the courts functioned, the facilities available, and the composition of the courts was gathered. The sessions devoted to assessing the functioning of the courts looked in particular at the type of cases the courts dealt with, the procedures necessary for opening a case before the courts, and the decisions made by the judges. Examination of the interaction between the community courts with the state justice system was aimed at assessing the relationship of the courts with the judicial courts and other institutions such as the Institute for Legal Aid. Finally, it was assessed how the courts interact with other mechanisms of dispute resolution, such as those provided by CSOs and traditional healers.

Each of the focus group discussions lasted about two hours, giving the participants the chance to openly discuss their experiences. Although the sessions were fairly lengthy, the participants enjoyed them as they had few other opportunities to express themselves and reflect on their involvement in the courts. No audio-recorder was authorised by the groups since participants wanted to discuss the questions freely and anonymously. To make sure that all information was preserved, the author took extensive notes during the discussions, and these were organised immediately after the end of the interview. Although the local languages of the capital city are Changane and Ronga, the community court judges spoke and understood Portuguese, the language adopted for the discussions. At those moments when judges preferred to express themselves in either Changane or Ronga, or they could not understand the author's questions, the President of the Commission of the Maputo community court judges assisted with the necessary translation and interpretation.

The data collected from the focus groups was analysed by dividing the information into the broad themes outlined in the guidelines for semi-structured interviews. Each theme was examined based on the responses from the participants, and any information that revealed patterns was grouped so as to enable broad understanding of the functioning of the courts. This analysis will be discussed in Chapter 5, where the identification of the interviewees (always between five to eight participants) is made by using two references, a number and a letter. For example, a reference can be 001(A). The number 001 will refer to the code given to the group discussion while the letter A will specify the interviewee.

2.4.3 Access to case files and empirical observation of court hearings

Between January and August 2015, the author of the thesis had access to 99 cases' files from three community courts, namely *Chamanculo B, Mikadjuine* and *Polana Canhiço B.* These files provided in-depth data about the type of conflicts opened at the courts; the procedures of the courts; and the duration of the cases and their sentencing. In addition, the files allowed the gathering of some personal information about plaintiffs or defendants, with this yielding a more detailed understanding on the actual functioning of the courts; the profile of those who resort to the courts; and the type of sentences delivered by the judges.

Observation of two criminal cases was allowed by judges in order to witness and understand how community courts handle cases and reach their final decisions. The two cases were observed at the courts of *Costa do Sol* and *Polana Canhiço B.* At the *Polana Canhiço B* court (a court which had the highest domestic violence cases in the city), a case of domestic violence was observed, while a case of theft at *Costa do Sol* was also closely followed. The two cases were chosen as representing the most prevalent criminal cases dealt with by community courts. Because no authorisation for recording was given, the author has relied on extensive hand-written notes taken while sitting at the back of the rooms where the hearings took place.

2.4.4 Individual interviews with other stakeholders

Individual interviews were conducted with four types of stakeholder: governmental institutions; judges and prosecutors from district courts in the city; some CSOs; and development actors such as the UNDP (which finances projects related to non-state mechanisms of conflict resolution). These all helped in the assessment of the perspectives of different actors working within, and supporting the reform of, the Mozambican criminal justice system. The following table shows the institutions and the designation of each of the interviewed people.

N.	Type of institution	Name	Person interviewed
1	Governmental Institutions	Ministry of Justice, Constitutional and Religious Affairs	Responsible for Community Courts
2		Provincial Directorate of Justice	Director
3		Legal and Judicial Training College	Director
4		Legal Aid Institute	Director
5	District Courts	*Kampfumo* District Court	Judge Prosecutor
6		*Kamubukwana* District Court	Judge Prosecutor
7		*Kamaxakeni* District Court	Judge Prosecutor
8		*Nhlamankulu* District Court	Judge Prosecutor
9		*Kamavota* District Court	Judge Prosecutor
10		*Katembe* District Court	Judge Prosecutor
11	Civil society organisations	CEPAJI	Director
12		WLSA	Director
13		CESAB	Director
14		OREC	Director
15		JUSTA PAZ	Director
16		LDH	Director
17	Development actors	UNDP	Responsible for the Justice Program

18		UNICEF	Responsible for the Children Protection Office
19		DANIDA	Responsible for the Justice Program

Table 2: Governmental institutions, judicial judges, CSOs and development actors interviewed

The interview guidelines for the four types of stakeholders covered three main issues: the current challenges facing the criminal justice system in the country; the current situation of non-state mechanisms of conflict resolution in the country and in the city of Maputo; and the relationship between community courts and the state and non-state actors.

The 25 individual interviews were conducted face-to-face. Participants were chosen on the basis of their direct and indirect involvement with non-state mechanisms of conflict resolution and the criminal justice system.

The interviews with the four institutions representing the Ministry of Justice, Constitutional and Religious Affairs were aimed at understanding the political position these held towards non-state mechanisms of conflict resolution (and community courts in particular). Five judges and five prosecutors of the criminal sessions of the judicial courts of the city of Maputo were questioned about the challenges faced within the judicial system in their daily work and their collaboration with the community courts. The purpose of the interviews with representatives of CSOs was to seek a better understanding of projects involving non-state mechanisms of conflict resolution in Maputo and the relationship with community courts. Finally, the author chose to interview development actors that were providing financial support for justice system projects in the country (with the emphasis on those programmes related to community courts) in order to ascertain their involvement in improving access to justice in the country.

Each interview was conducted in Portuguese and lasted between 45 minutes and an hour. Since audio-recording was prohibited, the author relied on the extensive notes she took during the interviews, and these served as the basis for the analysis of the information collected.

As with the focus group discussions, the analysis of the interview data was undertaken by dividing the information into a number of broad themes: whether projects involving non-state mechanisms of conflict resolution were supported by the government, CSOs and development actors; and what were the implications for the justice system in the country. The analysis of the individual interviews will be discussed in Chapter 5. There, the reference for the individual interviews is given only by number (from 1 to 25).

2.5 Research ethics

The Research Ethics Committee granted ethical clearance on 7 November 2013, on condition that formal authorisation for the research was given by the Ministry of Justice, Constitutional and Religious Affairs. This was obtained in January 2014. The clearance was confirmed in April 2016 and extended for 12 months by the Research Ethics Committee.

Consent and information forms were signed by all participants and those who assisted me in explaining the research. The forms explained that participation was free and voluntary and that participants could decide whether to participate in the research. The forms included the terms of confidentiality, where confidentiality is understood to include that while the researcher

knows the identity of all the participants, all information presented in the thesis is separated out from any personal data and the information is not divulged improperly to others.

The confidentiality of the data collected was preserved by keeping the information in safe places: first of all in a locked drawer in the author's office at the Centre for Comparative Law in Africa (CCLA); and in Maputo, information was secured partly online and partly at home. At home, the author kept undigitised information such as the signed consent and information forms; online information was secured in a Dropbox account with two-step verification (where any attempt at opening the account from a new device requires coded permission from the user).

Permission was also required to tape-record interviews and such recording was done only with full consent of the participants. Audio records that disclosed the identity of the people involved were kept only if they consented thereto. Any names or information from which a person's identity could be inferred was removed (unless permission was specifically given for this to be published).

2.5.1 Participants' benefits

This research can benefit the different participants in different ways. Community court judges had the opportunity to share their experiences, positively contributing to the present study. This study shows the important role the judges play in the criminal justice landscape of the country and how (in particular) they can present important challenges around issues such as access to justice and the condition of prisons. This study benefits them by highlighting the contribution they make to the country's justice system and bringing this to the attention of the state. More particularly, it helps to deconstruct many of the usual criticisms directed at the judges of the community courts, and also shows how many of the same criticisms may, in fairness, be directed at judicial judges and the state court system. It helps identify common causes of concern within the Mozambican justice system as a whole, and not only in the community courts and other non-state mechanisms for conflict resolution.

State judges and prosecutors at district level may also benefit from the study as it shows how their workload in criminal cases can be reduced by promoting collaboration with community work. It also suggests that shifting some of the work from the state judges' sector to the community courts can improve access to justice for all, particularly with regard to petty crimes.

In addition, this study might assist state institutions such as the Ministry of Justice, Constitutional and Religious Affairs in promoting urgently needed reforms to the criminal justice system that take into better account the potential contribution of the community courts and consequently help with the historical challenges faced by the Ministry.

Bringing the attention of development actors to the findings of this study would also help in the creation of future projects involving community courts.

All the participants involved in the study will be invited to attend presentations about the final findings of the thesis, with the aim of promoting serious national debate about future criminal justice reforms in Mozambique. Similarly, the study can also be presented to partners from other Portuguese-speaking African countries, for example Angola and Guinea Bissau, which share similar historical characteristics with the Mozambican justice system.

2.6 Concluding remarks

This chapter showed that an exploratory approach provided the most suitable methodology for the study. The reasons for selecting Maputo as the case study were explained, as were the methods used to conduct the study. Access to historical archives, focus group discussions and individual interviews as well as access to case files and empirical observations were discussed. The second part of the chapter looked at research ethics and the different potential benefits for participants. In order for the benefits to be achieved by participants, however, the limitations of the literature on legal pluralism and the possibilities that postcolonial studies hold for criminal justice need to be analysed. This analysis is the topic of the next chapter.

Chapter 3
Criminal Justice: The Limits of Legal Pluralism and the Possibilities of Postcolonial Studies

> *It is not the Eurocentric conception of human rights that moves us, it is conceptions for dignity such as the fight for water, the fight for land, the fight for justice (De Sousa Santos, 2015).*[73]

3.1 Introduction

Chapter 3 reviews the theoretical framework used to conceptualise the role of community courts in Mozambique's criminal justice system. It is divided into two parts. The first part presents a critical analysis of the limits of the dominant discourse on legal pluralism, and assesses how the existing Mozambican literature on this has not addressed issues of criminal matters. The second part of the chapter considers how postcolonial studies have identified the mainstream Eurocentric responses of African states to criminal justice, and shows the possibilities for replacing these imported approaches with ones that highlight the need for the recognition of local knowledges.

3.2 Situating the limits of the dominant discourse on legal pluralism

Over the past 40 years, literature on legal pluralism has focused on civil rather than criminal matters. Legal pluralism is referred to in the dominant scholarly literature as the 'the presence in a social field of more than one legal order',[74] as defined by Griffiths in 1986.[75] Griffiths explains that legal pluralism is a 'state of affairs for any social field'[76] and does not limit the term's application to any particular arena. Legal pluralism may thus apply to civil and criminal matters alike.

The main issues which legal pluralists have focused on are the questions of access to land and property, women's access to family justice, and the relationship between religious norms and state laws, showing in each case how different norms can be applied.[77] The right of access to land (for example) can be grounded in state law, but also in non-state norms such as the

[73] See video available at: https://www.youtube.com/watch?v=5yqQ9n2nhgE&t=1397s (accessed 27 August 2021).
[74] Griffiths, J. (1986) 'What is Legal Pluralism?', *Journal of Legal Pluralism,* 24, p. 1.
[75] Ibid. pp. 1-55.
[76] Ibid. p. 3.
[77] See the exhaustive literature produced on these topics by the *Journal of Legal Pluralism* available at: https://commission-on-legal-pluralism.com/journal (accessed 20 June 2020).

recognition of land tenure by a local leader.[78] Similarly, marriage can be recognised by law, but also in and through the religious and/or traditional norms which recognise a marriage.[79]

The *Journal of Legal Pluralism and Unofficial Law* is an internationally recognised academic journal dedicated to legal pluralism around the world.[80] It has been the official publication of the Commission on Legal Pluralism since 1978 (the date of its founding), and also organises international symposia and courses on legal pluralism.[81] Between 1969 and 2020, the journal published over 600 articles on legal pluralism, while more than 500 articles focused on civil matters.[82] Articles related to criminal justice make up less than a tenth of the total number. This fact prompts two questions. Why is the *Journal of Legal Pluralism* not publishing more material on criminal justice? Are there not enough academics or practitioners who write about legal pluralism as applied to criminal justice?

There are, undoubtedly, authors who publish on legal pluralism as applied to criminal justice in other journals such as in the *Annual Review of Law and Social Science*,[83] the *Journal of Law and Society*,[84] the *Journal of Latin American Studies*,[85] the *Journal of African Law*,[86] and *Social and Legal Studies*,[87] to name just a few. However, articles which deal with criminal justice are much less frequent than those that deal with civil matters. In addition, the few articles that focus on criminal justice share two main characteristics. First, they tend to assess customary law practices as positive and as important for representing the multifaceted societies that they symbolise; secondly, they generally argue that the state should incorporate customary criminal practices within the state justice system. However, the incorporation of customary criminal law

[78] See authors such as Benda-Beckmann, Meinzen-Dick, Unruh and Knight. See Meinzen-Dick and R. Nkoya, L. (2007) 'Understanding legal pluralism in water and land rights: lessons from Africa and Asia', in van Koppen, B., Giordano, M. and Butterworth, J. (eds.), *Community-based Water Law and Water Resource Management Reform in Developing Countries*, pp. 8/1-8/12. Available at: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.468.8717&rep=rep1&type=pdf#page=109 (accessed 23 June 2020). See Knight, R. (2010), 105.

[79] See the extensive literature by Amien on the freedom of religion and women's rights to equality. Amien, W. (2006) 'Overcoming the Conflict between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages', *Human Rights Quarterly*, 28(3), pp. 729-754; Amien, W. (2010) 'A South African Case Study for the Recognition and Regulation of Muslim Family Law in a Minority Muslim Secular Context', *International Journal of Law, Policy and the Family*, 24 (3), pp. 361–396; Amien, W. (2013) 'Reflections on the recognition of African customary marriages in South Africa: seeking insights for the recognition of Muslim marriages', *Acta Juridica*, 1, pp. 357-384.

[80] See information available at: https://commission-on-legal-pluralism.com/journal (accessed 29 June 2020).

[81] Ibid.

[82] See issues of the journal available between 1978 and 2000, available at: https://bit.ly/3KUswPf (accessed 30 June 2020).

[83] See information about the journal available at: https://www.annualreviews.org/journal/lawsocsci (accessed 30 June 2020).

[84] See information about the journal available at: https://onlinelibrary.wiley.com/journal/14676478 (accessed 30 June 2020).

[85] See information about the journal available at: https://bit.ly/3KQ3H70 (accessed 30 June 2020).

[86] See information about the journal available at: https://bit.ly/3HjE5NU (accessed 30 June 2020).

[87] See information about the journal available at: https://journals.sagepub.com/home/sls (accessed 30 June 2020).

into state law is usually understood as presenting a variety of disadvantages.[88] Griffiths, for example, believes, referring to Botswana,[89] that through incorporation 'it is no longer possible … to see the customary system as representing something other than state justice'.[90] International organisations such as Penal Reform International also emphasise (referring specifically to Africa) that incorporating non-state justice systems into state one justice systems tends to diminish the important characteristics of non-state justice systems, such as flexibility and informality.[91] All in all, by promoting the incorporation of non-state mechanisms into state law, the articles on legal pluralism with regard to criminal justice reinforce legal centralism: the state's power of creating and enforcing the state criminal law.[92]

Legal centralism has its foundation in a Eurocentric theory, one which considers state law as the only existing law and standing as separate from other fields.[93] Legal pluralism (regarded variously as a theoretical framework, analytical tool, practice, or political issue)[94] emerged as a counter to legal centralism.[95] It challenges the legal-centralist view by showing that in reality people are governed by many different laws and not only those imposed by the state.[96] Legal pluralists stress how the state is far from being an autonomous social field: as Moore puts it, 'the state [in fact] creates laws but laws created by other social fields also affect the state law'.[97]

But if literature on civil matters challenges legal centralism, this approach does not appear in the articles related to criminal justice. The scholarly literature on legal pluralism with regard to criminal justice conspicuously fails to confront legal centralism. Paradoxically, it is susceptible to many of the criticisms that legal pluralists make against legal centralism, as the following examples show.

In 2003, in an article on human rights, federalism and legal pluralism in Ethiopia, Donovan and Assefa chose to assess how the different ethnic groups of the Amhara, Gumuz and Somali[98]

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[88] For the implications of the incorporation of non-state mechanisms into the state system, see Forsyth, M. (2007) 'A typology of relationships between state and non-state justice systems', *Journal of Legal Pluralism*, 56, pp. 67-113.

[89] See Customary Courts Act.

[90] Griffiths, A. (1996) 'Between Paradigms: Differing Perspectives on Justice in Molepolole Botswana', *Journal of Legal Pluralism*, 36, pp. 212. In her paper, Griffiths discusses issues of popular justice in the village of Molepolole, in Botswana. Although the focus of the paper is on gender, Griffiths argues that popular' justice in terms of the Chief's kgotla and Magistrate's court represents both the national legal system of Botswana and the interests of the state. For the legal framework in place, see also the Customary Courts Act (Act No. 16 of 1996).

[91] Penal Reform International (2000) *Access to Justice in Sub Saharan Africa: The Role of Traditional and Informal Justice Systems*. London and International: Penal Reform International.

[92] Araújo S. (2014) *Ecologia de Justiças a Sul e a Norte. Cartografias Comparadas das Justiças Comunitárias em Maputo e Lisboa*. Tese de Doutoramento. Universidade de Coimbra.

[93] Ibid.

[94] Melissaris, E. (2004) 'The More the Merrier? A New Take on Legal Pluralism', *Social and Legal Studies*, 13, p. 65.

[95] Griffiths defines legal centralism as follows: 'law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions'. Griffiths, J. (1986), p. 3.

[96] Melissaris, E. (2004), p. 68.

[97] Moore, S. F. (1973) 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study', *Law and Society Review*, 7(4), p. 723.

[98] According to Donovan and Assefa, Amharas are the people most closely identified with the ancient and modern Ethiopian state; Gumuz are the most removed from modern civilisation of all Ethiopian

deal with homicide, as the most extreme example of crimes.[99] The authors suggest there are two main reasons for Ethiopia to preserve its customary law practices. First, the country is very large, so it is practically impossible for the state to govern the whole country effectively.[100] Secondly, Ethiopia is composed of some 60[101] different legal systems, each of which has its own peculiar culture.[102] In the Amhara region, for example, customary proceedings deal with homicide as a matter of family responsibility and compensation rather than (as prescribed by the country's Penal Code) as a question of individual responsibility with imprisonment as the appropriate form of punishment.[103]

Donovan and Assefa illustrate how the recognition of customary practices could be reflected within the federalist states of the country, allowing these states legislative power over criminal matters. Ethiopia, in fact, has been a federal country since 1994 and is currently divided into nine (mainly ethnic) states.[104] Federalism could help with the recognition of the customary criminal justice practices active in each state and thereby enhance the effective participation and representation of each federal state.[105]

Rather than grounding their arguments in federalist theory, Donovan and Assefa suggest that the authority to accommodate customary law practices and set up procedural mechanisms to support and preserve them lies with the central government and is provided for by the 2003 Ethiopian Penal Code.[106] In 2003, the Ethiopian Penal Code dated back to 1957 and was based on the legal centralism of the European colonial legacy. A revised Penal Code came into force in 2004, and this represented an ideal opportunity for the federal states (rather than the central government) to have authority over criminal matters, but the opportunity for this faded away.[107] Instead, the state decided that the new code would continue to be based on the colonial legacy, and assigned power over penal matters to the central government.

As will be shown in the second part of this chapter, the Ethiopian state, like many other African States in the post-independence era, reasserted its monopoly on criminal matters through a

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ethnic groups, while Somalis are nomadic pastoralists, the least assimilated into the modern Ethiopian State.

[99] Donovan, D. and Assefa, G. (2003), pp. 505-552.

[100] Ethiopia has an area of 1.14 million km^2. See http://www.ethiopia.gov.et/facts-and-figures (accessed 25 June 2020).

[101] While Donovan and Assefa state in their article that there were 60 ethnic groups in Ethiopia, in the 2007 census the Ethiopian government recognised more than 90 such groups. See https://web.archive.org/web/20120214221803/http://www.csa.gov.et/pdf/Cen2007_firstdraft.pdf (accessed 25 June 2020).

[102] Ethiopia has a population of more than 84 millions people. See http://www.ethiopia.gov.et/facts-and-figures (accessed 25 June 2020).

[103] See articles 521-527 of the Penal Code. Aggravated homicide is punishable with life imprisonment or the death penalty (article 522 of the Penal Code). Article 522(2) states: 'Death sentence shall be passed where the offender has committed murder in the first degree while serving a sentence of rigorous imprisonment for life.

[104] The States are Afar, Amhara, Benishangul-Gumuz, Gambella, Harari, Oromia, Somali, Tigray and the Southern Nations, Nationalities and Peoples Region (SNNPR). The Oromo, Amhara, Somali and Tigrayans comprise 75% of the population.

[105] Ngoenha, S. (2018) *Filosofia Africana. Das independencies às liberdades*. Maputo: Paulina, p. 194.

[106] Donovan, D. and Assefa, G. (2003), p. 525.

[107] Fessha, Y.T. (2016) *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia*. Routledge.

Eurocentric approach. Postcolonial studies suggest that moving away from this colonial legacy can bring significant benefits to the people and their access to justice.

Nevertheless, by arguing that it is for the central government to accommodate customary law practices, the authors are open to the criticism that legal pluralists themselves make against legal centralism understood as embodying the centralised power of the state. Although recognising the importance of customary law practices, Donovan and Assefa embed customary criminal practices within a 'weak legal pluralism'.[108] Griffiths considers legal pluralism weak when the distinct legal orders are seen as branches of one and only existing order, that of state law.[109] The consequence is that (as Michaels puts it) '[by] transforming non-state norms into its own law, into facts, or into subordinated law, the state can maintain its law-making monopoly without having to interfere with these [non-state] norms themselves'.[110]

The need for placing the application of customary law practices in the hands of the state justice system was also shown in an article written by Rautenbach and Matthee, in 2010, for the *Journal of Legal Pluralism*.[111] This article examines the South African jurisprudence on criminal matters in which culture played a substantial role with regard to the definitional requirements of a crime and in terms of mitigating sentences.[112] The authors state that they are sceptical in believing that 'indigenous customs can be raised as a defence or mitigating factor whenever an African accused stands trial in South Africa'.[113] They argue, in fact, that courts can mitigate their sentences only when they found the accused not culpable for the committed crime. The culpability can be dismissed only if it is proved that the accused committed an action that, following customary practices, is lawful and that the person knew about the lawfulness and was in full possession of his or her mental faculties. The authors do not engage with the legal centralist perspective with which state courts see cultural defences, but leave entirely to the judiciary the proper and complete application of any cultural defence. They conclude by saying:

> The effective application of such a defence will be the task of the judiciary and the judiciary will need to perform this task objectively, in a state of mind free from any prejudice and preconceptions, and in the framework of constitutional values requiring respect for human dignity, freedom and equality.[114]

Leaving the application of customary practices in the hands of state justice (weak legal pluralism) has continued to be supported by legal pluralists, as can be seen in a recent article (2020) by Dambe and Fombad, one also published in the *Journal of Legal Pluralism*.[115] The

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[108] See Woodmann, D.G. (1988) 'Unification or continuing pluralism in family law in Anglophone Africa: past experience, present realities, and future possibilities', *Lesotho Law Journal*, 4(2), pp. 33-79. See also Dupret, B., Berger, M. and al-Zwaini, L. (1999) *Legal Pluralism in the Arab World*. The Hague: Kluwer Law International.

[109] Griffiths (1986) p.1.

[110] Michaels, R. (2005) 'The Restatement of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism', *Wayne Law Review*, 51, pp. 1209-1259.

[111] Rautenbach, C. and Matthee, J. (2010), pp. 109-144.

[112] For the definition of the term 'cultural defence', see Bennett T.W. (2004) *Customary Law in South Africa*. Cape Town: Juta.

[113] Rautenbach and Matthee (2010) p. 140.

[114] Ibid. p. 144.

[115] Dambe, B. J. and Fombad, C. M. (2020), pp. 65-81.

article examines cattle theft in Botswana, a crime that affects many people. The Stock Theft Act No. 16 of 1996 regulates cattle theft[116] and gives customary courts the jurisdiction to deal with the matter, while any appeals go to the Magistrates' Courts. Unlike the ways in which the customary courts apply the principles of restorative justice to cattle theft, the Stock Theft Act provides for the use of harsh penalties such as imprisonment.[117] Dambe and Fombad argue there is little evidence to suggest the Act has helped decrease stock theft: it has in fact continued to increase over the past 20 years. They conclude that it would be better for the Magistrates' Courts to have jurisdiction over cattle theft as these are 'courts that are competent in terms of personnel and procedure to deliver proper justice'.[118]

Legal pluralists would usually have found the long sentences of imprisonment provided by the Act to be deeply problematic, as they would also consider leaving the solution to cattle theft effectively in the hands of judicial courts.[119] An article on cattle theft in Lesotho, for example, shows how inefficient judicial courts are in attending to stock theft cases.[120] Dzimba and Matooane argue there are not enough judges in the country to deal with cattle theft (a common problem facing jurisdictions in southern African countries). They also state that

> [o]ften witnesses, victims, perpetrators and their relatives have to attend courts for lengthy periods of time. People want speedy delivery of justice: if they have to wait too long for this to happen, they lose confidence in the judicial system. Quite often they take the law into their own hands which has at times led to feuds, killings and destruction of property, leaving countless families destitute.

While Rautenbach and Matthee, Dambe and Fombad use positive terminology (such as 'proper justice', 'objectivity', and 'effective application') in representing the state justice system, they do not do so when describing non-state mechanisms of conflict resolution, such as the customary courts in Botswana and the appeal to customary practices (such as the cultural defence), in South Africa. Overall, in referring to state justice as the system that provides effective and proper justice, they assume the perspective of legal centralism. By doing so, other forms of conflict resolution are seen by implication as a lesser, ineffective or even improper form of justice. This implication works against the reasonable expectation that legal pluralists would encourage a shift in all sectors of society, criminal justice included, in accepting and

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[116] See Stock Theft Act. Available at: https://gazettes.africa/archive/bw/1996/bw-government-gazette-dated-1996-08-05-no-47.pdf (accessed 29 June 2020). The Stock Theft Act was amended by Act 7 of 2019.

[117] See articles 3(1) and (2) of the Stock Theft Bill 16 of 5 August 1996. Terms of imprisonment for stealing of stock or produce range from five to 20 years.

[118] Dambe and Fombad (2020), pp. 65-81.

[119] Article 3 of Act 7 of 2019 provides: '(1) Any person who steals any stock or produce, shall be guilty of an offence and, notwithstanding the provisions of any other written law, shall be sentenced for a first offence to a term of imprisonment for not less than five years or more than 12 years without the option of a fine, and for a second or subsequent offence to a term of imprisonment for not less than seven years or more than 15 years without the option of a fine. (2) Where, for the purpose of stealing any stock or produce, or in the course of stealing any stock or produce, violence or the threat of violence is used, the penalty shall be a term of imprisonment for not less than ten years or more than 20 years without the option of a fine, and if the violence used or threatened involves the use of a firearm or other offensive weapon the penalty shall be a term of imprisonment for not less than 12 years or more than 25 years without the option of a fine.'

[120] Dzimba, J. and Matooane, M. (2005) *Stock Theft and Human Security - A Case Study of Lesotho*. Pretoria: Institute for Security Studies. Available at: https://bit.ly/3o8XyJC (accessed 25 May 2021).

promoting a new frame of knowledge based on the premise that reality is far more complex and nuanced than that which state law creates, adjudicates and enforces.[121]

Pimentel, for instance (referring to the Indian American *Ex Parte Crow Dog* case law from the Sioux tribe of the 1880s) reminds us how the Supreme Court framed the necessary respect for an indigenous system of criminal justice.[122] In this case, which took place within the Sioux tribe, the murder of Spotted Tail by Crow Dog was resolved by meeting and discussion in which both the perpetrator and victim's families sat together with the tribal authorities. In the resolution of the crime, Crow Dog's family provided Spotted Tail's family with cash, some horses, and a blanket following the dictates of their culture. However, the white settlers did not approve of this form of resolution and brought the matter before the federal authorities. The consequent decision of the federal judges was to apply the death penalty, but the Supreme Court judged the matter differently and decided that the exclusive jurisdiction for this case of murder case belonged to the tribal authorities. As far back as the 19th century, the Supreme Court was able not only to recognise the importance of customary criminal practices in a community, but also to refrain from forcing state law upon that community.

Pimentel noted the importance of customary practices but he also stressed how 'the reform and development winds are blowing against them, particularly on what have become non-negotiable issues of human rights and rule of law'.[123] Customary practices in criminal justice are very likely to remain subordinate to state law. This is likely to be the case not only if states fail to get rid of their cultural and ideological biases, but also if the legal pluralist discourse on criminal justice does not manage to develop a different and coherent perspective to that offered by state centralist discourse.[124] On this particular issue, Isser observes:

> Too often customary structures are only caricatured in rule of law literature set against an idealized formal justice system. The result is that most practitioners seem to assume that 'customary' means more discriminatory abuse of human rights than formal systems and that customary systems are best left alone, or better, criminalized.[125]

The tendency to denigrate customary practices relative to an idealised state justice is discernible not only in the mainstream scholarly literature on legal pluralism, but also in the discourse of development actors. The World Bank, the Food and Agriculture Organization (FAO), and UN agencies such as UN Women all argue that while criminal customary practices with regard to crime are important, they tend to be more discriminatory than state justice. The FAO, for example, states that in some cases, '[c]ustomary norms may be used to dispossess women of their rights, although in other cases they may be used to defend women's land claims; this

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[121] Ehrlich, E. (2002) *Fundamental Principles of the Sociology of Law.* Routledge.

[122] Pimentel, D. (2010) 'Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law', *Harvard International Review*, 32(2), pp. 32-36.

[123] Ibid.

[124] Ludsin, H. (2003) 'Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of Its Customary Law', *Berkeley Journal of International Law*, 21 (62), pp. 62-110. Available at: http://scholarship.law.berkeley.edu/bjil/vol21/iss1/3 (accessed 29 June 2020).

[125] Isser, D.H. (2011) *Customary Justice and the Rule of Law in War-torn Societies* by Deborah H. Isser (ed.). Washington DC: United State Institute of Peace Press, Bruce Baker International Peacekeeping, p.19.

leaves room for uncertainty in the interpretation and application of the law'.[126] The UNDP states that both legal representation and the confidentiality of proceedings involving children are not always recognised by criminal customary law.[127] Similarly, the International Development Law Organization (IDLO) affirms that victims and suspects of crime are not necessarily protected in customary criminal procedures.[128]

The involvement of development actors within the discourse of legal pluralism as applied to criminal justice has increased over the years, largely due to the fact that because of their involvement in and knowledge of customary practices, development actors could create strategies to access justice for all and fight poverty. In reality, customary practices are more accessible to and comprehensible by people than the state justice system.[129]

Nevertheless, if development actors, from a state-law point of view, critique non-state mechanisms of conflict resolution for not respecting human rights and the rule of law, other authors show how indigenous populations are discriminated against by the state law of their countries.[130] In Canada, for example, as Depew remarks, '[a]boriginal people believe that the [state] justice system discriminates against them, and marginalises and trivialises the importance of their cultures and community circumstances to their justice concerns'.[131]

Similarly, since the 1990s, research has found an overrepresentation of Aborigines within the Australian criminal justice system.[132] Aborigines are much more likely to get arrested and be sent to prison,[133] not because they are more prone to crime but because the Australian criminal justice system is discriminating racially against them.[134] The lack of employment and educational opportunities, for example, and the difficulties in accessing health and social services affect the way Aborigines live their daily lives, and it is this way of life that precipitates the commission of crimes.

Non-violent alcohol and drug-related offences are the major source of the arrest of Aborigines in Australia and these offences are demonstrably related to ongoing poverty and

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[126]Gender and Land Rights Database. Mozambique – Customary norms, religious beliefs and social practices that influence gender-differentiated land rights. Available at: https://bit.ly/3u9ZZPP (accessed 16 October 2019).

[127] United Nations Development Programme (2015) Informal Justice Systems. Charting a course for Human Rights-based Engagement. *United Nations Development Program.* Available at: https://bit.ly/3Gelgv1 (accessed 16 October 2019).

[128] Ubink, J. and van Rooijc, B. (2011) *Traditional Justice: Practitioners' Perspectives. Towards Customary Legal Empowerment: An Introduction*. Working Paper Series. International Development Law Organisation, p. 5. Available at: https://www.files.ethz.ch/isn/137095/WP2UBINK.pdf (accessed 16 January 2021).

[129] See, for example, Ubink, J, and Mclnerney, T. (2011) *Customary Justice: Perspectives on Legal Empowerment.* International Development Law Organisation.

[130] See authors such as La Prairie, Doob, Hazelhurst, Tauri, Pratt, Hazelhurst and Landau.

[131] Depew, R.C. (1996) 'Popular Justice and Aboriginal Communities Some Preliminary Considerations', *Journal of Legal Pluralism*, 28, pp. 21-67.

[132] Broadhurst, R.G. (2002) 'Crime and Indigenous People', in Graycar, A. and P. Grabosky, (Eds.), *Handbook of Australian Criminology*, Melbourne: Cambridge University Press. Cunneen, C. (1992) *Aboriginal perspectives on criminal justice*. Sydney: Institute of Criminology. MonograSeries, 1, pp.1-94. Garland, D. (1990) *Punishment and modern society*. Oxford: Clarendon Press.

[133] In 2000, three-quarters of Australia's prison population were Aborigines, even though they represent less than 30 per cent of the country's broader population (about 20 million in 2000).

[134] Broadhurst, R.G. (2002). Cunneen, C. (1992). Garland, D. (1990).

unemployment.[135] Parents' involvement in drugs and alcohol and its criminal effects have also caused poor parenting and the poor performance of children in school, evident in the significant proportion of them who fail to complete their schooling. Meanwhile, lack of education has been identified as a major factor that increases the likelihood of crime: in other words, all these and other variables work to create a vicious circle of crime and discrimination.[136] Hogg shows that the reasons for this discrimination are complex: state policies have historically segregated Aboriginal people, with segregation serving as a vehicle for their cultural denial.[137] The Australian state criminal justice system consequently infringes not only the Aborigines' right not to be discriminated against, but their rights to promote and protect their own culture.[138]

Research also demonstrates the general discriminatory problems of state justice systems worldwide. Notoriously, the chances of being arrested in the United States of America (USA) multiply significantly for black people.[139] In 2011, the Special UN Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, highlighted how rich and poor are treated very differently by state justice systems.[140] In contrast, scholarly research has shown that non-state dispute resolution mechanisms consider people's socio-economic conditions in resolving conflicts.[141] It is not only that access to non-state mechanisms is less costly than access to the state courts: it is that these mechanisms better understand and consider the social and economic context of the people involved and consequently handle conflicts better.

Nevertheless, states across the world continue to penalise those who live in poverty, using excessive force and arbitrary detention and incarceration.[142] The evident racial and social discrimination at work in state justice systems has become, in the last decade, a constant concern. State justice is not exempt from problems related to racial and social discrimination. Consequently, the importance that the narrative of legal pluralism as applied to criminal justice places on state justice as opposed to non-state justice, cannot fail to be subject to criticism.

The narrative of legal pluralism in relation to criminal matters in Mozambique shares significant similarities with the international literature's mainstream approach. First of all, there is not enough research looking at criminal matters. Secondly, the existing literature reserves to the state its power on criminal matters, as it will be shown in the next section.

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[135] Cunneen, C. (1992).
[136] Ibid.
[137] Hogg, R. (2001) 'Penality and Modes of Regulating Indigenous Peoples in Australia', *Punishment & Society*, *3*(3), pp. 355–379.
[138] Ibid.
[139] Norris, C., Fielding, N., Kemp, C. and Fielding, J. (1992) Black and blue: 'An analysis of the influence of race on being stopped by the police', *British Journal of Sociology*, pp. 207-224.
[140] Carmona Sepulveda, M. and Donald, K. (2014) 'Access to justice for persons living in poverty: An Human Rights Approach*', Social Science Research Network.* Available at: https://ssrn.com/abstract=2437808 (accessed 24 October 2019).
[141] Ubink, J. and van Rooijc, B. (2011), p. 5.
[142] Carmona Sepulveda, M. (2011) *'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Penalization of People Living in Poverty & Human Rights', Social Science Research Network.* Available at: https://ssrn.com/abstract=2437813 (accessed 16 January 2021).

3.2.1 Limits of the Mozambican literature on legal pluralism in criminal justice

There is extensive literature on Mozambican legal pluralism. International authors such as Pimentel, Kyed, Corradi, Obarrio, Knight, Bicchieri have all written (in English)[143] about the role of legal pluralism in Mozambique.[144] There is also a literature available in Portuguese: important work by the sociologist De Sousa Santos; the anthropologist Meneses;[145] and scholars linked to the University of Coimbra such as Araújo.[146] At the local level, Mozambican authors such as the judge Trindade, the sociologist Fumo,[147] the jurist José[148] and the environmentalist Serra[149] have also published extensively on legal pluralism in the country (though these have focused on the role that non-state mechanisms of conflict resolution play in civil matters such as access to natural resources, land[150] and women' rights).

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[143] Kyed has also published in Portuguese. For example, the book by Kyed, H. M., Coelho, J. P. B., Souto, A. and Araújo, S. (orgs.) (2012) *The dynamics of legal pluralism in Mozambique*. Maputo: CESAB is also available in Portuguese as Kyed, H. M., Coelho, J. P. B., Souto, A. and Araújo, S. (orgs.) (2012) *A dinâmica do pluralismo jurídico em Moçambique* Maputo: CESAB.

[144] See Pimentel D. (2011) 'Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique', *Yale Human Rights and Development Journal*, 14(1), pp. 59-104; Kyed, H. and Buur, L. (2006) 'Contested Sources of Authority: Re-claiming state sovereignty and formalising traditional authority in post-conflict Mozambique', *Development and Change*, 37(4), pp. 847-870; Kyed, H. (2009) 'Mutual Transformations of State and Traditional Authority', *Cadernos de Estudos Africanos*, 16/17, pp.179-201; Kyed, H. (2009) 'The Politics of Legal Pluralism: state policies on legal pluralism and their local dynamics in Mozambique', *Journal of Legal Pluralism*, 59, pp.87-120; Knight, R. (2010) 'Statutory Recognition of Customary Land Rights in Africa: An Investigation into Best Practices for Lawmaking and Implementation', *FAO Legislative Study*, 105. Rome; Corradi, G. (2012), pp. 1-23; Corradi, G. (2011), pp. 1-27; Bicchieri, M. (2014) 'Communities' land rights, gender equality and rural development: Challenges and achievements in Mozambique', *Nature & Faune*, 28 (1), pp. 83-86; Obarrio, J. (2014) *The Spirit of the Laws in Mozambique.* Chicago: University of Chicago Press.

[145] Meneses, M. P. (2007). Meneses, M. P. (2009), pp. 9-42. De Sousa Santos, B. e Trindade, C. J. (2003).

[146] See Kyed, H. M., Coelho, J. P. B., Souto, A. and Araújo, S. (orgs.) (2012) *The dynamics of legal pluralism in Mozambique*. Maputo: CESAB; José, A. C., Araújo, S., Cuahela, A. e Fumo, J. (2016) 'As instâncias comunitárias no contexto da competição política: O caso de Angoche', in José, A.C (org.), *Retratos da justiça moçambicana: Redes informais de Resolução de conflitos em espaços urbanos e rurais. Maputo*. Centro de Formação Jurídica e Judiciária, pp. 223-272; Araújo S. (2012) 'Por uma ecologia de Justiças: Um estudo Rural e Urbano da Pluralidade Moçambicana', in Kyed, H.M., Borges Coelho, J.P., Neves De Souto A. e Araújo, S. (org.) *A Dinâmica do Pluralismo Jurídico em Moçambique*. Centro de Estudos Sociais Aquino de Bragança. Maputo, pp. 113-134; Araújo, S. (2010) 'Legal pluralism and interlegality: The role of community justices in Mozambique', in Hinz, M., and Mapaure, C. (org.) In *Search of Justice and Peace. Traditional and Informal Justice Systems in Africa*. Windhoek: Namibia Scientific Society.

[147] José, A. C., Araújo, S., Cuahela, A. e Fumo, J. (2016), pp. 223-272. José, A. C., Araújo, S., Cuahela, A. e Fumo, J. (2016) 'Legitimidade, resolução de conflitos e acesso à justiça em Macossa', in José, A.C (org.) *Retratos da justiça moçambicana: Redes informais de Resolução de conflitos em espaços urbanos e rurais. Maputo*. Centro de Formação Jurídica e Judiciária, pp. 273-328.

[148] José, A.C. (2016) *Retratos da justiça moçambicana: Redes informais de Resolução de conflitos em espaços urbanos e rurais*. Maputo. Centro de Formação Jurídica e Judiciária.

[149] Serra, C.E. (2014) *Estado, Pluralismo Jurídico e Recursos Naturais. Avanços e recuos na construção do Direito Moçambicano*. Maputo: Escolar Editora.

[150] Serra argues that although the Mozambican state recognises legal pluralism in the country, the population has not managed to gain effective access to land and natural resources. Problems around access to land and natural resources have deteriorated even further since the exploitation of natural resources attracted large investment by multinational corporations. The state gives corporations extensive land concessions while the local population is forced to resettle elsewhere.

Bicchieri, Corradi and Kyed examine the role legal pluralism plays in development, but only in relation to women, children's rights and the political implications of non-state mechanisms of conflict resolution.[151] Bicchieri and Ayala, for example, argue (in a position paper written under the aegis of the FAO) that although customary practices are the entry door used by the large majority of Mozambicans to solve their conflicts, they are 'often unfair and discriminatory against women'.[152] As in the international literature, these authors highlight (adopting the perspective of state justice) how non-state justice is discriminatory in Mozambique, but without making an equitable comparison with the state justice that would illustrate the issues that women face in even getting access to state justice. State justice is, for the majority of the Mozambican men as well as for the majority of Mozambican women, extremely costly, is presented in a legal jargon which is difficult to comprehend and, for those living in the rural areas, geographically distant and difficult to attend.

For women, access to state justice is made even more difficult if the levels of literacy and poverty are taken into consideration.[153] In Mozambique, statistics show that women are poorer and less literate than men.[154] In addition, women victims of violence do not receive the comprehensive appropriate treatment by the state justice, which should include compensation, restoration of the suffered damage/s and the provision of emotional and psychological support. Although the Law on Domestic Violence, Law 29/2009, covers such services in theory, in practice women encounter difficulties in accessing these services due to the lack of implementation of the law.[155]

While Meneses and Florêncio are interested in analysing the history of legal pluralism in Mozambique, De Sousa Santos has produced a rich bibliography on legal pluralism there. His central aim was the creation of a theoretical framework for rethinking the important role of legal pluralism in the country. We will examine this framework, and particularly the roles of 'postabyssal thinking' and 'epistemologies of the south', in the second part of this chapter.

Among the cited authors, Pimentel and Trindade are the only two who make specific reference to criminal matters. As a legal scholar, Pimentel assesses the Mozambican framework for legal pluralism. Throughout his work, when concerned about countries that have retained criminal jurisdiction within non-state mechanism of conflict resolution, Pimentel reminds one that

> [t]here are good reasons for customary courts to retain criminal jurisdiction: remote and rural communities need to maintain law and order. Access to justice remains a concern as well. When statutory courts are inaccessible for large portions of the population, restricting the subject matter jurisdiction of customary courts may have no other impact than to deny litigants a forum and a chance to have their claims heard.[156]

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[151] Corradi, G. (2011) 'Access to justice in Pemba City: How exploring women's lived realities with plural law uncovers programmatic gaps', *Journal of Legal Pluralism*, 64, pp. 1-27. Kyed, H. and Buur, L. (2006), pp. 847-70. Kyed, H. (2009), pp. 179-201. Kyed, H. (2009), pp. 87-120.

[152] Bicchieri, M. and Ayala, A. (2017) 'Legal pluralism, women's land rights and gender equality in Mozambique. Harmonizing statutory and customary law', *FAO Paper*, 104. Available at: http://www.fao.org/3/a-i7825e.pdf (accessed 16 October 2019).

[153] For a discussion of these factors, see the first part of Chapter 4 of this thesis.

[154] Ibid.

[155] Petrovic, V. (2018) 'Vítimas de crime em Moçambique: quais os seus direitos?, *Journal Savana*, 10 August.

[156] Pimentel D. (2011), p.65.

Pimentel does not elaborate on the need for customary courts to retain criminal jurisdiction, but his position brings to light the importance of access to justice for all, and the problems state justice has in providing such access. Trindade, meanwhile, has regularly explored the development of different mechanisms of conflict resolution, with particular emphasis on community courts.[157] He focuses on the resilience that these have displayed, over decades of constant change between political silence and dynamism. Trindade notes that community courts deal, in fact, mainly with cases related to theft, domestic violence and simple assault.[158] He does, however, not analyse in any significant detail what the implications are of the non-state mechanisms' criminal jurisdiction for the state criminal justice system of the country and the people in particular. A deeper analysis from Trindade (who served as a judge and at other levels in different courts of the country for more than 30 years) would have added important insights to the discussion around criminal justice in Mozambique.[159]

In addition to research by individuals, research has also been conducted by national CSOs such as the Centre for Research and Support to Informal Justice (*Centro de Pesquisa e Apoio à Justiça Informal*, CEPAJI), Women and Law Southern Africa (WLSA), and the Study Centre Aquino de Bragança (*Centro Estudos Aquino Bragança*, CESAB), as well as OREC and JUSTA PAZ. They have all published extensive work on legal pluralism in Mozambique that focuses on community courts. Between 2009 and 2013, CEPAJI published three such studies, which dealt with the situation of community courts in the country, the protection of human rights, and public perceptions of community courts.[160] In 2006 and 2008, WLSA conducted two studies: the first on the role of customary law for cases of domestic violence, and the second focusing women's access to justice.[161] Other national organisations such as OREC and JUSTA PAZ have published extensive work on the role of community courts and other mechanisms of conflict resolution in the country.[162] No one, however, has ever looked at customary criminal

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[157] De Sousa Santos, B. e Trindade, C. J. (2003) *Conflito e Transformação Social: Uma Paisagem das Justiças em Moçambique*. Oporto: Afrontamento.

[158] Ibid. p. 328.

[159] See information on the career of judge Trindade since 1977. Available at: https://bit.ly/3rc2Ju7 (accessed 16 February 2021).

[160] CEPAJI was an association created in 2009. Its goal was to promote and assist non-state mechanisms of conflict resolution, specifically community courts, through training, research and advocacy. Since 2011, CEPAJI has organised ten seminars and trained more than 300 judges. The training focused on matters such as the link between the state and non-state mechanisms of conflict resolution as well as tradition and human rights. CEPAJI conducted three research initiatives, funded by DANIDA, which ended in 2014. As noted above, one project focused on mapping community courts in the country; the second study was on citizens' perception of community courts; and the last related to community courts' respect of human rights. See Centro de Pesquisa e Apoio à Justiça Informal (2011) *Estudo sobre a Percepção dos Cidadão acerca dos Tribunais Comunitários em Moçambique.* Maputo; Centro de Pesquisa e Apoio à Justiça Informal (2013), *Relatório Final sobre o Mapeamento dos Tribunais Comunitários em Moçambique.* Maputo.

[161] Arthur, M. J.e Mejia, M. (2006) 'Instâncias locais de resolução de conflitos e o reforço dos papéis de género: A resolução de casos de violência doméstica', in *Outras Vozes*, 17, pp. 1-8. Women and Law in Southern Africa (2008) *A Ilusão da Transparência na Administração da Justiça*. Maputo.

[162] Huo, T. (2016) *Os Tribunais Comunitários e a Resolução e Prevenção de Conflitos na Comunidade. O caso dos Tribunais Comunitários de Maputo*. Maputo. Da Costa Gaspar, A. (coord.) (2006) *Análise Comparativa de Conflitos: Realidades e Práticas Sócio- Culturais de Inhambane e Sofala*. Organização para Resolução de Conflitos, 4. Da Costa Gaspar, A. (coord.) (2009) *Análise Comparativa de Conflitos: Realidades e Práticas Sócio- Culturais de Manica e Sofala*. Organização para Resolução de Conflitos, 5. Da Costa Gaspar, A. (coord.) (2009) *Análise do conflito sócio- cultural em Manica e Tete*. Organização para Resolução de Conflitos, 6.

law, even though, working on the ground in close connection with the local population, they are aware of the problems that people face in accessing criminal justice.[163]

The lack of literature about criminal matters suggests that, as in the international literature, the belief of legal pluralists in Mozambique is that the state holds the power in criminal matters. This position will be reinforced by the next part of this chapter. This examines the mainstream approach of African states to legal pluralism as applied to criminal justice and how postcolonial theories can challenge it by revisiting the relationship with non-state mechanisms of conflict resolution.

3.3 Framing the possibilities of postcolonial theory for criminal justice

Over five centuries, European nations came to have total dominance over the criminal justice system of colonised countries as well as over the racist ideologies that supported colonial control of the resolution of conflicts arising among local populations.[164] Colonisation pervaded all fields of people's lives, from the economy and politics to culture and justice. It was only from the second half of the 20th century that colonised countries in Africa, Asia, the Caribbean and South America began to gain formal independence from their colonial rulers.[165] Today, this older form of colonialism (in which one nation rules over another), although not totally absent, is surely much less common.[166] The simple absence of a formal colonial system, however, has not automatically led to an equitable criminal justice system in the formerly colonised countries.

In Asia, women and children in particular suffer racial and social discriminatory problems arising within the justice system, criminal justice included.[167] The lack of access to justice for all in Africa and the overcrowding of prisons constitute the most pressing issues of the criminal justice systems in the continent.[168] What are the reasons behind such injustices? One of the main reasons (as argued throughout these pages) is the continuing impact of the colonial legacy on the former African colonised nations, as will be argued below.

Postcolonialism is an umbrella term used to describe a set of theories and practices that seek to explore the legacy of colonialism in the present day.[169] While many of these theories and

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[163] Interviews with representatives of CEPAJI, WLSA, OREC, JUSTA PAZ, January 2016-January 2017.

[164] Pakenham, T. (1990) *The Scramble for Africa: The White Man's Conquest of the Dark Continent 1876-1912.* Random House.

[165] Tharoor, S. (2017) *Inglorious Empire: What the British did to India*. New Delhi: Aleph Book Company. Meredith, M. (2005) *The State of Africa: A History of the Continent since Independence.* Simon & Schuster. Buarque de Holanda, S. (1936) *Raizes do Brasil*. Brasil: Editora José Olympio.

[166] See new forms of colonialism. See, for example, Liberti, S. (2013) *Land Grabbing. Journeys in the new Colonialism*. Milano: Verso.

[167] See, for example, A/HRC/26/38/Add.2 Report of the Special Rapporteur on violence against women, its causes and consequences, on her mission to Bangladesh (20–29 May 2013). On the situation of women, see the report of 2012 of the Human Rights of Pakistan. Available at: http://hrcp-web.org/hrcpweb/ (accessed 16 July 2020).

[168] See the extensive work of the Africa Criminal Justice Reform project of the Dullah Omar Institute of the University of Western Cape. Available at: http://acjr.org.za (accessed 16 July 2020). The project has published on issues relating to the criminal justice systems of various countries on the continent, among them Zambia, Malawi, Mozambique, Angola, South Africa, Zimbabwe and Liberia.

[169] On postcolonialism in Africa, see authors such as Aimé Césaire, Léopold Sedar Senghor, Franz Fanon, Chimamanda Adichie, Ngũgĩ wa Thiong'o, Chinua Achebe and Wole Soyinka.

practices attend to the political, economic and literary legacies put in place during colonialism, this chapter will attend in particular to their role in better understanding criminal justice.

In 1978, Edward Said published *Orientalism*, a work considered the foundation of postcolonial studies. Here Said argued that 'ideas, cultures and history cannot seriously be understood or studied without their force, or more precisely their configurations of power, also being studied'.[170] In regard to the criminal justice sector, this statement suggests that whoever enjoys the greater power in society will likely have the greater power in framing the criminal justice system of that society. Said argued that 'the West' – a term used to refer to the colonising nations – had power over 'the East' (the colonised nations).[171] In addition, he argued that the West took away the ability of the East to define itself. Following Said, one would expect that the West's conceptions of criminal justice systems would come to define the criminal justice systems of the East.

In fact, the period of colonialism saw the transplantation of the criminal justice systems of England, Germany, France, Spain and Portugal into the various states of the African, Asian and South American continents, where they ended up legally defining the criminal justice systems there.[172] In addition, over the centuries, European countries came to represent the criminal justice systems previously found in Africa, Asia and South America as uncivilised, second-class, informal and generally negative.

Said wrote *Orientalism* during the Cold War, a period of tension between the USA and the Soviet Union that extended from the 1950s until 1990.[173] Terms such as 'West' and 'East' originate in part from the Western and Eastern Blocs, the former led by the liberal US and the latter by the communist Soviet Union. In relation to Africa, the dichotomy between west and east came to represent the division between the colonisers and colonised. After the collapse of the Soviet Union and demolition of the Berlin Wall in 1991,[174] the terms 'West' and 'East' were slowly replaced by 'North' and 'South'.[175] The Global North is represented by political and economic elites that impose their power across the globe through ideas and practices of democracy, free markets, private property, and individual liberty.[176] It is mainly represented by the USA and other European nations, but within a state, the Global North can also refer to the elites that have power. The Global South is, by contrast, made up of indigenous communities, people of colour, women and migrants who live in degraded environments, suffering poverty

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[170] Said, E. (1978) *Orientalism*. London: Pantheon Books. p. 12.
[171] Ibid.
[172] See colonial literature on the topic. On Lusophone Africa, see, for example, Moreira, A. (1955) *Administração da Justiça aos Indígenas*, Lisboa: Agência Geral do Ultramar. See also Coissorò, N. (1984) 'African Customary Law in the Former Portuguese Territories, 1954-1974, *Journal of African Law, 28* (1/2), pp. 72-79. Available at: http://www.jstor.org/stable/745484. (accessed 16 January 2021). On Francophone Africa, see Lewis, M. D. (1962) 'One Hundred Million Frenchmen: The "Assimilation" Theory in French Colonial Policy', *Comparative Studies in Society and History,* 4 (2), pp. 129–153; Gerring, J., Daniel Ziblatt, J. and Julian, A. (2011) 'An Institutional Theory of Direct and Indirect Rule', *World Politics,* 63(3), pp. 377-433; Cohen, W. B. (1971) *Rulers of Empire: the French Colonial Service in Africa*. Hoover Institution Press.
[173] Cardona, L. (2007) *Cold War KFA*. Routledge.
[174] See the official website on the Berlin Wall. Available at: http://www.berlin.de/mauer/en/ (accessed 16 January 2021).
[175] Castells, M. (1996) *The Information Age: Economy, Society and Culture*. Oxford: Blackwell.
[176] Sheppard, E. and Nagar, R. (2004) 'From east west to north south', *Antipode,* 36, pp. 557-63.

and experiencing limited access to social services such as health and education.[177] The North continues to impose its ideas and power on the South. Countries that dare to refuse to follow the capitalistic and neoliberal approach to economy and politics are likely to be tarred with terms such as terrorist, outsider and rebel. The Global South, then, has no other option than to resist and fight.[178]

With regard to criminal justice, the Global North continues to impose its justice system on the South and the South continues to find it difficult to create spaces where alternatives to the mainstream system are possible and acknowledged as worth the same consideration as the mainstream approach.[179] Since the 1970s, there has however been an increasing number of protests targeting the Global North from the Global South, and particularly so from South America.[180] Examples of this include the successful protest movements in Chile and Argentina that succeeded in dissolving, in 2003, the 1986 and 1987 amnesty laws, as well as the continuing mobilisation of human rights defenders (such as the Mothers of Plaza de Mayo) who demand the reopening of criminal proceedings against those responsible for disappearances and extra-judicial murder;[181] in Bolivia, the mobilisation that succeeded in having Evo Morales elected as president of the country in 2006;[182] and the mobilisation of indigenous people for the recognition of their culture, bilingual education in schools, and proper access to natural resources and land.

In some ways similar to Said, Gayatri Spivak is another pioneer of postcolonial theory. In 1988, she published the article, 'Can the subaltern speak?'[183] Here, she argued that the East was downgraded to the 'other'. She states that 'the result of "the west" representing and defining "the east" on its behalf was to constitute the colonial subject as other'.[184] Spivak also uses terms such as 'centre' (as opposed to margin or periphery) to distinguish the knowledge of the West from the knowledge of the colonised East.[185] The West is the centre of global attention; it has a central voice while the East is unheard. Being the unheard other, the criminal justice system of the East becomes unknown and invisible.

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[177] Ibid.
[178] Ibid.
[179] Goirand, C. (2009) 'Movimentos sociais na América Latina: elementos para uma abordagem comparada', *Estudos histórico*, 22 (44). Available at: https://bit.ly/3HamMi5 (accessed 16 January 2021).
[180] De Sousa Santos, B. (2001), 'Los nuevos movimientos sociales'. Available at: https://bit.ly/3HfLca7 (accessed 16 January 2021). See also the website of the Social Movements Popular University. Available at: http://www.universidadepopular.org/site/pages/pt/em-destaque.php (accessed 16 January 2021). The Social Movements Popular University is a space of dialogue and exchange that was created in 2003 with the aim of articulating diverse knowledge, strengthening new forms of resistance and contributing to the reinvention of social emancipation. See also the Conversations of the World. Available at: https://www.youtube.com/watch?v=cx3yBN4HKLE (accessed 16 January 2021).
[181] The Mothers of the Plaza de Mayo are human rights defenders organised through an Argentine human rights association that was formed to find the *desaparecidos*, sons and daughters imprisoned by the state.
[182] Evo Morales was the President of Bolivia between 2006-2019 and regarded as the country's first president to come from the indigenous population.
[183] Spivak, G. C. (1988).
[184] Ibid. p.78.
[185] Spivak, G. C. (1993) *Outside in the Teaching Machine*. New York: Routledge, p.53.

De Sousa Santos calls the colonial-based dichotomy between the legal knowledge on the side of 'us' and the non-recognised knowledge of the 'other' 'postabyssal thinking'.[186] While the 'we' are represented by terms such as civilised, evolved, brave and valiant, the other is described as rebellious, dangerous, stranded, criminal, fool, indolent and uneducable.[187]

Said, Spivak and De Sousa Santos also bring to light how the West's idea of the East is no more than a fabrication, an artifact invented by the West. They also show how the binary west-east is used to define the good and bad, the first-class versus second-class, the normal versus the abnormal.[188] In this chapter, we examine these binaries applied to African criminal justice systems. Although colonial rule formally ended with the independence of African states, the criminal justice systems of these countries have yet to be decolonised. Decolonising a criminal justice system means, as Mbembe states, '[r]eshaping, turning human beings once again into craftsmen and craftswomen who, in reshaping matters and forms, needed not to look at the pre-existing models and needed not use them as paradigms'.[189]

The current state approach to criminal justice shares many common characteristics with the colonial system. This is partly explained by the simple fact that, post-independence, African states did not entirely abolish colonial laws, many of which remained as part of the legal systems of the new independent states.

During the colonial era, the power of the European metropolis to legislate and enforce penal laws was undeniable. No colonial administrators, missionaries or travellers ever challenged the power of the metropolis to resolve the conflicts of local populations. In 1925, Cabral Pereira[190] expressed his point of view on Portuguese customary criminal law:

> It would be extraordinarily harmful … that justice was not directly exercised by the dominating nation through employees or European judges. Indeed it is indispensable that the government has in his hand all efficient means to suppress the clutter theft attacks against human life and political unrest in order to ensure the most complete order without which the civilizing work cannot progress.[191]

Pereira sees local systems dealing with criminal matters as attacks on humanity, or at least on Western humanity, while the metropolitan system is regarded as the one that can bring 'the most complete order' to the colonised world. This is the colonial binary perspective at work on the justice system. Under racial and ideological domination, the French, Portuguese, and Spanish could only recognise and accept conflict resolution as understood in the European metropolis. This approach is recognised as the direct rule approach.[192] As De Sousa Santos

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[186] De Sousa Santos, B. (2007) 'Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges', *Review*, XXX, 1, pp. 45-89.
[187] Meneses, M. P. (2010), pp. 39-93. Available at: http://journals.openedition.org/eces/403 (accessed 16 October 2019).
[188] Said, E. (1978), pp. 45-89.
[189] Mbembe, A. (2015) 'Decolonising Knowledge and the Question of the Archive'. Available at: https://bit.ly/3HSX2Xm (accessed 16 July 2020).
[190] Cabral Pereira, A. A. (1925).
[191] Ibid. p. 15.
[192] For a discussion of this approach, see the first part of Chapter 4 of this thesis.

states, nothing was visible on the other side of the line between 'us' and 'them'.[193] This situation continues with criminal justice today.

While the English did commission plenty of studies to analyse local forms of conflict resolution, these local mechanisms were always represented as uncivilised [194] and, in consequence, not be used by the colonisers. Both in substance and in form, real penal law was the one written in the European metropolis and subsequently applied to the colonised.[195] As Fitzpatrick and Davies emphasise, only one definition of law, the positivistic Eurocentric knowledge, was applied. Other forms of laws were excluded as grounded in incomprehensible belief systems: local laws could not be recognised as knowledge.[196] Locally based beliefs, the products mainly of oral culture, were seen in a negative light.

In fact, when the first waves of independence began, little changed in this general situation. In 1955, the African Institute of Leiden organised a conference on the future of law in Africa, yet although the event focused on Africa law, only Anglophone countries attended the event, which was conducted in English and dealt only with the English common law system as imported to Africa. The conference was held in London with some 60 delegates (mainly English judges, colonial administrators, lawyers, and academics).[197] Allott reminds us that the conference put forward three main recommendations:

> 1) [R]ecording of customary law should be encouraged where desirable and feasible; 2) there should be a uniform criminal law (though with local variations permissible if these were written); 3) that the rules of practice and procedure in African or native courts should be moulded or guided in the direction of those observed in the superior and magistrates' Courts.[198]

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[193] De Sousa Santos, B. (2007), pp. 45-89.

[194] Castro A. J. (1950) 'Aspectos do direito e da justiça entre os povos incivilizados em geral e em especial em relação aos indígenas de Angola', *Mensario Administrativo*, 5, pp. 35-36. Cerqueira, I. B. (1934) 'A vida Indígena em Angola. Organização Social - Seu Estado Actual - Chefes Gentílicos – Seu Poder e Prestígio', *Boletim da Sociedade Luso Africana do Rio de Janeiro,* 12, pp. 25- 38. Coissoró, N. (1987), pp. 25-37. Cota, J. G. (1944) 'Mitologia e direito consuetudinário dos indígenas de Moçambique: estudo de etnologia', *Imprensa Nacional de Moçambique*, Lourenço Marques, pp. 87-154. Cota, J. G. (1946) *Projecto Definitivo do Código Penal dos Indígenas da Colónia de Moçambique acompanhado de um relatório e de um estudo sobre direito criminal indígena.* Lourenço Marques: Imprensa Nacional de Moçambique.

[195] In many African countries such as Kenya, Uganda and Zanzibar, the British colonial power introduced the Indian Penal Code of 1860 as the statutory basis for criminal law developments. Read, S. J. (1963) 'Criminal Law in the Africa of Today and Tomorrow', *Journal of African Law*, 7(1), pp. 5-17.

[196] Fitzpatrick, P. (1992) *The Mythology of Modern Law.* London: Routledge. Davies, M. (2002) *Asking the Law Question: the Dissolution of Legal Theory*. Sydney: Law Book.

[197] Allott, A. N. (1960) 'The London Conference of the Future of Law in Africa', *African Studies Bulletin*, 3(2). Read, S. J. (1963), pp. 5-17.

[198] Allott, A. N. (1960), p. 12. It is also important to mention how, later in the 1980s, Alott changed opinion towards the role of laws. In 1980, in the book "The Limits of Law" the author examines how laws work and their factors for success and failures. On failures, in the article titled "The effectiveness of Laws", Allott concludes that 'Laws may become ineffective even if they were originally effective, thanks to a change in the social context in which they operate. But the major reason for failure due to non-compliance is resistance caused by the unacceptability of the law; and this unacceptability is traceable mainly to the lack of an appropriate consensus'. Allott, A. N. (1981) 'The effectiveness of Laws', *Valparaiso University Law Review,* 15(2), p. 242.

In this, it is key to recognise that while the importance of customary law on the continent was recognised by the participants, this recognition is to be accorded only when 'desirable and feasible'.[199] In Foucault's work (also used by Spivak), desire is always strictly related to power and subjectivity.[200] Foucault states that 'we never desire against our interests, because interest always follows and finds itself where desire has placed it'.[201] When referring to a desirable customary law, the participants of the conference meant practices that were in the interests of English domination, and so based on the English criminal system. In 1959, the Nigerian Criminal Code was derived from the English one, in particular the Queensland Criminal Code of 1899.[202] In Tanganyika, Uganda, Kenya, Zanzibar, Northern Rhodesia, Nyasaland, and the Gambia, the situation was similar, with the application of the English Colonial Office Model Code.[203] The paramountcy of English desires and interests is evident in Read's formulations in 1963:

> It is an important part of the heritage of the common law in the whole area, where English law has applied so widely through six contiguous territories, that the criminal laws are so similar. The enjoyment of enactments in similar form, such as the Penal Codes, may well serve as a major advantage in the developing associations between these countries which are sure a significant feature in the current African scene.[204]

By envisaging a necessary uniformity to criminal justice, participants were excluding the local forms of customary practices. Although exceptions were made as far as written customary practices were concerned, the written form of the law followed English principles. The superiority of the English metropolis is further stressed when the participants stated that the native courts were to follow the principles and forms within which magistrates' courts function. Magistrate courts were those led by English judges. The codification of customary practices aimed at systematising collected information about traditions and customs into fixed categories, with these based firmly on the perspectives of those doing the codification.[205]

Although some authors even today are of the general opinion that the 'writing of customary law and its systematisation … does not change its nature, nor does it prevent subsequent amendments as a result of the dynamics of social life', there are inevitable problems when attempting to reduce customary practices to writing.[206] Elias and Roberts, for example, list a series of issues that arise both prior to codification (i.e. during the collection of information

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[199] Ibid. p. 15.
[200] Foucault, M. (1977) *Language, Counter-Memory, Practice: Selected Essays and Interviews*. Cornell University Press: Ithaca.
[201] Ibid. p. 215.
[202] Act 39 of 1899.
[203] Read, S.J. (1963), p. 5. See also Ibid.apo-Obe, A. (1992) 'The dilemma of African criminal law: Tradition versus modernity', *Southern University Law Review*, 19(2), pp. 327-356.
[204] Read, S. J. (1963), p. 11.
[205] In the 2011 Guinean project, funded by the UNDP and coordinated by the University of Lisbon in Portugal, the traditions of six different linguistic groups in the country – Balantas, Fulas, Mancanhas, Manjacos, Mandingas and Papeis – were systematised. The *Djumbai* method was used. Used mainly by the Guinean National Institute for Studies and Research (*Instituto Nacional Estudos e Pesquisa*, INEP) it is based on a tradition of interaction where questions are gradually formulated to study participants and answered by those with knowledge of the subject. See Universidade de Lisboa (2011) *Projecto de Recolha e Codificação do Direito Consuetudinário Vigente na República da Guiné-Bissau*. Programa de Desenvolvimento das Nações Unidas, p. 23.
[206] Ibid. p. 7.

about customary practices) as well as once codification is finalised.[207] Roberts, for instance, states that different methods of investigation should be considered if a complete picture of the customary practice under scrutiny is wanted, otherwise only a small part of the truth about the customary practice will be discovered.[208] Elias stresses how, once codified, customary practices become 'more artificial, far removed from the experience and comprehension of the people'.[209] Elias also suggests that customary practices should be systematised in legal textbooks to avoid fossilisation. He, in fact, highlights the risk '[t]hat customary law or the version of it put into a code might become fossilized, as the processes of legislative amendment or adjustment to the changing needs of social and economic life are notoriously slow'.[210]

Indeed, in the post-independence era, the codes and penal laws of the former colonisers were left almost intact in Africa.[211] While discriminatory and racially based provisions were abolished,[212] no space was given to customary practices by the new governments.[213] There were two main reasons for this. First, after decades of colonisation, customary practices were in part seen as betrayed and distorted forms of local dispute resolution processes by the new African movements of liberation which had fought for independence.[214] Secondly, the new governments faced the difficult task of unifying the diverse populations, cultures and traditions as a new nation under a new flag.

From independence through to the 1990s, the new countries (mainly governed by single political parties) displayed their monopoly over the creation and enforcement of criminal laws. They did so, however, by applying the colonial codes, building their foundation on the knowledge of the West, which, indirectly, continued to impose its power on the criminal justice system of the East. On a negative note, Mbembe affirms that, in fact, with African independence, all that really changed were the holders of power – while power was now in the hands of independence movements, the colonial legacy continued.[215] Mozambique (as also Angola and Guinea Bissau) chose to retain the Western-based criminal justice system for fear of anarchy.[216] In regard to the approach of the new Mozambican state, the philosopher Ngoenha

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[207] Elias, T.O. (1994) 'The Problem of Reducing Customary Laws to Writing', in Dundes R. A. and Dundes, A. (eds), *Folklaw: Essays in the Theory and Practice of Lex Non Scripta*. The University of Wisconsin Press, pp. 321-330.

[208] Roberts, S. (1994) 'The Recording of Customary Law: Some Problems of Method, in Dundes R., A. and Dundes, A. (eds.) *Folklaw: Essays in the Theory and Practice of Lex Non Scripta.* University of Wisconsin Press, pp. 331-338.

[209] Elias, T.O. (1994), p. 329.

[210] Ibid. p. 330.

[211] For the situation in the British colonial Africa, see Morris, H.F. (1974) 'A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa 1876-1935', *Journal of African Law,* 18(1), pp. 6-23; Marques-Guedes, A. (2003) *Pluralismo e Legitimação. A edificação jurídica pós–colonial de Angola.* Almedina; Lourenço, V. A. (2005) *Estado(s) e Autoridades Tradicionais em Moçambique: Análise de um processo de transformação política*. Lisboa: CEA.

[212] Morris, H.F. (1974).

[213] Hinz, M. (2008) 'Traditional courts in Namibia – part of the judiciary? Jurisprudential challenges of traditional justice', in Horn, N. and Bösl, A. (eds.) The Independence of the Judiciary in Namibia, p. 173. Bennett, T. (2006). De Sousa Santos, B. e Trindade, C. J. (2003).

[214] Sachs, A. and Honwana-Welch, G. (1990) *Liberating the Law. Creating Popular Justice in Mozambique*. London e New Jersey: Zed Books.

[215] Available at: https://bit.ly/3zKO8bJ (accessed 16 January 2021). See also Bragança, A. (1986) 'Independência sem descolonização: A transferência do poder em Moçambique, 1974-1975. Notas sobre os seus antecedentes', *Estudos Moçambicanos*, 5/6, pp. 7-28.

[216] Baltazar, R. (1977) 'Tribunais Populares. A justiça nas mãos do Povo', *Tempo* 394, pp. 30-39.

argues that the post-independent state 'failed to give the people a voice, and did not allow the people to actively participate in the elaboration of the new laws'.[217] In so doing, the new Mozambican state became the new 'master of the population's destiny'.[218]

Also, referring in 1974 to former Anglophone Africa, Morris wrote:

> In 1959 and 1960 the Northern Region of Nigeria replaced the two Codes [Criminal and Criminal Procedure Codes] with a Penal Code based on the Sudan Penal Code of 1899, itself derived from the Indian Penal Code, and a Criminal Procedure Code also derived from the Sudan and ultimately from India. In South Sudan but also in India, the existing codes were based on the English influence.[219]

Morris ended the article by stressing how 'the basic homogeneity of the criminal law and procedure in this large area of Africa remains', as had already been envisaged by the London conference two decades before.[220]

Today, African states' approach to criminal justice continues to be based on the Eurocentric legacy. As we shall see below, states still approach access to criminal justice and the idea of imprisonment as punishment using the Eurocentric knowledge of the colonial codes. The legal framework for access to justice and imprisonment will be analysed through comparison with what happens in practice across a range of different African countries.

In Africa, the majority of the people use non-state mechanisms to resolve their conflicts. In countries such as Ghana and Malawi, research found that between 70 and 85 per cent of conflicts are resolved by resorting to mechanisms different from those of the state.[221] Using non-state mechanisms of conflict resolution means, today, having a conflict resolved using a language understandable to the people involved in the case. If people understand the language, they become actively involved in conversations about the solution of the case. The community participates in the proceedings of the case and the judge of the non-state instance of conflict resolution decides the case, based on the interests of the people involved.[222] Resorting to non-state mechanisms also means using a tradition that responds to people's cultures.

It is worth noting that the term 'tradition' more often than not carries powerful connotations of the old-fashioned, the secondary, and things related to a negative and remote past. In 1981, however, Shils, in the book *Tradition,* aimed at rethinking the word 'tradition', seeking to restore some of its original dignity. He notes that

> [i]n the present century, there have been many prominent intellectual figures who have thought that what we have inherited is as bad as can be … Those who are attached to institutions, practices and beliefs that are

[217] Ngoenha, S. (2018), p. 25.
[218] Ibid. p. 27.
[219] Morris, H.F. (1974), pp. 6-23.
[220] Ibid. p. 23.
[221] Logan, C. (2013) 'The roots of resilience: Exploring popular support for African traditional authorities', *African Affairs*, 112 (448), pp. 353–376.
[222] See, for example, Ubink, J, and Mclnerney, T. (2011). See also United Nation Office of the High Commissioner for Human Rights (2016) Human Rights and Traditional Justice Systems in Africa, United Nation Office of the High Commissioner for Human Rights. Available at: https://bit.ly/3rdDyqS (accessed 16 July 2020). See authors such as La Prairie, Doob, Hazelhurst, Tauri, Pratt, Hazelhurst and Landau.

> designated as traditional are called 'reactionaries' or rather 'conservatives.[223]

States, however, mainly regard customary criminal practices as negative rather than recognising them as local knowledges that have been silenced and repressed for centuries.[224] Using the words of Horowitz, by giving voice to silenced and invisible knowledges, the legal system becomes more 'authentic'.[225] De Sousa Santos calls for authenticity as diversity. He explains that diversity is inexhaustible and the Eurocentric monoculture of modern science has to be confronted with other existing forms of knowledge.[226] Within what he calls the ecology of knowledges, De Sousa Santos aims at translating experiences based on the contexts in which they come from, giving voices to knowledges that have been marginalised or put aside.[227]

Diversity and authenticity in criminal justice are weakened by the human rights paradigm set by international agencies such as the United Nations (UN). The legal framework of many African states in regard access to justice mainly entails access to the human rights provided for by the UN international treaties.[228] Decision-making powers at the UN, however, are in the hands of five nations: China, France, Russia, the USA, and the United Kingdom.[229] The role of these countries with a permanent status and veto power in the decisions affects the fairness, truth, and lawfulness of the intergovernmental organisation.[230] The UN has also been criticised for its inefficacy, its lack of internal democratic processes, corruption and the promotion of globalisation, among other important criticisms.[231] Decisions taken by the UN do not then only work to represent the interests of a few select nations, but they also reaffirm a Eurocentric approach to the diverse sectors of life as well as (importantly) to communication. Portuguese

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[223] Shils, E. (1981), p.4.

[224] De Sousa Santos, B. (2008) *Another knowledge is possible: beyond northern epistemologies*. London: Verso. De Sousa Santos, B. (2014) *Epistemologies of the South: justice against epistemicide*. Routledge. Available at: http://www.boaventuradesousasantos.pt/media/INTRODUCCION_BSS.pdf (accessed 29 October 2017).

[225] Horowitz, D. (1994) 'The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change', *American Journal of Comparative Law*, XLII (3) pp. 233-93.

[226] De Sousa Santos, B. (2008). De Sousa Santos, B. (2014). Available at: https://bit.ly/3gd5K6Y (accessed 29 October 2017).

[227] De Sousa Santos, B. (2007), pp. 45-89.

[228] See United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), adopted in 1955 and revised in 2015; United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988); United Nations Basic Principles on the Role of Lawyers (1990); United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) (2010); United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2013); United Nations Basic Principles on the Independence of the Judiciary (1985); Kampala Declaration on Prison Conditions in Africa (1996); Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) (2002); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003); Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2005).

[229] See information available at: https://www.un.org/en/about-us/main-bodies (accessed 29 October 2017).

[230] Kelly, M.J. (2020) 'United Nations Security Council Permanent Membership and the Veto Problem', *Case Western Reserve Journal of International Law*, 52 (1), pp. 101-118. Available at: https://scholarlycommons.law.case.edu/jil/vol52/iss1/8 (accessed 29 October 2020).

[231] See, for example, the United Nations' failure to act against the Rwandan genocide in 1994 due to the veto of the USA and France. See also the cut of US funds to the United Nation Population Fund (UNFPA) in 2002 for the latter's involvement in Peru's population control programme. See too the veto used by China and Russia to refer Syria to the International Criminal Court in 2014.

is not considered an official UN language,[232] undermining the importance of a language spoken by about 300 million people globally and in fact the sixth-most spoken language in the world.[233] Meanwhile, both French (spoken by 80 million) and Russian (about 150 million) are both used as official UN languages.[234] As a result, much more effort of translation is needed by the Portuguese-speaking countries both to understand UN work and to be understood by the UN.

The most basic human rights related to access to justice include physical access to judicial courts; access to legal aid through state lawyers or access to a private lawyer; the right to a fair and speedy trial; and the existence and provision of impartial and independent judges who act with integrity.[235] Access to state justice also implies linguistic access, that is, access to laws in a language that is understandable by the people concerned.

Physical access to judicial courts has mainly been based on terms such as rationality, universality, abstraction, formality, hierarchy and statehood, in the process ignoring and making invisible an immensity of non-state legal worlds that are closer to the majority of African people.[236] Speediness, efficiency, informality and simplicity, for example, can challenge the Eurocentric paradigm of access to criminal justice, considering how these values serve people's needs in Africa.

There are, however, countries that include access to non-state mechanisms of conflict resolution within the definition of access to justice. Some do this by allowing for non-state mechanisms as far as they respect the constitution. For example, the Ghanaian Constitution declares in section 1(2): 'This Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall to the extent of the inconsistency, be void'. South Africa's Constitution recognises customary law in section 39(2). This requires a court to 'promote the spirit, purport and objects of the Bill of Rights when it interprets any legislation, or when it develops the common law or customary law'. However, the constitutional democratic values of human dignity, equality and freedom expressed in the preamble of the South African Constitution cannot be avoided by customary practices.

Other countries, such as Botswana, give no constitutional recognition to customary practices (though the limit of its application is contained in section 2 of the Customary Law Act).[237] In the colonial period, customary practices were (in the texts of constitutions and legal documents) subjected to conformity or to what is called the 'repugnancy clause'. During the colonial era,

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[232] Arabic, Chinese, English, French, Russian and Spanish are the six languages used for UN meetings as well as for the UN official documents.

[233] See the website https://www.ethnologue.com (accessed 29 October 2020).

[234] Ibid.

[235] The right to a fair trial is provided for by articles 7 and 10 of the Universal Declaration for Human Rights, article 14 of the International Covenant on Civil and Political Rights, and article 7 of the African Charter on Human and Peoples' Rights. Article 14(3)(c) of the International Covenant on Civil and Political Rights and article 7(1)(d) of the African Charter on Human and Peoples' Rights provide for the right to be tried without undue delay. The right of the accused to have both counsel of his or her choice and access to legal aid at the state's expense 'where the interests of justice so require' is provided for by articles 14(3)(b) and (d) of the International Covenant on Civil and Political Rights. The right to a defence and the right to have counsel of one's choice is contained in article 7(1)(c) of the African Charter on Human and Peoples' Rights.

[236] Benitez-Schaefer, F. (2012) *Plurality in Legal Development A Critical Appraisal of Modern and Post-Modern Models of Legal Development.* PhD Thesis. University of Vienna. Available at: https://core.ac.uk/download/pdf/11600935.pdf (accessed 10 August 2020).

[237] Act 51 of 1969.

these practices had to conform to the values of the European metropolis. Now they are subjected to constitutional conformity. Although the current clauses differ from the colonial ones (which were discriminatory in principle), today they represent both the assertion of a rigid model of state legality though also a balance between society and the state.[238] Some argue that the repugnancy clauses work to mitigate the harsher aspects of customary law. Others affirm that while limiting the application of customary law, constitutions also recognise the importance of rights that are not specifically spelt out in them.[239]

Repugnancy clauses relate both to civil matters and to criminal ones. There are, however, cases where criminal jurisdiction is taken away from the non-state mechanisms of conflict resolution. The Constitution of Malawi recognises customary civil law.[240] Article 110(3) states:

> Parliament may make provision for traditional or local courts presided over by lay persons or chiefs: Provided that the jurisdiction of such courts shall be limited exclusively to civil cases at customary law and such minor common law and statutory offences as prescribed by an Act of Parliament.

A question arises regarding the relation between customary law and written laws. Igwe and Ogolo affirm that the reference to written laws can be regarded as effectively abolishing customary criminal law. Given that customary criminal law still remains largely unwritten in many African countries (Malawi included), the application of customary criminal law is legally forbidden by the Malawian country.[241]

The legal frameworks of African countries rarely correspond to reality. In Malawi, for example, Sharf states that, contrary to what is set by law, '[t]he weakness of the formal justice system and the preference for dispute resolution by traditional authorities mean that in practice traditional authorities do deal with some situations involving criminal conduct'.[242] In Nigeria, the major tribal group, the Igbo, relies on its customary practices to resolve criminal issues rather than what is recognised by the Nigerian legal system, based as it is on the British colonial

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[238] Morais, B. A. (2020) *Pluralismo Jurídico em Moçambique: Análise da Efectivação da Lei No 4/92, de 6 de Maio, como Manifestação do Pluralismo Jurídico, consagrado nos Termos do Artigo 4 da CRM*. Tese de Doutoramento. Universidade Católica de Moçambique. Available at: http://repositorio.ucm.ac.mz/bitstream/123456789/145/1/BARBOSA%20MORAIS.pdf (accessed 18 January 2021). Igwe, O.W. and Ogolo, M.D. (2017) 'Repugnancy Test and Customary Criminal Law in Nigeria: A Time for Re-Assessing Content and Relevance', *Donnish Journal of Law and Conflict Resolution,* 33(3), pp. 35-39. Available at: https://ssrn.com/abstract=2528497 (accessed 16 October 2018). Uweru, B.C. (2008) 'Repugnancy doctrine and customary law in Nigeria: A positive aspect of British colonialism', *African Research Review*, 2(2), pp. 286-295. Taiwo, E.A. (2009) 'Repugnancy clause and its impact on customary law: Comparing the South African and Nigerian positions — Some lessons for Nigeria', *Journal for Juridical Science*, 34(1), pp.89-115. Available at: http://caid.ca/RepClaCusLaw2009.pdf (accessed 16 January 2021).

[239] Ibid.

[240] See 1994 Malawian Constitution as amended in 2017. Available at: https://www.constituteproject.org/constitution/Malawi_2017.pdf?lang=en (accessed 16 October 2020).

[241] Igwe, O. W. and Ogolo, M. D. (2017), pp. 35-39. Available at: https://ssrn.com/abstract=2528497 (accessed 16 October 2020).

[242] Scharf, W., Banda, C., Roentsch, R., Kaunda, D. and Shapiro, R. (2002) 'Access to Justice for the Poor of Malawi? An Appraisal of Access to Justice Provided to the Poor of Malawi by the Lower Courts and the Customary Justice Forums'. *Department of International Development*. Available at: http://gsdrc.org/docs/open/ssaj99.pdf (accessed 29 October 2017), p. 22.

legacy.[243] In Mozambique, until December 2020, the Penal Code prohibited community courts from dealing with criminal cases.[244] In practice, however, they have continued to deal with cases related to criminal offences such as domestic violence.[245]

The discrepancy between the centre and the periphery (as argued by Spivak) continues to be seen today in criminal justice. Laws are made in the most urbanised cities of the countries and are mainly cast in the colonial languages of French, English and Portuguese. The centre is represented mainly by the capital cities inhabited by people that speak these languages, while the rest of the country represents a periphery in which rural people speak indigenous languages. In addition, the same criminal justice system of the centre (the capital cities) enjoys more human and material resources than the periphery. The majority of judges, prosecutors and lawyers, for example, are based in the capital cities of the country.[246] The laws drafted in the centre apply both to the people who live in the centre and those who live in the periphery, where there is also a lack of judges, prosecutors and lawyers to enable proper access to criminal justice.[247]

Judgment 4/CC/2013 of the Constitution Council of Mozambique illustrates this dichotomy between centre and periphery and the problems arising from it.[248] The Mozambican judgment took away from police and prosecutors the power to arrest *fora flagrande delito* ('outside the commission of a crime'). The power remained only in the hands of judges. Consequently, in the areas where there are no judges, the right of victims to have their cases brought to justice in a reasonable time is considerably restricted. Victims need to wait for a judge's warrant of arrest for the suspect to be arrested. While this judgment was recognised as progressive jurisprudence with regard to the recognition of the suspect's rights, it undermined the right of victims living in the peripheral areas where there are no judges.[249]

The Eurocentric approach of African states towards their criminal justice systems, based on legal frameworks drafted in the African metropolis, is, however, even more visible when dealing with prisons and imprisonment. The institution of the prison was born at the end of the 18th century in Europe. Throughout colonisation and until the first half of the 20th century, prison was exported to the African continent and used to imprison those Europeans who were sent in exile to Africa after the commission of a crime. Only after the abolition of exile did local populations begin to be sent to prisons, as a form of punishment.[250]

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[243] Oraegbunam, I. E. (2010) 'Crime and Punishment in Igbo Customary Law: the challenge of Nigerian Criminal Jurisprudence, *OGIRISI: A New Journal of African Studies*, 7(1).
[244] The preamble of the 2014 Penal Code revoked the criminal jurisdiction of community courts.
[245] See Chapter 5 of this thesis for the findings collected through fieldwork.
[246] Citing data from Ordem dos Advogados de Moçambique (2019) *Relatório dos Direitos Humanos 2017*. In Maputo, there were 344 judges in 2017. Of them, 15.56 per cent (54) judges were operating in the capital city of the country. In 2017, there were a total of 1,460 lawyers in the country. Of them, 73.8 per cent (1,108) were working in the capital city of Maputo.
[247] Lorizzo, T., Petrovic, V. (2019) 'Powers of Arrest Curtailed by Constitutional Council in Mozambique – the impact of the 2013 decision'. *REFORMAR-Research for Mozambique,* September 2019. Available at: https://reformar.co.mz/publicacoes/impact-of-2013-decsion.pdf (accessed 29 October 2020).
[248] Ibid.
[249] Ibid.
[250] Sarkin, J. (2008) 'Prisons in Africa: an Evaluation from a Human Rights Perspective', *Sur - International Journal on Human Rights,* 9, pp. 22-49. Available at: http://socialsciences.scielo.org/pdf/s_sur/v4nse/scs_a02.pdf (accessed 16 July 2020).

Although an import, incarceration has been used, misused and overused across the continent for the past century. Today, countries such as South Africa, Ethiopia and Egypt have a prison population of more than 100,000 people.[251] From a total population of about 60 million people, about 160,000 are imprisoned in South Africa, one of the highest numbers in the world.[252] Countries such as Nigeria, Uganda, Rwanda and Kenya follow in its wake with prison populations exceeding more than 50,000 in each country.[253] In 2013, at a conference organised by Penal Reform International, the Tanzanian Chief Justice, Mohamed Chande Othman, urged his fellow judges to resist 'the storm of popular punitivism', suggesting that there is much to be done 'to wear off the passion for imprisonment as the only authoritative and justifiable form of punishment for all types of crimes and all convicted persons'.[254] In this overuse of imprisonment, countries exemplify the stance of a legal centralism which has 'simply fail[ed] to regard punishment emanating from sources other than the state as a phenomenon of the same sort as criminal punishment'.[255]

The vast majority of the incarcerated are poor people who cannot afford the costs of the legal assistance they need in order to access state justice properly. More than 40 per cent of people in sub-Saharan Africa live on less than USD 2 per day.[256] They are likely to wait months and years to be brought before a judicial authority.[257] Incarcerated, they are likely to wait long periods of time before being sentenced, considering the backlog of African judicial courts.[258] Many of them will be found innocent, but in the process they will have cost their governments a considerable amount from state budgets that are usually in any case inadequate or even non-existent with regard to guaranteeing the human rights of prisoners.[259] In 2013, Mohamed Chande Othman (see above) announced that Tanzania could save up to nine billion shillings per year if 30 per cent of the inmates serving prison terms were given alternative penalties: feeding a single prisoner cost the government approximately 2,300 shillings per day.[260]

Imprisonment is costly not only for governments but also for the families of inmates, particularly when a working member of the family is imprisoned. This has considerable impact on those who already live in poor conditions. Moreover, there is not only loss of income to contend with, but so too the many additional expenses that need to be met.[261] When it is a

[251] See information from the Centre Prison Study of the Essex University available at: https://www.prisonstudies.org/ (accessed 16 July 2020).
[252] Ibid.
[253] Ibid.
[254] See news available at: http://allafrica.com/stories/201311110005.html (accessed 11 January 2020).
[255] Galanter, M. (1966) 'The modernisation of law, in Miron W. (ed.), *Modernisation*, New York: Basic Books.
[256] See data available at: http://povertydata.worldbank.org/poverty/region/SSF (accessed 16 July 2020).
[257] See the publications of the Open Society Justice Initiative: Pretrial Detention and Health: Unintended Consequences, Deadly Results (2011); Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk (2011); Improving Pretrial Detention: The Roles of Lawyers and Paralegals (2012); The Socioeconomic Impact of Pretrial Detention (2011).
[258] Ibid.
[259] Ibid.
[260] See news available at: http://allafrica.com/stories/201311110005.html (accessed 11 January 2020). (For comparison, and considering an exchange rate of 7.3 in August 2021, 2,300 Tanzanian Shillings is equivalent to 312 South African Rands.)
[261] Muntingh, L. and Redpath, J. (2016).

woman or mother who is imprisoned, the socio-economic impact is all the greater, as it hits those who are cared for (children and the elderly) by the woman.[262]

However, rather than applying Eurocentric knowledges, or what De Sousa Santos calls abyssal thinking originating from colonial times, African states should begin seriously drawing on local knowledges to give space to local realities and people's needs.[263] The recognition of local knowledges means, though, that legislators, policy-makers, judges and all stakeholders in the criminal justice system would need to recognise the positive impact that other knowledges can have on future reforms. Hinz states (with specific reference to Namibia):

> Only when the seriousness of traditional justice and its administration are respected will justice be done to customary law and its operations. Only when traditional justice and its operation are respected as having their own rationale will it be possible to argue for changes to improve justice and its administration at all levels, in line with the wider debate about the rights of the parties involved in a dispute. Without an openness towards alternative approaches, communication with those who stand for such alternatives will fail. Without such openness, law reform will not be able to learn about the need to employ creative legal mechanisms that will give the traditional administration of justice the legally accepted and protected space not only to operate, but also to develop.[264]

Respect for customary law in criminal justice will be achieved only when political power imposes respect for it from all state institutions. There is a consequent responsibility on society as a whole to seek to make those in power more aware of the plight of the most vulnerable sectors of society.

Respect for customary law applied to criminal justice will be achieved only when the dichotomy between west/east or north/south fades away. Pejorative characterisations of customary law as uncivilised and second-class will need to be replaced with positive ones empathetic to the majority of the people and rooted in a positive past. The dichotomy between centre/periphery will need to fade away to become only the centre and laws, with policies being created to meet the needs of everyone. In other words, respect for customary law in relation to criminal justice will be achieved only when knowledges other than those grounded in the Eurocentric paradigm gain space, become visible and are regarded as equally or more important than the Eurocentric approach in resolving the local challenges which face the criminal justice system.

3.4 Concluding remarks

The first part of the chapter situated the limits of the legal pluralism literature within the criminal justice arena. There has been no extensive literature on legal pluralism as applied to criminal justice. The *Journal on Legal Pluralism* and other journals that publish on matters related to legal pluralism published fewer articles on criminal issues than on civil ones, showing that legal pluralists are less interested in challenging state power in the creation and application of criminal laws. Analyses of three articles (published over 30 years) show that arguments

[262] Ibid.
[263] De Sousa Santos, B. (2007, pp. 45-89.
[264] Hinz, M. (2008) 'Traditional courts in Namibia – part of the judiciary? Jurisprudential challenges of traditional justice', in Horn, N. and Bösl, A. (eds) *The Independence of the Judiciary in Namibia*, p. 173.

follow two patterns. On the one hand, they recognise the importance of non-state mechanisms of conflict resolution, but on the other, they require the incorporation of customary criminal law into the state system, thereby reinforcing one of the main characteristics of legal centralism. The articles further illustrate that, over thirty years, a few legal pluralist scholars that engaged with criminal justice matters, applied a weak approach to criminal justice. Also, when applied to civil matters, such an approach shows that it is as if non-state mechanisms of conflict resolution do not exist, but they become, instead, part of the state system. In contrast, a strong legal pluralism approach has not been considered by legal pluralists regarding criminal justice matters. However, a small amount of literature does exist at the international level on legal pluralism as applied to criminal justice. In Mozambique, there is no research on criminal issues from the point of view of legal pluralism.

The second part of the chapter showed (through the lens of postcolonial theory) the Eurocentric approach that African states continue to adopt towards criminal justice. Looking at both access to criminal justice and imprisonment as punishment, the second part of the chapter demonstrated that African states still approach criminal justice in ways that share many characteristics with the colonial and post-independence periods. These legal frameworks do not respect African realities, especially with regard to the experience of the rural areas which, as peripheral regions, tend to become invisible along with the needs and rights of their populations. While the African context needs fast, cheap and understandable forms of justice, African states continue to prioritise a mode of justice which is expensive, slow and difficult to understand.

The chapter also showed the challenges of the state prison system in the continent and the continued application of the state system as a punitive regime. Despite the problems raised by the use of incarceration in Africa (the consequences for governments as well as for the families of incarcerated people), the paradigm of incarceration as punishment is proving difficult to shift.

The application of local knowledge to the criminal justice system can offer solutions to the many problems faced by access to justice and imprisonment in Africa. Chapter 5 provides a number of examples from Mozambique to show some of the possibilities that customary law mechanisms provide for the system. The next chapter is concerned with the historical context of the state's approach to non-state mechanisms of conflict resolution in relation to criminal justice in Mozambique. It shows how the past shaped and continues to shape the approach to criminal justice in the country. It will begin, however, by addressing certain of the challenges the justice system currently faces.

Chapter 4
The State's Approach to Non-State Forms of Conflict Resolution in Criminal Justice

Thus, obedience to norms frequently reflects sociopolitical reality more than the status of those norms as law. As a result, '[d]efining the essence of law or custom is less valuable than situating these concepts in particular sets of relations between particular legal orders, in particular historical contexts (Merry, 1988, p. 889).

4.1 Introduction

Chapter 4 outlines the historical context of the state's approach to non-state mechanisms of conflict resolution in relation to criminal justice in Mozambique. The chapter begins with a critical analysis of the Mozambican national context in relation to access to justice and examines the main issues that people face when accessing the state criminal justice and its prison system. The chapter continues by analysing the Mozambican approach to non-state mechanisms of conflict resolution in relation to criminal justice, moving from the colonial period, across the struggle for independence and into the post-independence era. Finally, it analyses the current approach of the state to legal pluralism and compares it with the past one to highlight how the past shaped and continues to shape the approach to criminal justice.

4.2 Critical analysis of access to justice in Mozambique

Access to formal justice is a complex matter.[265] It does not refer only to the question of physical access to the judicial courts; it also concerns how well people understand the laws, their meaning and their terminology.[266]

In Mozambique, laws are published in the *Gazette of the Republic* (*Boletim da República*) before they enter into force and can also be accessed online at the government website.[267] The *Gazette* can also be accessed physically, at the offices of the National Press (*Imprensa Nacional*), after payment of a fee that depends on the number of pages requested.[268] Radio and television are the main sources for the disclosure of legal information in the country given that only 17 per cent of the population have access to the internet.[269] Levels of poverty in the country are high, with more than 40 per cent of people living below the poverty line.[270]

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[265] See various authors who have defined access to justice, among them Cappelletti, Garth, Canotilho, Gumerato Ramos, Watanabe and Alegre.

[266] Cappelletti, M. (1978) *Access to Justice*. Milano: Giuffrè Editore. Alegre, C. (1988) *Acesso ao Direito e aos Tribunais*. Coimbra: Almedina. Watanabe, K. (1988) 'Acesso à Justiça e Sociedade Moderna*',* in Grinover, A. P., Dinamarco, C. R. e Watanabe, K. (coord.), *Participação e Processo*. São Paulo: Editora Revista dos Tribunais, pp. 128-135.

[267] The government website is not regularly updated and not easily accessible.

[268] Photocopying each page costs 5 Meticals. (For comparison, and considering an exchange rate of 5.8 in August 2021, 5 Mozambican Meticals is equivalent to 1.16 South African Rands).

[269] Available at: https://data.worldbank.org/indicator/IT.NET.USER.ZS?locations=MZ (accessed 14 January 2021).

[270] World Bank (2018) 'Strong but nor broadly Shared Growth. Mozambique Poverty Assessment', *World Bank.* Available at:

Publication of the laws in the *Gazette* is in Portuguese since this is the official language of the country, notwithstanding that close to 90 per cent of Mozambicans do not identify Portuguese as their mother tongue.[271] About 12 million out of a total of 28 million Mozambicans are unable to read or write in Portuguese, and they express themselves into their own national languages.[272] Although the number of national languages is difficult to identify, *Ethnologue* recognises 43 national languages used across Mozambique.[273] Changane, Shona, Sena and Makonde are some of those spoken in urban as well as rural areas of the country. In view of this way of publishing and promulgating laws, it can be argued that access to the law in Mozambique is challenging and that genuine access to the legal system and the right to justice is limited.

Physical access to the courts and the judicial apparatus is also difficult. In 2017 there were a total of 152 courts in the country, with these divided between District, Provincial, Courts of Appeal and the Supreme Court.[274] There were 137 courts at the district level, and 17 districts without a court. Where there are no courts, the people have to walk long distances to see their case resolved before reaching a judicial court.[275] In total, there were only 344 judges and 448 prosecutors. In a country with an estimated population of more than 28 million,[276] this means one judge for every 80,000 people, and one prosecutor for every 60,000.[277] By comparison, South Africa has one magistrate for every 30,000 citizens.[278] At this most basic of levels, access to the state justice system is challenging for Mozambicans.

The situation is worsened by the geographical distribution of courts and judges. The northern province of Nampula, for example, is the most populated province of the country, with a population of more than six million people. In 2017, there were a total of 20 District Courts and 33 judges operating in that province.[279] By comparison, the city of Maputo, with a population of just a little more than one million has five District Courts and 54 judges.[280] The situation deteriorates further with specific regard to criminal justice, where (albeit that the number of judges working on criminal justice matters is not publicly available),[281] the gap between the number of judges and the extent of the population they serve is even more pronounced.

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http://documents1.worldbank.org/curated/en/248561541165040969/pdf/Mozambique-Poverty-Assessment-Strong-But-Not-Broadly-Shared-Growth.pdf (accessed 14 January 2021).

[271] Ministério da Educação e Desenvolvimento Humano (2017) 'Vamos Ler. Language Mapping Study in Mozambique', *USAID*, Outubro de 2017. Available at: https://bit.ly/3ufdAFw (accessed 14 January 2021).

[272] Ibid.

[273] Available at: https://www.ethnologue.com/country/MZ/languages (accessed 14 January 2021).

[274] Ordem dos Advogados de Moçambique (2019), p. 31.

[275] Available at: https://sustainabledevelopment.un.org/content/documents/26314VNR_2020_Mozambique_Report.pdf (accessed 14 January 2021).

[276] Results of the census of 2017, published by the National Statistic Institute (*Instituto Nacional de Estatística*, INE). Available at: http://www.ine.gov.mz/ (accessed 14 January 2021).

[277] Ordem dos Advogados de Moçambique (2019), p. 27.

[278] The South Africa Judiciary (2020) *Judiciary Annual Report 2019/2020*. South Africa. Available at: https://www.judiciary.org.za/index.php/documents/judiciary-annual-reports (accessed 14 January 2021).

[279] Ordem dos Advogados de Moçambique (2019), pp. 32-35.

[280] Ibid.

[281] The Higher Council of the Judiciary (Conselho Superior da Magistratura Judicia, CSMJl) does not publish specific data of judges disaggregated by the different jurisdictions in which they work, such as for example, civil, criminal, labour and family.

The condition of the prisons is also fraught with problems. There are currently about 20,000 prisoners for a system geared to holding 8,000.[282] Overcrowding regularly reaches 200 per cent, with some prisons, such as the Provincial Prison of Maputo, Inhambane and Tete, having more than four to eight times their official capacity.[283]

In the last decade, judges have frequently used imprisonment as a punishment, even for petty crimes.[284] Statistics from 2017 indicate that more than 50 per cent of prisoners were serving sentences of between three months and a year,[285] with some 80 per cent having sentences between three months and eight years.[286] Adding to these figures are the many cases of pre-trial detention, something which is also ordered illegally. District courts deal with less than 1,000 cases per year, with many of these being simply summary cases (*sumario crime)*. Summary cases are the simplest kind of legal proceeding, punishable with a prison sentence of up to one year of imprisonment. They are not intended to involve pre-trial detention.[287] But, in 2017, more than 40 per cent of the total number of 6,000 pre-trial detainees were in detention for summary cases.[288]Similarly, data from the National Correctional Service (Serviço Nacional Penitenciário, SERNAP research) showed that, in 2020, there were children and minors (16-21 years old) that had been given prison sentences above those legally prescribed.[289] Article 48 of the Penal Code sets the age for criminal responsibility at 16, while article 131 of the same prescribes a maximum prison sentence of eight years for children or minors up to 18 years old, while for those between 18 and 20, no prison sentence can exceed 12 years. According to SERNAP, about 30 children or minors, in a prison population of about 20,000, were illegally sentenced to imprisonment.[290]

Due to the age of the carceral infrastructure and the results of substantial overcrowding, conditions of detention in Mozambique are deplorable. Health and basic living conditions are the most pressing concerns. There are only 2,500 doctors and 15,000 nurses for the entire country and its population of 28 million.[291] Access to health care in prisons is challenging not only due to the lack of trained personnel but also due to the general absence of the necessary financial and material resources. In reality, health centres in prisons are more like pharmacies than hospitals, places where Panado is the main medicine.[292] Only very few prisons (the Provincial Prison of Maputo and the Regional Prison of Nampula, for instance) have any facilities for treating serious illness.[293] These do have functioning health centres with

[282] Information available at: https://www.prisonstudies.org/country/mozambique (accessed 14 January 2021).
[283] Ordem dos Advogados de Moçambique (2019), p. 53.
[284] Petrovic, V., Lorizzo, T. and Muntingh, L. (2020).
[285] Ordem dos Advogados de Moçambique (2019), p. 49.
[286] Ibid.
[287] Decree 28/1975 of 1 March.
[288] Ordem dos Advogados de Moçambique (2019), p. 46.
[289] Data from the Mozambican National Correctional Service (*Serviço Nacional Penitenciário*, SERNAP) (January 2020).
[290] Ibid.
[291] Information available at: https://www.who.int/hac/crises/moz/background/Mozambique_Sept05.pdf (accessed 14 January 2021).
[292] Lorizzo, T. (2012), pp. 29-38. Available at: https://bit.ly/3ggk92c (accessed 11 September 2019).
[293] Progettomondo Mlal. (2014) *Manual de Boas Práticas em Processo de Reabilitação das Pessoas Privadas da Própria Liberdade.* Maputo, p. 50.

equipment for ophthalmology services, clinical laboratories and a staff of specialised practitioners such as psychologists.

Furthermore, there are no programmes for the rehabilitation and social reintegration into society of prisoners.[294] SERNAP found that some 1,600 prisoners were recidivists in January 2020.[295] Meanwhile, a study of the socio-economic impact of pre-trial detention found (in 2016) that at the Maputo Provincial prison some prisoners had already been incarcerated there more than five times.[296] While there is no research on the specific issue of recidivism in Mozambican prisons, it is likely that the lack of a programme of rehabilitation and reintegration into society impacts on the number of recidivists in the country.

Access to justice in prison is also challenging. In 2017, there were about 250 paralegals working for the Legal Aid Institute (*Instituto de Patrocínio e Assistência Jurídica*, IPAJ) and about 1,500 lawyers registered with the Bar Association (*Ordem dos Advogados de Moçambique*, OAM).[297] Likewise, judges and lawyers are unevenly distributed in the country. About 74 per cent of the total number of lawyers work in Maputo, with the rest spread out among the other provinces.[298] Access to justice in prison is problematic not only in terms of the small number of legal practitioners available, but so too in terms of quality of service. Reports by national and international organisations have repeatedly noted cases of corruption where the paralegals of the IPAJ demand bribes to perform what should be a free service.[299] Meanwhile, private lawyers are very expensive. The general population cannot afford to pay high fees for proper access to the state justice system.[300]

This overview of the state justice system points to a real need for a system that pays attention to the socio-economic contexts in which it is situated if the cause of justice is to be served. This is a struggle that can best be fought through the application of local knowledge. In Mozambique, people in fact rely on a heterogeneous system of conflict resolution mechanisms in both rural and urban areas. In these mechanisms, local knowledge can do much to supplement the state system and provide resources for a better justice for all. Actors can include chiefs of the land (in rural areas); block secretaries and neighbourhood secretaries (in urban settings); community courts; and a variety of non-state mechanisms, among them CSOs, churches and mosques.[301] Through these mechanisms, Mozambicans could be able to resolve civil issues

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[294] Rede da Criança (2019) *Crianças em Conflito com a Lei - Acesso à Assistência Jurídica a Programas de Reabilitação e Reinserção Social*. REFORMAR – Research for Mozambique. Available at: https://reformar.co.mz/publicacoes/digital-criancas-em-conflito-com-a-lei_rdc.pdf/view (accessed 10 August 2021).

[295] Data from the Mozambican National Correctional Service (*Serviço Nacional Penitenciário*, SERNAP) (January 2020).

[296] Muntingh, L. and Redpath, J. (2016).

[297] Ordem dos Advogados de Moçambique (2019), p. 27.

[298] Ibid.

[299] See information on the lack of integrity of the paralegals from IPAJ available at: https://www.wlsa.org.mz/advogados-do-ipaj-acusados-de-pratica-de-corrupcao/; https://cipmoz.org/wp-content/uploads/2018/08/122_CIP_Newsletter14.pdf; https://noticias.mmo.co.mz/2014/03/instaurado-10-ik,lprocessos-crime-contra-oficiais-do-ipaj-acusados-de-extorsao.html; https://www.youtube.com/watch?v=sJjWnA0oD6U (accessed 15 January 2021).

[300] Information available at: https://zambeze.info/?p=6314 (accessed 15 January 2021).

[301] Islam is the second-largest religion in Mozambique today. Mainly of South Asian origin, Muslims have long ties with Mozambique that go back to pre-colonial history. While during the colonial period,

such as family problems, disputes between neighbours as well as criminal issues such as domestic violence, theft and assault. The state approach to these mechanisms has, however, always been reluctant in relation to criminal matters, as it will be shown below. The analysis of the state approach to legal pluralism in criminal justice will show that certain trends recur in how the state deals with criminal justice.

4.3 Historical development of the state approach to legal pluralism in criminal justice

4.3.1 Colonial Mozambique

Portugal began colonising Mozambique in the 15th century, although effective colonial occupation began only at the end of the 19th century. Mozambique was a settlement colony (*colonia de povoamento)* in which the Portuguese aimed at inhabiting and developing the land with housing, creating international forms of trade and expanding the basic structures of the colony (schools, hospitals, and the like).[302] The country was a large territory and difficult to control, but through the establishment of land grants (*prazos)*, the power of the Portuguese increased over time. The *Prazos* were areas of concessions in which the administrators (*Prazeiros)* had jurisdiction over the resident population in the territory of the concession. The *Prazeiro* could require services; levy taxes; maintain an army for the defence of the land and maintenance of order; and hold trials and apply punishment. The *Prazeiros* exercised almost absolute power and with little direct control by the Portuguese state.[303]

It was through assimilation that the *Prazeiros* subjugated the heterogeneous world of different ethnic groups which they encountered in Mozambique. Based on the direct-rule system the French developed for their colonies, assimilation required African people to become similar to the colonisers.[304] Assimilation had different dimensions, but it was mainly through the language and culture of the colonisers that Africans were slowly assimilated with the Europeans.[305]

Assimilation did not provide for recognition of any form of dispute resolution other than the exclusive application of the metropolitan system of the colonisers. Even though other local fora of conflict resolution existed in practice among local people, the objective of the direct-rule system was that Africans would walk away from their traditions and customs.[306]

Islam faced challenges as the Portuguese made Catholicism their dominant religion, since independence, Muslims have regained their power. Von Sicard, S. (2008) 'Islam in Mozambique: Some Historical and Cultural Perspectives', *Journal of Muslim Minority Affairs*, 28(3), pp. 473 — 490.

[302] Newitt, M.D. (1995) *History of Mozambique*. London: Hurst & Company. Leslie, C. et al. (2006) *Slaves: from classical times to the modern age.* Center for the Study of Slavery, Resistance and Abolition: Yale University Press. Iliffe, J. (1999) *Os Africanos: história de um continente*. Lisboa: Terramar. Keehan, E. K. (1990) 'The Legal System of Mozambique', in Kenneth, R. R. (ed.) *Modern Legal Systems Cyclopedia.* William S Hein & Co.

[303] Isaacman, A. F. (1972) *Mozambique: The Africanization of a European Institution—The Zambesi Prazos, 1750–1902*. Madison: University of Wisconsin Press.

[304] Conklin, A. L. (1997) *A Mission to Civilize: The Republican Idea of Empire in France and West Africa, 1895-1930*. Stanford, Calif: Stanford University Press.

[305] Ibid.

[306] See Lewis, M. D. (1962) 'One Hundred Million Frenchmen: The "Assimilation" Theory in French Colonial Policy', *Comparative Studies in Society and History*, 4 (2), pp. 129–153; Gerring, J., Daniel Ziblatt, J. and Julian A. (2011), pp. 377–433; Cohen, W. B. (1971). Mamdani, M. (1996) *Citizen and*

The application of the direct-rule was provided for by the 1822 Constitution of the Portuguese Monarchy, which stated that the Portuguese nation was the union of the Portuguese of both hemispheres, including the colonies.[307] Decree 24 of 1832 officially affirmed that the Portuguese justice system which applied in Portugal was to be expanded to the colonies.[308] In 1852, the Additional Act to the Constitution of the Monarchy (*Acto Adicional á Carta Constitucional da Monarquia*) authorised the introduction of special laws, considering that the Portuguese laws, as enacted in the metropolis, were not adaptable to Africans.[309] De Sousa Santos describes very well the dichotomy that existed during colonialism between the world of the Portuguese ('us') and the world of local people ('other').[310] For the first centuries of colonisation, the Portuguese did not recognise anything on the other side of their world; the knowledge existing on the other side of us was, in practice, an invisible knowledge.[311]

The *Prazos*, however, became areas where justice began to be managed privately and the *Prazeiros* were often found to not respect Portuguese rules, deciding themselves how to administer their land and impose punishments.[312] Rather than a system of direct rule, the Mozambican system was becoming a private one, managed individually. Given the sheer size of Mozambique, it proved impossible in practice for Portugal to manage and control each *Prazo;* the idea of direct rule proved illusory.

The failure of direct administration was subsequently resolved in the Conference of Berlin (1884-1885) and the 1891 Luso-British agreement. The Conference formalised the occupation, division, and colonisation of the African territories by the European powers, while the 1891 Luso-British agreement officially established the Mozambican borders and European control of the territory. Mozambique was mainly divided between private companies controlled and financed by the British: the Mozambique, Zambezi and Niassa Companies.[313] Forced labour

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Subject: Contemporary Africa and the Legacy of Late Colonialism. New Jersey: Princeton University Press.

[307] Article 20 of the 1822 Constitution of the Portuguese Monarchy. Available at: https://www.fd.unl.pt/Anexos/Investigacao/7511.pdf (accessed 15 January 2021).

[308] Decree 24 of 1832. Available at: https://www.fd.unl.pt/Anexos/Investigacao/1799.pdf (accessed 15 January 2021).

[309] Article 15 of the 1852 Additional Act to the Constitution of the Monarchy. Available at: https://digitarq.arquivos.pt/details?id=4161658 (accessed 15 January 2021).

[310] De Sousa Santos, B. e Meneses, M. P. (2006) *Identidades, colonizadores e colonizados: Portugal e Moçambique*. Relatório final do Projecto POCTI/41280/SOC/2001. Coimbra: CES.

[311] Meneses, M. P. (2010), pp. 39-93. Available at: http://journals.openedition.org/eces/403 (accessed 13 January 2020).

[312] The system of the *Prazos* was designed by Afonso de Albuquerque (1509-1515), and although Mouzinho da Silveira decreed its abolition in 1832, it was only finally abolished with the Portuguese Colonial Act of 1930. See Newitt, M. (1969) 'The Portuguese on the Zambezi: An Historical Interpretation of the Prazo System', *The Journal of African History, 10* (1), pp. 67-85. Available at: http://www.jstor.org/stable/180296 (accessed 14 January 2021).

[313] The Mozambique Company ended its mandate in 1942, but it continued to operate in the agricultural and commercial sectors in the Manica and Sofala provinces. The *Grupo Entreposto Commercial* was created in 1961, replacing the Mozambique Company. The *Groupo Entreposto* became a holding company in 1972 and has continued to operate in the country since then. The Niassa Company covered the northern territories of Niassa and Cabo Delgado. Funded by a Portuguese, the Company was put in the hands of a consortium of French and British capitalists before entering the hands of Germans. The Company became famous for the founding of the town Porto Amelia, now Pemba. It was finally abolished in 1929, as the Portuguese did not renew the concession because the areas were not developing as per contractual obligations. The Zambezia Company lasted longer than

was used, with people sent to the mines in South Africa and other British colonies.[314] Roads and ports were built to enable the trade of goods. The private concessions remained active on Portuguese land until the regime of Salazar (*Estado Novo),* which came into force in Portugal in 1933.

British colonisation introduced the indirect-rule system to administer all dimensions of the colony. Through indirect rule, the colonisers used traditional rulers to govern the vast country which the Portuguese on their own had proved unable to administer.[315] With regard to the justice system, things also began changing and the existence of local fora of dispute resolution were increasingly recognised by the colonial state.

In 1901, at the first Colonial National Congress held in Lisbon at the headquarters of the Geographical Society of Lisbon,[316] Pessoa expressed his thoughts about the diversity of the colonies and the need to apply indirect rule:

> What is proven is that it is not possible to enact a general law for all colonies and that we should respond to the circumstances and customs of each colony to especially decide what suits each one of them.[317]

While now obvious, in the colonial period the assertion that direct application of metropolitan law to overseas territories was impossible was a milestone. The indirect-rule regime recognised the existence of local fora of dispute resolution together with the European-based judicial system so as to better control the administration of the colonies and their populations. In addition, by giving power to certain local authorities (such as the chief of the land (*regulos)*), the Portuguese officially recognised and allowed local people to solve their own disputes by applying local normative orders. Through this system, the Portuguese could continue their process of conquest. While indirect rule has sometimes been considered a more tolerant approach than direct rule, this is incorrect: the recognition of certain forms of traditions and customs did not mean greater freedom for the local population, but rather better control of them by the Portuguese.[318]

The Political, Civil and Criminal Statute of the Indigenous People of Angola and Mozambique *(Estatuto Político, Civil e Criminal dos Indígenas de Angola e Moçambique*), as well as the Organic Law and Administrative Reform of the Overseas Territories (*Carta Orgânica e a Lei da Reforma Administrativa Ultramarina*) were promulgated in 1926 and 1933, respectively.[319]

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the others, until 1942, but the concession was not renewed for the same reasons of not seeing major development in Zambezia and Tete provinces.

[314] Martinez, E, S. (2008) *O Trabalho Forçado na Legislação Colonial Portuguesa - O Caso de Moçambique (1899-1926).* Tese de Mestrado. Universidade de Lisboa. Available at: https://bit.ly/3ocSsMi (accessed 21 January 2021).

[315] Mamdani, M. (1996) *Citizen and Subject. Contemporary Africa and the legacy of late colonialism.* Princeton: Princeton University Press.

[316] At the first Colonial National Congress held in Lisbon at the headquarters of the Geographical Society of Lisbon (2-5 December of 1901), the opening of the event was attended by King Carlos.

[317] Carvalho Pessoa, J.C. (1901) 'A Nossa Legislação Ultramarina – Analyse Crítica', *Boletim da Sociedade de Geografia,* 16(19), pp. 503-519. Lisboa: Imprensa Nacional.

[318] Havik, P. (2010) 'Direct or Indirect Rule? Reconsidering the roles of appointed chiefs and native employees in Portuguese West Africa', *Africana Studia,* 15, pp. 29-36.

[319] The first Decree 12.533/1926 was followed by Decree 16.473/1929 under the name the Political, Civil and Criminal Statute of the Indigenous People of Africa *(Estatuto Político, Civil e Criminal dos Indígenas das colónias portuguesas de África*).

These two legal documents provided for the existence of two justice systems: one to be applied only to the Portuguese through the formal justice system of the metropolis; and one applied to the local people, based on their traditions and customs.[320]

Hobsbawm and Ranger (as well as Meneses and Granjo) argue that in colonial time, tradition was not simply recognised by the colonisers, but rather reinvented by them, thanks to the plasticity of tradition.[321] The reinvention of tradition was, however, not a straightforward phenomenon led only by the Portuguese. In more complex ways, tradition was also reinvented by the traditional authorities themselves, with their playing the crucial role of intermediates between the colonisers and local people.[322] They could maintain their privileged position by obeying the Portuguese, collecting taxes (*imposto de palhota),* recruiting labour, confiscating land, and keeping the peace among the local population.[323]

There is no consensus on how the role of traditional authorities in the colonial period should be understood. While one school of thought regards traditional authorities as heroes (the administrators and custodians of local customs who have kept tradition alive),[324] another school (represented by authors such as Sachs, Hall and Young) suggests they were enemies of the local communities.[325] Sachs writes:

> Even the judicial power they [traditional authorities] exercised became tainted, since it came to be regarded as a perk for the services, rendered to the colonial state, handsomely rewarded in terms of the gifts necessary to 'open' the court ... [T]he only custom that really counted in the courts of the chiefs in the late colonial period was the custom of visiting the chief's house the night before the hearing with a gift more extravagant than that given by the opponent.[326]

Tradition was not only reinvented, but also in part censored through the repugnancy clause *(Cláusula de Repugnância*), established by article 138 of the Constitution of the 1951 Portuguese Republic (*Constituição da República Portuguesa).* The article reads:

> In the overseas territories, there shall exist, where necessary and according to the state of evolution of the populations, special statutes that establish, under the influence of the Portuguese public and private law, legal regimes

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[320] Martinez, E, S. (2010) *Legislação portuguesa para o Ultramar. Conflicto Social y Sistemas Jurídicos Consuetudinários Africanos: La Redefinición Constante de la Tradición*. 7 Congresso de Estudos Africanos. Available at: https://bit.ly/3g7rD7U (accessed 15 January 2021).

[321] Hobsbawm, E. and Ranger, T. (2012). Meneses, M. P. (2016) 'Os sentidos da descolonização: uma análise a partir de Moçambique', *OPSIS* 16 (1), pp. 26-44. Granjo, P. (2011) 'Trauma e Limpeza Ritual de Veteranos em Moçambique', *Cadernos de Estudos Africanos*, 21, pp. 43-69.

[322] See Meneses, M.P. (2006) 'Traditional Authorities in Mozambique: between Legitimisation and Legitimacy', in Hinz, M.O. (ed.) *The Shade of New Leaves. Governance in Traditional Authority: A Southern African Perspective*, Berlin: Lit Verlag, p. 93-120; Meneses, M. P. (2004) 'Toward inter-legality? Traditional Healers and the Law in Post-Colonial Mozambique', *Beyond Law*, 27, pp. 7-31.

[323] Ibid.

[324] O'Laughlin, B. (2000) 'Class and the Customary: The Ambiguous Legacy of the Indigenato in Mozambique', *African Affairs*, 99, pp. 5-42.

[325] Hall, M. and Young, T. (1997) *Confronting Leviathan: Mozambique since Independence.* London: Hurst and Company. Coelho, J.P.C.B. (1993) *Protected Villages and Communal Villages in the Mozambican Province of Tete (1968-1982). A History of State Resettlement Policies, Development and War*. PhD Thesis. University of Bradford.

[326] Sachs, A. (1984) 'Changing the Terms of the Debate: A Visit to a Popular Tribunal in Mozambique', *Journal of African Law*, 28(1/2), pp. 99-10.

> compromised with their [local population] traditions and customs that are not incompatible with moral, dictates of humanity or free exercise of Portuguese sovereignty.[327]

With this clause, the Portuguese retained the power to allow (or not) the use of local normative orders and their related systems of dispute resolution. Martinez calls this a 'special justice' in which local fora could be used only after the scrutiny of the repugnancy clause.[328] Local normative orders were racially discriminated against and always worked according to the logic that the 'other' existed to become 'us' (as Meneses and De Sousa Santos remind us).[329] Proof of this logic was the concept of the assimilated (*assimilados)*: a class of people who were more than indigenous but less than Portuguese.[330] Only these second-class citizens could gain access to civil rights and to the same justice system as the Portuguese.[331]

The Portuguese used special courts (*Julgado Istrutor)* for civil and criminal matters involving Europeans living in the country:[332] The Portuguese Codes were applied and, in criminal matters, imprisonment was available as a form of punishment.[333] Imprisonment in the colonies was used for those Portuguese who were sentenced to exile (*degredo*) by a court in Portugal.[334]

The Indigenous Courts (*Tribunais Privativos dos Indígenas)* were established in 1929 to have jurisdiction solely over the local population.[335] Five people comprised the Indigenous Court, and the president of such courts was the administrator of the area where the court operated (*Circunscrição* and/or *Concelho*).[336] There were two public officials working within the colonial administration, chosen by the president of the court and two local advisors (*assessores*), with the role of giving advice on the applicable local customs. The head of the court remained a Portuguese man, while the two officials and advisors were Africans. The advisors reported cases to the court, gave instruction on cases, and suggested appropriate

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[327] Article 138 of the 1951 Constitution of the Republic of Mozambique.

[328] Martinez, E, S. (2012) *Uma Justiça Especial para os Indígenas. Aplicação da Justiça em Moçambique (1894-1930)* Tese de Doutoramento. Universidade de Lisboa. Available at: https://repositorio.ul.pt/bitstream/10451/7314/1/ulsd063628_td_Esmeralda_Martinez.pdf (accessed 16 January 2021). See also Coissoró, N. (1984), pp. 72-79. Available at: http://www.jstor.org/stable/745484. (accessed 16 January 2021).

[329] De Sousa Santos, B. (2010) 'Para além do pensamento abissal: das linhas globais a uma ecologia dos saberes', in De Sousa Santos, B., Meneses, M. P. *Epistemologias do Sul***.** São Paulo: Cortez, pp. 31-83. De Sousa Santos, B. (2004) *Do pós-moderno ao pós-colonial: e para além de um e de outro.* Conferência de abertura do VIII Congresso Luso-Afro-Brasileiro de Ciências Sociais, Coimbra. Available at: www.ces.uc.pt/misc/Do_pos-moderno_ao_pos-colonial.pdf (accessed 16 January 2021).

[330] De Sousa Santos, B. e Meneses, P. (2006).

[331] For insight into the lives of *assimilados,* see Isaacman, A. (1988) 'Colonial Mozambique, an Inside View: The Life History of Raúl Honwana', *Cahiers d'Études Africaines*, 109, pp. 59-88; Moreira, J. (1997) *Os Assimilados, João Albasini e as Eleições, 1900-1922*. Maputo: Arquivo Histórico.

[332] Martinez, E, S. (2008), p. 273. Available at: https://bit.ly/3KTrKC6 (accessed 21 January 2021).

[333] Ibid.

[334] The word '*degredo*' does not have a precise equivalent in other languages. In the Portuguese colonial empire, it designated a very specific type of criminal expulsion. In addition to its legal usage, the word referred to the places where the sentence was served. From the perspective of the Portuguese punitive system, in most cases *degredo* meant expelling the criminal from the place where the crime was committed and sending him or her to another location that may or not have been part of the metropolitan territory. The *degredo* was abolished in 1954 by Decree 39.668.

[335] *Regulamento dos Tribunais Privativos dos Indígenas* (Diploma Legislativo 37, 12 November 1927)

[336] Martinez, E, S. (2012). Available at: https://repositorio.ul.pt/bitstream/10451/7314/1/ulsd063628_td_Esmeralda_Martinez.pdf (accessed 16 January 2021).

punishment.[337] While the colonial administrators could control the local people through the advisors, the advisors themselves could also manipulate the collected information as well as the traditions and customs applicable to the cases.[338]

Indigenous Courts dealt with both civil and criminal cases, not questioning whether this distinction had any real meaning for local people.[339] The Swedish missionary Junod described the life of the Thonga community (who inhabited the southern part of the country), noting that laws among the Thonga were oral and well known by the people. The law was the 'custom that has always been'.[340] He emphasised that the Thonga had a strong sense of justice, one linked to notions of collectivity and harmony. They believed in the social order and the peaceful solidarity of their community, and made no distinction between civil and criminal justice matters. The peace of the community broken through theft, for example, had to be restored through the exhibition of the thief to the people and his or her public shame as well as the restitution of the stolen goods.

In his analysis of homicide in African traditional societies, Nhlapo argues that 'values and norms in respect of killing existed and that notions of accountability were indeed recognised, although being drawn from strong communitarian foundations and a widespread belief in the supernatural'.[341] The Portuguese saw customary criminal law as cruel. As Cabral Pereira[342] observed at the time,

> Barbarian peoples are generally characterised, from the point of view of criminology, by the little importance attached to human life, by the mediocre respect for the property of others, [by] the substitution of private revenge for public repression and the absence of an energetic opinion condemning crime ... It would be extraordinarily harmful that justice was not directly exercised by the dominating nation through employees or European judges. Indeed it is indispensable that the government has in his hand all efficient means to suppress the attacks against human life and political unrest in order to ensure the most complete order without which the civilizing work cannot progress.[343]

Imprisonment was introduced in the colony first for Portuguese citizens and later applied to the local population, although it was not considered that useful if used without the application of any other type of punishment. Where the Portuguese Criminal Code of 1886 was indeed applied to Mozambicans as well as to the Europeans, this application was highly criticised by Antonio Enes, one of the thinkers of Portuguese colonialism in Africa. In 1913 Enes stated that imprisonment did not intimidate Africans as the conditions in a prison were likely to be an

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[337] Thomaz do Nascimento, F. (2011) 'Que justiça deve-se aplicar? Dois tribunais coloniais privativos para os 'africanos' em Moçambique', *Métis: história & cultura,* 10(19), pp. 81-98.
[338] Thomaz do Nascimento, F. (2012) *Casaco que se despe pelas costas: a formação da justiça colonial e a (re)ação dos africanos no norte de Moçambique, 1894 - c. 1940*. Tese de Doutoramento. Universidade Federal Fluminense. Available at: https://www.historia.uff.br/stricto/td/1419.pdf (accessed 16 January 2021).
[339] Junod, H. A. (1913) *The life of a South African Tribe.* 1st edition. London: Macmillan & Co.
[340] Ibid. p. 387.
[341] Nhlapo, T (2017) 'Homicide in traditional African societies: Customary law and the question of accountability', *African Human Rights Law Journal,* 17(1), pp.1-34.
[342] Cabral Pereira, A. A. (1925).
[343] Ibid. p. 9.

improvement on their ordinary living conditions.[344] De Sampayo e Mello critiqued the use of imprisonment for Africans, arguing that people in prison did not work, were lazy, and regarded imprisonment as a reward. Corporal punishment would work better in inhibiting the criminality of the local population.[345] Enes suggested that when looking at the question of African prison reform, the Portuguese should consider terms of forced labour rather than imprisonment.[346] Forced labour[347] (*trabalho correctional*), as a special form of punishment, applicable only to the *indigena,* was formally established through Decree of 27 September 1894.[348] The *trabalho correctional* involved a term of more than 90 days, with some exceptions: anyone found loitering, drunk, disobeying public authorities or committing corporal offences would be punished by a term of correctional labour of up to 90 days.[349]

Correctional labour was unpaid until 1914, when the new Policy on Indigenous Labour (*Regulamento do Trabalho dos Indígenas*) prohibited correctional labour without payment.[350] The Policy provided that the salary was equally divided between the prisoner/worker and the police force (for their costs in surveilling the prisoner).[351] Labourers would work normal hours, and be brought back to prison at the end of the day.[352] In 1927, the Policy for the Indigenous Courts (*Regulamento dos Tribunais Privativos dos Indígenas)* distinguished public labour from correctional labour. While public labour is done in a place different from where the person lives, correctional labour can be done at the residence or outside the residence of the sentenced person. In both situations, the person would be under police control for the duration of the labour.[353] Despite these provisions, Enes noted in 1947 that in Mozambique

> there are always three or four hundred criminals in the fortress of São Sebastião, of which only a few do work, if they wish, for the government and private individuals. Prisons are jammed with idlers and public administrations do not have staff for indispensable occupation.[354]

By the 1950s, the fortress of São Sebastião in the Mozambican Island was already overcrowded and the correctional labour system was not working as planned. Other prisons such as the Civil Prison (*Cadeia Civil*) of Lourenço Marques (today Maputo) were inadequate due to the deplorable condition of the place. In these circumstances, 'there was no possibility of separating local people from the Europeans', Rodrigues notes in his important study of the prison system in the colonies (published in 1963).[355]

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[344] Martinez, E, S. (2008). Available at: https://bit.ly/3HfMPEt (accessed 21 January 2021).
[345] De Sampayo e Mello, L. (1910) *Questões Coloniais, Política Indígena*. Porto.
[346] Enes, A. (1947) *Moçambique*. 4 ed. Lisboa: Imprensa Nacional, p. 72.
[347] Forced labour was part of the political ideology of the all-Portuguese colonisation. It was applied as a way to grow the economy and subjugate people. Forced labour was used to build roads and infrastructure and cultivate land. Martinez, E, S. (2008). Available at: https://bit.ly/3G92KDi (accessed 21 January 2021).
[348] Ibid. p. 70.
[349] Ibid. p. 71.
[350] Ibid. p. 72.
[351] Ibid. p. 248. In Mozambique the policy was introduced in 1918 with the Bulletin 26(1) of 19.07.1918.
[352] Ibid. p. 249.
[353] Ibid. p. 525.
[354] Martinez, E, S. (2008). Available at: https://bit.ly/3ATf3mk (accessed 21 January 2021).
[355] Rodrigues L. F. (1963) *Contribuição para o estudo do sistema prisional no Ultramar*. Instituto Superior de Ciências Sociais e Política Ultramarina: Universidade Técnica de Lisboa, p. 54.

The racial superiority of the metropolitan law was considered the only instrument that could lead Africans out of their uncivilised state. This was, however, not the case with matters of civil law. Local populations had been legally authorised by the Portuguese to deal with their civil issues, using their traditions. Already in 1869, article 8 of the 18 November Decree (which extended the application of the Portuguese Civil Code to Mozambique) recognised the validity of civil local practices. This provision aimed at expropriating the lands and better subjugating its local people, inhibiting possible violent reactions to the interference of the colonisers in the lives of local people.

The difference between civil and criminal matters was also seen in the attempts made by the Portuguese to collect and codify local customs. Reports by governors, local administrators and travellers, the decisions of judges, studies commissioned by the government, and anthropological work by missionaries – all of these made civil local traditions more comprehensible to the Portuguese.[356] These texts often represented ethnographic research, describing the stories of people's lives. They were also legal accounts regarding the administration and management of conflicts within local populations. The anthropologist Meneses reminds us that these accounts 'symbolised the making of customary law from above', underlying the racial division of the colonial administration – the stories were interpretations made purely by colonisers.[357]

They were, however, also used by the Portuguese for the recognition of civil practices between local people. Attempts to codify customary civil and commercial law in Mozambique began in the 19th century with two documents published on the local deployment in the Mozambican Island and the Inhambane province. The first was the Code of the Indigenous People of the Inhambane District *(Código Cafreal do Distrito de Inhambane).* This was written by Cunha and published in 1852. The same author wrote a second text focusing on the Mozambican Island and published in 1885. In 1905 and in 1907, two codes about the traditions and customs of the Sena people in the Gaza Province were published, followed by the Project of the Civil Code for the District of Sena (*Projecto de Código de Milandos para a Circunscrição de Sena)* of Monteiro Lopes (in 1909) and the Civil Code (*Código de Milando*) of Cabral in 1925.[358]

Little attention was paid to customary criminal law. Studies on customary criminal law were commissioned by the Portuguese for background information to be used in the application of the Portuguese Criminal Code to Mozambique, as no Mozambican Criminal Code ever came into force in the country. A Final Project of the Criminal Code for the Indigenous People of Mozambique (*Projecto Final do Código Penal dos Indígenas de Moçambique*) was published in 1946.[359] This work was divided into two parts, the first focusing on general crimes and criminals (*Dos Crimes em geral e dos Criminosos*) and the second on specific crimes (*Dos Crimes em especial*). The legislation was the product of research conducted by Cota, who studied and collected the traditions of a variety of ethnic groups in Mozambique.[360]

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[356] Dias, A.J., Dias M. e Guerriero M.V. (1966) *Macondes (Os) de Moçambique.* Junta de Investigações Ultramar: Centro de Estudos de Antropologia Cultural.
[357] Meneses, M.P. (2006), p. 101.
[358] Martins, A. R. (1960) 'Monografia sobre os usos e costumes dos "SENAS"', *Boletim da Sociedade de Estudos de Moçambique*, pp. 13- 33.
[359] Cota J. G. (1946).
[360] Cota J. G. (1944).

The Criminal Code for Mozambique never came into force and the colonial power never recognised the existence of local practices of criminal justice. In the rural areas, the chiefs of the lands controlled the population and the way they resolved their problems, while in the urban areas the situation was far more centralised and placed in the hands of the colonisers. In the cities, notably in the capital city of Lourenço Marques (today Maputo),[361] the local population interacted, and to some degree integrated, with the white Europeans, and so (though in small numbers) were more prone to abandon the dictates of their own culture and be subject to Portuguese justice.[362]

In 1961 the Political, Civil and Criminal Statute of the Indigenous People of the Portuguese colonies was revoked through Law Decree 43893, with the Minister of the Overseas Territories, Moreira[363] proclaiming full citizenship for all Mozambican Africans. In the preamble, the law states:

> Since the main reason of the Statute is in regard to the contents of the private lives of various ethnic groups, we found the opportunity of their withdrawal on terms to be clearly established that the Portuguese people are subjected to a policy that law is equal for all without distinction races, religion, or cultural content predominates. We will take effect everywhere the rule that there is no dependency between the status of private law and political status.[364]

While the revocation of the Statute did not mean the immediate end of racial subjugation in practice, it did signal an awareness of what was happening in African liberation movements. The Portuguese colonies of Guinea Bissau, Angola and Mozambique began to prepare for the armed struggles for independence that were to come.

4.3.2 The independence and post-independence eras

The Mozambican Liberation Movement FRELIMO (*Frente de Libertação de Moçambique*) was formed by Eduardo Chivambo Mondlane in Tanzania in 1962; the armed struggle against the Portuguese started two years later in 1964.[365] The first liberated areas (*Zonas Libertadas*) were in the northern part of the country.[366] Here, the physical dismantling of the Portuguese system and the lack of a new system of justice left a void. The FRELIMO Disciplinary

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[361] The capital city was moved from the Mozambican Island to Lourenco Marques in 1898.

[362] Coissorò, N. (1984) 'African Customary Law in the Former Portuguese Territories, 1954-1974', *Journal of African Law, 28* (1/2), pp. 72-79. Available at: http://www.jstor.org/stable/745484. (accessed 16 January 2021).

[363] Adriano José Alves Moreira was a top political figure in Portugal throughout the second half of the 20th century. The Minister for Overseas under Oliviera Salazar's dictatorship, he introduced legislative reforms during his two years (1961–1963). See Moreira, A. (1955).

[364] Ibid, p. 5.

[365] Mondlane, E. (1968) *Nationalism and Development in Mozambique.* University of California. Available at: http://digitallibrary.usc.edu/cdm/compoundobject/collection/p15799coll60/id/7807/rec/97 (accessed 16 January 2021). Mondlane, E. (1977) *Lutar por Moçambique*. Lisboa: Sá da Costa. Isaacman, A. and Isaacman, B. (1983) *Mozambique: From Colonialism to Revolution, 1900-1982*. Colorado: Westview Press.

[366] Gentili, A. M. (1993) 'A subversão no distrito de Cabo Delgado entre 1950 e 1960 segundo as fontes administrativas locais', *Boletim do Arquivo Histórico de Moçambique*, 14, pp. 103-116. Available at: http://www.ahm.uem.mz/novo/images/sumariosArquivo/ahm-Arquivo-N14-especial.pdf (accessed 16 January 2021). On justice matters, see the Journal *Tempo* of 3 September 1979, No. 413 and the speeches of the I National Meeting of the Ministry of Justice.

Committees (*Comites Disciplinares),* the Popular Courts (*Tribunais Populares de Base*) and, later, the Dynamising Groups *(Grupos Dinamizadores*),[367] sought to fill the gap and assist the local people with various issues, from family disputes to criminal matters.[368]

Public criticism or humiliation (*critica publica*) was established as the main form of punishment for thieves, but this was often complemented by other forms of penalty as aggrieved people often demanded compensation for stolen goods. In more serious cases, such as poisoning and homicide, communities would demand the application of the death penalty.[369] In a 1984 interview with the journal *Justiça Popular*, Major-General Moiane, speaking about justice in the liberated areas, stated that while punishments such as the death penalty were applied,[370] the FRELIMO Disciplinary Committees and the Popular Courts insisted on dialogue as ways of moving the struggle forward.[371] In this way, the creation of a new nation – one whose people understood the reason for the revolutionary struggle, the need for the dismantling of colonial structures and the adoption of new socialist principles – could begin.

As the power of the committees, courts and the party cell groups in the liberated areas grew, the role of the colonial traditional authorities shrank. In his study of traditional authorities in the Zambezia region, Chichava shows that it is a mistake to see colonial traditional authorities as a homogeneous group.[372] Among them were high-ranking authorities such as the *regulos* but so too lower-level authorities such as the Chiefs of Villages (*Chefes de Povoações*) and the Chiefs of Groups of Villages (*Chefes de grupos de Povoações*). Each had a different relationship with the colonial power and were treated very differently by the colonisers. While the colonial administration collaborated mainly with the chiefs of the lands (*regulos),* extending them financial support, the remaining authorities had no help from the Portuguese. At the same time, though, this also meant they had more freedom to decide on the administration of their territories and on the social issues of their people.

In the struggle era, FRELIMO looked for support precisely from these lower-level authorities so as to mobilise local people to fight against the Portuguese. By organising resistance to the authoritarian *regulos* that for many decades had imposed Portuguese rule on the locals, the Chiefs of Villages helped FRELIMO liberate areas from the Portuguese. Independence was gained in 1975 with the proclamation of the Popular Republic of Mozambique (*Republica Popular de Moçambique*). The elimination of inequality, the abolition of private property, the

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[367] Meneses, M. P. (2009), pp. 9-42.

[368] Meneses, M. P. (2016) 'Hidden Processes of Reconciliation in Mozambique: The Entangled Histories of Truth-seeking Commissions held between 1975 and 1982', *Africa Development,* 41(4), pp. 153-180. Available at: http://www.jstor.org/stable/90013893 (accessed 16 January 2021).

[369] The death penalty was abolished in 1990.

[370] On the role of violence perpetrated by FRELIMO in the post-independence era, see Igreja, V. (2010) 'Frelimo's Political Ruling through Violence and Memory in Postcolonial Mozambique', *Journal of Southern African Studies, 36*(4), pp. 781-799. Available at: www.jstor.org/stable/29778067 (accessed 16 January 2021). See also Bertelsen, B. E. (2003) 'The traditional lion is dead. The ambivalent presence of tradition and the relation between politics and violence in Mozambique', in Goirand, C. (ed.) *Lusotopie. Violence et contrôle de la violence au Brésil, en Afrique et à Goa*. Paris: Éditions Karthala, pp. 263-281.

[371] Honwana-Welch, G. e Dagnino, F. (1984) 'O Direito e a Justiça nas Zonas Libertadas', *Justiça Popular,* 8, pp. 11-16.

[372] Chichava, S. (2007) *'Os chefes 'tribais são fantoches'! A Frelimo e o poder tradicional durante a luta anticolonial na Zambézia.* Tese de MEstrado. Universidade Eduardo Mondlane. Available at: https://macua.blogs.com/files/os-chefes-tribais-sao-fantoches.pdf (accessed 16 January 2021).

repression of counter-revolutionaries and the consolidation of unity, independence and the conquests of the revolution were the main aims of the new Marxist-Leninist state.[373]

After independence, the old colonial traditional authorities were viewed negatively. Chichava argues that traditional authorities were incompatible with the socialist principles of the FRELIMO government.[374] Meanwhile, Mondlane argued that with independence, it was important not only to eliminate the colonial power and all the authorities that had kept the discriminatory system working, but also to establish a new system so as not to leave an administrative vacuum in the country.[375]

In a famous speech delivered in 1970 (prior to independence), Samora Machel, the future first President of the country, stated that 'to unite all Mozambicans, transcending traditions and different languages, requires that the tribe must die in our consciousness so that the nation may be born'.[376] Literature published on the history of FRELIMO generally considers the expression 'the tribe must die' as a remarkable stance taken by the new government against all forms of local practices.[377] This perception was reinforced by article 4 of the 1975 Constitution of the Popular Republic of Mozambique (*Constituição da República Popular de Moçambique*). It provided for the 'elimination of colonial and traditional structures of oppression and exploitation and the accompanying mentality'.[378] The adjectives 'colonial' and 'traditional' came to be regarded as a natural pairing. All local practices that could be regarded as a threat to the creation of a new socialist state had to be abolished.

However, the dismantling of the colonial authorities was not accompanied by an abolition of all colonial laws.[379] Indeed, at the third FRELIMO Congress in 1977, the Minister of Justice, Rui Baltazar, pronounced, 'We need to combat the left tendency of believing that the colonial laws must be all abolished in one single moment. Such a decision can bring us to situations of anarchy and crises of authority.'[380]

These fears of anarchy and of leaving an administrative vacuum in the country may well represent a missed opportunity for the serious consideration of legal pluralism and the diversity of traditions in Mozambique. Authors such as Mbembe have noted how independence became little more than 'the transfer into native hands of those unfair advantages which were a legacy of the colonial past'.[381] If the preservation of colonial laws, such as the Portuguese Criminal

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[373] Mondlane, E. (1977).
[374] Ibid.
[375] Ibid.
[376] Machel, S. (1970) 'Educate Man to Win the War, Create a New Society and Develop our Country', in *Mozambique Sowing the Seeds of Revolution,* Mozambique, pp. 37-45. Available at: http://www.marxists.info/subject/africa/machel/1970/educate-win-war.htm (accessed 16 January 2021).
[377] Saul, J. S., (Ed.) (1985) *A Difficult Road: The Transition to Socialism in Mozambique*. New York: Monthly Review Press. Saul, J. S., (2005) 'Eduardo Mondlane & the Rise & Fall of Mozambican Socialism', *Review of African Political Economy,* 104 (5), pp. 309-315.
[378] See the 1975 Constitution of the Popular Republic of Mozambique. Available at: http://cedis.fd.unl.pt/wp-content/uploads/2016/02/CONST-MOC-75.pdf (accessed 16 January 2021).
[379] However, article 71 of the 1975 Constitution provided that all laws contrary to the 1975 Constitution were to be abolished. Examples were the legislation on private property, which was abolished.
[380] Baltazar, R. (1977), pp. 30-39.
[381] Available at: https://bit.ly/3odYBrv (accessed 16 January 2021). See also Bragança, A. (1986), pp. 7-28.

Code of 1886, can be considered to represent the continuity of colonial legislative power in the hands of FRELIMO, the Decree 28/1975 can be cited as an exception to this in the specific field of criminal justice.

Colonial law was generally recognised as incomprehensible to the local population, highly bureaucratic, and not in touch with Mozambican reality. It was characterised by an excessive and harmful formalism which impeded the realisation of justice.[382] The promulgation of Decree 28/1975 on summary cases (*sumario crime*) was intended to address some of these problems, with article 4 conferring upon judges a greater freedom of action with regard to criminal cases in which the perpetrator had been caught in the commission of a crime (*flagrante delito).* The law provided for judges to bring the case to immediate judgment, avoiding the common formalism of regular proceedings (such as delays between the different phases of the judicial process and, in particular, the application of pre-trial detention).[383]

In addition, the practical experience of popular justice inspired a new approach by the state to legal pluralism. In fact (*pace* Machel), it was neither the tribe nor its traditions and customs that died in the post-independence period.[384] Twenty law students from the newly established Law Faculty at Eduardo Mondlane University in Maputo were sent to the remote areas of the country by the Ministry of Justice.[385] For four months, they engaged in intensive research, consulting with local people and collecting practices on the functioning of the justice administration and traditions and customs in the different areas. This work was the foundation from which the Mozambican law of the Judicial Reform (*Reforma Judiciaria*) was crafted.[386] As Serra reminds us, '[I]t could have been a mistake and antidemocratic, the creation of laws without consulting the people that the same laws were going to protect.'[387] Popular justice did indeed seek to be both popular and democratic, made by Mozambicans for Mozambicans.

The preamble of Law 12/1978 of the Judicial Organisation (*Lei da Organização Judiciária*) states:

> Abolishing the colonial justice system and establishing a justice that serves the interests and aspirations of Mozambicans has always been the fundamental objective of the liberation struggle. Since immediately, a justice system connected to the way of life, aspirations of the people and the demands of the struggle itself was created.

[382] At the III FRELIMO Congress, held in Maputo on 3-7 September 1977, Samora Machel stated that 'the judiciary must be reorganised so that justice becomes accessible and understandable to the common citizen of our land. The bourgeois system involved the administration of justice of an unnecessary complexity, impenetrable for the masses, of a deliberately confused language, slowness and costs that create a barrier between the people and justice.'

[383] Decree 28/1975 was developed specifically to fight the black market (*candonga*). It did not provide for the application of pre-trial detention.

[384] Sachs, A. and Honwana-Welch, G. (1990). See also the 2014 speech of Graça Machel at the Third Annual Lecture of the Institute for Strategic Reflection. She stated: 'I do not believe that the tribe must die for the nation to live. I believe that ethnic diversity, racial diversity and class diversity must be offered a clear value proposition that makes them feel that they benefit from being part of a nation state'. Available at: https://bit.ly/3HbkeAe (accessed 16 January 2021).

[385] Baltazar, R. (1977), pp. 30-39.

[386] Ibid.

[387] Serra, C.E. (2014), p. 252.

If popular justice sought to represent the traditions and customs of the people, the main legal pluralism literature argues that this form of justice was not quite as plural as it pretended to be.[388] The pyramidal courts structure, divided into different layers, from the Popular Courts of the Localities,[389] Villages and Neighbourhoods (*Tribunais Populares das Localidades, Aldeias e Bairros*), to the Popular Supreme Court, was, in fact, problematic for the real recognition of legal pluralism.

The Popular Courts of the Localities, Villages and Neighbourhoods had the competence to judge petty civil and criminal cases, such as family issues and theft. These courts were made up of lay judges, usually illiterate and chosen from the community. Unlike the practice of the higher courts, common sense and justice were used to resolve cases rather than the mechanical application of laws.[390] Reconciliation between the parties was sought in resolving issues between people, and judges had discretion whether to apply public criticism or humiliation (*critica publica*), community service and/or fines on the guilty. Also, unlike the practice of the higher courts, the popular courts were not allowed the option of imprisonment as a form of punishment.

In similar fashion, both the armed struggle and the popular courts also provided opportunities for revolutionary education. In 1982, in the journal *Justiça Popular*, Honwana stated that while she visited various Popular Villages Courts as part of a team organised by the Ministry of Justice, communities would explain that two of their main problems were theft and men abandoning their families. When asked for solutions, the team was given the following answers: for theft, the cutting off of fingers; for abandonment, forced labour for a year or so in distant plantations. The teams responded with other suggestions, arguing that the courts were not there to threaten and instill fear, but rather to act as a school of justice. Here judges could learn from the experience of the communities but, at the same time, avoid using corporal punishment.[391] Because of their local knowledge of the communities, the judges were better able to understand the issues facing them, and were not alienated as in the previous elite system of law.

The lowest courts were, however, inserted within the new formal judicial system. This made the state approach to legal pluralism (and to criminal justice) weaker than it could have been if the lowest courts had been positioned outside the judicial pyramid. In the terms offered by legal pluralism, this insertion meant that the non-state system was subordinated to the state system in a repressive fashion, although it also meant that the status of the courts was formally accepted. Forsyth, considering some of the different approaches of the state to non-state justice, puts forward the example of Botswana. She states that Botswana has attempted 'to incorporate its customary justice system almost entirely into its state system, and perhaps as a result has tried to ensure that there will be no 'non-state' customary justice system to compete with its 'state' customary justice system'.[392]

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[388] Meneses, M., Nunes, J., Añón, C., Bonet, A., e Gomes, N. (2019) 'O Estado, o direito costumeiro e a justiça popular', in De Sousa Santos, B. *Construindo as Epistemologias do Sul Para um pensamento alternativo de alternativas,* 2, pp. 225-242.

[389] Geographically, the lowest local level of the state's central administration is the locality. In 2017, Mozambique had 1,052 localities.

[390] Honwana-Welch, G. e Dagnino, F. (1984), pp. 11-16.

[391] Ibid.

[392] Forsyth, M. (2007), p. 67.

Indeed, the popular justice experience was a state justice experience: law was the state and the state was the law.[393] This was a unique experience that reflected the peculiar socialist context in which it was created.[394] It was also a short-lived experience, one lasting just 14 years, from 1978 until 1992.

From the beginning of the 1980s, the political situation in the country began to deteriorate as the conflict between FRELIMO and Mozambican National Resistance (*Resistência Nacional de Moçambique*, RENAMO) intensified. With funding for RENAMO provided by apartheid South Africa, the civil war lasted 16 years until, in 1992, the Peace Accords (*Acordo Geral de Paz*) were signed in Rome.[395] A few days after the agreement, Amnesty Law 15/1992 of 15 October left all perpetrators of violations unpunished and their victims neither recognised nor recompensed.[396]

RENAMO had established alliances with the traditional local authorities which had been officially abolished in 1974. These authorities helped it in the management and administration of the territories, their natural resources and the population, and acted as intermediaries between RENAMO and the population itself.[397] During the civil war, FRELIMO had already realised what an important role traditional authorities were going to play in the future, both generally in the administration of the country and more specifically in the collection of votes in the elections to come. In fact, it was RENAMO which received, in the first democratic elections of 1994, mass support from the rural areas, mainly due to the influence of the traditional authorities.[398]

After Samora Machel's death in a suspicious plane accident in 1986, the country moved quickly from socialism to capitalism, and formerly nationalised enterprises were privatised as the economy adopted the rules and practices of the international free market.[399] In 1990, the new Constitution provided for a multiparty political system with free elections, which were first held in 1994. Although RENAMO dominated the central provinces, FRELIMO with its new leader, Alberto Chissano, won the elections overall with almost 53 per cent of the votes.[400]

Following the election, FRELIMO began to alter its approach towards traditional authorities, allowing them administrative powers. Formal recognition was brought about through Law 3/1994. This empowered traditional authorities in the consultation and decision-making process

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[393] Morais, B. A. (2020).

[394] Sachs, A. (1984) , p. 101. See Meneses, M. et al. (2019), pp. 225-242.

[395] The Peace Agreement was signed by the President of Mozambique, Joaquim Chissano, and the RENAMO leader, Afonso Dhlakama, on 4 October 1992. Three Italians and one Mozambican mediated the Agreement. From the Italian delegation, two members were from the Community of Sant' Egidio, Andrea Riccardi e Matteo Zuppi, and one man represented the Italian government, Mario Raffaelli. The Mozambican mediator was Bishop Jaime Gonçalves.

[396] Igreja, V. (2015) 'Amnesty Law, Political Struggles for Legitimacy and Violence in Mozambique', *International Journal of Transitional Justice,* 9(2), pp. 239–258.

[397] Florêncio, F. (2008) 'Autoridades tradicionais vaNdau de Moçambique: O regresso do indirect rule ou uma espécie de neo-indirect rule?', *Análise Social, 43*(187), pp. 369-391. Available at: http://www.jstor.org/stable/41012639 (accessed 18 January 2021).

[398] West H. G. and Kloeck-Jenson, S. (1999) 'Betwixt and Between: 'Traditional Authority' And Democratic Decentralization in Post-War Mozambique', *African Affairs*, 98 (393), pp. 455–484.

[399] Castel-Branco, C. N. (1995) 'Opções Económicas de Moçambique 1975-95: Problemas, Lições e Ideias Alternativas', in Mazula, B. (ed.) *Moçambique Eleições, Democracia e Desenvolvimento*, pp. 581-636. See also Mosca, J. (2005) *Economia de Moçambique, Século XX*. Lisboa: Editora Piaget.

[400] Lodge, T., Kadima, D., and Pottie, D. (eds.) (2002) *Compendium of Elections in Southern Africa*. Electoral Institute for Sustainable Democracy in Africa.

at the administrative local level, as well as conflicts decision and matters related to the use of land.[401] As in the colonial era, traditional authorities made their official appearance as agents to assist in the ruling party's political control over the vast territory of the country.[402]

In 1992, the practice of popular justice was officially abandoned. Law 10/1992 redivided the judicial structure of the country into three: District and Provincial levels, and the Supreme Court in Maputo.[403] Specialised courts were created to adjudicate particular matters, among them Labour Courts (Law 18/1992) and the Juvenile Court of the City of Maputo (Law Decree 40/1993). The Popular Courts of the community level were removed from the judicial pyramid and renamed community courts (*Tribunais Comunitários*),[404] thus placing them outside the official judicial structure. The comprehensive functioning of community courts will be analysed in Chapter 5. It is important, however, to note that while such courts kept the main characteristics of the popular courts of the communitarian level (competence to judge petty civil and criminal offences, to apply traditions and customs, and with no imprisonment provided), their decisions have not been legally enforceable since 1992. As a result, judges working within the judicial courts do not consider decisions by community courts.

From the standpoint of legal pluralism, the state approach to criminal matters was stronger than that held in relation to popular justice. Community courts are left to decide on cases, still applying traditions and customs and avoiding imprisonment. There was no distinction between the approach of the state to civil and criminal matters. It is not known just how much this approach helped people access justice and avoid arrest and incarceration. In any case, this approach was soon going to weaken again. The following section will show how the current approach of the state to legal pluralism as applied to criminal matters is similar to the one that held sway during the colonial era.

4.4 The state's current approach to legal pluralism in criminal justice

Twelve years after Law 4/1992 had created community courts, article 4 of the 2004 Constitution formalised legal pluralism in a milestone for the African continent. The article provides that '[d]ifferent normative systems and other mechanisms of dispute resolution are recognised, insofar as they are not contrary to the values and principles of the Constitution'.[405]

Here it is important to grasp that while article 4 expresses the state's recognition of legal pluralism, it also limits this recognition by placing it within the borders of the Constitution (repugnancy clause). In search of greater balance between society and the state, the Constitution recognises the importance of rights that are not specifically spelt out. Article 35 of the

[401] Serra, C.E. (2014). Law 3/1994 was replaced by Law 2/1997, limiting the participation of traditional authorities. The debate was reintroduced with the discussion of the Land Law, where the expression 'local leaders' emerged and they were given an interventionary role in the management of natural resources, in conflict resolution, in the titling process, and in the identification of occupied land and land to be occupied.

[402] Orre, A. (2007) 'Integration of traditional authorities in local governance in Mozambique and Angola: the context of decentralisation and democratisation', in Marques-Guedes A. and Lopes, M. J. (eds.), p. 143.

[403] The three layers became four with Law 24/2007, which created the Appeal Courts of Maputo, Beira and Nampula.

[404] Law 4/1992 of 6 May. Available at: https://bit.ly/3rcGfZN (accessed 16 January 2021).

[405] The English translation of the Mozambican Constitution. Available at: https://bit.ly/3obzyFG (accessed 18 January 2021).

Constitution recognises the right of equality, while access to a court is provided for by article 36. Article 212(3) of the Constitution spells out that the law may establish institutional and procedural mechanisms for linking judicial courts to other fora whose purpose is the settlement of interests and resolution of disputes.[406] The combination of articles 4 and 212(3) in effect recognises other rights such as a person's possibility of using other fora for conflict resolution that are linked to the formal justice system. At the same time, though, the repugnancy clause represents the assertion of a rigid model of state legality.[407] Although far from the discriminatory principles at work in the colonial period, the repugnancy clause came to assert the control of the state over the application of traditions and customs as in the colonial period.

In addition, article 118 of the Constitution specifically supports those traditional authorities that are legitimised by the population and follow customary law, defining their relationship with other institutions. Just before the 2004 Constitution, however, Mozambique provided a framework to institutionalise the traditional authorities. Law 15/2000 recognised rural traditional authorities such as the *regulos* and neighbourhood secretaries (*secretários dos bairros*) as local organs of the state.[408] More than 2,000 authorities were recognised with different ranges of powers from key state-administrative and security duties, including policing, taxation, population registration, justice enforcement, land allocation and rural and urban development.[409] Since then, local officials wear a uniform and display other symbols of the state, and have the right to retain a percentage of tax return revenue collected from the people. That these are similar characteristics that colonial traditional authorities employed during the colonial era shows how weak the implementation and intervention capacity of the state remains in much of the country, especially in rural areas.[410]

In 2007, Law 24/2007 was enacted with the aim of reforming the content of Law 10/1992 on judiciary organisation. It stresses the importance of community courts for the dynamism of the social and economic life of the country. Article 5 of the new law stipulates that '[c]ommunity courts are non-judicial mechanisms of conflict resolution; they are independent, informal, judge according to common sense and fairness, privilege orality, and consider the existing social and cultural values of Mozambican society while respecting the Constitution'.

Article 6 of the same law states that law regulates the relationship between community courts and other mechanisms of conflict resolutions. However, while the provisions of all these laws lay out the relevant principles on the functioning of community courts on paper, they have never been regulated in detail and in practice are never used.[411] On criminal matters, the regulation of community court functioning could have created the foundation from which challenging pressing issues such as access to justice and ultimately the condition of prisons could be addressed. The identification of the criminal offences that community courts would

[406] Ibid.
[407] Morais, B. A. (2020).
[408] In addition, in 2003, Law 8/2003 of the Local Organs of the State (*Lei Órgãos Locais do Estado*) and its regulation, Law Decree 11/2005, were enacted. Among these organs, traditional authorities are also mentioned.
[409] Buur, L. and Kyed, H.M. (2005) *State Recognition of Traditional Authority in Mozambique. The Nexus of Community Representation and State Assistance*. Nordiska Afrikainstitutet: Uppsala. Available at: https://www.files.ethz.ch/isn/96053/28.pdf (accessed 24 January 2021).
[410] Morais, B. A. (2020).
[411] See information available at: https://bit.ly/3g9RGev (accessed 28 January 2021).

have competence in would have strengthened their role in combating petty crimes committed in the neighbourhoods where courts operate.

Since 2001, community courts have been formally placed under the Justice Provincial Directorates (these are responsible for ensuring the installation, operation and registration of the courts). In practice, though, they have little support from the government.[412] In this way, the state effectively delegitimises community courts from the top down.[413]

With particular reference to criminal matters, article 2 of the Mozambican Criminal Code enacted through Law 35/2014 and entered into force in July 2015 states that community courts have no more jurisdiction in criminal matters, and assigns them only the competence to deal with petty civil offences. The decision becomes problematic for the recognition of customary criminal law. Through this provision, the Mozambican state showed its monopoly in deciding on criminal cases, though recognising that civil cases can continue to be solved by the people through non-state justice instances. As in the colonial period, the state approach to customary criminal law was cautious, as it is seen as dangerous to leave community courts to deal with criminal cases, even slight ones.

Since 2000, both international scholarly research and reports from CSOs have argued that community courts violate human rights. In 2008, a report of a consortium of national CSOs submitted to the Human Rights Committee under the Mozambican revision for the International Covenant on Civil and Political Rights states that 'the Community Tribunals frequently violate the right to physical and moral integrity, subject people to cruel, degrading treatment and discriminate against women'.[414] The discriminatory treatment of women is also shown by Corradi in a 2011 work published on access to justice in the northern city of Pemba. This looks at women and community courts: 'A case in point is the treatment of domestic violence, where community court judges were reported as requesting the husband to refrain from mistreating his wife while asking the wife to obey her husband'.[415] Community courts have also been subject to criticism in relation to land and inheritance rights by the FAO[416] and to children's rights by Save the Children.[417]

Responding to such constant international pressure on community courts, the legislator decided (in the 2014 Criminal Code) to shrink the competences of community courts down to civil cases (yet not dealing with criticisms that have affected the civil jurisdiction over the years).[418] There are different reasons for the state to limit the community courts' competence on criminal matters. As in the colonial period, the state has wanted to make clear its monopoly on criminal matters as the only creator of normative orders related to criminal justice and the enforcement of such orders.

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[412] Resolution 6/2001 defines the structure and functions of the Statute of the Justice Provincial Directorates. Within the different departments of which the Justice Provincial Directorates is composed, the Department of Registries and Notaries is competent for dealing with the community courts matters.

[413] Morais, B. A. (2020).

[414] Information available at: https://bit.ly/3HvAzA9 (accessed 23 January 2021).

[415] Information available at: https://bit.ly/3od8A0m (accessed 23 January 2021).

[416] Information available at: http://www.fao.org/3/al131e/al131e01.pdf (accessed 19 January 2021).

[417] Information available at: https://resourcecentre.savethechildren.net/node/6463/pdf/6463.pdf (accessed 19 January 2021).

[418] The preamble of the 2014 Penal Code revoked the criminal jurisdiction of community courts.

The Eurocentric approach of the state towards criminal justice can be seen in the legal education available in law faculties and at the Judicial Training Centre (*Centro de Formação Jurídica e Judicial*, CFJJ) for those who want to become judges or prosecutors. At the Law Faculty of the public University Eduardo Mondlane, the curricula focus on the positivist approach to law. This is taught – as in colonial times – as at least prioritising state law. Only the state law (in the written norms of the codes) represents the law in the curricula of the law faculties. Courses on legal pluralism do not form part of the curriculum, not even in the form of short modules. It is the same with the law faculties at the private universities in the country.[419] Students do not engage with matters related to legal pluralism in their courses, while their attendance at the annual conferences on legal pluralism is sparse.

Law students thus generally graduate from the faculty with no exposure to legal pluralism. If they become aware of the existence of other normative systems outside state law, it is because of their individual experience at home. If they grew up on the outskirts of the capital, or come from other parts of the country, they may well have engaged with community courts (for example, for family reasons). However, any such private experience with these mechanisms remains incomplete if it is not complemented by the study of concepts of legal pluralism that would enable a student to think critically about the topic.

The Legal and Judicial Training Centre of Maputo trains judges and other actors in the system, such as prosecutors and legal aid officers. The curriculum of the centre included, in the past, a theoretical and practical exercise on legal pluralism. In an interview, a former director (2000-2007) of the Legal and Judicial Training Centre explained that students were introduced to the importance of mechanisms of conflict resolution other than those provided by the state justice system; the aim was also to foster relationships with community courts judges. However, the former Director revealed, this component of the course gradually shrank, and there are currently few activities around non-state mechanisms of conflict resolution or opportunities to form relationships with members of the judicial apparatus.[420]

The civil servants who work in the Ministry of Justice, Constitutional and Religious Affairs (*Ministério da Justiça, Assuntos Constitucionais e Religiosos*) also tend to have a Eurocentric approach to criminal justice. In an interview conducted at the Ministry of Justice, Constitutional and Religious Affairs, a public official admitted,'We are all very legalistic', referring here to the approach of the Ministry of Justice to criminal justice. After hearing the reason for this dissertation, the official responded to the need to look at the role of community courts in order address problems affecting access to criminal justice and conditions in prisons:

> [This is a] very bold proposal that will perhaps get people thinking, but the way we think about this is that the state is the only one with the power on criminal matters. Remember, *nullum crimen, nulla poena, sine lege*.[421]

The Latin expression means that no person can face criminal punishment except for an act which is criminalised by law before the commission of the act. It also served as a reminder that

[419] See the law faculties of the following universities: Universidade Católica da Beira and Universidade Técnica de Moçambique.
[420] In 2019, the CFJJ introduced compulsory practical training or internship at the institution (*estagio de imersão e estágio intercalar*), along with visits to different institutions including community courts.
[421] Interview with the civil servant responsible for community courts at the Ministry of Justice, Constitutional and Religious Affairs, January 2017.

penal legal information shall be published in writing in a legal text. Both elements represent a Eurocentric view of justice.

The revised Criminal Code, Law 24/2019,[422] which entered into force in December 2020, replaced the community court criminal jurisdiction that had been revoked through the 2014 Penal Code. In an informal interview, however, a civil servant mentioned that a new law on community courts is undergoing preparation and the current proposal excludes criminal jurisdiction from the competence of the community courts. If such a proposal is accepted in parliament, the state will state its monopoly over criminal matters (ignoring the major problems that have plagued the sector for decades). This is the most recent development on community courts, which concludes the analysis on the state approach to non-state mechanisms as applied to criminal justice. made in these pages. The next section will examine a range of differences and similarities that highlight how the past continues to shape the present.

4.5 Historical differences and similarities in state approach to legal pluralism in criminal justice

The colonial period is the necessary point of departure for analysing differences and similarities in the state approach to legal pluralism as applied to criminal justice. In this period, the existence of customary criminal law was recognised by neither the direct or indirect rule systems applied by the Portuguese in the 19th and early 20th centuries. During the period of direct rule, customary criminal practices were excluded *a priori*, and few attempts were made to codify these practices. Such attempts were, however, conducted to better control the people and better apply the Portuguese Criminal and Criminal Procedure Codes rather than codifying customs for their official use by the local population.

The difference in approach that the Portuguese had towards traditional civil and criminal practices can be seen through three different aspects. First, in 1869, the application of traditions and customs to civil matters was formalised in a legal document, though one which never received authorisation for direct application. Secondly, many more than those on criminal matters were the codes that collected and codified traditions and customs on civil matters in the country. This documentation showed the attention that civil matters received as compared to criminal ones. Thirdly, while the application of tradition to civil matters was considered valuable for the Portuguese themselves, customary practices regarding criminal acts were seen as something against the values of the European metropolis. The legal limitation for applying customary law only insofar as it respected European principles (the repugnancy clause), which was inserted in the 1951 Portuguese Constitution, turned out in practice to function only in relation to the institutions of customary civil law and not with those of customary criminal law.

Griffiths distinguishes between strong and weak forms of legal pluralism. The former refers to the idea that '[not] all law is state law administered by a single set of state-sponsored institutions', while the weak form is one that considers the 'distinct legal orders as branches of one and only existing order, the state law'.[423] Following Griffiths, it can be argued that, during colonisation, the stronger form of legal pluralism was observed in customary civil law but not

[422] Available at: https://bit.ly/3HagCyt (accessed 19 January 2021).
[423] Griffiths, J. (1986), p.1.

in customary criminal law. In this way, the colonial state recognised that it was not the sole producer of normative order in civil matters, but that it enjoyed the monopoly of power in criminal matters.

The control of the Portuguese over local criminal matters is visible in the composition of Indigenous Courts, their selection of cases, and the punishment they administered. These courts were created in 1929 by the Portuguese for resolving local conflicts. The judge of the courts was a Portuguese administrator, while his advisors were local authorities controlled by the colonial administration. On criminal matters, the judge applied the Portuguese Penal and Criminal Procedure Codes. Although research has shown that people living in the southern part of Mozambique saw no distinction between civil and criminal matters,[424] the judge's advisors ensured that the penal colonial norms were applied.

When the harmony and peace of the local population was broken through wrongdoings of one sort or another, these were restored within the community, usually through the restitution of stolen goods (in case of theft), or by execution in cases of homicide. Prior to colonisation, Mozambique had no prison system, and punishment by confinement within a closed facility was unknown. Prisons were introduced to Mozambique for those Portuguese sentenced to exile from the mother country. It was only later, through sentences imposed by the Indigenous Courts, that prisons were used for the local population, although this also began to be highly criticised by the same Portuguese administration. As previously mentioned, pioneers of the colonial justice administration such as Enes considered the use of imprisonment without other types of punishment as a kind of reward for Africans, arguing that they were better off in prisons than in their own homes in terms of material conditions. As a result, from the beginning of the 20th century, correctional labour became the main form of punishment for local people.

Two characteristics of the colonial state approach to legal pluralism are applied to criminal justice. First, legal pluralism as applied to criminal justice was not recognised. Consequently, traditions and customs relating to criminal matters were not codified. Secondly, the lack of recognition and codification regarding criminal matters was reinforced by the Portuguese who controlled the resolution of the local population's conflicts. The norms applicable to local people, the authorities that applied such norms, and the type of punishment used by such authorities to punish locals were centralised in the hands of the Portuguese, through their power and Eurocentric politics and policies on justice administration. In the discussion below, such characteristics are compared with other historical periods to illustrate possible differences and similarities within the state approach to legal pluralism as applied to criminal justice.

The struggle for independence was a challenging period in Mozambique. While the Portuguese were trying to consolidate their control of the country, the FRELIMO movement struggled to gain access to the local population. To do so, it recognised the importance of legal pluralism in the liberated areas. It was, as such, willing to recognise the power of the local authorities who were side-lined by the Portuguese-controlled *regulos,* and introduced the Popular Courts. These were composed of members of the local communities and aimed to resolve civil and criminal cases through the application of local traditions and customs. But FRELIMO's acceptance of legal pluralism in this manner only lasted until Mozambique gained independence in 1975.

[424] Junod, H. A. (1913).

Machel's slogan the 'tribe must die' came to epitomise the approach of the new Mozambican state to all traditional authorities and practices. While the practices were abolished, some traditional authorities were publicly humiliated, with some of their members tortured and killed as traitors. In justice matters, though, the Portuguese Penal Code of 1866 and the Criminal Procedure Code of 1932 and all Portuguese laws that were not contrary to the principles of the newly established government continued to structure and administer people's lives.[425] As De Sousa Santos stresses, despite having its own culture and tradition, Mozambique ended up adopting European law as a form of modernisation and consolidation by the new political regime.[426] Similarly, Mbembe states that the only thing that changed with independence was the elite exercising the power:[427] This was no longer in the hands of the Portuguese, but rested instead with the most educated people of the country, often coming from the southern regions of Gaza and Maputo.[428]

In 1978, the post-independence era brought with it the experience of popular justice.[429] Popular justice provided four different levels of courts, from the lowest level of the community-based court to the highest level of the Popular Supreme Court, with the courts of the District and Provincial levels lying between. While the higher courts applied the national laws and imposed imprisonment for criminal cases, the community-based Popular Courts had a number of defining characteristics. Their judges were lay judges, chosen by the community from the most respected people in the community; they had jurisdiction on both civil and criminal cases, and these cases were resolved through the application of the community's particular traditions and customs.[430] Finally, in criminal matters, they did not impose terms of imprisonment, but instead punished wrongdoers through public reprimand, community service and/or the imposition of fines. Popular justice came to be recognised as a unique event characterised by the active and constant participation of the masses in the elaboration of the proposal and discussion of new laws.[431]

Nonetheless, this was also to be understood as a form of state justice and, as such, legal pluralist literature argues that popular justice did not recognise, in practice, legal pluralism as it pretended to do.[432] Indeed, there were structural similarities in the attitude to criminal justice between the colonial period and the early post-independent period with regard to the principles of legal pluralism: the new government did not recognise customary law and it decided to continue to apply Portuguese laws. This extended to civil and criminal matters alike.

Although formally abolished in 1974, traditional authorities remained dormant. When the civil war began in 1977, RENAMO was able to use the power of the old traditional authorities as

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[425] De Sousa Santos, B. (1988) *El discurso y el poder. Ensayo sobre la sociología de la retórica jurídica*. Porto Alegre: Sergio A Fabris.
[426] De Sousa Santos, B. (2006) 'The heterogenous state and legal pluralism in Mozambique', *Law and Society Review*, 40 (1), pp. 39-75.
[427] Available at: https://bit.ly/3HSX2Xm (accessed 16 January 2021).
[428] Lundin, I. (1995) 'Partidos políticos: a leitura da vertente étnico-regional no processo democrático', in Mazula, B. *Moçambique, Eleições, Democracia e Desenvolvimento*. Maputo: Embaixada do Reino dos países Baixos.
[429] Law 12/1978 of 2 December.
[430] In criminal justice matters, especially in relation to punishment, community-based Popular Courts continued to follow certain pre-colonial characteristics such as described by Junod, H. A. (1913).
[431] Sachs, A. and Honwana-Welch, G. (1990).
[432] Meneses, M., Nunes, J., Añón, C., Bonet, A., e Gomes, N. (2019), pp. 225-242.

well as the new ones (RENAMO authorities) to gain control of certain rural areas of the central provinces of the country. Thanks to this, it gained more than 40 per cent of the vote in the first democratic election of 1994.[433] Thereafter, the FRELIMO ruling party began to reconsider the importance of these local authorities, allowing them some administrative powers.[434] Both FRELIMO and RENAMO understood the colonial lesson: that it was impossible to control and administer a vast country such as Mozambique without the help of local authorities.

The popular justice experience was unique and short-lived, lasting 14 years before officially ending in 1992 when the community-based popular courts were renamed community courts and positioned outside the judicial system. Considered as part of the heterogeneous field of non-state mechanisms of conflict resolution, the general functioning of community courts was framed through Law 4/1992. The new approach of the state to legal pluralism extends its principles to criminal matters. Community courts share different characteristics with the community-level popular courts, such as in the composition of the courts and the way they resolve civil and criminal cases by using traditions and customs and the use of alternatives to imprisonment as a form of punishment.

Legal pluralism was recognised by the Constitution in 2004, though with the repugnancy clause still in place (as in the colonial period) to balance the people's right to refer to non-state forms of conflict resolution while retaining the control of the state over the whole system. The state reasserted its monopoly over criminal matters when in 2015 the Penal Code removed criminal jurisdiction from community courts, revealing a weaker legal-pluralism approach to criminal matters than to civil ones. This is something that will be restated if the new law on community courts, which is undergoing preparation, excludes criminal jurisdiction from community courts' competences.

The state approach to legal pluralism as applied to criminal justice in the post-independence period has structural similarities with that in the colonial period. The government reasserted its collaboration with traditional authorities to retain control over the local population. Although legal pluralism is recognised in the most important document of the country, its Constitution, and the repugnancy clause is used to find a balance between the use of non-state mechanisms of conflict resolution and the principles of the Constitution, the existence of the repugnancy clause goes back to the colonial period. Finally, the approach of the state to civil matters, as during colonialism, is different to that applied in criminal ones. The state continues to keep control over criminal matters.

4.6 Concluding remarks

This chapter examined the historical context of the Mozambican state's approach to legal pluralism in relation to criminal justice. It showed that problems associated with state criminal justice, namely difficult access to justice and the condition of prisons, are strictly related to the historical background of the state's approach to legal pluralism as applied to criminal justice.

In the first part of the chapter, the challenges in access to justice and the prison situation were discussed. These included the language used by state criminal justice (only Portuguese); the

[433] Harrison, G. (1995). Elections in Mozambique, *Review of African Political Economy*, 22(63), pp. 115-118.
[434] Law 19/1997 of 1 October followed by Law 15/2000 of 20 June.

difficulties of internet access to the law; the insufficient number of judges, prosecutors, lawyers and paralegals, and their uneven spread across the country; deplorable conditions in prisons due to colonial infrastructure and overcrowding; illegal imprisonment formalised by judges; and problems in accessing health and justice. In addition, the link between poverty and criminality has shown that it is the poorest in society who suffer most from these challenges to the system.

The second part of the chapter examined different historical periods and looked at how different forms of state (colonial, post-independence and contemporary) approached the question of legal pluralism as applied to criminal justice. This moved from the non-recognition of legal pluralism in colonial times to its recognition when convenient for FRELIMO during the struggle. The early post-independence era saw a return to characteristics that were well known during the colonial time: the state abolished all forms of traditional authorities and practices, not recognising their importance. Although popular justice prevailed in the socialist-communist period at the communitarian level, this remained a form of state justice, and the literature on legal pluralism does not recognise it as a positive endorsement by the state of legal pluralism. A stronger approach to legal pluralism emerged in 1992, however, with the establishment of community courts and again in 2004 with the broad constitutional recognition of legal pluralism. By 2015, though, the country was back to a weak form of legal pluralism with regard to criminal justice: the current government decided that the monopoly on criminal matters stays with the state and removed criminal jurisdiction from the community courts.

The chapter illustrated how the past shaped and continues to shape approaches to criminal justice, even while the state justice system faces challenges in providing access to justice for all and meeting adequate standards in prison conditions. Rather than critically engaging with these issues, the state continues to let history repeat itself. The chapter specifically looked at how different states (colonial and post-colonial) retained as much control over criminal matters as they could. Both the state and the dominant norms in scholarly literature give limited recognition to legal pluralism when it comes to criminal justice. However, modes of thought advocated in postcolonial studies, which were introduced in the second part of Chapter 3, hold raise the possibility for the state to shift from a paradigm based on an imported and Eurocentric approach to justice to one founded on the recognition of local knowledges. The functioning of community courts, as an example of local knowledge, is examined in the next chapter through the lens of postcolonial theory.

Chapter 5
Framing the Functioning of Community Courts in Maputo through Postcolonial Lenses

> *Utopia is imagining possible futures, the exploration through the imagination of new human possibilities and new forms of will ... just because there is, in its name, something radically better worth fighting for and for which humanity has the right (De Sousa Santos,2000, p. 307).*

5.1 Introduction

Thus far, the limited recognition of legal pluralism as applied to criminal justice by the state and the literature on legal pluralism has been explored in Chapters 3 and 4. To gain a better understanding of what happens in reality, it is useful to examine the operation of community courts, particularly as considered in this thesis as forms of local knowledge in practice.

It is difficult to look at community courts from a criminal justice perspective, though, given that community courts have limited exposure to criminal cases. Nonetheless, how community courts work can offer some insight to the legal and practical obstacles to, as well as opportunities for, enhancing access to justice for all and ultimately ameliorating conditions in prisons. In this chapter, it is argued that while obstacles exist for community courts to enhance access to criminal justice, there are many opportunities for them to show how to shift the paradigm based on the imported and Eurocentric approach to criminal justice to a paradigm based on the recognition of local knowledge. Such a shift, however, will be possible only if, and when the state approaches criminal justice through the lenses provided by postcolonial studies.

This chapter is divided into three parts. The first provides a general overview of community courts in Mozambique and analyses the legal framework governing them. The second part illustrates, in detail, the functioning of community courts in Maputo. It shows how community courts function, the cases typically brought before them, as well as their proceedings and sentences and certain other characteristics. A comparative analysis is made of the functioning of the community courts and that of judicial courts. The third and final part of the chapter considers the relationship that community courts have with state and non-state mechanisms of conflict resolution and what the ensuing relationship entails.

This chapter seeks to address the question: What are both the legal and practical obstacles as well as the opportunities to enhance community access to criminal justice? Where possible, specific reference is made to the involvement of community courts in minor criminal matters.

The methodology employed in this aspect of the study was discussed in detail in Chapter 2, but it is important to highlight again that this chapter explores the findings of fieldwork conducted in Maputo from January 2015 to February 2017. This comprised 21 focus group discussions conducted with judges of the community courts of Maputo, interviews with representatives of governmental institutions such the Ministry of Justice, Constitutional and Religious Affairs (Legal Aid Institute and Legal Training College), and interviews with judges and prosecutors working in the six District Courts of Maputo, as well as with CSOs and development actors.

The 21 focus group discussions were conducted in the six of the seven Districts of Maputo city,[435] which are the most urbanised districts of the country: *Kamubukwana, Kamaxakeni, Nhlamankulu, Kamavota, Katembe* and *Kampfumo.* In *Kamubukwana's* District, group discussions were held with the community courts of the following six neighbourhoods: *Malhazine, Magoanine A, Magoanine D, Nsalene, Inhagoia B* and *25 de Junho.* In *Kamaxakeni's* District the community courts of *Urbanização, Mafalala* and *Polana Canhiço B* were visited. In *Nhlamankulu's* District, group discussions were held with the judges of the community courts of the neighbourhoods *Unidade 7, Chamanculo D* and *Mikadjuine.* Community court judges of *Mahotas, Albazine* and *Costa do Sol* were part of the focus group discussions conducted in *Kamavota's* District. In the central District of *Kampfumo,* a group discussion was held with the only community court of *Malhangalene B.* Finally, in the District of *Katembe,* the newly established community courts of *Inguide, Chali, Incassane, Chamissava* and *Guachene* neighbourhoods were part of the fieldwork.

Information gathered through 99 cases, between January and August 2015, from three community courts, namely *Chamanculo B, Mikadjuine* and *Polana Canhiço B,* was also used. Such information helped to shed light on which types of conflict the courts deal with, the procedures followed, and the duration of the cases and their sentences. Finally, the chapter includes findings from the empirical observation made of two cases dealing with criminal matters (domestic violence and theft). These two cases were observed at the courts of *Costa do Sol* and *Polana Canhiço B and* were chosen because they represent the kind of criminal cases that community courts deal with most often.

5.2 An overview of community courts in Mozambique

Mozambique has a heterogeneous system of community justice institutions.[436] Community-based authorities, such as the *regulos*,[437] secretaries of the neighbourhood and community courts[438] are some of the non-state mechanisms of conflict resolution which exist in the country. Others are represented by police stations, the Office for the Assistance to Children and Family Victims of Domestic Violence (*Gabinete de Atendimento à Família e Menores Vítimas de Violência Doméstica,* GAFMVV), CSOs, churches, mosques, and legal clinics at universities.[439] Mozambique is a social field where more than one legal order exists, and as such it conforms with the definition of legal pluralism given by Griffiths in 1986.[440]

Community courts, specifically, originate from the popular courts of the localities, villages, and neighbourhoods (*Tribunais Populares das Localidade, Aldeias e Bairros*) which were

[435] The Island of Kayaka was left out due to time constraints and transport difficulties, with no regular boat service. Although it is possible to fly to the island from Maputo, the cost of a return fare is a prohibitive 150 USD, which is equivalent to about 2,000 South African Rands.
[436] De Sousa Santos, B. (2006) 'The Heterogeneous State and Legal Pluralism in Mozambique, *Law & Society Review*, 40 (1), pp. 39-75.
[437] Meneses, M.P. (2006), pp. 93-120. See also Meneses, M. P. (2009), pp. 9-42. Isaacman, A. (1987) 'Régulos, diferenciação social e protesto rural. O regime do cultivo forçado do algodão em Moçambique 1938-1961', *Revista Internacional de Estudos Africanos*, 6-7, pp. 37-82.
[438] De Sousa Santos, B. e Trindade J. C. (eds). (2003).
[439] Araújo S. (2014) *Ecologia de Justiças a Sul e a Norte. Cartografias Comparadas das Justiças Comunitárias em Maputo e Lisboa*. Tese de Doutoramento. Universidade de Coimbra.
[440] Griffiths, J. (1986), 24.

established in 1978.[441] Popular courts of the community level were then renamed and legally recognised as community courts through Law 4/1992. Differently from the popular courts of the community level,[442] which were part of the judicial system, community courts were left outside the state system. Like the interviews with the judges of the popular courts at the community level,[443] the focus group discussions conducted in Maputo showed that community court judges deal with civil and minor criminal cases and base their decisions on the traditions and values of the community in which they operate.

Since 1994, the number of community courts continued to increase, so much so that in 2011 there were as many as 1,688 community courts in the country, operating in the remote rural areas as well as in the bigger cities of Pemba, Quelimane, Beira and Inhambane, among others.[444] Between 5,000 and 7,000 judges were working at the community courts in 2011.[445] In 2011, only 18 out of a total of 128 districts did not have community courts.[446] According to the most recent official data from 2017, there were about 2,500 community courts in the country.[447] If this data is still correct, it means that, in a population of about 28 million people, there is just one community court per 11,000 people, as compared to one judge of a judicial court per 80,000 people.[448] The numerical gap shows that community courts offer greater access to justice than the judicial courts.

The possibility that community courts serve a larger number of people in need than judicial courts is also supported by the fact that community courts are trusted by the people, and so are highly used by them. In Mozambique, more than 80 per cent of conflicts are resolved through non-state mechanisms of conflict resolution, community courts included.[449] The courts are utilised not only by people in rural areas (representing more than 65 per cent of the population) but also by those in the most urbanised centres of the country, especially for issues related to family and community disputes.[450] A recent study by UNDP on access to justice in the country states:

> There is greater confidence in community courts compared to formal judicial courts, where 70% of respondents consider that [community courts] are an effective source of conflict resolution at the community level,

[441] Sachs, A. and Honwana-Welch, G. (1990). Gundersen, A. (1992) 'Popular Justice in Mozambique: Between State Law and Folk Law', *Social & Legal Studies,* 1, pp. 257-82.
[442] Honwana-Welch, G. (1982) 'Tribunais de Base ou a Base da Justiça Popular', *Justiça Popular*, 5, pp. 4-5.
[443] Ibid.
[444] See the Centro de Pesquisa e Apoio à Justiça Informal (2013). The study states that in 2011 there were 1,688 community courts in the country. Most of the community courts can be found in the North (43.1%) and Centre (46%) of the country, particularly the northern provinces of Nampula and Cabo Delgado and the central provinces of Tete and Zambezia.
[445] Ibid.
[446] Ibid.
[447] Centro de Formação Jurídica e Judiciária (2017). Maputo.
[448] Ordem dos Advogados de Moçambique (2019).
[449] Chirayath, L., Sage, C. and Woolcock, M. (2005). Available at: https://bit.ly/3KUTyWF (accessed 13 January 2020).
[450] Ibid.

> probably due to the informal and little bureaucratic mechanisms for resolving conflicts used by them.[451]

In addition, in 2020, recognition of the community courts' work was also noted, at the political level, by the Minister of Justice, Constitutional and Religious Affairs (*Ministério da Justiça, Assuntos Constitucionais e Religiosos*, MJACR), Helena Kida. In November 2020, during the Coordinator Council of the Ministry, the Minister stressed her support, in the five years to come, of community courts and other non-state mechanisms of conflict resolution as means of promoting justice.[452] Since 2001, in fact, community courts have been placed under the responsibility of the MJACR, specifically under the Justice Provincial Directorates (*Direcção Provincial da Justiça*, DPJ),[453] which is responsible for ensuring courts' installation, operation and registration.

This overview of community courts highlights six practical opportunities for them to enhance criminal justice: (1.) the existence, in practice, of legal pluralism in both the civil and criminal fields; (2.) the regular increase in community courts; (3.) the higher ratio of community courts to the population than of state judges to the population; (4.) extensive use of community courts by the people; (5.) the public's trust and confidence in community courts; and (6.) political recognition of community courts by political representatives.[454]

This information can be set against the bigger picture of the criminal justice system in the country. As noted in Chapter 4, the state criminal justice system faces many challenges. It is unable to provide access to justice that, by considering the socio-economic characteristics of the population, responds to its particular needs.[455] Imprisonment is overused and the illegality and arbitrariness of those who enforce the law is a systemic concern.[456] The first part of Chapter 4 showed that the state system incarcerates the most vulnerable people in society without addressing the causes of crime or the question of re-education and rehabilitation.[457] There are many reasons for these limitations: the simple incapacity of the state in terms of the available number of judiciary and justice officials, a heavily bureaucratic criminal justice system that affects the time in which justice is served, and the fact that accessing state justice is expensive, among other causes.[458]

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[451] United Nations Development Programme (2021) *Estudo de Base sobre o Acesso dos Cidadãos aos Serviços de Justiça em Moçambique.* Draft version, p.15.

[452] Anon (2020) 'Ministra da Justiça defende reforma legal para promoção da cidadania e paz', *Jornal Notícias*, 30 November.

[453] The DPAJ was created under subparagraph a) of paragraph 2 of article 2 the Organic Statute of the Ministry of Justice, published by Ministerial Decree 68/97 and under Resolution 6/2001. The Provincial Department of Justice (DPAJ) is headed by the Provincial Director and works with the following departments: Department of Notary Registries and Religious Affairs; Legal Aid Department; Department of Prisons; Division of Administration and Finance and Division of Human Resources. One of the functions of the first department is to provide for the installation, operation, and registration of the community courts. Created in 1997, the DPAJ began operating in 2011. For further information, see https://www.pmaputo.gov.mz/por/Documentos/Legislacao (accessed 11 July 2020).

[454] De Sousa Santos, B. e Trindade J. C. (eds). (2003); De Sousa Santos, B. (2006), pp. 39-75; Meneses, M.P. (2006), pp. 93-120. See also Meneses, M. P. (2009), pp. 9-42. Isaacman, A. (1987), pp. 37-82. Araújo S. (2014).

[455] See the analysis in the first ten pages of Chapter 4.

[456] Ibid.

[457] Ibid.

[458] Ibid.

There is a struggle for criminal justice in the country mainly due to the Eurocentric approach that the state has taken historically to justice. To challenge this view, a shift is needed, and it has four points of departure: 'learn that the South exists; learn to go South; learn from the South and with the South'.[459] De Sousa Santos calls the shift the Epistemology of the South, and this chapter aims to show that a possibility for improving the criminal justice system in Mozambique does exist and that it lies here in Mozambique. For the sake of this chapter, in fact, the South will be represented by community courts as local knowledges. Community courts exist, they come from the past, and the next pages will show what the state should learn from them and better apply local knowledge to criminal justice.

5.3 Community courts' legal framework

Law 4/1992 officially recognised community courts as a resolution mechanism, taking them away from the judicial system. The preamble of the law states that

> toward the recognition of a harmonic society constituted by peaceful communities, the Mozambican Parliament declares that the establishment of the community courts is essential to solve small disputes, standardise practices, and enrich Mozambican uses and traditions.

Law 4/1992 is generic and the 15 articles that compose the legal document focus on the competencies and composition of community courts. Article 3 provides that community courts resolve petty civil and criminal offences, that is, those not punishable by imprisonment. Public reprimand, community service, fines and compensation for damages caused by the commission of an offence are provided as penalties that judges can apply. Eight judges, elected among Mozambican people from the age of 25 years, comprise a community court, as prescribed by article 7.[460] Article 12 states that it is the provincial government that is responsible for the administration of community courts,[461] while article 13 states that it is the competence of the national government to establish mechanisms and terms for the election of judges.[462] Finally, article 14 gives to judicial courts' judges of the district level the responsibility to monitor the election of new judges.[463]

From a legal pluralism perspective, community courts gained recognition through Law 4/1992 as they were excluded from the state judicial system. As analysed in detail in Chapter 3, the incorporation of non-state mechanisms of conflict resolution into state justice foresees disadvantages.[464] Through incorporation, non-state mechanisms of conflict resolution will be like the state system, and the fundamental characteristics of these mechanisms, such as

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[459] De Sousa Santos, B. (1995) *Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*. New York: Routledge, p. 580.
[460] Article 7 Law 4/1992 (Composition): 1. The community courts will be composed of eight members, being five permanent members and three substitutes. 2. The members of the community courts shall elect the president among themselves. 3. In his or her absences and impediments, the president will be replaced by the eldest member.
[461] Article 12 Law 4/1992 (Establishment of community courts): The establishment of community courts will be the direct responsibility of provincial governments.
[462] Article 13 Law 4/1992 (Elections): It is the responsibility of the Government to establish the mechanisms and deadlines for the election of members of community courts.
[463] Ibid.
[464] Griffiths, A. (1996), pp.195-214. Penal Reform International (2000).

flexibility and informality, will fade away to fit into the new state context, one that is represented rather by rigidity and formality.[465]

In 2004, community courts, as non-state mechanisms of conflict resolution, gained constitutional recognition. Article 4 of the 2004 Constitution recognises the possibility for citizens to resort to different mechanisms of conflict resolution, as long as they respect the values of the Constitution. Five years later, in 2007, article 5 of Law 24/2007 (which reformed the formal judicial organisation)[466] stressed the important contribution of community courts to the dynamism of the social and economic life of the country. The article states that

> community courts are non-judicial mechanisms of conflict resolution; they are independent, informal, judge according to common sense and fairness, privilege orality, and consider the existing social and cultural values of Mozambican society while respecting the Constitution.

The constitutional recognition of legal pluralism can be seen, through a first approach, as the greatest recognition that legal pluralism has obtained in any country. Concerns, however, immediately emerge regarding the respect that non-judicial mechanisms of conflict resolution have towards the Constitution, better known as the repugnancy clause. The current clause differs from the colonial one of 1951, which was discriminatory in principle,[467] and although some literature affirms that repugnancy clauses today represent a balance between society and the state,[468] legal pluralism and postcolonial studies agree that repugnancy clauses are the assertion of a rigid model of state legality in which Western-trained personnel impose conformity to a Western style of justice.[469] A Western-trained public servant, in fact, will apply a Eurocentric approach to justice, ignoring *a priori* the importance of local knowledge. Against this, the constitutional recognition of legal pluralism could become an opportunity for criminal justice by enriching its practices. A legal pluralist with postcolonial views on criminal justice could pay real attention to non-state mechanisms of conflict resolution, recognising and accepting how important local knowledge is. While the repugnancy clause will always be controversial, article 5 of Law 24/2007 went further in this regard, eliminating some doubts and stating how community courts can consider local knowledge while respecting the constitution. Legal pluralist academics entertain the hope 'of not seeing legal pluralism and the democratisation of access to justice result[ing] in a mere constitutional fetish'.[470]

In June 2015 the new Mozambican Penal Code entered into force. It revoked n. 2 of article 3 of Law 4/1992, according to which community courts could deal with minor criminal offences.[471] The revocation restricted the scope of action of the community court to civil cases,

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[465] Ibid.

[466] Law 24/2007 replaced Law 10/1992.

[467] See article 138 of the Constitution of the 1951 Portuguese Republic.

[468] Igwe, O. W. and Ogolo, M. D. (2017), pp. 35-39. Available at: https://ssrn.com/abstract=2528497 (accessed 16 October 2018). Uweru, B.C. (2008), pp. 286-295. Taiwo, E. A. (2009), pp. 89-115.

[469] See the definition of weak legal pluralism in Griffiths, J. (1986), p.1. With specific reference to postcolonial gender studies, see Amede Obiora, L. (1995) 'New Skin, Old Wine: (En)gaging Nationalism, Traditionalism, and Gender Relations', *Indiana Law Review,* 28 (3), pp. 575- 599.

[470] José, A.C. (2016), p. 31.

[471] Article 3(2) Law 4/1992 (Competence) 2. Community courts have also the competence to rule on minor offences that are not subject to custodial sentences and to which applying measures such as a) public reprimand; b) community service for a period not more than thirty days: c) fine whose value does not exceed 10000.00 MT; d) deprivation, for a period not exceeding thirty days, of the exercise of

and the legislator established the state monopoly over criminal cases in the country. The limitation to civil cases represented a legal obstacle for criminal justice, but in December 2020, the revised Penal Code restored community courts' jurisdiction over petty criminal matters.

The restoration of the criminal jurisdiction in the hands of community courts presents an important opportunity to enable local communities to deal with minor offences and not rely on the state criminal justice system, one which frequently results in extensive pre-trial detention and other adverse consequences. Law 4/1992, however, states that community courts can deal with minor criminal offences that do not involve imprisonment.[472] Consequently, this positive opportunity can become a legal obstacle if some legal remedies are not applied. A legal remedy can, for example, develop from the revision of Law 4/1992 which is currently in progress at the Ministry of Justice, Constitutional and Religious Affairs. Allowing community courts to have jurisdiction on petty criminal cases that are punished by imprisonment, such as theft, assault, simple domestic violence, cannabis cultivation and trafficking small quantities of drugs[473] will be in line with the norms of the new Penal Code[474] that provides for the application of alternatives to imprisonment in the country. In fact, provided that the defendant is a primary offender, and that he or she returns the stolen goods and/or repairs the caused damage, the state judge should prioritise the application of an alternative to prison rather than impose a term of imprisonment of up to three years.[475]

In an interview with one prosecutor, he indicated concern about whether a community court judge would know whether the accused was a primary offender or not.[476] While this is a valid concern, research shows that identifying repeat offenders is also difficult for state judges.[477] During the 2014 research on children in conflict with the law, one state judge said:

> Given the precariousness of the criminal record system, it is quite difficult, sometimes even impossible, to verify the situation and criminal background of the defendants, thus leaving the doubt as to whether someone is a primary or repeat offender. Some repeat offenders are identified by a judicial official who casually recognise them, when they are not the ones to reveal, consciously or unconsciously, that they already have a criminal record.[478]

While an effective centralised criminal record system should be established to improve the exchange of information on criminal records, access to such information should be given to state judges and prosecutors as well as to community court judges.

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the right whose immoderate use originated the offense; e) compensation for damages caused by the offense, to be applied independently or accompanied by any of the others.

[472] N. 2 of article 3 Law 4/1992.

[473] On the treatment of drug cultivation, use and trafficking, see Law 3/1997. Article 34 of Law 3/1997, for example, punishes the cultivation of cannabis with imprisonment up to one year.

[474] Article 67 Penal Code (Prevalence of non-custodial sentences) 1. Considering the individual treatment of a sentence, non-custodial sentences are privileged, with emphasis on re-socialisation. Whenever possible, the offender shall be freed, monitored by the State and the community. 2. Deprivation of liberty shall occur or be maintained when, through the application of or non-custodial sentences, it is not possible to prevent the future practice of crimes by the offender or guarantee the protection of legal assets.

[475] Article 68 Penal Code.

[476] Interviewee 12.

[477] Procuradoria-Geral da República (2018).

[478] Ibid. p. 77.

A closed list of specific crimes, then, chosen among those punishable by up to three years imprisonment,[479] could be inserted into the new law to increase the competences of the courts on criminal matters. A team composed of jurists and sociologists with a background in legal pluralism and postcolonial studies and knowledgeable on alternatives to imprisonment could be established to analyse the specific criminal offences to be inserted in such a list.

Broadening community courts' competences to include, for example, theft, assault, simple domestic violence, and cannabis cultivation, would mean less cases going through the criminal justice system and more cases dealt with at the community level. This would also result in more people serving non-custodial sentences and less people entering the prisons and contributing to (and suffering from) problems such as overcrowding and its consequences. While pressure should be applied, at the political level, to increase the competences of community courts, the provision of the law that provides for the criminal jurisdiction represents a valuable opportunity for the criminal justice system to improve people's access to justice and ultimately the condition of the prisons.

5.4 The functioning of community courts in Maputo

5.4.1 The Maputo community courts' Commission

During a focus group discussion with community court judges,[480] a judge said that, in March 2010, the judges of the Maputo community courts created the Commission (*A comissão*) following a recommendation of the CSO, CEPAJI. With funding provided by the Danish Development Cooperation (DANIDA), CEPAJI was working in the country to promote the overall work of the community courts.[481]

Composed of five judges, one president, and the judges of four community courts in the capital city,[482] the Maputo courts' commission has the role of localising the courts, organising the revitalisation of those that are not operational, and monitoring those that function in the city. Since its inception, the commission has been operating at the community court of the *Mikadjuine* neighbourhood.

The commission is not a legal entity. The unpublished statute of the commission (shown to the author during the fieldwork) provides a mandate for five years, renewable twice.[483] The board elected in 2010 remains in operation. Election of new members occurs only on the death of active members. The commission acts as an intermediary body between the Ministry of Justice, Constitutional and Religious Affairs and the courts, and is chaired by a president. The commission organises training opportunities for judges and provides a mechanism for dialogue and collaboration with public and private entities, and state and non-state organisations.

[479] The full list of offences punishable by up to three years' imprisonment is on file with the author of the thesis.
[480] Interviewee 012(A).
[481] See footnote 160.
[482] In 2010, the President of the community court of *Mikadjuine*'s neighbourhood was elected president of the Commission together with four other judges, each of whom is a president of a community court in the city: the presidents of the neighbourhoods of *Polana Caniço B*, *Inhagoia* B, *Jardim* and *Urbanização*.
[483] The Statute of the Commission is on file with the author of the thesis.

It is through the commission that judges can speak and be heard in fora organised by development actors, state institutions and CSOs, around different topics (including access to justice for all). During the fieldwork, the thesis's author had the opportunity to observe, at various events,[484] attendance of the commission and the way in which the commission participated in the discussion on behalf of the Maputo judges. In practice, the commission was mainly represented by its president. His message was consistent across events: community courts are closer to the people; they understand the problems of the population and know how to resolve people's conflicts; and they help the state improve access to justice. In an interview, another judge reaffirmed the message given to the public on community courts:

> The commission is the voice of the judges, not only the ones operating in the city of Maputo but also the voices of all community courts' judges of the country. Through the commission, we can be heard, not only exposing our needs and necessities but also improving the problems that the state faces in access to justice for all people.[485]

On the issue of their competence on criminal justice, another judge said:

> The state has the monopoly on criminal justice and we have accepted such decision. Although the law gives us power to deal with minor criminal cases, we avoid taking these cases to avoid problems with the prosecutors of the courts. However, when we can, in different meetings where criminal justice is discussed, we share that we could often help, because not everyone that commits a crime needs imprisonment.[486]

The existence of the commission represents a positive opportunity for community court judges to express their positions on different issues in which they may be directly or indirectly involved, and on how to improve the courts' functioning and collaboration with different actors.

The work of Spivak and De Sousa Santos on subalterns and the south provides some useful theoretical resources.[487] 'Subalterns' are those from social, political, and geographical perspectives that are excluded by Eurocentric power while 'the south' is a cultural metaphor that refers to all forms of subordination created by Eurocentric power. Community courts and their judges are examples of what is meant by the south and the subaltern. While Spivak stated pessimistically that 'the subaltern cannot speak', another theorist, Maggio, challenged her work in 2007, suggesting that the subaltern can actually be heard.[488] The Maputo community courts'

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[484] The first event was a meeting organised by the Ministry of Justice, Constitutional and Religious Affairs with representatives of the Ugandan community courts. I was invited to the event, which took place at the Ministry in November 2015. The president of the Commission attended the event. In December 2017, 2018 and 2019, on the occasion of Human Rights Day, the Faculty of Law of the University Eduardo Mondlane invited me to speak about the role of community courts in the protection of human rights. The Commission of the community courts of Maputo attended the events, together with judges from other community courts operating in Maputo. In August 2017, I had the opportunity to travel to Kigali (Rwanda) with a delegation from the Ministry of Justice, Constitutional and Religious Affairs to attend the Continental Conference on Collaboration between the Judiciary and Community Justice Institutions. The president of the Commission made a presentation on the collaboration between the judiciary, state institutions and community courts.

[485] Interviewee 009 (B).

[486] Interviewee 008 (B).

[487] Spivak, G. C. (1988). De Sousa Santos, B. (1995). De Sousa Santos, B. (2014).

[488] Maggio, J. (2007) 'Can the Subaltern Be Heard?: Political Theory, Translation, Representation, and Gayatri Chakravorty Spivak', *Alternatives*, 32 (4), pp. 419-443.

commission represents one resource that judges have so as to speak and be heard in different fora.

5.4.2 The number of community courts in Maputo

In April 2015, there were 38 community courts functioning in six of the seven Districts of the capital city.[489] Four years before that, there were only 11 community courts, and the increase reveals the growing importance of such non-state mechanisms of conflict resolution, operating in the most urbanised city in the country.[490] According to the census of 2017, there were about 1,100,000 people living in the city of Maputo, so that there was one community court for every 29,000 people.[491] In comparison, the same year found six state district courts, one per 180,000 people in Maputo.[492]

The most urbanised district of the city, the *Kampfumo* District, had one community court. People living where state institutions are physically closer than in rural areas made full use of this non-state mechanism. The District of *Kamubukwana*, one of the most populated of the city, had one community court in each of the 14 neighbourhoods of the district. With a total population of about 290,000 people, every 20,000 inhabitants had access to one court. In the same district, there is one judicial court in operation. Community courts do not only serve a greater number of people than judicial courts, but they are also physically closer to people's homes than judicial courts, and consequently more accessible. In the *Kamubukwana* District, for instance, people can refer to the community courts of the neighbourhood where they live rather than being forced to use inadequate public transport to reach the judicial court of the district.

That community courts are more numerous than judicial courts, presents a positive practical opportunity. In practice, the existence of community courts in all corners of the city means that people in need of justice can more easily acquire some access to it.

5.4.3 Places where community courts function and their politicisation

Focus group discussions found that ten of the 21 community courts visited in 2015 used an office in the same premises as the secretary of the neighbourhood (*secretário do bairro*). The secretary of the neighbourhood is a local political agent who was originally tasked by FRELIMO with resolving everyday disputes in the area and also for the communities' social control.[493] Although highly criticised in the scholarly literature[494] for being the representative of FRELIMO (and as such promoting the party's agenda rather than good governance and democracy per se), the secretary of the neighbourhood is highly used by residents, particularly

[489] In 2015, Maputo was divided into seven Districts and 64 neighbourhoods *(bairros)*. Each neighbourhood was subdivided into blocks (*quarteirões)*. In April 2021, there were 42 community courts of which 35 were functioning in the city of Maputo.
[490] Centro de Pesquisa e Apoio à Justiça Informal (2013).
[491] Information available at: https://bit.ly/33XegVr (accessed 3 December 2021).
[492] Ordem dos Advogados de Moçambique (2019).
[493] Forquilha, S. C. (2008) 'O Paradoxo da Articulação dos Órgãos Locais do Estado com as Autoridades Comunitárias em Moçambique: Do discurso sobre a descentralização à conquista dos espaços políticos a nível local', *Cadernos de Estudos Africanos*, 16/17, pp. 89-114. Gentili, A. M. (2004) 'Democracy and citizenship in Mozambique', in Triulzi A., Ercolessi C. *State, power, and new political actors in postcolonial Africa*, Fondazione Giangiacomo Feltrini, Milano. pp. 153-174.
[494] Ibid.

for property and administrative issues.[495] Two community courts operated outside the secretary's premises, under a tree or on benches outside the office, while one community court shared the same office as the secretary.

The physical proximity of community courts to the secretaries works in favour of the courts. Residents who approach the secretaries for help become aware of the courts and what they can do, though the fact that they are so physically close to spaces linked to political entities has raised concern over the politicisation of the community courts. There is, however, no evidence that shows that the fact of shared spaces has impacted on the impartiality of community courts in Maputo, particularly considering that the municipality has always been in the hands of FRELIMO and that no local representatives from other parties have operated in the city.[496]

Nonetheless, scholarly literature on community courts in Mozambique has regularly expressed concern about the use of political spaces by the courts.[497] In 2003, Gomes said that 'sharing facilities with other structures ... can hinder functional autonomy and its assertion as independent structures'.[498]

Yet, the question of the politicisation of justice needs to be analysed more broadly beyond the issue of community courts. For instance, state judges in the country are regularly accused of partisanship and of lacking proper independence.[499] Judicial independence refers to judicial decisions that are free, fair and impartial, and that rely only on the facts and the law.[500] Research, however, has revealed the closeness of the judicial judges to the FRELIMO party.[501] A 2006 study pointed out how, in district courts in particular (where these are often faced with a shortage of funds and a lack of physical infrastructure), judges may be more vulnerable to external influence, including possible corruption.[502] On the other hand, one community court judge noted:

> The risk of corruption of community court judges is very low or non-existent, considering the social control that communities have on the courts.

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[495] Ginisty, K. and Vivet, J. (2012) 'Frelimo Territoriality in Town: the Example of Maputo', *L'Espace Politique*, 18. Available at: http://journals.openedition.org/espacepolitique/3164 (accessed 11 March 2021).

[496] According to the most recent information, in April 2021 five courts were operating on the premises of FRELIMO: the courts of *Inhagoia A, Inhagoia B, Costa do Sol, Unidade 7 e Kampfumo* central district.

[497] De Sousa Santos, B. e Trindade, J. C. (eds). (2003).

[498] Gomes, C., Fumo, J., Mbilana, G. e De Sousa Santos, B. (2003) 'Os tribunais comunitários', in De Sousa Santos, B. e Trindade, J. C. (eds). (2003), 2, p. 331.

[499] See 2012 data overview of corruption and anti-corruption in Mozambique from U4 Expert Answer. Available at: https://bit.ly/3recpnX (accessed 9 November 2020). See also info available at: https://www.business-anti-corruption.com/country-profiles/mozambique/ (accessed 9 November 2020) and 2016 Country Findings – Mozambique from Africa Integrity Indicators. Available at: https://www.globalintegrity.org/wp-content/uploads/2016/06/ AII4-Findings-Mozambique.pdf (accessed 9 November 2020).

[500] See definition available at: http://www.unodc.org/unodc/en/corruption/new/judicial-integrity.html (accessed 12 November 2018).

[501] REFORMAR-Research for Mozambique. (2019) An Assessment of some Aspects of Judicial Integrity in Mozambique. *REFORMAR-Research for Mozambique*. Available at: https://bit.ly/3G9HDAF (accessed 1 January 2020).

[502] AfriMAP (2006) *Mozambique: Justice Sector and the Rule of Law*. Open Society Foundations. Available at: https://acjr.org.za/resource-centre/Mozambique%20Justice%20report%20-Eng.pdf/view (accessed 10 December 2020).

> Judges are well regarded and communities around the courts are very aware of all that is happening in the area, the behavior and the decisions of the judges. In addition, knowing that cases in general don't stop at the community level but often continue to other levels, such as judicial courts, judges refrain from corruption.[503]

There is no specific research on the corruption of community court judges. However, some postcolonial theorists argued that African corruption is actually 'a Western invention that emerged as a postcolonial construct that has distorted and ignored the true nature of the problem'.[504] In a recent article published in 2019, Apata concludes:

> If one were to probe deep into the idea of corruption in Africa one might find that corruption is probably not the biggest challenge to African development as many have claimed. Indeed a closer inspection of the subject – that is, if one can get through the confusion and the moral panic that the discourse engenders – might reveal corruption to be but a consequence of deeper problems.[505]

An in-depth analysis should be made of corruption in the country using the lenses provided by postcolonial studies. If the use of political representatives' spaces from community courts is a fact, the politicisation of the courts will fade away only once the full democratisation of all sectors of the country is complete. Forquilha, in fact, reminds us that democracy is yet to be completed as the Mozambican reality is that of a private appropriation of the state by the FRELIMO ruling party.[506]

Focus group discussions also showed that the premises in which the community courts operate are mostly old, hot, and badly maintained. With the walls cracked and leaking, there is often no electricity and little natural light coming through the windows. Judges in the community courts often had to borrow tables and chairs from the secretaries. There were often no shelves available for the storage of documentation, with many of the files left lying about on the floor and/or on tables. All in all, the working conditions in which community court judges operate are deplorable and may affect the daily performance of the judges. Conditions should be improved by at least providing courts with furniture and working materials such as paper and pens. These appalling working conditions are also shared by many judicial courts at the district level. Research reveals that

> [i]n addition to the lack of magistrates and officials, a part of the courts (mainly district) works in very precarious conditions, being installed in degraded or inadequate buildings for the preservation of the processes (and

[503] Interviewee 012(A).
[504] Apata, G.O. (2019) 'Corruption and the postcolonial state: how the west invented African corruption', *Journal of Contemporary African Studies*, 37(1), p. 43.
[505] Ibid. p. 56.
[506] Forquilha, S. C. (2009) 'Reformas de Descentralização e Redução da Pobreza num Contexto de Estado Neo-patrimonial. Um olhar a partir dos Conselhos Locais e OIIL em Moçambique', II Conferência do IESE, "Dinâmicas da Pobreza e Padrões de Acumulação em Moçambique". Available at: https://www.iese.ac.mz/~ieseacmz/lib/publication/II_conf/CP25_2009_Forquilha.pdf (accessed 9 August 2021).

> even for the health of the professionals who work in them) and which even do not have electricity, running water, equipment or sufficient furniture.[507]

Analysis of the community courts' workplaces will be enriched by an assessment of the profile of the judges and how they came to be appointed as judges.

5.4.4 The profile of community court judges

In April 2015, there were 188 judges working in the community courts of Maputo. Seventy-nine of these were women and 109, men. While Law 4/1992 prescribes (in article 7) that community courts should have five judges, there were courts with less than this, due to several deaths among the judges. There was no gender disparity in the general composition of the community courts, but this was not so with regard to the chairmanship. There were 34 male presidents out of the 38 community courts in the city, with women chairing only four community courts. Gender balance in leadership positions is important not only in the abstract (because it increases gender equity), but also practically, in terms of the experience that women can bring to the work of the courts.[508] Women who need to approach the courts for gender-related problems are likely to be less intimidated when the court is chaired by a woman rather than a man.

The lack of gender balance in the community courts reflects similar problems in the state justice system. In Mozambique, while there is some balance between the number of female and male judges (158 female to 227 male judges), in 2021 there were still less women than men in the top positions.[509] There were two female judges among the 12 Supreme Court judges, and 19 female judges in the Courts of Appeal out of a total of 65. In the 11 Provincial Courts, four were presided over by female judges.[510]

Worldwide, it is well known that women are much less represented than men as chairs in the judiciary.[511] What is less known is whether female judges decide differently to men on criminal matters. Research shows that female judges operating at the state criminal courts in the USA are harsher than their male counterparts.[512] They proved much more likely to incarcerate and impose longer sentences than their male colleagues, and as such exemplify the paradigm of the retributive American criminal justice system.[513]

However, research has also found that gender matters are treated differently when the trial judge is a woman.[514] Women judges are more sensitive when dealing with female sexual

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[507] José, A.C. (2016), p. 21.
[508] See information available at: https://bit.ly/3KX2VoT and at: https://bit.ly/3ggpE0Q (accessed 10 March 2021).
[509] Data from the Higher Council of the Judiciary (*Conselho Superior da Magistratura Judicia, CSMJ*) (January 2021).
[510] Ibid.
[511] See data available at: https://bit.ly/35s04E4 (accessed 10 August 2021).
[512] Gruhl, J., Spohn, C. and Welch, S. (1981) 'Women as Policymakers: The Case of Trial Judges', *American Journal of Political Science*, 25 (2), pp, 308-322. Steffensmeier, D. and Herbert, C. (1999) 'Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?', *Social Forces*, 77 (3), pp. 1163– 96.
[513] Steffensmeier, D. and Herbert, C., pp. 1163– 96.
[514] Cases in which gender itself is an issue such as domestic violence.

discrimination and will favour women victims more often than male judges.[515] They support cases involving child support and property settlement on divorce and are likely to rule against males in family law cases.[516] These findings are consistent with the literature by international organisations such as the International Development Law Organization (IDLO).[517] In a study of community courts in Eritrea, for example, Andemariam says:

> The presence of women in community courts is of paramount importance both to women litigants and to women living in various communities. First, it strengthens the Government's policy to ensure access to all offices and occupations on a gender-equal basis. Second, arguably the presence of a woman in a community court gives a woman litigant an advantage because the woman judge may be more understanding to women-specific issues, such as child maintenance, than her male colleagues. Finally, the presence of a woman judge in the community court may encourage women litigants to bring their cases before the court, especially in a society where women have been traditionally barred from accessing justice directly.[518]

The literature above shows that more female representation among judges is important, especially for gender-related cases. Considering that issues such as domestic violence are matters dealt with at the community court level, the presence of more female judges in the courts would strengthen the way the latter deal with such cases by considering the existing dynamics between men and women in a case.

The ages of the 156 community court judges included one who was between 20 and 30 years old; 48 who were between 31 and 50; 81 who were between 51 and 70; and 26 who were above the age of 70 years. More than half of the judges were older than 50 years, having begun work as judges between 1978 and 1992. It was found that their age and the duration of their mandate as judges in the area contributed to the respect they enjoyed from the residents they presided over. Judges gain power[519] and supremacy in their neighbourhoods and are well known by their communities. A judge said:

> I have been living in the community where I work as a judge for more than 20 years and I know my people and their problems and this is important

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[515] Allen, D. and Wall, D. (1993) 'Role orientations and women state supreme court justices', *Judicature*, 77, pp. 156-165. Martin, E. (1993) 'The representative role of women judges', *Judicature*, 77, pp. 166-173. Peresie, L. J. (2005) 'Female Judges Matter: Gender and Collegial Decision Making in the Federal Appellate Courts', *Yale Law Journal*, 114, pp. 1759-1778. Kenney, S. (2012) *Gender and Justice: Why Women in the Judiciary Really Matter*. Routledge.

[516] Ibid.

[517] Ubink, J. and Mclnerney, T. (2011).

[518] Andemariam, S.W. (2011) 'Ensuring Access to Justice through Community Courts in Eritrea', in Ubink, J. and Mclnerney, T. (2011), p. 122.

[519] While it is acknowledged in Chapter I, as a limitation, that the thesis does not focus on recipients of court hearings or judgments, research shows that non-state mechanisms of conflict resolution can exercise power over the beneficiaries of the decisions. Community court judges, for example, may make a decision influenced by a more powerful party. The sentence may appear consensual, but in fact result from coercion. See, for example, Abel, R. L. (1982) *The Politics of Informal Justice*. New York: Academic Press.

> because when they come to us, I can already imagine what is the problem and the causes because I know the situation.[520]

The existence of judges who serve in the same community as where they live is a positive practical opportunity for people's effective access to justice because such judges are aware of and understand the problems of their communities. They are often familiar with the causes of the conflicts and can see the best solution for the cases placed before them, as is demonstrated below in the discussion about how judges decide their cases.

The judges work on a voluntary basis and receive no subsidy from the state for their involvement in the community courts. When asked why they were willing to work for no pay, one judge explained: 'I have been doing a good job for the maintenance of the peace and social harmony of the communities and their population. They need us, and I am not doing this for money.'[521] While many of the judges were formally retired, others still worked elsewhere.[522] The professional status of 68 of the judges is identified in the graph below.

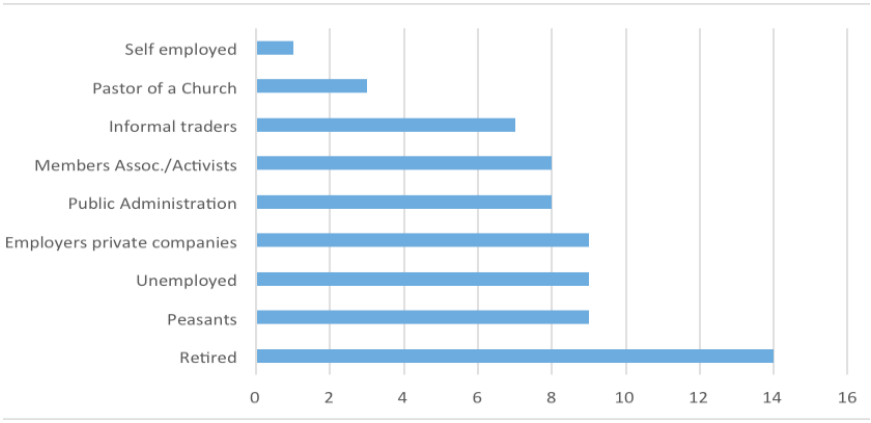

Figure 1: Professional activities of 68 community court judges in Maputo[523]

While 45 community court judges earned a separate salary,[524] for 14 of the retired judges and eight of the unemployed judges the only household income came from the fee the court charges for opening a case, which comprises a sum of 400 Meticals.[525] Two hundred Meticals are paid by the plaintiff at the opening of the case, while the defendant pays 200 Meticals on his or her first court appearance. This sum is then divided between the five to eight judges comprising the court.

Over the years, community courts judges requested (through their commission) that the Ministry of Justice, Constitutional and Religious Affairs provide a regular subsidy for their work. In the focus group discussions, the judges said they envisaged a subsidy similar to that

[520] Interviewee 013(E).
[521] Interviewee 001(C).
[522] Considering that community courts operate once or twice a week, the fact that judges were working elsewhere did not affect their productivity at the courts.
[523] The figure is the author's creation.
[524] About one-third of those who were part of the group discussions.
[525] For comparison and considering an exchange rate of 5.8 (August 2021), 400 Mozambican Meticals is equivalent to 93 South African Rands.

received by traditional authorities (such as *regulos*, for example) and community leaders (such as the secretaries of the neighbourhood). In fact (through Decree 15/2000 and Decree 11/2005), *regulos* and the secretaries of the neighbourhood receive both a monthly subsidy and their own uniforms and/or badges.[526] This request has yet to receive a response from the Ministry.

In addition, in 2012, to better structure the financial situation of the judges, the commission opened a revenue bank account, where judges would regularly deposit the money collected from case fees. The judges explained that, at the end of the year, the amount deposited by the courts is distributed equally among the judges. One judge added:

> Not all courts are paying the amounts received by the fees of the cases, especially the judges of courts that open a great number of cases. These judges prefer to distribute the fees of the parties involved among themselves immediately, rather than depositing them in the bank account.[527]

These bank accounts are managed by the President of the Commission and another commission member (and not by an outside authority). There is also no oversight of either the number of cases or whether that number corresponds to the amounts deposited. The courts independently decide how to use the bank account.

The revision of Law 4/1992 would address problems related to the use of the bank account and the distribution of fees. The revision could provide that fees be paid into a specific bank account managed by the Ministry of Justice, Constitutional and Religious Affairs. The Ministry could then use the collected revenue to pay all community court judges a regular and fixed subsidy that would be established by law.

At least one commentator, Campos, remains cautious about the possibility of direct state support for community court judges. Such support would 'take away from the community authorities their autonomy as representatives of segments of Mozambican society and transform them into agents of the State […] open[ing] up a process of party co-optation'.[528] While this same concern can be extended to judicial judges (as they receive a salary from the state budget),[529] only when the process of democratisation of the country is complete will it wither away. Only when the state and the ruling party are in practice two distinct entities (and when different political parties are able to participate actively in the life of the country) will the payment of a subsidy to judges be considered a benefit rather than an obstacle to improving access to justice in the country.

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[526] Note that this is a similar situation that occurred during Portuguese colonisation. In focus group discussion 012, respondent A said that the subsidy of the secretaries of the neighbourhood was about 4,000 Meticals per month (for comparison and considering an exchange rate of 5.8 in August 2021, 4,000 Mozambican Meticals is equivalent to 689 South African Rands). See also De Sousa Santos, B. e Trindade J. C. (eds). (2003).

[527] Interviewee 012(A).

[528] Campos, L.M. (2018) 'O AUXILIO ADMINISTRATIVO DAS AUTORIDADES TRADICIONAIS NA ADMINISTRAÇÃO PÚBLICA LOCAL EM MOÇAMBIQUE: UMA HERANÇA DO ESTADO COLONIAL', *História e Cultura*, 7 (1), p. 326.

[529] Article 50 of Law 7/2009 (Statute of Judicial Magistrates) states: '1. The State guarantees the economic independence of judicial magistrates, through remuneration adequate to the dignity of their functions. 2. The remuneration regime referred to in the previous number is established by legal diploma, taking into account the specificity of the judicial function, the category and length of service provided by the magistrate'.

5.4.5 Appointment of community court judges

One of the interviewed judges said that

> a community court judge's appointment process starts with a communication of the Justice Provincial Directorate (*Direcção Provincial da Justiça*, DPJ) to the secretary of the neighbourhood. The secretary gives, then, the information to the Chief of the Block (*Chefe do Quarteirão*), who then indicates possible candidates among the most respected people of the community. The nominated people are, consequently, introduced to the secretary of the neighbourhood, who sets a meeting to finally nominate the chosen people.[530] All the Chiefs of the Ten Houses (*Chefes das Dez Casas*) and the Chiefs of the Blocks are invited to a ceremony, together with religious representatives and other FRELIMO organisations such as the Organisation of the Mozambican Women (*Organização das Mulheres Moçambicanas*, OMM) and the Organisation of the Mozambican Youth (*Organização dos Jovens Moçambicanos*, OJM). Also the Justice Provincial Directorate, a judge of the judicial court and a representative from the district administration (*vereador*) attend the event. In case of the creation of a new community court, among those nominated, eight people are appointed: five judges will effectively constitute the community court and three will operate when needed, in case of necessity. Differently from before is that we lost the great involvement of the community, which was replaced by the strong role of the secretary.[531]

Other judges held different views on the appointment process, with the majority contesting the idea of the role played by the secretary of the neighbourhood. Most of these had filled the post since 1978,[532] and others since 1992.[533] The judges all agreed that while, in both the 1978 and the 1992 elections, the community played an important role in the appointment of judges, the community's involvement had shrunk in more recent years. One judge said:

> The community living in the neighbourhood was called to actively participate in the election. It was the community that decided who were the most suitable people, among the oldest ones and the most respected, to become judges. Now the community is not involved like before, and the secretary of the neighbourhood is left with a lot of power to decide about the new judges through the Chiefs of the Blocks and the Chiefs of the Ten Houses. It was good that the community was involved because it was a communitarian process.[534]

Since 1922, appointments occurred only sporadically and then only to fill a vacancy upon a judge's death. In Maputo, the most recent process happened with the creation of five new community courts in the Katembe District in 2014.

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[530] Until the 1990s, the population had a particular role in the election of the judges as it was the people of the community who decided upon the judges of the community courts. Thereafter, the secretary of the neighbourhood has been approving people appointed by the secretaries of the blocks. The role of the population in the election process has diminished.

[531] Interviewee 012(A).

[532] Interviewee 001(D), 004(A), 005(A), 006(B), 007(B), 010(A), 013(C) and 014(A).

[533] Interviewee 002(A), 003(C), 008(A), 009(A), 011(B), 012(A), 015(C), 021(B).

[534] Interviewee 015(D).

From the focus group discussions, it became clear that there is a strong link between the election of the judges of the community courts and the secretary of the neighbourhood and the political party FRELIMO. This relationship reinforces concerns about the political interference of the party within the functioning of the community courts. It represents an obstacle that will only be overcome when the regulation of Law 4/1992 provides, in detail, for how elections are to be conducted. So far, Law 4/1992 is vague in this regard, specifying only that the national government is responsible for running the elections of the community court judges and that judicial judges have the responsibility to monitor these elections.[535] The revision of Law 4/92 could regulate how elections are announced, organised, and conducted. Elections could also involve the community of the neighbourhood in which the courts operate, as they did in the past.

After this assessment of the profile and the appointment of the community court judges, the next section focuses on the cases reported to community courts and the latter's proceedings.

5.4.6 Cases in the community courts

According to data from the community courts' commission, the courts in Maputo opened a total of 860 cases in 2013. Between 2010 and 2013, the annual number of cases increased from 300 (in 11 courts) to more than 800 (in 38 courts). On average, each community court opened about 20 cases a year, though much more can be done considering the potential the courts have in the districts. In comparison, a judicial court in Maputo resolves about 700 cases per year.[536]

The author had access to 99 files from three of the 21 community courts visited.[537] Among these cases, there were 21 cases related to land issues, followed by 19 family cases, 12 moral offences,[538] and 12 cases of domestic violence. Eight processes were related to housing issues, while six cases dealt with debts and five cases with assault. There were four cases in each of the following categories: conflicts of inheritance, child maintenance, theft, and witchcraft.

Focus group discussions noted that community courts dealt with criminal offences such as theft and domestic violence, and that these could be punished by imprisonment, despite the legal provision that placed such punishment outside the jurisdiction of the community courts.[539] Informal discussion with a community court judge confirmed that the courts continue to deal with domestic violence rather than other criminal offences. The reason for this may lie in the fact that while the 2014 Penal Code removed criminal jurisdiction from community courts, acts of domestic violence can also be punished by the imposition of community service, a penalty available to community courts.[540] Focus group discussions with community court judges further revealed some anxiety about how prosecutors and judicial judges respond to the fact that

[535] Articles 13 and 14 of Law 4/1992.
[536] Petrovic, V., Lorizzo, T. and Muntingh, L. (2020).
[537] Community courts of *Chamanculo B, Mikadjuine* and *Polana Canhiço B.*
[538] During a focus group discussion 012, respondent A shared that moral offences are those offences provided by traditions and customs such as insulting someone.
[539] Article 3 Law 4/1992.
[540] Ibid.

community courts deal with criminal cases.[541] One judge said that 'to avoid any discontent, we are dealing with criminal cases (even for lesser offences) less and less'.[542]

Nonetheless, community courts play an important role regarding criminal justice, particularly so with crimes of theft and domestic violence. The legal frameworks of community courts, the numbers of people incarcerated and the increase of such crimes in the country are analysed below. Community courts also have the potential to engage with juvenile crime, by diverting such crimes away from the state justice system.[543] If this were to come about, it would mean that children[544] and juveniles could avoid imprisonment and the very real possibility of coming back into society worse off than before.[545]

In terms of article 270 of the Penal Code, theft (*furto*) is punishable by a prison sentence of between six months and 12 years, depending on the value of the stolen goods. Under Law 8/2002,[546] punishment for theft is determined in relation to the national monthly minimum salary for civil servants. In 2021, this was about 4,000 Meticals,[547] meaning that anyone found guilty of stealing something whose value does not exceed ten minimum salaries (40,000 Meticals) can be punished by a prison sentence of up to six months.[548]

According to the Mozambican National Correctional Service, the number of children between the ages of 16 and 18 incarcerated annually from 2015 to 2020 has fluctuated.[549] In 2015, there were 1,043 children in the prisons. In 2016, the number dropped by 347 children but increased again in 2017, rising to 1,035. In 2018, the number dropped to 644 and, over the past two years, has remained more or less constant, with 487 and 454 children imprisoned in 2019 and 2020. The number of imprisoned juveniles (18-21 years) in the country increased from about 2,000 in 2015 to more than 3,000 in 2020.[550] Research reveals both the deplorable socio-economic profile of the children and juveniles who enter the state criminal justice system and the inability of this system to provide the necessary programmes of rehabilitation and reintegration.[551] In addition, on returning to their communities, they are likely to suffer major discrimination from their own families.[552] Community court judges, instead, are familiar with the areas in which they work and know and understand the problems of the neighbourhood and its population. They know and/or can easily ascertain the causes at work in criminal offences. They also have the advantage of involving more people in the resolution of these cases, notably both relatives

[541] Interviewee 001(A); 003(E); 005(A); 006(A); 007(A); 009(B); 010(A); 012(A); 013(E); 0014(A) and 0015(B).
[542] Interviewee 013(E).
[543] UNICEF (2021) Final Report. Analysis of the Situation of Access to Justice for Children in Mozambique. Forthcoming publication.
[544] The age of criminal responsibility in Mozambique is 16 years old.
[545] UNICEF (2021) Final Report. Analysis of the Situation of Access to Justice for Children in Mozambique. Forthcoming publication.
[546] Law 8/2002 of 5 February.
[547] See information available at: https://wageindicator.org/salary/minimum-wage/mozambique (accessed 28 January 2021). (For comparison, and considering an exchange rate of 5.8 in August 2021, 4,000 Mozambican Meticals is equivalent to 930 South African Rands).
[548] Article 270(1)(a) Penal Code.
[549] Data from the Mozambican National Correctional Service (*Serviço Nacional Penitenciário*, SERNAP) (July 2021).
[550] Ibid.
[551] Procuradoria-Geral da República (2018). Rede da Criança (2019).
[552] Ibid.

and neighbours. Owing to these factors, they are often able to offer solutions that go beyond the mere application of the law, as will be shown below.

Literature shows also that the vast majority of children are sentenced to short prison terms, mainly for crimes such as theft.[553] In 2020, more than 90 per cent of 16-year-old and 85 per cent of 17-year-old children were sentenced to prison terms of up to two years.[554] Incidentally, theft is also recognised as the most common crime for all age groups by the National Correctional Service.[555] The imprisonment of children is detrimental to the development of personality, and should only be used as a last-resort option,[556] while sentencing adults to a prison sentence for minor thefts costs the state much more than the value of the stolen goods.[557] In addition, theft continues to increase despite the fact that more and more people are imprisoned for theft (as shown by data from the Attorney-General's Office).[558] Imprisoning thieves does not discourage others from stealing.

Mozambique is not an isolated case in this respect. Worldwide, there are too many people locked up for small thefts.[559] In the USA, for example, 45,000 people out of more than 2 million Americans are incarcerated for small thefts – legislators are planning to decriminalise such criminal offences, making them punishable either with the replacement of the stolen goods and/or a fine.[560] The reform would also create space in the overcrowded prison system for people who commit more serious crimes.

Domestic violence became a criminal offence by virtue of Law 29/2009.[561] Its article 13 considers simple physical violence as any physical damage that violates a woman's physical integrity, whether by using any instrument or not. It is punishable by a prison sentence of up to six months. The state judge can also replace imprisonment with a community service order (a punishment used by community courts as well).[562] In addition, domestic violence in Mozambique is a public crime, meaning that anyone can report the crime and the complaint cannot be redrawn. Women who have reported on their husbands, for example, but found themselves reconsidering their decision, are no longer allowed to drop the cases. However, the

[553] UNICEF (2021) Final Report. Analysis of the Situation of Access to Justice for Children in Mozambique. Coming publication, p.18.
[554] Ibid.
[555] Data from the Mozambican National Correctional Service (*Serviço Nacional Penitenciário*, SERNAP) (March 2021).
[556] See the United Nations Global Study on Children Deprived of Liberty. Available at: https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Funding.aspx (accessed 28 October 2021).
[557] Editorial Board (2021) 'Too Many People Are Locked Up for Small Thefts', *The New York Times*, 29 March. Available at: https://www.nytimes.com/2021/03/29/opinion/felony-theft-law-new-york.html (accessed 28 August 2021).
[558] Data from Attorney General's Office available in: Gungunhana, N. (2019) *O Crime de Linchamento no Centro de Moçambique: o Caso da Província de Sofala*. Tese de Mestrado. Instituto Superior de Ciências Policiais e Segurança Interna, p. 56. Available at: https://bit.ly/3redhsJ (accessed 28 January 2021). In 2007, the annual report of the Attorney-General's Office stated that 1,771 cases related to theft that year. The crime of theft increased every year from 4,408 (2008) to 7,986 (2017).
[559] On the situation in the USA, see information available at: https://www.prisonpolicy.org/reports/pie2020.html (accessed 28 August 2021).
[560] Editorial Board (2021).
[561] Law 29/2009 of 29 September.
[562] Article 21 of Law 29/2009.

sheer number of requests by women to withdraw such cases (usually unsuccessfully) are raising concerns about the impact of this law.[563]

The number of cases of domestic violence continues to increase.[564] 2017 to 2019 saw a rise of 19 per cent.[565] In 2019, the most cases were reported in the province and city of Maputo, with 3,803 in the city and 2,686 in the province.[566]

Research on theft and domestic violence shows concerns over whether imprisonment is the best solution for these criminal offences. Imprisonment of offenders does little to deter others from committing the same crimes.[567] Research reveals that those who enter the criminal justice system are from the poorest part of society.[568] Worldwide, offenders are likely to be poor, uneducated, black and from specific geographical areas. Research has also found that imprisonment can turn out to be a school in criminality and that prison does not rehabilitate those who enter it.[569] Imprisonment is expensive for the USA.[570] In Mozambique, incarceration costs the state more than 200 Meticals per person per day.[571] Every year and based on the latest total prison population of about 20,000 people, about 1.5 billion Meticals is spent on imprisonment.[572]

Women's organisations have long held the view that restorative justice is not appropriate for cases of domestic violence.[573] However, research suggests that community justice can be more effective in dealing with it than the criminal justice response. Through community justice there is more accountability for men who perpetrate the violence. It avoids the revictimisation of women that a criminal process exposes, and in general works to empower victims to deal with the acts committed against them.[574]

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[563] Informal interview with a prosecutor, Attorney-General's Office, January 2020.
[564] See data available from National Institute for Statistics. Available at: https://bit.ly/3uewqwv (accessed 28 January 2021). See also the media news. Available at: https://bit.ly/3rdzMxI (accessed 28 January 2021).
[565] Instituto Nacional de Estatísticas (2019) *Estatísticas de violência doméstica, casos criminais e cíveis 2019*, p. 10. Available at: https://bit.ly/3g8Boma (accessed 28 January 2021).
[566] Ibid. p. 11.
[567] Muntingh, L. (2008) 'Punishment and deterrence: don't expect prisons to reduce crime', *South African Crime Quarterly*, 26, pp. 3-10. Doob, A. and Webster, C. (2003) 'Sentence severity and crime: Accepting the null hypothesis', in Tonry, M. (Ed.) *Crime and Justice: A Review of Research*. Chicago, IL: University of Chicago Press, pp. 143-195.
[568] Carmona Sepulveda, M. (2011). Available at: https://ssrn.com/abstract=2437813 (accessed 16 January 2021).
[569] Gendreau, P., Goggin, C. and Cullen, F.T. (1999) *The Effects of Prison Sentences on Recidivism*. Canada: Public Works and Government Services.
[570] Henrichson, C., Rinaldi, J. and Delaney, R. (2015) *The price of jails: Measuring the taxpayer cost of local incarceration*. New York: Vera Institute of Justice. Kleykamp M., Rosenfeld J. and Scotti R. (2008) *Wasting money, wasting lives: Calculating the hidden costs of incarceration in New Jerse*y. Trenton NJ: Drug Policy Alliance. Spelman, W. (2000) 'What Recent Studies Do (and Don't) Tell Us about Imprisonment and Crime', *Crime and Justice,* 27, pp. 419-494.
[571] Ordem dos Advogados de Moçambique (2019). (For comparison and considering an exchange rate of 5.8 (August 2021), 200 Mozambican Meticals is equivalent to 46.5 South African Rands).
[572] For comparison, and considering an exchange rate of 5.8 in August 2021, 1.5 bn Meticals is equivalent to 348,837 South African Rands.
[573] See news available at: https://bit.ly/3s0AcXH; https://bit.ly/3IV1ndj; https://bit.ly/3ui5dcf (accessed 16 August 2021).
[574] Bals, N. (2008) 'Is victim-offender mediation a promising alternative for handling violence in relationships?', in TOA Infodienst (Newsletter of Service Bureau for VOM and Conflict Resolution of

In addition, in Mozambique, provisional findings of a research project by REFORMAR (on the impact of gender dynamics in judicial sentences) raise many concerns about the knowledge and sensitivity of state judges for dealing with gender issues, particularly in cases of domestic homicide perpetrated by women.[575] This research (conducted in Maputo) found, for instance, that judges are sentencing women who killed their husbands, ex-husbands, partners, or ex-partners with prison sentences of between 20 and 24 years despite years of documented abuse, similar to cases where gender dynamics did not apply.[576]

The above analysis shows some of the challenges faced by the state criminal justice system in dealing with cases of domestic violence and theft. It also illustrates how community courts could be more effective in dealing with these cases than the criminal justice response. The following section examines court proceedings, the language used in community courts, the duration of cases, the judges' decisions, and the penalties imposed.

5.4.7 Proceedings of a case opened at a community court

Of the 21 courts visited, the author of the thesis could identify how 13 courts were functioning.[577] Of the 13 courts that were observed, seven courts were relatively autonomous,[578] meaning that the plaintiff could bring the case to the court directly. In the other six community courts, cases first had to be submitted to the secretary of the neighbourhood, who would then decide whether to bring it before the community court and whether it could resolve it.[579] One of the courts of the *Nhlamankulu* District, for example, was experiencing a problematic relationship with the secretary, with the result that the court was unable to resolve any case. Here, the judges noted:

> We have a problem with the secretary. He does not recognise us and, not having an independent place to stay, we sit outside its premises but don't receive any case. We hope that with the next secretary we can start a better relationship.[580]

In addition, in the *Katembe* District, where five courts were created in 2014, the secretaries of the five neighbourhoods decided on which cases could be taken. The dependency of the courts

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the German Probation Service, Cologne), pp. 16-24. Braithwaite, J. and Daly, K. (1995) 'Masculinities, Violence, and Communitarian Control', *Australian Violence: Contemporary Perspectives II*, Conference Paper. Canberra: Australian Institute of Criminology, pp. 221-251. Dissel, A. and Ngubeni, K. (2003) *Giving Women their Voice: Domestic Violence and Restorative Justice in South Africa*. Paper submitted for the 11th International Symposium on Victimology 13-18 July 2003, Stellenbosch, South Africa.

[575] Ongoing research on crimes of aggravated homicide perpetrated against partners (former or current) and their relationship to gender dynamics. Data has already been collected in the Female Penitentiary Establishment of Maputo, and the analysis of the sentences related to such cases is ongoing. See 'Ferreira Judgement' in South Africa and the importance for the judicial apparatus to adopt an appropriate response in matters related to killing abusive intimate partners.

[576] Ibid.

[577] The judges of the remaining eight community courts did not disclose anything about the relationship with the secretary of the neighbourhood and case proceedings.

[578] Community courts of *Malhangalene B, Costa do Sol, Chamanculo D, Mikadjuine, Polana Canhiço B, Malhazine and Magoanine A.*

[579] Community courts of *Inguide, Chali, Incassane, Chamissava, Guachene and Unidade 7.*

[580] Interviewee 010(A).

on local political representatives was a recurring element, also in relation to the opening of a case at community level.

Araújo has analysed how the several types of community justice in Mozambique are selectively used by the citizens, based on degree of accessibility, expectations, and problems to resolve.[581] Cooperation or competition can apply.[582] Interviews with representatives of CSOs confirmed that these kinds of relationships are at work in non-state mechanisms of conflict resolution. An interview with representatives of the Human Rights League (LDH) found that people use the organisation to resolve cases which have been reported originally to other CSOs and/or community courts but where one of the parties was dissatisfied with the decision taken by them.[583] Cooperation among different non-state forms of conflict resolution represents a positive opportunity for criminal justice: the more cases resolved at community level, the less cases reach the state criminal justice system and eventually prison. The prison system will therefore admit less people and the state will have a better chance of reducing overcrowding and improving the condition of prisons.

Court proceedings are similar across all community courts. As one judge explained,

> [o]nce a plaintiff opens a case at the community court, a form is filled in with his or her personal information, the defendant's information and the fact/s that generated the conflict. Once this form is filled and signed, the court gives the plaintiff a notification that he or she will give to the Chief of the Block where the defendant lives. The notification serves to inform the defendant to appear before the court in a quite short period of time, between a few days and one week, after the opening of the case. At the opening of the case, the plaintiff pays the amount of 200 Meticals[584] as fees to the court. At the first hearing, if both parties are attending the case, the president of the court asks them to enter the room. Identification documents are asked to ascertain their identity. The defendant is then asked to show his or her notification and the plaintiff is consequently asked to explain the matter of the case, followed by the defendant's explanation. Thereafter, the judges ask questions about matters related to the case. One of the judges, never the president, acts as a clerk to keep notes of the declarations of the parties. After their declarations, the parties are asked to leave the room. The judges decide about the case immediately or in a few days from the first hearing. If the case requires much information, they usually ask the parties to go back home and discuss the conflict with their families and or community, if needed. They do also make visits to the families and/or communities when necessary, to better comprehend the situation they have been asked to solve. The timeframe for the second hearing can be extended to a maximum of three weeks. The process can last, in total, between one

[581] Araújo S. (2014).
[582] Ibid.
[583] Interviewee 22. The LDH has been dormant since 2015 due to financial problems. However, it could mediate cases or bring them to court. In 2013, for example, 236 counsellings were given; 79 cases were solved with mediation; and 241 entered into judicial courts. Cases opened at the LDH could concern a variety of matters: labour, civil, criminal (mainly domestic violence), housing, human rights violation, land and child maintenance.
[584] For comparison and considering an exchange rate of 5.8 (August 2021), 200 Meticals is equivalent to 46.51 South African Rands.

> and three weeks. In cases where the parties do not appear before the court, the process is annulled after a month.[585]

The process above is similar for both civil and criminal cases, though the forms used to record information about the cases differ from one court to another. Some judges displayed written forms in which the declaration of the parties was recorded, but in the majority of the courts, orality prevailed, and the information was not recorded. This difference depended on various factors, but mainly on whether the court was provided with recording material (as basic as paper and pens) by the Ministry of Justice, Constitutional and Religious Affairs, and whether the judges could write in Portuguese. In the cases where forms were written, they were not always complete. A judge explained this while showing some completed forms:

> We write down the most important information such as the declarations and the sentence. Most of the time, in fact, the judge taking notes is very slow and he does not manage to capture all the information that is said. But we make sure that, at least, the most important one is there.[586]

The information that was gathered reveals in detail how, in comparison with the judicial courts, community courts can be simplified mechanisms of conflict resolution. State criminal justice systems are known worldwide to be highly bureaucratic in nature.[587] Raharjo notes that '[f]rom the first time the case goes to court, then to the penitentiary, with its peak in court proceedings … the involvement of actors (human/law enforcement) and bureaucracy/procedure is very high'.[588]

In Mozambique, Pedroso and José have shown how much time can pass between the lodging of a complaint and the case trial, namely anything from a few months to several years.[589] With summary cases, which, according to the law, have to be dealt with in no more than eight days from the commission of the crime and where the law does not provide for pre-trial detention, it is common to see people in pre-trial detention for over a year without having had their case resolved.[590] Pedroso and José argue that the main causes of the problems in the legal system are a legal culture based on norms alien to its society with a highly complex and bureaucratised structure that allows no deviation from rigid rules.[591] Instead, the simplified characteristics of community courts offer positive opportunities for improving people's access to criminal justice. These characteristics are described below.

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[585] Interviewee 012(A).

[586] Interviewee 011(A).

[587] Horder, J. (2014) 'Bureaucratic "criminal" law: too much of a bad thing?', in Duff, R. A., Farmer, L., Marshall, S. E., Renzo, M. and Tadros, V. (eds.) *Criminalization: The Political Morality of the Criminal Law*. Oxford University Press USA, New York, NY, pp. 101-131. Nardulli, P. F., Flemming, R. B. and Eisenstein, J. (1985) 'Criminal courts and bureaucratic justice: Concessions and consensus in the guilty plea process', *Criminology*, 76, pp.1103-1131.

[588] Raharjo, A. (2017) 'Bureaucracy in Criminal Justice. A Study of Criminogenic Factors in Law Enforcement on Narcotics Crime Settlement', *Advances in Economics, Business and Management Research*, 43, pp.6-10.

[589] Pedroso, J., Trindade, J.C., José, C.A. e De Sousa Santos, B. (2003) 'Caracterização do desempenho dos tribunais: um roteiro dos bloqueios do Sistema judicial', in De Sousa Santos, B. e Trindade, J. C. (eds). (2003), pp. 519-612.

[590] Ordem dos Advogados de Moçambique (2019).

[591] Pedroso, J. et al. (2003), p. 562.

5.4.8 Language spoken at the community court

During court proceedings, the most commonly spoken languages are Changane or Ronga, the local languages of Maputo city and province. When parties come from other areas of the country and judges do not understand the local language spoken by the parties, Portuguese is spoken. In general, however, people use their local languages. People then feel that, in general, they can express themselves and be understood. Fieldwork showed that judges share literacy characteristics with the people they are seeking to help. A judge said:

> My mother tongue is Changane and this is the language I speak in my daily life. Also at work and at the court, I always speak Changane. When we receive a case, we speak Changane with the people and they too speak with us in this language. It is normal to do so and not to speak Portuguese. Portuguese is the language of those other judges, that when they talk few people understand.[592]

While the language spoken within judicial courts is Portuguese, 90 per cent of Mozambicans do not identify Portuguese as their mother tongue.[593] About 12 million out of the total 28 million of Mozambicans are unable to read or write in Portuguese.[594] In addition, the judges in judicial courts not only use Portuguese, but also make use of a legal terminology that the majority of Mozambicans find difficult to comprehend. Literature showed that 'the codes, artefacts, languages, rituals and symbols handled in the judicial courts are foreign to the sociocultural contexts in which they are inserted, translating into an obstacle to the understanding of the messages they intend to convey'.[595]

The use of language is a central topic in postcolonial studies, and important to the language of justice.[596] These studies emphasise the importance of local languages as against the languages imposed on people by the colonisers and still in use in Africa due to the Eurocentric state approach to justice.

The fact that community court judges communicate with people using local languages is a practical way to make access to justice more effective. Those with little education and/or who are illiterate are more likely to be understood when they are asked to talk, and also to understand what the community court judges have to say, especially when the judges do not use formalistic language or legal jargon. Consequently, access to criminal justice, at the community level, is more accessible than at the judicial level.

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[592] Interviewee 014(D).

[593] Ministério da Educação e Desenvolvimento Humano (2017). Available at: https://www.researchgate.net/profile/Kaitlin_Carson/publication/341214732_Language_Mapping_Study_in_Mozambique_Final_Report/links/5eb41261299bf152d6a28210/Language-Mapping-Study-in-Mozambique-Final-Report.pdf (accessed 14 January 2021).

[594] Ibid.

[595] José, A.C. (2016), p. 28.

[596] Johanne, F. (1986) L*anguage and colonial power: the appropriation of Swahili in the former Belgian Congo 1880-1938*. Cambridge: Cambridge University Press. Tarr, N. (2017) 'The language of justice: when the colonial past is invited into the courtroom', *Études de lettres*, 3-4, pp. 155-172. Blagg, H. and Anthony, T. (2019) *Decolonising Criminology: Imagining Justice in a Postcolonial World*. London, Palgrave Macmillan.

5.4.9 Duration of cases at community courts

Of the 99 cases the author of the thesis had access to, 40 were finalised within the research period and their sentencing scrutinised. In terms of duration, 16 cases took between 11 and 25 days to resolve, and nine took from 26 days to two months to finalise. Eight cases took only ten days to complete, but four took more than 101 days to resolve. Three cases lasted between 61 and 101 days. All in all, the timeframe for the resolution of cases in the community courts was short: almost 50 per cent of the analysed cases were resolved within a month, with the courts showing how access to justice can be provided in a reasonable time.

As mentioned previously, bureaucracy is one of the root causes of the slow pace of processes at the judicial court level. Criminal cases can take years, as can the most simplified type of criminal process namely, the summary case.[597] Waiting for a case to be heard generates immense frustration for all parties concerned, both for the victim and the accused, who is incarcerated.[598] It is important to note that across the world, research shows that one out of every three people held in pre-trial custody are found not guilty.[599]

The duration of a case brought to the community court is reasonable, as are the fees that need to be paid to open a case before the community court – this is discussed below.

5.4.10 Fees at the community courts

Each party needs to pay a fee of 200 Meticals to open a case before a community court.[600] The fee is divided among the community court judges. The plaintiff pays the fee immediately on opening a case and the defendant pays after their first court appearance. Often the parties cannot afford to pay the cost of the case and are asked to sign a declaration in which they agree to pay the fees in tranches over a period of 15 days.

Of the 99 cases, the author of the thesis was able to determine the professional activities exercised by 33 plaintiffs and 26 defendants from those that opened cases at community courts.[601] Among the plaintiffs, 13 people were unemployed, eight people were working in the informal sector (earning between 2,000 and 3,000 Meticals per month),[602] and 13 worked for private companies or public administration, earning somewhere between 4,000 and 5,000 Meticals a month.[603] The monthly minimum salary in 2015 was 3,010 Meticals, meaning that

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[597] Pedroso, J. et al., p. 572.

[598] Kafka, F. (1961) *Parables and Paradoxes*. New York: Schocken Books, p. 65. Butts, J. and Halemba, G. (1996) *Waiting for justice: Moving young offenders through the juvenile court process*. Pittsburgh, PA: National Center for Juvenile Justice. Wemmers, J. M. (1996) *Victims in the Criminal Justice System. Studies on crime and justice*. Dutch Research and Documentation Centre of the Ministry of Justice. Butts, J.A. and Sanborn, J.B. (1999) 'Is juvenile justice just too slow?', *Judicature*, 83, pp. 16-24.

[599] See https://bit.ly/3oeLczE (accessed 10 April 2021).

[600] In 2021, in an informal conversation, the president of the Commission said that courts are asking a fee between 100 and 500 Meticals. For comparison and considering an exchange rate of 5.8 (August 2021), 100 and 500 Meticals is equivalent to 23.26 and 116.28 South African Rands.

[601] The 99 case files were from three community courts, namely *Chamanculo B*, *Mikadjuine* and *Polana Canhiço B*.

[602] For comparison and considering an exchange rate of 5.8 (August 2021), 2,000-3,000 Mozambican Meticals is equivalent to 46,512 and 697.68 South African Rands.

[603] For comparison and considering an exchange rate of 5.8 (August 2021), 4,000-5,000 Mozambican Meticals is equivalent to 1,123,12-1,403.90 South African Rands.

people had to pay about five per cent of their monthly income to open a case. While expensive, this is much cheaper than the cost of referring a case to the judicial court, where the plaintiff has to pay judicial fees (*custas judiciais*). Judicial fees are the amounts paid by the citizen for the practice of acts in judicial proceedings.[604] Considering access to justice as a public service constitutionally guaranteed by the state to citizens through access to the courts, the costs constitute the fee that the user of the courts must pay to benefit from this public service.[605]

The Centre for Public Integrity (*Centro de Integridade Publica*, CIP)[606] states that for summary cases (*processo sumario crime*), the judicial fee is about 100 Meticals, for correctional police cases (*policia correcional*), the amount goes up to 400 Meticals, and for quarrel cases (*querela*),[607] the fee amounts to 800 Meticals.[608] With judicial fees, the cost for the services for a lawyer needs to be calculated. While the cost for private lawyers is known to be high,[609] the assistance given by state-appointed lawyers is highly criticised in Mozambican literature.[610] For children who find themselves in conflict with the law in Mozambique, there is effectively no access to justice. Children are not assisted by the same state-appointed lawyers through all the phases of the criminal justice process (from arrest to police custody, trial, imprisonment, and post-trial), the state-appointed lawyers do not prepare for the cases, and there is no communication between the lawyers and the client beforehand.[611]

In community courts, people do not need to pay for a lawyer. Community courts are much cheaper to run than the judicial courts, and thus represent a cost-effective positive opportunity for improving effective access to justice for all.

5.4.11 Community court decision-process and penalties

Findings from the focus group discussions show that the final judgments made in cases brought before the community courts are always reached through a mixture of local traditions and customs and the strict application of the law. When asked to define traditions and customs, the following explanation was given by a judge:

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[604] The Code of Judicial Costs (*Código das Custas Judiciais*) was approved by Decree 43809 of 20 July 1961, which was amended by Decree 48/89 of 28 December 1989.

[605] Centro de Integridade Pública (2017) 'Custas Judiciais em Moçambique. Um Verdadeiro Entrave para o Direito de Acesso à Justiça', *Centro de Integridade Pública*, 24. Available at: https://cipmoz.org/wp-content/uploads/2018/08/A-TRANSPARENCIA-Custas-Judiciais.pdf (accessed 10 April 2021).

[606] Ibid, p. 2.

[607] The 2014 Penal Code provided for three different types of criminal proceedings, namely summary cases, correctional police and quarrels. Summary cases are those cases that need to be immediately judged, and can be punished with a prison term of up to one year. Pre-trial detention is not provided for such cases. Correctional police cases are cases that can be punished with imprisonment up to two years, and quarrel cases are initiated through a complaint made by a complainant – such cases can be punished with a prison sentence from two to 24 years.

[608] For comparison and considering an exchange rate of 5.8 (August 2021), 100/400/800 Mozambican Meticals is equivalent to 28.08/112.31/224.62 South African Rands.

[609] See international news on the topic. Bergmark, M. (2015) 'We don't need fewer lawyers. We need cheaper ones. Unable to afford representation, more Americans are going to court alone, and they're losing', *The Washington Post*, 2 June. Margolis, H.S. (2018) 'Why Are Lawyers So Expensive?', *Margolis & Bloom*, 6 March. Anon (2017) 'Legal system expensive, big lawyers charge like taxis: Law Commission chairman', *The Economic Times*, 23 September.

[610] Procuradoria-Geral da República (2018). Rede da Criança (2019).

[611] Ibid.

> [They are] any norm different from the law that people follow constantly and by themselves. Customs and traditions are the foundation of people's lives, in the country. They are transmitted to people by orality; they are known by everyone and followed as such.[612]

Another judge said: 'We follow our customs but there is time when we need to take away the coat of our tradition to borrow the jacket of the law.'[613] When the author of the thesis asked what he meant by the metaphor of the coat and the jacket, he replied:

> We always have one coat in our wardrobe to cover ourselves in cold days and protect us. That is the meaning of our uses and our tradition. But often we need to apply the law and we used to say that we need to borrow the jacket from the white. We don't have jackets, they are expensive.[614]

The metaphor coat/jacket represents the dichotomy between community justice and the state justice system. The judicial courts apply the law, while community courts refer back to traditions and customs for guidance. In Mozambique, laws are made in the capital city, often without involving people through public consultations.[615] They are drafted and published only in Portuguese and on the internet. Only 17 per cent of the people, however, have access to the internet, and the overall literacy rate in the country is 47 per cent where female literacy amounts to 28 per cent and the male literacy rate is 60 per cent.[616]

The laws are made far away from the people and in a language unfamiliar to most of them. Information on laws is distributed through online channels, which the majority of the people do not have access to. These are factors that explain what it means to say that access to justice in Mozambique follows a Eurocentric approach. Adapting the work of Spivak, where the centre continues to be the knowledge of the West and at the periphery the invisible East,[617] the laws are made in the centre, ignoring the majority of the people who can neither speak nor be heard. All in all, the laws of the country remain unknown by the majority of its people, not only in the rural areas, but also in the most urbanised zones of the country.

Community court decisions represent, by contrast, a mixture of customs and laws. The judges do not come up with the sentence, but rather act as mediators. All the community court judges confirmed what was said by one of the judges with regard to restorative justice:[618]

> The sentence is, most of the time, an agreement between the parties reached mainly through consensus and equity, during the explanation of the facts, frustration, anger and expectation from both parties. The involvement of other people beyond the parties involved in the dispute is also crucial. We

[612] Interviewee 011(B).
[613] Interviewee 013 (B).
[614] Ibid.
[615] When public consultations occur, they are conducted in Portuguese.
[616] See information available at: https://www.usaid.gov/mozambique/education (accessed 10 April 2021).
[617] Spivak, G. C. (1993), p.53.
[618] Restorative justice is opposed to retributive justice, which sees only the application of a punishment resulting from the commission of a crime. Restorative justice instead focuses on addressing the damage caused by the crime, not only holding the offenders accountable for their actions but providing an opportunity for the parties directly affected by the crime (victims and communities) to identify and address the consequences of the crime. Restorative justice encourages the involvement of all parties and offers an opportunity for healing, reparation and reintegration.

> rely extensively on the participation of extended families and members of the community where the parties belong. We also make visits to the places where the plaintiff and the defendant are from. We interview people and observe the living conditions and surrounding situations. Back at the court, during the hearing, we act as mediators and lead the parties towards the resolution of the case. When an agreement cannot be reached, we decide on the case, applying customs and if necessary, the laws.[619]

Meanwhile, interviews with judges from the six judicial courts[620] found that the state courts practice retributive justice. One judge said:

> We apply the laws and the punishment provided by the laws for the specific crime. We interview the parties during the hearing and we do not involve extended family members and communities where the parties belong. We do so, when involving witnesses, to give some more information about the specific case. After hearing the parties and possible witnesses, we decide on the case, applying the penalty provided by law.[621]

Fines and community service orders are applied mainly by community courts, as explained by one community court' judge:

> No imprisonment is provided per law and applied in practice. In the past, public reprimand was the main deterrent used to prevent further conflicts. The wrongdoers were shamed in public before the community where they belonged. It was a practice in which communities provided for social control in the areas where parties lived. Nowadays, this custom has disappeared and we apply compensation to the victim and community service to the wrongdoer. Community service is conducted in public spaces such as schools and hospitals. Fines between 500 – 1,500 Meticals[622] are also applied as punishment and the amount is shared among the judges. Fines can be paid by the defendant immediately after the sentence or in different tranches in a period of 30 days when the defendant has not the financial possibility to pay the whole amount at once. The same people involved during the proceedings will function as social pressure for the defendant to conform to the decision of the court. Also, the judges monitor the defendant's compliance with the decision, visiting the places where community service is conducted, and asking the parties to regularly refer to the court.[623]

The information about the courts' proceedings and penalties shared by the judges during the focus group discussions is confirmed by the empirical observations that the author of this thesis conducted in two criminal cases at the community courts of *Costa do Sol* and *Polana Canhiço B.* These dealt with theft and domestic violence.

[619] Interviewee 011(A). Community courts apply laws such as the Family Law, the Domestic Violence Law and the Land Law.
[620] District courts of *Kampfumo, Kamubukwana, Kamaxakeni, Nhlamankulu, Kamavota* and *Katembe*.
[621] Interviewee 7.
[622] For comparison and considering an exchange rate of 5.8 (August 2021), 500/1,500 Mozambican Meticals is equivalent to 140.39/421.17 South African Rands.
[623] Interviewee 014 (A).

The case of theft involved a 16-year-old child who stole a phone from one of his neighbours' houses.[624] The boy was caught while running away from the house by another neighbour, and the case was brought before the community court by the two neighbours. The court notified the family of the boy who was represented by his grandmother. At the first hearing, the grandmother appeared with the boy, together with three neighbours from the area in which they lived. The judges asked the neighbour who caught the boy to explain the reason why he had brought the case to the court. He explained the occurrence and said he had brought with him a few other neighbours who had also been victims of other incidents perpetrated by the same boy.

The judges then asked the other two neighbours to speak. The first was the woman whose phone was stolen. She said that she left the door of the house open while she was at the back of the house. She did not hear anyone come into the house. She was alerted by the neighbour who returned her phone. She confirmed that she had left the phone at the entrance of the house. The other neighbour who was called in explained that, a few months before this incident, the same boy was found with other children from the area smoking and drinking beer behind a local shebeen along with some older people who were unknown in the area.

The grandmother was then asked to intervene while the boy was sitting at the back. The grandmother, of about 70 years of age, said:

> The boy is my grandchild, the son of my daughter who died a few years ago in a *chapa* [Mozambican public transport] accident. I have four other children, but they all work in other cities and live there with their families. My daughter had no husband and was taking care of the boy alone. When she died, there was no one else that could take care of him other than myself. But he is a troublemaker. He is not going to school because I don't have the money to pay for the uniform and the cost of the *chapa*. I was cooking nuts for him to sell in the city and earn some money for both of us. He did at the beginning, but then he told me that that job was too hard and he did not want to do it anymore. In the morning he wakes up and returns at night. I have also seen him with a new pair of shoes and trousers and I asked him where did you find that? He told me that a friend gave them to him. I am old and I cannot go after him to see what he does, and this is the first time I hear the stories I am hearing here. I don't know what to do anymore.[625]

The judges asked the boy to come to the front and asked him if what he had heard was true. The boy said he was sorry for stealing the phone from the neighbour, but that he does not know anything about smoking and drinking at the shebeen; his neighbour must be confusing him with someone else. The judges decided to end the first hearing and make a visit to the grandmother's house the following week.

When the author of the thesis reached the grandmother's house with the president of the court, the grandmother welcomed them in. The house was dark. There were two rooms. One room was a kitchen with a table and a few utensils; the other room a bedroom with two mattresses on the floor. There were cracking walls everywhere and the general condition of the house was deplorable. The judge made the visit and asked the grandmother for the phone numbers of her eldest son. He told her to come back to the court the following week.

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[624] Case observed at the community court of *Costa do Sol* in April 2015.

[625] Interview observed during the empirical observation of the case of theft at the community court of *Costa do Sol* in April 2015.

During the week, the judge made a call to the grandmother's eldest son, and left a message, introducing himself and asking him to call back. The son called back and explained that he had not talked to the mother of the child for a few years and did not want to have anything to do with her.

The judges also asked the neighbours what they knew about the grandmother and why she had been left alone with no support from her relatives. One of them explained that she had been living there only with her daughter, and that no other children ever visited. They knew the family had had a fight long ago and that, since then, they did not come back anymore, leaving the mother, sister, and boy alone.

The week after, at the second hearing, the judges invited all the parties who attended the first hearing as well as a representative from the CSO Humana People to People (ADPP),[626] which was working in the area and supporting disadvantaged children. The judges explained the situation and asked the ADPP representative whether there was any possibility of helping the boy. The representative replied that the organisation was running a nearby project that was assisting orphans, and this could provide assistance. The boy could help in the everyday activities of the organisation, and he would also have the opportunity to study. The judges decided that the boy would take part in the project during the day and at night return home to the grandmother. The grandmother agreed. To check on the boy's progress and behaviour, the ADPP would appear before the court every 30 days while the neighbours involved in the incident would watch to see if the boy behaved correctly.

The domestic violence case involved a married couple who had already discussed several problems with the community court a year previously.[627] The husband conducted regular relationships with other women, he did not provide any support for the married couple's three children, he paid insufficient attention to his wife, and even though he had been asked to address the family situation, he refused to do so. Living in this situation, the wife often reacted violently, constantly shouting at her husband. At the time, the court, after hearing from the husband and wife, and the families of both sides, as well as from the eldest child (aged 17 years), made an agreement with the couple that the husband would rethink his behavior and that the wife would stop acting violently. Every 30 days they would come before the court to share developments in the family situation.

For the first few months, the couple respected the court's decision, but the situation soon began to deteriorate, and the wife returned the matter to the court. The husband, in fact, became aggressive and the wife began to fear for her life. The court now asked the parties about what they wanted to do and invited the families to speak as well. The wife wanted to stay in the home with the three children. The husband said that he no longer wanted to live with his wife, but he wanted the goods he had bought for the house returned to him. The families involved were also heard. They confirmed that things were bad between the couple, and that they had even twice had to intervene when the husband beat the wife.

The court's decision was to fine the husband 1,500 Meticals for the violence perpetrated, to allow a division of the goods of the house, for the wife to continue living in the house with the

[626] See information available at: https://www.adpp-mozambique.org/who-we-are#about-us (accessed 10 December 2021).
[627] Case observed at the community court of *Polana Canhiço B* in June 2015.

three children, and for the husband to move into the new house he had built. The court also ruled that, every three months, they would appear before the court to check in on developments.

The two cases both show how community courts rely on the involvement of both the families involved and the surrounding community to better understand the cases before them and for reaching their final verdict. In the first case, the neighbours where the grandmother and boy lived were able to give the judges important information about the boy's behaviour on the street, which was unknown to the grandmother. In the second, the family of the married couple usefully confirmed the information given by the couple about the impossibility of their continued cohabitation.

The first case shows also how the judge's visit to the grandmother's house was fundamental to ascertaining the socio-economic condition in which the grandmother and boy lived. All focus group discussions with the judges showed how making visits to the sites where the problem arises is one of the main characteristics of community courts. In the first case, the community court managed to bring in a CSO that was working in the area. The organisation was able to help the boy and assist the grandmother in caring for him. The involvement of other non-state actors can represent a way for community courts to enhance the participation of the community in the problems of the community. Finally, because community courts' decisions are not legally binding, what is important is that there is a social monitoring system to help ensure that the court's decisions and recommendations are followed by the parties concerned. The cases show how monitoring is done by the same judges and/or the community and families involved.

By contrast, interviews with the judges in the Maputo criminal courts show how they apply a system of imprisonment and fines in response to crimes, and that alternatives to imprisonment are hardly ever applied.[628] Alternatives to imprisonment were introduced with the 2014 Penal Code and are currently also provided by the new Penal Code.[629] Mediation, deferral of the process, and community service are some of the alternatives provided.[630] However, a research study by REFORMAR on the implementation of community service between 2015-2019 found that district judges applied only about 1,500 community service orders over four years in the whole country. This represents a small portion of the cases (a single district court judges for about 700 cases a year).[631] The research found that the majority of judges in the city of Maputo did not apply community service orders[632] and received no training concerning alternatives to imprisonment by the Legal Training College (neither in their formal academic training nor in their job training).[633]

The punitive culture of the judiciary in the country is the product of a Eurocentric legal education, one that prioritises retributive justice. This punitive legal culture (as described in detail in Chapter 3) permeates the entire justice system. The interview with the Director of the Legal Training Centre found that in the training for judges and prosecutors, matters such as

[628] Petrovic, V., Lorizzo, T. and Muntingh, L. (2020).
[629] Law 24/2019 of 24 December.

[630] Article 71 Penal Code and 328 Criminal Procedure Code (Law 25/2019 of 26 December).
[631] Petrovic, V., Lorizzo, T. and Muntingh, L. (2020).
[632] Ibid.
[633] The module on alternatives to imprisonment was inserted, for the first time within the curriculum of the Legal Training College in 2021. Different activities on the same subject, such as workshops, have begun to be offered by the Legal Training College to judges and prosecutors in 2021.

prisoners' rights and alternatives to imprisonment were never a part of the Centre's curriculum.[634] Two new modules on penology and on alternatives to imprisonment were introduced in 2021 as the result of recommendations arising from the work that UNDP and the national organisation REFORMAR carried out in the country. In addition, seminars and workshops could be organised and conducted as in-job training for judges and prosecutors already operating in the country. Training could also be conducted at the law faculties in the country to sensitise and teach students how understanding local knowledge can improve criminal justice in the country. As De Sousa Santos says, '[R]ather than bringing knowledge outside from the universities, it is extremely important that local knowledge is brought to the universities'.[635]

In the last decade, imprisonment (as explained in detail in Chapter 4) has become the norm, even for petty crimes.[636] The misuse of pre-trial detention is regularly criticised by international and national organisations, which also point out the negative impact that such detention has on the alleged offenders and their families.[637] The problems around the prison system and the overuse of imprisonment affected men and also women and children, the most vulnerable people in society.[638]

By contrast, decisions at the community court level are reached mainly through consensus of the parties involved, with mediation by the judges, the involvement of the family and community and/or organisations working in the areas in different issues, the visits that judges make to the homes of the parties involved, the application of fines and community service orders, and how decisions are monitored, all represent positive opportunities for a restorative justice to be applied.

There are, however, cases where the parties do not respect what was agreed in court and no solution is found at the community level. In these situations, the judges transfer the case to other non-state mechanisms of conflict resolution and/or to the state courts. The following section of this chapter focuses on the relationship that courts have with such mechanisms, starting with the referral of cases.

5.5 Relationship between community courts and state and non- state mechanisms of conflict resolution

5.5.1 Referral of cases

Findings from the fieldwork show that the transfer of cases forms a link between community courts and state and non-state actors. A community court judge explained: 'Transfers are

[634] Interviewee 3.
[635] See video available at: https://www.youtube.com/watch?v=5yqQ9n2nhgE&t=1397s (accessed 27 August 2021).
[636] Ibid.
[637] Ordem dos Advogados de Moçambique (2019). Muntingh, L. and Redpath, J. (2016).
[638] Lorizzo, T. (2012) 'Prison reform in Mozambique fail to touch the ground. Assessing the experience of pre-trial detainees in Mozambique', *South Africa Crime Quarterly*, 42, pp. 29-38. Procuradoria-Geral da República (2018) *Crianças em conflito com a Lei em Moçambique. Em busca de uma Estratégia de Protecção.* Centro de Estudos Sociais Aquino de Bragança (CESAB) e África Criminal Justice Reform (ACJR) do Dullah Omar Institute da Universidade de Western Cape. Rede da Criança (2019).

seldom done through written referrals; more often people are sent verbally by judges to have their case heard before other mechanisms.'[639] Written referrals differ according to the court, depending on whether they have received the necessary materials from the National Justice Directorate and whether the judges can write Portuguese. Some courts used dedicated forms for transfer, other judges prefer to write referrals by hand. All referrals must include the name of the court of origin, the names of the plaintiff and defendant, the terms of the case, and the judging authority to which the case is referred.

In 2013 (according to data shared by the Maputo courts commission), 125 cases out of 680 were transferred to state and/or non-state mechanisms of conflict resolution. Of the 125 cases, 27 were accessed to analyse which institution they were transferred to and the procedures followed by the courts in transferring the cases. The majority of these (18) were transferred to judicial courts. This was done either because the cases were found to be outside the courts' jurisdiction or because the community court judges were unable to find solutions to the cases.

Five out of six interviews with Maputo judicial judges found that when cases are transferred from community courts to their courts, no importance is given to the fact of transfer. Judicial judges simply start the case from the beginning, as if it had not already been looked at by the community court in question.

With very few exceptions, there is no specific relationship between judges in community courts and judicial judges. A community court judge explained: 'I personally talk with the prosecutor of the judicial court of my district, but this is an exception.'[640] The exceptionality was confirmed by the prosecutors interviewed during the fieldwork: 'I don't trust community court judges as they apply traditions and customs, and often these are against the law.'[641]

In addition, it was rarer to see cases transferred from judicial courts to community courts. Out of six judicial judges interviewed, only one judge said that she was collaborating with the community court judges, not only making sure that she was aware of the development of cases at the community level but also to transfer cases to community courts where she had no doubt they would be better dealt with there.[642]

Scholarly research notes the lack of collaboration between community court judges and judicial courts and makes the recommendation that better relations between them would improve access to justice for all.[643] Similarly, the latest study on the current state of children's' access to justice (one in which representatives from community courts from all the country's provinces participated) found that:

> All respondents were of the opinion that community courts could have an important role to play in issues related to children justice, crime prevention and improving access to justice for children, but that their role needs to be recognised by key stakeholders. Respondents felt strongly that all discussions related to children justice need to involve community courts. Community court judges and community leaders must be included in legal education (lectures, workshops, training opportunities). It was also stated

[639] Interviewee 012 (A).
[640] Interviewee 011 (A).
[641] Interviewee 8.
[642] Interviewee 9.
[643] Procuradoria-Geral da República (2018). Rede da Criança (2019).

> that cooperation with 'official' justice institutions should improve, with stronger recognition and support from the Government.[644]

Two of the 27 cases analysed were sent to the Association of Traditional Healers (*Médicos Tradicionais de Moçambique*, AMETRAMO) because they were regarded as cases of witchcraft.[645] At the *Mikadjuine* court, for example, one day a week is devoted to AMETRAMO cases, but also when needed. AMETRAMO representatives met the parties involved in the dispute at the court, and chairs and tables were removed to lay a mat (*esteira*) on the floor.[646] Two cases were transferred to the courts' commission, as the body that represents all courts in Maputo. As such, it is considered by the judges as the court with the most knowledgeable judges in the city. Community courts transfer cases to the commission when they are unclear about the way to proceed, and/or when judges need specific support for analysing and resolving cases. One case was sent to the Children's Court (*Tribunal de Menores)* because the matter involved a child younger than 16. According to a community court judge, in 2016, the President of the Children's Court asked for the contacts of all presidents of the community courts of the city.[647] The judge would then use the phone numbers to contact the president of the closest community court to where the children involved in the Children's Court cases lived.

Two cases on domestic violence were sent to a police station and the Department for Assisting Minors and Families Victims of Domestic Violence (*Gabinete Atendimento à Menores e Famílias Vitimas de Violência Doméstica*, GAMFVV). One case, related to land issues, was sent to the *regulo,* the traditional chief of the land. And another case was transferred to the Legal Aid Institute (*Instituto de Patrocínio e Assistência Jurídica*, IPAJ) for the legal assistance. IPAJ is a state institution created by Law 6/1994,[648] under the responsibility of the Ministry of Justice, Constitutional and Religious Affairs. Its creation was intended to enable the realisation of the right of defence and provide legal representation and assistance for economically disadvantaged citizens. In 2013, Ministerial Regulation 156/2013 created the Provincial and District Delegations of IPAJ. The delegations seek to 'promote, primarily, the extrajudicial resolution of conflicts (article 2), and the promotion of alternative mechanisms of conflict resolution under the terms of legal pluralism and the laws in place (Articles 6(d), 7(d), and 18(d))'.

Following this provision, and since 2015, seven IPAJ District Delegations were opened in the capital city of Maputo, while a central office continues functioning in the central district of the city.[649] The central office was the only one functioning from 1994 to 2015. In 2016, the IPAJ central office resolved 122 extrajudicial cases, while the districts of the city completed 535.[650] These numbers are similar to those of the cases opened at community court level in the same

[644] UNICEF (2021) *Final Report. Analysis of the Situation of Access to Justice for Children in Mozambique*. Coming publication, p. 68.
[645] AMETRAMO was created in September 1992 with the support of the Ministry of Health. The Association is constituted as an organ regulated by the government to bring together healers who perform consultations with an oracle who receives the spirits of ancestors.
[646] The involvement of the AMETRAMO costs between 2,000 and 30,000 Meticals. For comparison and considering an exchange rate of 5.8 (August 2021), 2,000/30,000 Mozambican Meticals is equivalent to 465.12/6,976.75 South African Rands.
[647] Interviewee 012(A).
[648] Lorizzo, T. (2012), pp. 29-38.
[649] Interview with the Director of the Legal Aid Institute, February 2016.
[650] In 2014, IPAJ solved a total of 593 extrajudicial cases, while 456 cases were solved in 2015.

year. They deal with matters such as family conflicts, child maintenance, conflicts between neighbours, and debt. Since the creation of the District Delegations, the IPAJ performs two functions. First, it provides assistance to community courts through training opportunities (as is analysed below), and secondly, it resolves cases that could be resolved by community courts.

Further research, beyond the scope of this thesis, is necessary to answer what the significance is of the creation of IPAJ District Delegations for existing community courts, and how the relationship between the IPAJ and community courts might develop in the future. Such research would need to answer whether the community courts will reinforce or diminish their role within the communities. Further research would also need to see whether the IPAJ works to assist community courts in solving cases that would not usually go through the channel of community courts, or whether it is actively removing cases from the community courts. Finally, further research would also assess whether community courts hope to gain more institutional recognition through their relationship with IPAJ or whether they fear a loss of cases at community level, and the subsequent diminution of their power.

As explained above, and as argued in other research, cooperation and competition are the forms used by all non-state mechanisms of conflict resolution to relate to each other.[651] If cooperation rather than competition is utilised, for example, by the transfer of cases from community courts and other non-state mechanisms of conflict resolution, there is a positive opportunity for access to criminal justice for the following reasons. As more cases are resolved at the community level, less cases will reach the state criminal justice system and be subjected to its problems. With specific reference to judicial courts, the improvement of the relationship with community courts can have twofold objectives: judicial judges can obtain from community courts information that they would be less likely to obtain otherwise, as they do not live in the neighbourhoods of the parties concerned; and such information could help in the understanding of the socio-economic causes of the crime and eventually of the consequences of any decision the judge will take. At the same time, a better relationship with community court judges could increase the possibility for state judges transferring cases to community courts. Judicial judges, however, do not trust community court judges. Although some community court judges send cases to the judicial courts, the majority of the state judges show little interest in understanding and accepting what the community court judges manage to find at the community level. This bias is a practical obstacle that needs to be overcome to strengthen collaboration between the courts and create regular and effective channels of communication between community courts and judicial courts.

5.5.2 Community courts' formalisation

In 2010, judges of community courts were encouraged by CEPAJI to create associations for the protection of their interests. Although the constituted associations were never legally recognised by the Ministry of Justice, Constitutional and Religious Affairs and CEPAJI itself closed down due to lack of funding, the Maputo courts' commission was created in 2010 as the natural development of such plans. A judge remarked:

> The commission sends to the Justice Provincial Directorate (DPJ) monthly reports about the number of cases solved by each court and general information about the functioning of the courts in the city. As a counterpart, the DPJ distributes to the courts, material such as papers and pens. The DPJ

[651] Araújo S. (2014).

> is also called in for the opening of new courts and the formalisation of others, which is a procedure conferring official recognition to the courts.[652]

Focus group discussions with community court judges found that out of the 38 courts operating in the city of Maputo, seven community courts were formalised by the DPJ since 2007,[653] and 16 new community courts were established.[654] The remaining 15 courts operating in the city date back to the Popular Courts. These were created between 1983 and 1987, and now await official recognition.[655] In the meantime, even the community courts that have not yet been officially formalised are operating normally. As one judge puts it:

> The formalisation began with my initiative and it has been welcomed by the population. It involves the courts that were non-operational, to give them a new and effective recognition. A representative of the DPJ chaired the ceremony, which involved speeches delivered by a religious representative of the community, the commander of the police station, the secretary of the neighbourhood, representatives of IPAJ as well as the prosecutor and the judge of the judicial court of the neighbourhood. The judges pledged an oath, after which they are officially introduced to the inhabitants of the neighbourhood. The judges received the Constitution of the Republic and other books containing specific laws such as the Family and the Domestic Violence Laws.[656]

The focus group discussions with the judges showed that formalisation is seen as a strong message of recognition from the government and as shown at the beginning of the chapter, the political recognition of community courts by political representatives represents a practical opportunity to improve access to criminal justice in the country.

5.5.3 Training opportunities

Interviews with state institutions and CSOs found that in the period 2013-2017, community courts judges received training not only by national CSOs (such as CEPAJI) but also by state institutions such as the IPAJ, the Attorney General's Office and the Law Faculty of University Eduardo Mondlane (*Universidade Eduardo Mondlane*, UEM).[657] The training aimed to provide judges with knowledge of the new legal instruments most recently promulgated. These include those mainly related to women and children (such as the Law on Domestic Violence and the Family Law) as well as land law and human rights.

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[652] Interviewee 011(A).

[653] The community courts of *Malhangalene B* and *Mahotas* were formalised in 2010, while those of *Malanga Xipamanine, Unidade 7, Ferroviario/Laulane and Mavalane A/FPML* were formalised in the last few years.

[654] The community court of *Magoanine A* was created on 6 March 2014, while the five community courts of the *Catembe* district were created on 29 May 2013. In the same year, the community court of *Magoanine C* was created on 30 August 2013, and on 9 November 2013 the community court of *25 Junho A*. In 2012, the community court of *Chamanculo D* was created on 9 March 2012 and the one in *Malhazine* on 13/7/2012, while the community court of *Zimpeto* was created on 31/10/12. 2011 saw the creation of courts in *Dimitrov, 25 Junho B and Nsalene* on 9/11/11. In 2010 the community courts of *Chamankulo B* were created while the community court of *Albazine* was created in 2007.

[655] *Mikuadjuine/Mafalale, Maxaquene B, C, D, Polana Canhico A, B, Urbanizacao, Hulene A, Costa do Sol, Bagamoio, Inhagoia A, B, Jardim and Luís Cabral and Magoanine B.*

[656] Interviewee 012(A).

[657] Interviewee 2, 4, 17 and 19.

The training opportunities, however, divided the national community between those who are pro and others who are contra such learning opportunities. The interview with the organisation CEPAJI, involved in training activities with community courts judges, found that training provided good opportunities for judges to become familiar with the new legal developments and be sensitised about the human rights of vulnerable groups.[658] This opinion was shared by development actors involved in funding such opportunities (including the United Nation Development Program, UNICEF and the Danish Development Cooperation). [659] These development actors argue that the presence of non-state mechanisms of conflict resolution (including community courts) can no longer be ignored, and that there is consequently an urgent need to further the knowledge and awareness of human rights in these institutions.[660]

In an interview with the director of a CSO who was a legal pluralist academic, the director found the idea of such training a westernised one, and one that likely only appealed because of the funding it brought to the organisers.[661] In this interview, the director argued that community court judges had no need of such training. The director explained that community court judges were likely too old to take in new concepts (such as the idea of domestic violence as it is perceived and understood today), and besides, the main objective of community courts is (in the legal pluralist perspective) the application of traditions and customs.[662]

Lively debate about whether training presents a good opportunity or an obstacle to community courts in enhancing access to justice will continue. Legal pluralism and postcolonial theory both agree that if such training is conducted by Western-trained personnel, it only distance community court judges from their constituencies and force them to assume all the problems faced by judicial judges. If such training is conducted by legal pluralists applying postcolonial studies to criminal justice, community courts judges may come to understand that they have respected knowledge and that they can play an important role in the criminal justice system.

5.6 Concluding remarks

All in all, community courts are best seen as having legal and practical opportunities for, rather than as posing obstacles to, the improvement of access to criminal justice for all (and ultimately bettering the conditions of prisons). The opportunities were presented through the lenses provided by postcolonial theory.

Discussions at the Ministry of Justice, Constitutional and Religious Affairs about the new community court bill exemplify the legal opportunities discussed in this chapter. In line with the Penal Code reform that reinforced the legal framework on alternatives to imprisonment, the revision of the law could represent the possibility of broadening community court competences in relation to those criminal cases that (also at the state court level) can have sentencing which does not include the possibility of incarceration. Such a broadening of community court competences could represent the first step towards the recognition of, in practice, legal

[658] Interviewee 17.
[659] Interviewee 23, 24 and 25.
[660] Ibid.
[661] Interviewee 19.
[662] Ibid.

pluralism as applied to criminal justice, and as provided by article 4 of the Mozambican Constitution.

At the national level, the existence of legal pluralism, the regular increase of community courts, and the recognition of community courts by political representatives are the main factors enabling community courts to improve access to justice for all in the country. The fieldwork conducted in the city of Maputo confirmed these factors, as well as other practical opportunities, which outnumber the practical obstacles.

As shown in the chapters of this thesis, however, recognition of only legal pluralism in practice is not enough. The weak approach of legal pluralism to criminal matters must be accompanied by a theoretical framework of postcolonial studies, the application of which was analysed through the below characteristics of community courts.

The existence of the community courts' commission represents one way in which judges can share their opinions and positions on different issues as well as improve collaboration with different external stakeholders.

The gender balance among judges is shown to be important not only for gender equity, but also for its many repercussions on how cases involving gender issues are dealt with at the courts (for example, domestic violence). Interest in achieving such a balance is also visible in the new training opportunities made available to community court judges, and particularly those around issues of domestic violence and general family law. In terms of the composition of the community courts, having judges live in the same community in which they work helps to improve equitable access to criminal justice, as the judges are more aware of the problems in their own communities and better understand their causes and ways of addressing them.

Court proceedings and their characteristics represent the most important practical opportunities for community courts to improve access to criminal justice and improve conditions in the prison system. Community courts provide simplified mechanisms of conflict resolution with respect to the languages used, offer better timeframes for case resolution, and are less expensive to run and participate in. Conversely, in the judicial courts, several factors undermine equal access to the justice system. These include the well-known bureaucracy of the judicial courts and the delays this causes, the use of the Portuguese language and technical terminologies that are largely unknown to the majority of Mozambicans, and the high costs of bringing cases to court.

Community courts – in the ways in which decisions are taken at the community level, and the kind of remedies and penalties put forward – practise and embody the principles of restorative justice. On the other hand, judicial courts practise and embody the ideas of retributive justice, and show little interest in understanding either the causes of crime or the consequences that imprisonment can have, both for offenders and their families. At the judicial courts, judges apply the law while community courts reach their decisions by forging consensus between the parties. The judges of the community courts act as mediators, involving extended families and local communities where necessary. Community courts apply fines and issue community service orders. Their decisions are monitored not only by the courts, but also by families and the local communities. For community courts, the aim of punishment is the restoration of the social harmony broken by the dispute.

Concerns were noted throughout this chapter in relation to the love-hate relationship that community courts have with the secretaries of the neighbourhoods. On the one hand, the

physical proximity of the courts to the secretaries of the neighbourhoods can strengthen collaboration. On the other hand, as critics highlight, this may lead to a politicisation of the courts in which community court judges become agents of the ruling political party rather than acting as the providers of a non-partisan public service. The concern about the politicisation of the community court judges is also stressed in relation to the issue of the subsidies that judges regularly request from the state. These concerns, however, will only be removed when a democratic system governs all sectors of the country.

Finally, the relationship between the judicial courts and non-state mechanisms of conflict resolution represents a practical opportunity for the criminal justice system. The use of non-state conflict resolution mechanisms will decrease the number of cases that have to go through the criminal justice system. But relations between the judicial courts and community courts remain challenging. It is only by strengthening collaboration and creating regular and effective channels of communication between the two court systems that this relationship will improve.

Chapter 6
Conclusions and Recommendations

This thesis has shown that there is a struggle for criminal justice in Mozambique that needs to be fought. Today, the state criminal justice system is responsible for many injustices suffered by the most vulnerable people in society. Justice delayed is justice denied; expensive justice is unfair; a legal system that is incomprehensible to its subjects (through language and jargon) cannot work properly and is unjust. The imposition of prison sentences that respect only the law and do not consider the diverse factors that could have caused and/or precipitated the commission of a crime (especially by a child) is unjust. Imprisonment is unjust if the factors that have caused and/or precipitated the commission of a crime have not been given a solution during the incarceration and the person that served the sentence is found re-entering society worse off than when he or she entered the prison.

Local knowledge may however represent at least a starting point for the utopian idea of bringing an end to such injustice. The ways in which local knowledge can assist in the improvement of criminal justice has been largely ignored both by the scholarly literature on the topic and by the state itself. Such a utopian perspective holds that community courts as local knowledge can improve justice, at least as applied to petty crimes in the country.

The literature on legal pluralism on criminal justice has revealed its limitations. In the 40 years since its foundation as a theory, few authors have tried to deal seriously with its implications for criminal justice. When they have done so, they fall into the same trap as the legal centrists: believing that the state and state law is the only source for and enforcer of criminal justice. Chapter 3 examined both the imitations of legal pluralism and postcolonial theory as applied to the criminal justice field. The postcolonial theory lens seeks to identify and reject the sources of injustice that date back to colonial times, and which the current state has not yet banned. It insists on a necessary investment in local experiences as providing the opportunity to ameliorate the criminal justice system. Improving the criminal justice system means fighting injustices and investing in a system that considers, for example, the socio-economic causes and consequences of crime. The lens of postcolonial theory presents a possible means for decolonising the state criminal justice system and finding suitable solutions for improving both access to justice and conditions in the prisons.

In the Mozambican context, words such as flexibility, comprehensibility, speediness, proximity and cheapness are familiar and appealing to the majority of Mozambicans. The criminal justice system needs to come closer to the people rather than remain the static, incomprehensible, slow, remote and expensive criminal justice that it currently is. It is also important to remember that imprisonment is a colonial form of punishment, one that has been used, abused and overused throughout the continent over the last century. Overcrowding is one of the most pressing issues in prisons both in the African continent as well as in Mozambique. The majority of the imprisoned are poor people who cannot economically afford the legal assistance they would have needed to access the state justice system properly. And while legal pluralists failed to consider other types of punishments that have their origins in sources other than the state, postcolonial theory opens up precisely this possibility as a way of helping people avoid people entering a carceral system that will inflict severe damage on them.

The development of any such use of the insights of postcolonial theory for improving criminal justice is challenging to achieve. This is particularly so considering the lack of recognition that local knowledge has had by legislators, policy-makers, judges and all the stakeholders involved in the criminal justice system in Mozambique. This lack of recognition by the state dates back to colonial times. During colonisation, the Portuguese applied a justice system based on Portuguese laws while local forms of conflict resolution were invisible. Unlike civil matters, criminal issues were dealt with only by means of legislation imported from Portugal and its particular forms of punishment. Imprisonment was initially used for those Portuguese who had been sentenced to exile from the home country and only later to local people, though with this gradually being replaced by terms of forced labour rather than imprisonment. This replacement was justified by the idea that imprisonment for Africans was more of a reward than a punishment, something that only changed in the first period of post-independence.

At that point, although FRELIMO retained Portuguese laws that were not contrary to its own principles (including the option of imprisonment), forms of Popular Justice were also established. However, Popular Justice initiatives remained in thrall to state justice strictures and, from a legal pluralistic view, were never as plural as they pretended to be. While they recognised local knowledge through the creation of community level courts, which applied local customs and did not provide for imprisonment, these courts were the entry door to a state justice system based on Portuguese foundations.

The situation changed again in 1992, when the state resumed its monopoly over criminal justice and the Popular Justice courts at the community level became the community courts established in Law 4/1992. Since 1992, the state has ignored the role that local communities can play in the improvement of the state criminal justice system. In 2014, the Penal Code further removed the competence of the community courts competences in their jurisdiction over criminal matters. Law 4/1992, in fact, had previously given the courts jurisdiction over criminal matters not punishable by imprisonment. The revised Penal Code that entered into force in December 2020 revoked this limitation and the revision of Law 4/1992 and its regulation are currently under discussion at the Ministry of Justice, Constitutional and Religious Affairs. These are the legal and political opportunities from which this thesis wants to benefit, to improve the criminal justice system in the country and specifically related to petty crimes.

Mozambicans use community courts all across the country, in the villages and in the cities, in the north, centre, south, east and west of Mozambique. Mozambicans trust community courts and they are confident that they will bring justice to them. As they are to be found in every corner of the country, they serve a greater number of people than official judicial courts. Community courts are made up by judges who know the areas in which they operate and this local knowledge helps them deal with the cases brought before them, understanding the reality of what is presented to them. The judges deal mainly with civil cases, but they also have had experience in dealing with criminal offences such as theft, assault and domestic violence. Community courts are simple non-state mechanisms of conflict resolution with no bureaucracy. In them, the local language is shared by both the judges and the people involved. In them, cases are resolved quite quickly, and cases can be opened at comparatively low costs to the people involved. Applying restorative justice, the community courts always seek social solutions to the problems of justice. This always takes into account the socioeconomic situation of the people in trying to find the best way to restore peace and harmony.

Furthermore, it is noteworthy that all the criticisms made in the past decades of the community courts can also be made against the system of state criminal justice: the politicisation of justice is to be found in both the community courts and state justice. Meanwhile, the concerns about making judges agents of the state by paying them a subsidy is no different in essence from those raised by the salaries paid to state judges from state budgets. Along with the issues concerning the election of judges, the above issues will only find a solution when the process of installing participatory democracy in the whole country is complete. It is also worth noting that both community courts and district judicial courts have deplorable working conditions. Meanwhile, judges in both spheres need better training in dealing with cases (such as those of domestic violence) which involve gender dynamics of a kind that has only recently come into focus, as ongoing research by REFORMAR demonstrates.

All in all, it is high time for the state to face up to its weaknesses and have the maturity to adopt postcolonial answers to the problems besetting criminal justice in Mozambique. This process could begin with the ways in which petty criminal offences are dealt with, and by engaging specifically with the following recommendations.

First, state power needs to acknowledge and show respect to local knowledge as it is practised in community courts. Such respect needs to spread to all state institutions, including the police, judicial courts, lawyers and, indeed, society in general. This respect can begin by being sensitive to, and changing, the implications of existing terminology. Forms of local knowledge should be recognised in positive terms, terms which recognise possibilities rather than limitations. This recognition needs to be made in the language of legal documents, the language of policies and in plans of action. It needs to be shared by all the stakeholders who work within the criminal justice system, and this can be achieved through seminars and other meetings where new ideas, terms and meanings can be internalised by all actors. The Legal Training College and the Universities need to acknowledge and add to their curricula the discipline and insights of legal pluralism and address these in relation to both civil and criminal law. For the state judges and prosecutors already operating in the country, the Legal Training College should organise in-job training through the provision of seminars and workshops. In addition, the public should also be informed about the important role that community courts can have in the criminal justice system, as well as about possible alternatives to imprisonment. Awareness campaigns should be organised across the country.

Law 4/1992 needs to be finally revised and promulgated and its regulation drafted. With regard to criminal justice, the law could increase the competences of community courts to deal with criminal offences that are punishable (according to the Penal Code) with terms of imprisonment of up to three years. This would be in line with the norms that already provide for the application, by state judges, of alternatives to imprisonment. Considering that community courts apply only alternatives to imprisonment, broadening their competences will allow cases to avoid entering the criminal justice system and be resolved at community level. A team of experts with a background in legal pluralism and postcolonial studies and knowledgeable on alternatives to imprisonment could create a list of criminal offences that community courts could deal with. An effective centralised criminal record system should be set properly in place, with information on repeat offenders easily accessible to community court judges.

The revision of Law 4/1992 and its regulation could provide for the following:

- the creation of community court commissions throughout the country, with regular elections;
- the independence of the courts from the secretaries of the neighbourhood, not only in relation to the premises in which the courts operate, but also with regard to election processes and the opening of cases at the community level;
- attaining equity in the provision of male and female judges (and also for all chairing positions);
- a regular and fixed subsidy for all community court judges (paid through a bank account managed by the Ministry of Justice, Constitutional and Religious Affairs and into which people could directly pay their fees, with this revenue being used to pay subsidies to the judges);
- details for the organisation of judges' elections and elections could involve the community of the neighbourhood where the courts operate, as in the past;
- legislation could provide for the strengthening of the relationship between community courts and the judiciary through a constant dialogue enabled by a structure of regular meetings on issues arising in the neighbourhoods; and
- the revision of the law could also provide for the legally binding nature of the decisions taken at the community court level – this measure would increase the respect of the state judges for community courts and the work of the community judges by inhibiting appeals to the state courts about community level decisions.

This study has shown that further research is necessary in many areas. We need an updated mapping of community courts in the country: the last complete survey goes back to 2011. More specifically, we need more information on both the number of community court judges and the number of community courts in the country. This information could help the state in planning the introduction of the subsidies to be paid to the community court judges. No information is available on corruption within non-state mechanisms of conflict resolution (and specifically at the community court level), and this needs to be gathered. It is also extremely important to assess the developing relationship between community courts and state institutions such as the Legal Aid Institute: this research could also assess best practices for collaboration between the judiciary and community courts.

The state should have no fears about letting go of some of its criminal justice powers. The state can never be replaced by community courts in dealing with criminal justice. There is, however, an opportunity for the state to work towards resolving some of the pressing issues of criminal justice by giving community courts, jurisdiction over certain criminal offences. Seizing this opportunity would mean that the utopian desire to recognise the importance of local knowledge in criminal justice is no longer utopian.

Bibliography

Abel, R. L. (1982) *The Politics of Informal Justice.* New York: Academic Press.

Acton, T. (2005) 'Conflict Resolution and Criminal Justice – Sorting out Trouble; Can legislation resolve perennial conflicts between Roma/Gypsies/travellers and "national majorities?"', *Journal of Legal Pluralism*, 51, pp. 29-49.

AfriMAP (2006) *Mozambique: Justice Sector and the Rule of Law*. Open Society Foundations. Available at: https://acjr.org.za/resource-centre/Mozambique%20Justice%20report%20-Eng.pdf/view (accessed 10 December 2020).

Alegre, C. (1988) *Acesso ao Direito e aos Tribunais*. Coimbra: Almedina.

Allen, D. and Wall, D. (1993) 'Role orientations and women state supreme court justices', *Judicature*, 77, pp. 156-165.

Allott, A. N. (1960) 'The London Conference of the Future of Law in Africa', *African Studies Bulletin*, 3(2).

Allott, A. N. (1980) *The Limits of Laws.* London: Butterworths.

Allott, A. N. (1981) 'The effectiveness of Laws', *Valparaiso University Law Review*, 15(2), pp. 229-242.

Amede Obiora, L. (1995) 'New Skin, Old Wine: (En)gaging Nationalism, Traditionalism, and Gender Relations', *Indiana Law Review*, 28(3), pp. 575-599.

Amien, W. (2006) 'Overcoming the Conflict between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages', *Human Rights Quarterly*, 28(3), pp. 729-754.

Amien, W. (2010) 'A South African Case Study for the Recognition and Regulation of Muslim Family Law in a Minority Muslim Secular Context', *International Journal of Law, Policy and the Family*, 24(3), pp. 361-396.

Amien, W. (2013) 'Reflections on the recognition of African customary marriages in South Africa: seeking insights for the recognition of Muslim marriages', *Acta Juridica*, 1, pp. 357-384.

Andemariam, S.W. (2011) 'Ensuring Access to Justice through Community Courts in Eritrea', in Ubink, J, and Mclnerney, T. (2011) *Customary Justice: Perspectives on Legal Empowerment.* International Development Law Organisation, pp. 113-130.

Andrews, D. A. and Bonta, J. (2010) 'Rehabilitating criminal justice policy and practice', *Psychology, Public Policy, and Law*, 16(1), pp. 39-55.

Anon (2017) 'Legal system expensive, big lawyers charge like taxis: Law Commission chairman', *The Economic Times*, 23 September.

Anon (2020) 'Ministra da Justiça defende reforma legal para promoção da cidadania e paz', *Jornal Notícias*, 30 November.

Apata, G.O. (2019) ’Corruption and the postcolonial state: how the west invented African corruption’, *Journal of Contemporary African Studies*, 37(1), pp. 43-56.

Araújo, S. (2010) ‘Legal pluralism and interlegality: The role of community justices in Mozambique’, in Hinz, M., and Mapaure, C. (org.) In *Search of Justice and Peace. Traditional and Informal Justice Systems in Africa*. Windhoek: Namibia Scientific Society.

Araújo S. (2012) ‘Por uma ecologia de Justiças: Um estudo Rural e Urbano da Pluralidade Moçambicana’, in Kyed, H.M., Borges Coelho, J.P., Neves De Souto, A. e Araújo, S. (org.) *A Dinâmica do Pluralismo Jurídico em Moçambique*. Centro de Estudos Sociais Aquino de Bragança. Maputo, pp. 113-134.

Araújo S. (2014) *Ecologia de Justiças a Sul e a Norte. Cartografias Comparadas das Justiças Comunitárias em Maputo e Lisboa*. Tese de Doutoramento. Universidade de Coimbra.

Araújo, S. (2014) ‘Law, Justice, and Citizenship in the Twenty First Century. Community Justices, access to justice and citizenship’, *Portugal and Mozambique after 1974*, Coimbra: University of Coimbra.

Arthur, M, J.e Mejia, M. (2006) ‘Instâncias locais de resolução de conflitos e o reforço dos papéis de género: A resolução de casos de violência doméstica’, in *Outras Vozes*, 17, pp. 1-8.

Asante, R. (2017) ‘Why justice in Africa is slow and unfair - Justice delayed and denied’, *The Economist*, 1 July. Available at: https://www.economist.com/middle-east-and-africa/2017/07/01/why-justice-in-africa-is-slow-and-unfair (accessed 9 September 2018).

Bals, N. (2008) ‘Is victim-offender mediation a promising alternative for handling violence in relationships?’, in TOA Infodienst (Newsletter of Service Bureau for VOM and Conflict Resolution of the German Probation Service, Cologne), pp. 16-24.

Baltazar, R. (1977) ‘Tribunais Populares. A justiça nas mãos do Povo’, *Tempo* 394, pp. 30-39.

Bank, L. and Southall, R. (1996) ‘Traditional Leaders in South Africa’s New Democracy’, *Journal of Legal Pluralism*, 37-38, pp. 407-430.

Bastos, F. L. e Fernando, L. (1961) ‘A recolha e a codificação do direito costumeiro vigente na República da Guiné Bissau’, in Bastos, F. L. (ed.) *Estudos em homenagem ao Prof. Doutor Jorge Miranda*. Coimbra, 1, pp. 697-722.

Bastos, F.L. (2011) Direito Costumeiro vigente na Guiné-Bissau. Relatório Final do Projecto de recolha e Codificação do Direito Consuetudinário vigente na República da Guiné- Bissau. PNUD-UE-Faculdade Direito De Bissau.

Benda-Beckmann, F., Benda-Beckmann and K., Griffiths, A. (2009) *The Power of Law in a Transnational World: Anthropological Enquiries*, Oxford/New York: Berghahn Books.

Benitez-Schaefer, F. (2012) *Plurality in Legal Development A Critical Appraisal of Modern and Post-Modern Models of Legal Development.* PhD Thesis. University of Vienna. Available at: https://core.ac.uk/download/pdf/11600935.pdf (accessed 10 August 2020).

Bennett, T. (2006) ‘Comparative Law and Customary Law’, in Reimann, M. and Zimmermann, R. (eds.) *The Oxford Handbook of Comparative Law*. Oxford.

Bergmark, M. (2015) ‘We don’t need fewer lawyers. We need cheaper ones. Unable to afford representation, more Americans are going to court alone, and they’re losing’, *The Washington Post*, 2 June.

Bertelsen, B. E. (2003) ‘The traditional lion is dead. The ambivalent presence of tradition and the relation between politics and violence in Mozambique’, in Goirand, C. (ed.) *Lusotopie. Violence et contrôle de la violence au Brésil, en Afrique et à Goa*. Paris: Éditions Karthala, pp. 263-281.

Bicchieri, M. (2014) ‘“Communities” land rights, gender equality and rural development: Challenges and achievements in Mozambique’, *Nature & Faune*, 28 (1), pp. 83-86.

Bicchieri, M. and Ayala, A. (2017) ‘Legal Pluralism, Women’s Land Rights and Gender Equality in Mozambique’, *Food and Agriculture Organization of the United Nations*, 104. Available at: http://www.fao.org/policy-support/tools-and-publications/resources-details/en/c/1395534/ (accessed 9 September 2018).

Black, A. (2021) ‘Replicating “a model of mutual respect”: could Singapore’s legal pluralism work in Australia?’, *Journal of Legal Pluralism*, 65, pp. 65-102.

Blagg, H. and Anthony, T. (2019) *Decolonising Criminology: Imagining Justice in a Postcolonial World*. London, UK: Palgrave Macmillan.

Bragança, A. (1986) ‘Independência sem descolonização: A transferência do poder em Moçambique, 1974-1975. Notas sobre os seus antecedentes’, *Estudos Moçambicanos*, 5/6, pp. 7-28.

Braithwaite, J. and Daly, K. (1995) ‘Masculinities, Violence, and Communitarian Control’, *Australian Violence: Contemporary Perspectives II*, Conference Paper, Canberra: Australian Institute of Criminology, pp. 221-251.

Bräuchler, B. (2010) ‘The revival dilemma: reflections on human rights, self-determination and legal pluralism in eastern Indonesia’, *Journal of Legal Pluralism*, 62, pp.1-42.

Bohannan, P.J. (1957) *Justice and Judgment among the Tiv*. Oxford: Oxford University Press.

Broadhurst, R.G. (2002) ‘Crime and Indigenous People’, in Graycar, A. and P. Grabosky, (eds.) *Handbook of Australian Criminology*. Melbourne: Cambridge University Press.

Buarque de Holanda, S. (1936) *Raízes do Brasil*. Brasil: Editora José Olympio.

Butts, J. and Halemba, G. (1996) *Waiting for justice: Moving young offenders through the juvenile court process*. Pittsburgh, PA: National Center for Juvenile Justice.

Butts, J.A. and Sanborn, J.B. (1999) ‘Is juvenile justice just too slow?’, *Judicature*, 83, pp. 16-24.

Buur, L. (2006) ‘New Sites of Citizenship. Recognition of Traditional Authority and Group-based Citizenship in Mozambique, *Journal of Southern African Studies*, 32(3), pp. 56-82.

Buur, L. and Kyed, H.M. (2005) *State Recognition of Traditional Authority in Mozambique. The Nexus of Community Representation and State Assistance*. Nordiska Afrikainstitutet: Uppsala. Available at: https://www.files.ethz.ch/isn/96053/28.pdf (accessed 24 January 2021).

Cabral Pereira, A. A. (1925) *Raças, Usos e Costumes dos Indígenas da Província de Moçambique*. Imprensa Nacional Lourenço Marques.

Campos, L.M. (2018) 'O AUXILIO ADMINISTRATIVO DAS AUTORIDADES TRADICIONAIS NA ADMINISTRAÇÃO PÚBLICA LOCAL EM MOÇAMBIQUE: UMA HERANÇA DO ESTADO COLONIAL', *História e Cultura*, 7 (1), pp. 314-338.

Cappelletti, M. (1978) *Access to Justice*. Milano: Giuffrè Editore.

Cardona, L. (2007) *Cold War KFA*. Routledge.

Carmona Sepulveda, M. (2011) 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Penalization of People Living in Poverty & Human Rights', *Social Science Research Network*. Available at: https://ssrn.com/abstract=2437813 (accessed 16 January 2021).

Carmona Sepulveda, M. and Donald, K. (2014) 'Access to justice for persons living in poverty: An Human Rights Approach*', Social Science Research Network.* Available at: https://ssrn.com/abstract=2437808 (accessed 24 October 2019).

Carvalho Pessoa, J.C. (1901) 'A Nossa Legislação Ultramarina – Analyse Crítica', *Boletim da Sociedade de Geografia,* 16(19), pp. 503-519. Lisboa: Imprensa Nacional.

Castel-Branco, C. N. (1995) 'Opções Económicas de Moçambique 1975-95: Problemas, Lições e Ideias Alternativas', in Mazula, B. (ed.) *Moçambique, Eleições, Democracia e Desenvolvimento*, pp. 581-636.

Castells, M. (1996) The Information Age: Economy, Society and Culture. Oxford: Blackwell.

Castro A. J. (1950) 'Aspectos do direito e da justiça entre os povos incivilizados em geral e em especial em relação aos indígenas de Angola', *Mensário Administrativo,* 5, pp. 35-36.

Centro de Formação Jurídica e Judiciária (2017) *O Funcionamento dos Tribunais Comunitários e sua Interação com os Palácios de Justiça*. Maputo.

Centro de Integridade Pública (2017) 'Custas Judiciais em Moçambique. Um Verdadeiro Entrave para o Direito de Acesso à Justiça', *Centro de Integridade Pública,* 24. Available at: https://cipmoz.org/wp-content/uploads/2018/08/A-TRANSPARENCIA-Custas-Judiciais.pdf (accessed 10 April 2021).

Centro de Pesquisa e Apoio à Justiça Informal (2011) *Estudo sobre a Percepção dos cidadãos acerca dos Tribunais Comunitários em Moçambique*. Maputo.

Centro de Pesquisa e Apoio à Justiça Informal (2013) *Relatório Final sobre o Mapeamento dos Tribunais Comunitários em Moçambique*. Maputo.

Cerqueira, I. B. (1934) 'A vida Indígena em Angola. Organização Social - Seu Estado Actual - Chefes Gentílicos – Seu Poder e Prestígio', *Boletim da Sociedade Luso Africana do Rio de Janeiro,* 12, pp. 25-38.

Cezerilo, L. (2013) *Um Olhar Para as Janelas da Esperança*. 1ª Edição. Alcance Editores: Maputo.

Chiba, M. (1993) 'Legal pluralism in Sri Lankan society: Towards a general theory of non-western law', *Journal of Legal Pluralism and Unofficial Law*, 33, pp. 197-212.

Chichava, S. (2007) *'Os chefes 'tribais são fantoches'! A Frelimo e o poder tradicional durante a luta anticolonial na Zambézia.* Tese de Mestrado. Universidade Eduardo Mondlane. Available at: https://macua.blogs.com/files/os-chefes-tribais-sao-fantoches.pdf (accessed 16 January 2021).

Chirayath, L., Sage C. and Woolcock, M. (2005) 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems'. *World Bank Resources*. Available at: http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf (accessed 13 January 2020).

Coelho, J.P.C.B. (1993) *Protected Villages and Communal Villages in the Mozambican Province of Tete (1968-1982). A History of State Resettlement Policies, Development and War*. PhD Thesis. University of Bradford.

Cohen, W. B. (1971) *Rulers of Empire: the French Colonial Service in Africa*. Hoover Institution Press.

Coissorò, N. (1984) 'African Customary Law in the Former Portuguese Territories, 1954-1974, *Journal of African Law, 28* (1/2), pp. 72-79. Available at: http://www.jstor.org/stable/745484. (accessed 16 January 2021).

Coissoró, N. (1987) 'O Direito Costumeiro Africano na Legislação Portuguesa (1954-1975)', *Estudos Políticos e Sociais*, XV (1-2), pp. 25-37.

Conklin, A. L. (1997) *A Mission to Civilize: The Republican Idea of Empire in France and West Africa, 1895-1930*. Stanford, Calif: Stanford University Press.

Corradi, G. (2011) 'Access to justice in Pemba City: How exploring women's lived realities with plural law uncovers programmatic gaps', *Journal of Legal Pluralism*, 64, pp.1-27.

Corradi, G. (2012) 'An Emerging Challenge for Justice Sector Aid in Africa: Lessons from Mozambique on Legal Pluralism and Human Rights', *Journal of Human Rights Practice*, pp. 1-23.

Cota, J. G. (1944) 'Mitologia e direito consuetudinário dos indígenas de Moçambique: estudo de etnologia', *Imprensa Nacional de Moçambique*, Lourenço Marques, pp. 87-154.

Cota, J. G. (1946) *Projecto Definitivo do Código Penal dos Indígenas da Colónia de Moçambique acompanhado de um relatório e de um estudo sobre direito criminal indígena*. Lourenço Marques: Imprensa Nacional de Moçambique.

Creswell, J.W. (2007) *Qualitative inquiry and research design: Choosing among five approaches*. Second Edition. California: Sage.

Cunneen, C. (1992) *Aboriginal perspectives on criminal justice*. Sydney: Institute of Criminology. MonograSeries, 1, pp.1-94.

Da Costa Gaspar, A. (coord.) (2006) *Análise Comparativa de Conflitos: Realidades e Práticas Sócio- Culturais de Inhambane e Sofala*. Organização para Resolução de Conflitos, 4.

Da Costa Gaspar, A. (coord.) (2009) *Análise Comparativa de Conflitos: Realidades e Práticas Sócio- Culturais de Manica e Sofala*. Organização para Resolução de Conflitos, 5.

Da Costa Gaspar, A. (coord.) (2009) *Análise do conflito sócio- cultural em Manica e Tete*. Organização para Resolução de Conflitos, 6.

Dambe, B. J. and Fombad, C. M. (2020) 'The stock theft act and customary courts in Botswana: justice sacrificed on the altar of expediency?', *Journal of Legal Pluralism*, 52 (1), pp. 65-81.

Damren, S. C. (2002) 'Restorative justice: prison and the native sense of justice', *Journal of Legal Pluralism*, 47, pp. 83-111.

Davies, M. (2002) *Asking the Law Question: the Dissolution of Legal Theor*y. Sydney: Law Book Co.

Denzin, N. K. and Lincoln, Y. S. (2005) *The Sage Handbook of Qualitative Research*. Third Edition. Thousand Oaks, CA: Sage.

Depew, R.C. (1996) 'Popular Justice and Aboriginal Communities Some Preliminary Considerations', *Journal of Legal Pluralism*, 28, pp. 21-67.

De Sampayo e Mello, L. (1910) *Questões Coloniais, Política Indígena*. Porto.

De Sousa Santos, B. (1988) *El discurso y el poder. Ensayo sobre la sociología de la retórica jurídica*. Porto Alegre: Sergio A Fabris.

De Sousa Santos, B. (1995) *Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*. New York: Routledge

De Sousa Santos, B. (2000) *A Crítica da Razão Indolente: Contra o Desperdício da Experiência*. Porto: Afrontamento.

De Sousa Santos, B. (2003) 'Para uma Sociologia das Ausências e uma Sociologia das Emergências', in De Sousa Santos (org.), *Conhecimento Prudente para uma Vida Decente: um Discurso sobre as Ciências Revisitado*. Oporto: Afrontamento, pp. 735-775.

De Sousa Santos, B. (2004) *Do pós-moderno ao pós-colonial: e para além de um e de outro.* Conferência de abertura do VIII Congresso Luso-Afro-Brasileiro de Ciências Sociais, Coimbra. Available at: www.ces.uc.pt/misc/Do_pos-moderno_ao_pos-colonial.pdf (accessed 16 January 2021).

De Sousa Santos, B. (2004) 'A Critic of Lazy Reason: Against the Waste of Experience', in Wallerstein, I. (ed.), *The Modern World-System in the Lounge Durée*. Boulder, CO: Paradigm Publishers, pp. 157-197.

De Sousa Santos, B. (2006) 'The Heterogeneous State and Legal Pluralism in Mozambique', *Law & Society Review*, 40(1), pp. 39-75.

De Sousa Santos, B. (2007) 'Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges', *Review*, XXX, 1, pp. 45-89.

De Sousa Santos, B. (2008) *Another knowledge is possible: beyond northern epistemologies*. London: Verso.

De Sousa Santos, B. (2010) 'Para além do pensamento abissal: das linhas globais a uma ecologia dos saberes', in De Sousa Santos, B., Meneses, M. P. *Epistemologias do Sul*. São Paulo: Cortez, pp. 31-83.

De Sousa Santos, B. (2014) *Epistemologies of the South: justice against epistemicide*. Routledge. Available at: http://www.boaventuradesousasantos.pt/media/INTRODUCCION_BSS.pdf (accessed 29 October 2017).

De Sousa Santos, B. (2016) 'Epistemologies of the South and the Future', *From the European South: a transdisciplinary journal of postcolonial humanities*, 1, pp.17-29.

De Sousa Santos, B. e Meneses, M. P. (2006) *Identidades, colonizadores e colonizados: Portugal e Moçambique*. Relatório final do Projecto POCTI/41280/SOC/2001. Coimbra: CES.

De Sousa Santos, B. e Trindade, C. J. (2003) *Conflito e Transformação Social: Uma Paisagem das Justiças em Moçambique*. Oporto: Afrontamento.

De Sousa Santos, B., Nunes, J.A. and Meneses, M.P. (2007) 'Opening Up the Canon of Knowledge and Recognition of Difference', in De Sousa Santos, B., *Another Knowledge is Possible. Beyond Northern Epistemologies*. Verso: London, pp. XIX-LXII.

Dias, A. J. Dias e Guerriero, M.V. (1966) *Macondes (Os) de Moçambique*. Junta de Investigações Ultramar: Centro de Estudos de Antropologia Cultural.

Diogo, F. do Amaral (2008) 'Uma articulação entre o Estado e as Autoridades Tradicionais? Limites na congruência entre o Direito do Estado e os Direitos 'Tradicionais' em Angola', *Estudos Comemorativos dos 10 anos da Faculdade de Direito da Universidade Nova de Lisboa*. Coimbra: Almedina, 1, pp. 715-753.

Dissel, A. and Ngubeni, K. (2003) *Giving Women their Voice: Domestic Violence and Restorative Justice in South Africa*. Paper submitted for the XIth International Symposium on Victimology 13-18 July 2003, Stellenbosch, South Africa.

Donovan, D. and Assefa, G. (2003) 'Homicide in Ethiopia: Human Rights, Federalism and Legal Pluralism', *The American Journal of Comparative Law*, 51(3), pp. 505-552.

Doob, A. and Webster, C. (2003) 'Sentence severity and crime: Accepting the null hypothesis', in Tonry, M. (ed.) *Crime and Justice: A Review of Research*. Chicago, IL: University of Chicago Press, pp. 143-195.

Dupret, B., Berger, M. and al-Zwaini, L. (1999) *Legal Pluralism in the Arab World.* The Hague: Kluwer Law International.

Dwyer, C. S. (2009) 'The Space Between: On Being an Insider-Outsider in Qualitative Research', *International Journal of Qualitative Methods*, 8(1), pp. 54-63.

Dzimba, J. and Matooane, M. (2005) *Stock Theft and Human Security - A Case Study of Lesotho*. Pretoria: Institute for Security Studies. Available at: https://issafrica.s3.amazonaws.com/site/uploads/MANYCHAP7.PDF (accessed 25 May 2021).

Editorial Board (2021) ‘Too Many People Are Locked Up for Small Thefts’, *The New York Times*, 29 March. Available at: https://www.nytimes.com/2021/03/29/opinion/felony-theft-law-new-york.html (accessed 28 August 2021).

Elias, T.O. (1994) ‘The Problem of Reducing Customary Laws to Writing’, in Dundes R. A. and Dundes, A. (eds.), *Folklaw: Essays in the Theory and Practice of Lex Non Scripta*. The University of Wisconsin Press, pp. 321-330.

Ehrlich, E. (2002) *Fundamental Principles of the Sociology of Law*. Routledge.

Enes, A. (1947) *Moçambique*. 4 ed. Lisboa: Imprensa Nacional, p. 72.

Eysenck, H. J. (1976) *Case studies in behavior therapy*. London: Routledge.

Farran, S. (2011) ‘Navigating Between Traditional Land Tenure and Introduced Land Laws in Pacific Island States’, *Journal of Legal Pluralism,* 64, pp. 65-90.

Fessha, Y.T. (2016) *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia*. Routledge.

Fitzpatrick, P. (1992) *The Mythology of Modern Law.* London: Routledge.

Fletcher, G.P. (2000) *Rethinking Criminal Law*. Oxford University Press. Bazemore.

Florêncio, F. (2008) ‘Autoridades tradicionais vaNdau de Moçambique: O regresso do indirect rule ou uma espécie de neo-indirect rule?’, *Análise Social, 43*(187), pp. 369-391. Available at: http://www.jstor.org/stable/41012639 (accessed 18 January 2021).

Florêncio, F. (2012) ‘Traditional Authorities and legal pluralism: a comparative analysis of two case studies in Angola and Mozambique’, in Kyed, H. M., Araújo, S., de Souto A., and Coelho, J. P. B. (eds.), *The Dynamics of Legal Pluralism in Mozambique. State and Non-State mechanisms of justice and public safety*. Maputo: CESAB, pp. 93-112.

Florêncio, F. et al. (2010) ‘No Reino da Toupeira. Autoridades Tradicionais do M’Balundu e o Estado Angolano’, *Vozes do Universo Rural*. *Reescrevendo o Estado em África,* Lisboa: Centro de Estudos Africanos/ ISCTE-IUL e Gerpress, pp. 79-175.

Foucault, M. (1977) *Language, Counter-Memory, Practice: Selected essays and interviews*. Translated from the French by D.F. Bouchard. Sheddy, S. Cornell University Press: Ithaca.

Forquilha, S. C. (2008) ‘O Paradoxo da Articulação dos Órgãos Locais do Estado com as Autoridades Comunitárias em Moçambique: Do discurso sobre a descentralização à conquista dos espaços políticos a nível local’, *Cadernos de Estudos Africanos*, 16/17, pp. 89-114.

Forquilha, S. C. (2010) ‘Governação Distrital no Contexto das Reformas de Descentralização Administrativa em Moçambique: lógicas, dinâmicas e desafios*’,* in De Brito, L., Castel-Branco, C.N., Chichava, S. e Francisco, A. *Desafios para Moçambique 2010.* Available at: https://www.iese.ac.mz/desafios-para-mocambique-2010/ (accessed 9 August 2021).

Forsyth, M. (2007) ‘A typology of relationships between state and non-state justice systems’, *Journal of Legal Pluralism*, 56, pp. 67-113.

Fournier, P. (2012) ‘Halacha, the ‘Jewish State’ and the Canadian Agunah: Comparative Law at the Intersection of Religious and Secular Orders’, *Journal of Legal Pluralism,* 65, pp. 165-204.

Frankenberg, G. (1985) ‘Critical Comparisons: Re-thinking Comparative Law’, *Harvard International Law Journal,* 26, pp. 411-456.

Galanter, M. (1966) ‘The modernisation of law’, in Miron W. (ed), *Modernization*. New York: Basic Books.

Garland, D. (1990) *Punishment and modern society*. Oxford: Clarendon Press.

Garland, D. (2001) *The Culture of Control. Crime and Social Order in Contemporary Society*. Oxford University Press.

Gaum, G., Hoffman, S. and Venter, J. H. (2006) ‘Factors That Influence Adult Recidivism: An Exploratory Study in Pollsmoor Prison’, *South African Journal of Psychology,* 36(2), pp. 407-424.

Gendreau P., Goggin C. and Cullen F.T. (1999) *The Effects of Prison Sentences on Recidivism*. Canada: Public Works and Government Services.

Gentili, A. M. (1993) ‘A subversão no distrito de Cabo Delgado entre 1950 e 1960 segundo as fontes administrativas locais’, *Boletim do Arquivo Histórico de Moçambique*, 14, pp. 103-116.

Gentili, A. M. (2004) ‘Democracy and citizenship in Mozambique’, in Triulzi A., Ercolessi C. *State, power, and new political actors in postcolonial Africa*, Fondazione Giangiacomo Feltrini, Milano. pp. 153-174.

Gerring, J., Daniel Ziblatt, J. and Julian A. (2011) ‘An Institutional Theory of Direct and Indirect Rule’, *World Politics,* 63(3), pp. 377-433.

Giffard, C. and Muntingh, L. (2006) *The effect of sentencing on the size of the South African prison population*. Open Society Foundation. South Africa. Available at: https://acjr.org.za/resource-centre/The%20impact%20of%20sentencing%20on%20the%20size%20of%20the%20prison%20population.pdf (accessed 11 January 2020).

Ginisty, K. e Vivet, J. (2012) ‘Frelimo Territoriality in Town: the Example of Maputo’, *L’Espace Politique*, 18. Available at: http://journals.openedition.org/espacepolitique/3164 (accessed 11 March 2021).

Godoy, A.M. (2004) ‘Globalisation, state law and legal pluralism in Brazil’, *Journal of Legal Pluralism,* 51, pp. 61-69.

Goirand, C. (2009) ‘Movimentos sociais na América Latina: elementos para uma abordagem comparada’, *Estudos históricos,* 22 (44). Available at: https://www.scielo.br/j/eh/a/fNZLLNgnL9VSJRX3mtd4GNc/?lang=pt (accessed 16 January 2021).

Gomes, C. e Araújo, R. (2012) 'A Luta pela Relevância Social e Política: Os tribunais Judiciais em Angola', *Luanda e Justiça: Pluralismo jurídico numa sociedade em transformação – Volume II*. Almedina: Coimbra.

Gomes, C., Fumo, J., Mbilana, G. e De Sousa Santos, B. (2003) 'Os tribunais comunitários', in De Sousa Santos, B. e Trindade J. C. (eds). (2003) *Conflito e Transformação Social: Uma Paisagem das Justiças em Moçambique*. Oporto: Afrontamento, 2, p. 189-334.

Gordon, J. (2005) 'White on White: Researcher reflexivity and the logics of privilege', *White schools undertaking reform. Urban Review,* 37(4), pp. 279-302.

Granjo, P. (2011) 'Trauma e Limpeza Ritual de Veteranos em Moçambique', *Cadernos de Estudos Africanos,* 21, pp. 43-69.

Griffiths, J. (1986) 'What is Legal Pluralism?', *Journal of Legal Pluralism,* 24.

Griffiths, A. (1996) 'Between Paradigms: Differing Perspectives on Justice in Molepolole Botswana', *Journal of Legal Pluralism,* 36, pp. 195-214.

Gruhl, J., Spohn, C. and Welch, S. (1981) 'Women as Policymakers: The Case of Trial Judges', *American Journal of Political Science,* 25 (2), pp, 308-322.

Guadagni, M. (1996) *Il Modello Pluralista*. Giappichelli: Torino.

Gundersen, A. (1992) 'Popular Justice in Mozambique: Between State Law and Folk Law', *Social & Legal Studies,* 1, pp. 257-82.

Gungunhana, N. (2019) *O Crime de Linchamento no Centro de Moçambique: o Caso da Província de Sofala*. Tese de Mestrado. Instituto Superior de Ciências Policiais e Segurança Interna, p. 56. Available at: https://comum.rcaap.pt/bitstream/10400.26/30345/1/DISSERT.%20MESTRADO_NELITO.pdf (accessed 28 January 2021).

Hall, M. and Young, T. (1997) *Confronting Leviathan: Mozambique since Independence*. London: Hurst and Company.

Harrison, G. (1995). Elections in Mozambique, *Review of African Political Economy*, 22(63), pp. 115-118.

Havik, P. (2010) 'Direct or Indirect Rule? Reconsidering the roles of appointed chiefs and native employees in Portuguese West Africa', *Africana Studia,* 15, pp. 29-36.

Henrichson C., Rinaldi J. and Delaney R. (2015) *The price of jails: Measuring the taxpayer cost of local incarceration*. New York: Vera Institute of Justice.

Hinz, M. (2008) 'Traditional courts in Namibia – part of the judiciary? Jurisprudential challenges of traditional justice', in Horn, N. and Bösl, A. (eds.) *The Independence of the Judiciary in Namibia*, p. 173.

Hinz, M. and Mapaure, C. (2009) *Search of Justice and Peace. Traditional and Informal Justice Systems in Africa, Legal pluralism and interlegality: The role of community justices in Mozambique*. Berlin: Verlag.

Hobsbawm, E. and Ranger, T. (2012) *The Invention of Tradition*. Cambridge: Cambridge University Press.

Hogg, R. (2001) 'Penality and Modes of Regulating Indigenous Peoples in Australia', *Punishment & Society,* 3(3), pp. 355-379.

Honwana-Welch, G. (1982) 'Tribunais de Base ou a Base da Justiça Popular', *Justiça Popular,* 5, pp. 4-5.

Honwana-Welch, G. e Dagnino, F. (1984) 'O Direito e a Justiça nas Zonas Libertadas', *Justiça Popular,* 8, pp. 11-16.

Horder, J. (2014) 'Bureaucratic "criminal" law: too much of a bad thing?', in Duff, R. A., Farmer, L., Marshall, S. E., Renzo, M. and Tadros, V. (eds.) *Criminalization: The Political Morality of the Criminal Law*. Oxford University Press USA, New York, NY, pp. 101-131.

Horowitz, D. (1994) 'The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change', *American Journal of Comparative Law*, XLII (3) pp. 233-93.

Huo, T. (2016) 'Os Tribunais Comunitários e a Resolução e Prevenção de Conflitos na Comunidade'. *O caso dos Tribunais Comunitários de Maputo*. Maputo.

Ibid.apo-Obe, A. (1992) 'The dilemma of african criminal law: Tradition versus modernity', *Southern University Law Review*, 19(2), pp. 327-356.

Igreja, V. (2010) 'Frelimo's Political Ruling through Violence and Memory in Postcolonial Mozambique', *Journal of Southern African Studies*, 36(4), pp. 781-799. Available at: www.jstor.org/stable/29778067 (accessed 16 January 2021).

Igreja, V. (2015) 'Amnesty Law, Political Struggles for Legitimacy and Violence in Mozambique', *International Journal of Transitional Justice,* 9(2), pp. 239-258.

Igwe, O. W. and Ogolo, M. D. (2017) 'Repugnancy Test and Customary Criminal Law in Nigeria: A Time for Re-Assessing Content and Relevance', *Donnish Journal of Law and Conflict Resolution,* 33(3), pp. 35-39. Available at: https://ssrn.com/abstract=2528497 (accessed 16 October 2018).

Iliffe, J. (1999) *Os Africanos: história de um continente*. Lisboa: Terramar. Keehan, E. K. (1990) 'The Legal System of Mozambique', in Kenneth, R. R. (ed.) *Modern Legal Systems Cyclopedia.* William s Hein & Co.

Isaacman, A. F. (1972) *Mozambique: The Africanisation of a European Institution—The Zambesi Prazos, 1750–1902*. Madison: University of Wisconsin Press.

Isaacman, A. (1987) 'Régulos, diferenciação social e protesto rural. O regime do cultivo forçado do algodão em Moçambique 1938-1961', *Revista Internacional de Estudos Africanos,* 6-7, pp. 37-82.

Isaacman, A. (1988) 'Colonial Mozambique, an Inside View: The Life History of Raúl Honwana', *Cahiers d'Études Africaines*, 109, pp. 59-88.

Isaacman, A. and Isaacman, B. (1983) *Mozambique: From Colonialism to Revolution, 1900-1982*. Colorado: Westview Press.

Isser, D.H. (2011) *Customary Justice and the Rule of Law in War-torn Societies* by Deborah H. Isser (ed.). Washington DC: United State Institute of Peace Press, Bruce Baker International Peacekeeping.

Jackson, A.Y. and Mazzei, A. (2012) *Thinking with Theory in Qualitative Research. Viewing data across multiple perspectives*. Routledge: London and New York.

Jefferson, A. M. (2012) 'Conceptualising confinement: Prisons and poverty in Sierra Leone', *Criminology & Criminal Justice*, 14(1), pp. 44-60.

Johanne, F. (1986) *Language and colonial power: the appropriation of Swahili in the former Belgian Congo 1880-1938*. Cambridge: Cambridge University Press.

José, A.C. (2016) *Retratos da justiça moçambicana: Redes informais de Resolução de conflitos em espaços urbanos e rurais*. Maputo. Centro de Formação Jurídica e Judiciária. Maputo. Centro de Formação Jurídica e Judiciária.

José, A. C., Araújo, S., Cuahela, A. e Fumo, J. (2016) 'As instâncias comunitárias no contexto da competição política: O caso de Angoche' in José, A.C. (org.), *Retratos da justiça moçambicana: Redes informais de Resolução de conflitos em espaços urbanos e rurais.* Maputo. Centro de Formação Jurídica e Judiciária, pp. 223-272.

José, A. C., Araújo, S., Cuahela, A. e Fumo, J. (2016) 'Legitimidade, resolução de conflitos e acesso à justiça em Macossa', in José, A.C. (org.) *Retratos da justiça moçambicana: Redes informais de Resolução de conflitos em espaços urbanos e rurais.* Maputo. Centro de Formação Jurídica e Judiciária, pp. 273-328.

Junod, H. A. (1913) *The life of a South African Tribe.* 1st edition. London: Macmillan & Co.

Kafka, F. (1961) *Parables and Paradoxes*. New York: Schocken Books.

Kanuha, V. K. (2000) '"Being" native versus "going native": Conducting social work research as an insider', *Social Work*, 45(5), pp. 439-447.

Kelly, M.J. (2020) 'United Nations Security Council Permanent Membership and the Veto Problem', *Case Western Reserve Journal of International Law*, 52(1), pp. 101-118. Available at: https://scholarlycommons.law.case.edu/jil/vol52/iss1/8 (accessed on 29 October 2020).

Kenney, S. (2012) *Gender and Justice: Why Women in the Judiciary Really Matter*. Routledge.

Kyed, H. (2009) 'Mutual Transformations of State and Traditional Authority', *Cardernos de Estudos Africanos*, 16/17, pp.179-201.

Kyed, H. (2009) 'The Politics of Legal Pluralism: state policies on legal pluralism and their local dynamics in Mozambique', *Journal of Legal Pluralism*, 59, pp.87-120.

Kyed, H. M., Coelho, J. P. B., Souto, A. and Araújo, S. (orgs.) (2012) *The dynamics of legal pluralism in Mozambique*. Maputo: CESAB.

Kyed, H. and Buur, L. (2006) 'Contested Sources of Authority: Re-claiming state sovereignty and formalising traditional authority in post-conflict Mozambique', *Development and Change*, 37(4), pp. 847-870.

Kleykamp M., Rosenfeld J. and Scotti R. (2008) *Wasting money, wasting lives: Calculating the hidden costs of incarceration in New Jersey*. Trenton NJ: Drug Policy Alliance.

Knight, R. (2010) 'Statutory Recognition of Customary Land Rights in Africa: An Investigation into Best Practices for Lawmaking and Implementation', *FAO Legislative Study*, 105. Rome.

Kumar, R. (2014) *Research Methodology: A Step-by-Step Guide for Beginners*. Los Angeles: Sage.

Lewis, M. D. (1962) 'One Hundred Million Frenchmen: The 'Assimilation' Theory in French Colonial Policy', *Comparative Studies in Society and History*, 4 (2), pp. 129-153.

Little, D. (1991) *Varieties of Social Explanation. An Introduction to the Philosophy of Social Science*. Westview Press.

Locher, M. Steimann, B. and Upreti B.R. (2012) 'Land grabbing, investment principles and plural legal orders of land use', *Journal of Legal Pluralism*, 65, pp. 31-63.

Lodge, T., Kadima, D., and Pottie, D. (eds.) (2002) *Compendium of Elections in Southern Africa*. Electoral Institute for Sustainable Democracy in Africa.

Logan, C. (2013) 'The Roots of Resilience: Exploring popular support for African traditional authorities', *African Affairs*, 112 (448), pp. 353-376.

Lorizzo, T. (2012) 'Prison reform in Mozambique fails to touch the ground. Assessing the experience of pre-trial detainees in Maputo', *South Africa Crime Quarterly*, 42, pp. 29-38. Available at: https://www.researchgate.net/publication/301275781_Prison_reforms_in_Mozambique_fail_to_touch_the_ground_Assessing_the_experience_of_pre-trial_detainees_in_Maputo (accessed 11 September 2019).

Lorizzo, T. (2015) 'Book review – Estado, Pluralismo Jurídico e Recursos Naturais –Avanços e Recuos na Construçao do Direito Moçambicano', *Journal of Comparative Law in Africa*, 2(1), pp. 111-117.

Lorizzo, T. and Petrovic, V. (2019) 'Powers of Arrest Custailed by Constitutional Council in Mozambique – the impact of the 2013 decision'. *REFORMAR-Research for Mozambique,* September 2019. Available at: https://reformar.co.mz/publicacoes/impact-of-2013-decsion.pdf (accessed on 29 October 2020).

Lourenço, V. A. (2005) *Estado(s) e Autoridades Tradicionais em Moçambique: Análise de um processo de transformação política*. Lisboa: CEA.

Ludsin, H. (2003) 'Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of Its Customary Law', *Berkeley Journal of International Law*, 21 (62), pp. 62-110. Available at: http://scholarship.law.berkeley.edu/bjil/vol21/iss1/3 (accessed 29 June 2020).

Lundin, I. (1995) 'Partidos políticos: a leitura da vertente étnico-regional no processo democrático', in Mazula, B. *Moçambique, Eleições, Democracia e Desenvolvimento*. Maputo: Embaixada do Reino dos países Baixos.

Machel, S. (1970) ‘Educate Man to Win the War, Create a New Society and Develop our Country’, in *Mozambique Sowing the Seeds of Revolution,* Mozambique, pp. 37-45. Available at: http://www.marxists.info/subject/africa/machel/1970/educate-win-war.htm (accessed 16 January 2021).

Malinowski, B. (1926) *Crime and Custom in Savage Society.* Polska: Fundacja Nowoczesna. Available at https://wolnelektury.pl/media/book/pdf/crime-and-custom-in-savage-society.pdf (accessed 29 January 2021).

Maggio, J. (2007) ‘Can the Subaltern Be Heard?: Political Theory, Translation, Representation, and Gayatri Chakravorty Spivak’, *Alternatives*, 32(4), pp. 419-443.

Mamdani, M. (1996) *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*. New Jersey: Princeton University Press.

Margolis, H.S. (2018) ‘Why Are Lawyers So Expensive?’, *Margolis & Bloom*, 6 March.

Marks, M. (2004) ‘Researching Police Transformation. The ethnography imperative’, *British Journal of Criminology*, 44(6), pp. 866-888.

Marques-Guedes, A. (2003) *Pluralismo e Legitimação. A edificação jurídica pós–colonial de Angola*. Almedina.

Marques-Guedes, A. (2007) ‘The State and “Traditional Authorities”, in Angola. Mapping issues’ in Marques-Guedes, A. and Lopes, M. J. (eds.) *State and Traditional Law in Angola and Mozambique*, pp. 15-67.

Marques-Guedes, A. (2008) ‘Uma articulação entre o Estado e as Autoridades Tradicionais? Limites na congruência entre o Direito do Estado e os Direitos “Tradicionais” em Angola’, in Freitas do Amaral, D. (ed.) *Estudos Comemorativos dos 10 anos da Faculdade de Direito da Universidade Nova de Lisboa,* 1, pp. 715-753.

Marques-Guedes, A. and Lopes, M. J. (2007) *State and Traditional Law in Angola and Mozambique*, Coimbra: Almedina.

Martin, E. (1993) ‘The representative role of women judges’, *Judicature*, 77, pp. 166-173.

Martinez, E. S. (2008) *O Trabalho Forçado na Legislação Colonial Portuguesa - O Caso de Moçambique (1899-1926)*. Tese de Mestrado. Universidade de Lisboa. Available at: https://repositorio.ul.pt/bitstream/10451/434/1/17799_TRABALHOFOR00C7ADONALEGISLACAOCOLONIALPORTUGUESA.pdf (accessed 21 January 2021).

Martinez, E. S. (2010) *Legislação portuguesa para o Ultramar. Conflicto Social y Sistemas Jurídicos Consuetudinarios Africanos: La Redefinición Constante de la Tradición*. 7 Congresso de Estudos Africanos. Available at: https://repositorio.iscte-iul.pt/bitstream/10071/2396/1/CIEA7_29_MARTINEZ_Legislação%20portuguesa%20para%20o%20Ultramar.pdf (accessed 15 January 2021).

Martinez, E. S. (2012) *Uma Justiça Especial para os Indígenas. Aplicação da Justiça em Moçambique (1894-1930)* Tese de Doutoramento. Universidade de Lisboa. Available at: https://repositorio.ul.pt/bitstream/10451/7314/1/ulsd063628_td_Esmeralda_Martinez.pdf (accessed 16 January 2021).

Martins, A. R. (1960) ‘Monografia sobre os usos e costumes dos “SENAS”’, *Boletim da Sociedade de Estudos de Moçambique,* pp. 13-33.

Max, G. (1997) ‘Concepts in the comparative study of tribal law’, in Nader, L. (org.), *Law in culture and society*. 2nd Edition. Berkeley and Los Angeles: University of California Press Lda.

Mbembe, A. (2015) ‘Decolonising Knowledge and the Question of the Archive’. Available at: https://bit.ly/3HSX2Xm (accessed 16 July 2020).

Meagher, K. (2007) ‘Introduction: special issue on informal institutions and development in Africa’, *Afrika Spectrum,* 42(3), pp. 405-418. Available at: http://nbn-resolving.de/urn:nbn:de:0168-ssoar-362035 (accessed 13 September 2018).

Meinzen-Dick and R. Nkoya, L. (2007) ‘Understanding legal pluralism in water and land rights: lessons from Africa and Asia’, in van Koppen, B., Giordano, M. and Butterworth, J. (eds.), *Community-based Water Law and Water Resource Management Reform in Developing Countries,* pp. 8/1-8/12. Available at: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.468.8717&rep=rep1&type=pdf#page=109 (accessed 23 June 2020).

Melissaris, E. (2004) ‘The More the Merrier? A New Take on Legal Pluralism’, *Social and Legal Studies,* 13, pp. 57-79.

Meneses, M. P. (2004) ‘Toward inter-legality? Traditional Healers and the Law in Post-Colonial Mozambique’, *Beyond Law,* 27, pp. 7-31.

Meneses, M. P. (2006) ‘Traditional Authorities in Mozambique: between Legitimisation and Legitimacy’, in Hinz, M.O. (ed.) *The Shade of New Leaves. Governance in Traditional Authority: A Southern African Perspective,* Berlin: Lit Verlag, pp. 93-120.

Meneses, M. P. (2006) ‘Law and Justice in a Multicultural Society: The Case of Mozambique’, *CODESRIA,* pp. 63-88.

Meneses, M. P. (2007) ‘Pluralism, Law and Citizenship in Mozambique’, *Oficina do CES,* 291. Coimbra: CES.

Meneses, M. P. (2009) ‘Poderes, direitos e cidadania: o ‘retorno’ das autoridades tradicionais em Moçambique’, *Revista Crítica de Ciências Sociais,* 87, pp. 9-42.

Meneses, M. P. (2010) ‘O “indígena” africano e o colono “europeu”: a construção da diferença por processos legais’, *e-cadernos CES,* 7, pp. 39-93. Available at: http://journals.openedition.org/eces/403 (accessed 13 January 2020).

Meneses, M. P. (2016) ‘Os sentidos da descolonização: uma análise a partir de Moçambique’, *OPSIS* 16(1), pp. 26-44.

Meneses, M. P. (2016) ‘Hidden Processes of Reconciliation in Mozambique: The Entangled Histories of Truth-seeking Commissions held between 1975 and 1982’, *Africa Development,* 41(4), pp. 153-180. Available at: http://www.jstor.org/stable/90013893 (accessed 16 January 2021).

Meneses, M., Nunes, J., Añón, C., Bonet, A., e Gomes, N. (2019) 'O Estado, o direito costumeiro e a justiça popular', in De Sousa Santos, B. *Construindo as Epistemologias do Sul Para um pensamento alternativo de alternativas,* 2, pp. 225-242.

Menski, W. F. (2006) *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*. Cambridge: Cambridge University Press.

Menski, W. F. (2007) 'Beyond Europe', in Orucu, E. and Nelken, D., (eds.), *Comparative Law. A Handbook.* London: Hart Publishing, pp. 189-216.

Merry, S. E. (1988) 'Legal Pluralism', *Law and Society Review,* 22, pp. 869-896.

Michaels, R. (2005) 'The Restatement of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism', *Wayne Law Review,* 51, pp. 1209-1259.

Ministério da Educação e Desenvolvimento Humano (2017) Vamos Ler. Language Mapping Study in Mozambique. *USAID*, Outubro de 2017. Available at: https://www.researchgate.net/profile/Kaitlin_Carson/publication/341214732_Language_Mapping_Study_in_Mozambique_Final_Report/links/5eb41261299bf152d6a28210/Language-Mapping-Study-in-Mozambique-Final-Report.pdf (accessed 14 January 2021).

Mondlane, E. (1968) *Nationalism and Development in Mozambique.* University of California. Available at: http://digitallibrary.usc.edu/cdm/compoundobject/collection/p15799coll60/id/7807/rec/97 (accessed 16 January 2021).

Mondlane, E. (1977) *Lutar por Moçambique*. Lisboa: Sá da Costa.

Molokomme, A. (1990-1991) 'Disseminating Family Law Reforms: Some Lessons from Botswana', *Journal of Legal Pluralism,* 30-31, pp. 303-329.

Moore, S. F. (1973) 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study', *Law and Society Review,* 7(4), pp. 719-746.

Morais, B. A. (2020) *Pluralismo Jurídico em Moçambique: Análise da Efectivação da Lei No 4/92, de 6 de Maio, como Manifestação do Pluralismo Jurídico, consagrado nos Termos do Artigo 4 da CRM*. Tese de Doutoramento. Universidade Católica de Moçambique. Available at http://repositorio.ucm.ac.mz/bitstream/123456789/145/1/BARBOSA%20MORAIS.pdf (accessed 18 January 2021).

Moreira, A. (1955) *Administração da Justiça aos Indígenas*, Lisboa: Agência Geral do Ultramar.

Moreira, J. (1997) *Os Assimilados, João Albasini e as Eleições, 1900-1922*. Maputo: Arquivo Histórico.

Morris, H.F. (1974) 'A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa 1876-1935', *Journal of African Law,* 18(1), pp. 6-23.

Mosca, J. (2005) *Economia de Moçambique, Século XX*. Lisboa: Editora Piaget.

Muntingh, L. (2002) 'Tackling recidivism: what is needed for successful offender reintegration', *Track Two: Constructive Approaches to Community and Political Conflict*, 11, pp. 20-24.

Muntingh L (2008) ‘Punishment and deterrence: don’t expect prisons to reduce crime’, *South African Crime Quarterly*, 26, pp. 3–10.

Muntingh, L. and Redpath, J. (2016) ‘The socio-economic impact of pre-trial detention in Kenya, Mozambique and Zambia’. University of Western Cape: Dullah Omar Institute. *Africa Criminal Justice Reform*, December 2016. Available at: https://acjr.org.za/resource-centre/socio-economic-impact-web-lowres.pdf (accessed 11 January 2020).

Nardulli, P. F., Flemming, R. B. and Eisenstein, J. (1985) ’Criminal courts and bureaucratic justice: Concessions and consensus in the guilty plea process’, *Criminology*, 76, pp. 1103-1131.

Newitt, M. (1969) ‘The Portuguese on the Zambezi: An Historical Interpretation of the Prazo System’, *The Journal of African History, 10* (1), pp. 67-85. Available at http://www.jstor.org/stable/180296 (accessed 14 January 2021).

Newitt, M.D. (1995) *History of Mozambique*. London: Hurst & Company. Leslie, C. et al. (2006) *Slaves: from classical times to the modern age.* Center for the Study of Slavery, Resistance and Abolition: Yale University Press.

Ngoenha, S. (2018) *Filosofia Africana. Das independências às liberdades*. Maputo: Paulina

Nhlapo, T. (2017) ‘Homicide in traditional African societies: Customary law and the question of accountability’, *African Human Rights Law Journal,* 17(1), pp.1-34.

Nyaura, J.E. and Ngugi, M.N. (2014) ‘A Critical Overview of the Kenyan Prisons System: Understanding the Challenges of Correctional Practice’, *International Journal of Innovation and Scientific Research*, 12(1), pp. 6-12.

Norris, C., Fielding, N., Kemp, C. and Fielding, J. (1992) ‘Black and blue: “An analysis of the influence of race on being stopped by the police”’, *British Journal of Sociology*, pp. 207-224.

Obarrio, J. (2014) *The Spirit of the Laws in Mozambique.* Chicago: University of Chicago Press.

O’Laughlin, B. (2000) ‘Class and the Customary: The Ambiguous Legacy of the Indigenato in Mozambique’, *African Affairs*, 99, pp. 5-42

Oomen, B. (1999) ‘Group rights in post-apartheid South Africa: the case of the traditional leaders’, *Journal of Legal Pluralism*, 44, pp. 73-103.

Oppler, S. (1998) *Correcting Corrections: Prospects for South Africa’s Prisons*. Institute for Security Studies. South Africa.

Oraegbunam, I. E. (2010) ‘Crime and Punishment in Igbo Customary Law: the challenge of Nigerian Criminal Jurisprudence, *OGIRISI: A New Journal of African Studies*, 7(1).

Ordem dos Advogados de Moçambique (2019) *Relatório dos Direitos Humanos 2017*. Maputo.

Orre, A. (2007*)* ‘Integration of traditional authorities in local governance in Mozambique and Angola: the context of decentralisation and democratisation’, in Marques-Guedes A. and Lopes, M. J. (eds.) *State and Traditional Law in Angola and Mozambique*, pp. 139-199.

Orre, A. (2008) 'Fantoches e Cavalos de Tróia? Instrumentalização das autoridades tradicionais em Angola e Moçambique', *Cadernos de Estudos Africanos*, 16/17, pp. 139-178.

Pakenham, T. (1990) *The Scramble for Africa.The White Man's Conquest of the Dark Continent 1876-1912*. UK: Random House.

Parson, L. (2019) 'Considering Positionality: The Ethics of Conducting Research with Marginalised Groups', in Strunk, K. K. and Locke, L. A. (eds.), *Research Methods for Social Justice and Equity in Education*. Palgrave Macmillan: Switzerland, pp. 15-32.

Pedroso, J., Trindade, J.C., José, C.A. e De Sousa Santos, B. (2003) 'Caracterização do desempenho dos tribunais: um roteiro dos bloqueios do Sistema judicial', in De Sousa Santos, B. e Trindade J. C. (eds). (2003) *Conflito e Transformação Social: Uma Paisagem das Justiças em Moçambique*. Oporto: Afrontamento, pp. 519-612.

Peleikis, A. (2006) 'Whose heritage? Legal pluralism and the politics of the past. A case study from the Curonian Spit (Lithuania)', *Journal of Legal Pluralism*, 53-54, pp. 209-237.

Penal Reform International (2000) *Access to Justice in Sub Saharan Africa: The Role of Traditional and Informal Justice Systems*. London and International: Penal Reform International.

Peresie, L. J. (2005) 'Female Judges Matter: Gender and Collegial Decision Making in the Federal Appellate Courts', *Yale Law Journal*, 114, pp. 1759-1778.

Petrovic, V. (2018) 'Vítimas de crime em Moçambique: quais os seus direitos?', *Journal Savana*, 10 August.

Petrovic, V., Lorizzo, T. and Muntingh, L. (2020) 'Alternatives to Imprisonment in Mozambique. The implementation of community service orders', *REFORMAR-Research for Mozambique*, March 2020. Available at: https://reformar.co.mz/publicacoes/tsu-moz-english.pdf/view (accessed 18 April 2021).

Pimentel, D. (2010) 'Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law', *Harvard International Review*, 32(2), pp. 32-36.

Pimentel, D. (2011) 'Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique', *Yale Human Rights and Development Journal*, 14(1), pp. 59-104.

Procuradoria-Geral da República (2018) *Crianças em conflito com a Lei em Moçambique. Em busca de uma Estratégia de Protecção.* Centro de Estudos Sociais Aquino de Bragança (CESAB) e Africa Criminal Justice Reform (ACJR) do Dullah Omar Institute da Universidade de Western Cape.

Progettomondo Mlal (2014) *Manual de Boas Práticas em Processo de Reabilitação das Pessoas Privadas da Própria Liberdade*. Maputo.

Raharjo, A. (2017) 'Bureaucracy in Criminal Justice. A Study of Criminogen Factors in Law Enforcement on Narcotics Crime Settlement', *Advances in Economics, Business and Management Research*, 43, pp. 6-10.

Rautenbach, C. and Matthee, J. (2010) 'Common law crimes and indigenous customs: dealing with the issues in South African law', *Journal of Legal Pluralism*, 12, pp. 109-144.

Read, S. J. (1963) 'Criminal Law in the Africa of Today and Tomorrow', *Journal of African Law*, 7(1), pp. 5-17.

Rede da Criança (2019) *Crianças em Conflito com a Lei - Acesso à Assistência Jurídica a Programas de Reabilitação e Reinserção Social*. REFORMAR – Research for Mozambique. Available at: https://reformar.co.mz/publicacoes/digital-criancas-em-conflito-com-a-lei_rdc.pdf/view (accessed 10 August 2021).

REFORMAR-Research for Mozambique (2018) Mozambique Thematic Report on the Implementation of the ICCPR in relation to criminal justice in preparation for the Civil Society Submission to the United Nations Human Rights Committee. *REFORMAR-Research for Mozambique*. Available at: https://reformar.co.mz/publicacoes/moz-iccpr-criminal-justice-reformar.pdf (accessed 1 January 2020).

REFORMAR-Research for Mozambique (2019) An Assessment of some Aspects of Judicial Integrity in Mozambique. *REFORMAR-Research for Mozambique*. Available at: https://reformar.co.mz/publicacoes/an-assessment-of-some-aspects-of-judicial-integrity-in-mozambique.pdf (accessed 1 January 2020).

Roberts, S. (1994) 'The Recording of Customary Law: Some Problems of Method, in Dundes R., A. and Dundes, A. (eds.) *Folklaw: Essays in the Theory and Practice of Lex Non Scripta.* The University of Wisconsin Press, pp. 331-338.

Rodrigues, L. F. (1963) *Contribuição para o estudo do sistema prisional no Ultramar*. Instituto Superior de Ciências Sociais e Política Ultramarina: Universidade Técnica de Lisboa, p. 54.

Sacco, R. (1992) *Trattato di Diritto Comparato*. Fifth Edition. UTET: Torino.

Sacco, R. e Gambaro, A. (1996) *Sistemi Giuridici Comparati*. UTET: Torino.

Sacco, R., Guadagni M., Aluffi Beck-Peccoz R. e Castellani, L. (1995) *Il Diritto Africano*. UTET: Torino.

Sachs, A. (1984) 'Changing the Terms of the Debate: A Visit to a Popular Tribunal in Mozambique', *Journal of African Law*, 28(1/2), pp. 99-10.

Sachs, A. and Honwana-Welch, G. (1990) *Liberating the Law. Creating Popular Justice in Mozambique*. London and New Jersey: Zed Books

Said, E. (1978) *Orientalism*. London: Pantheon Books.

Sarkin, J. (2008) *Human Rights in African Prisons*. Pretoria: HSRC.

Sarkin, J. (2008) 'Prisons in Africa: an Evaluation from a Human Rights Perspective', *Sur - International Journal on Human Rights,* 9, pp. 22-49. Available at: http://socialsciences.scielo.org/pdf/s_sur/v4nse/scs_a02.pdf (accessed 16 July 2020).

Saul, J. S., (ed.) (1985) *A Difficult Road: The Transition to Socialism in Mozambique*. New York: Monthly Review Press.

Saul, J. S., (2005) 'Eduardo Mondlane & the Rise & Fall of Mozambican Socialism', *Review of African Political Economy,* 104(5), pp. 309-315.

Scharf, W., Banda, C., Roentsch, R., Kaunda, D. and Shapiro, R. (2002) 'Access to Justice for the Poor of Malawi? An Appraisal of Access to Justice Provided to the Poor of Malawi by the Lower Courts and the Customary Justice Forums', *Department of International Development*. Available at: http://gsdrc.org/docs/open/ssaj99.pdf (accessed on 29 October 2017), p. 22.

Serra, C.E. (2014) *Estado, Pluralismo Jurídico e Recursos Naturais. Avanços e recuos na construção do Direito Moçambicano*. Maputo: Escolar Editora.

Sezgin, Y. (2010) 'How to integrate universal human rights into customary and religious legal systems?', *Journal of Legal Pluralism,* 60, pp. 5-40.

Shah, P. and Menski, W. F. (2006) *Migration, Diasporas and Legal Systems in Europe*. London and New York: Routledge-Cavendish.

Shahar, I. (2012) 'Legal pluralism incarnate: An institutional perspective on courts of law in Colonial and postcolonial settings', *Journal of Legal Pluralism,* 65, pp.133-163.

Sharf, W. (2003) 'Non-State Justice Systems in Southern Africa: How Should Governments Respond', University of Cape Town. *Governance and Social Development Resource Centre*. Available at: http://www.gsdrc.org/docs/open/ds35.pdf (accessed 1 January 2020).

Sheppard, E. and Nagar, R. (2004) 'From east west to north south', *Antipode,* 36, pp. 557-63.

Shils, E. (2006) *Tradition*. University of Chicago Press.

Spelman, W. (2000) 'What Recent Studies Do (and Don't) Tell Us about Imprisonment and Crime', *Crime and Justice,* 27, pp. 419-494.

Spivak, G. C. (1988) 'Can the subaltern speak?', in Nelson, C. and Grossberg, L. (eds.) *Marxism and the Interpretation of Culture*. Macmillan Educatio: Basingstoke.

Spivak, G. C. (1993) *Outside in the Teaching Machine*. New York: Routledge.

Steffensmeier, D. and Herbert, C. (1999) 'Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?', *Social Forces,* 77(3), pp. 1163– 96.

Taiwo, E. A. (2009) 'Repugnancy clause and its impact on customary law: Comparing the South African and Nigerian positions – Some lessons for Nigeria', *Journal for Juridical Sciences,* 34(1), pp. 89-115. Available at: http://caid.ca/RepClaCusLaw2009.pdf (accessed 2 January 2020).

Tamanaha, B.Z. (2008) 'Understanding Legal Pluralism: Past to Present, Local to Global', in *Sydney Law Review*, 30, pp. 375-411.

Tarr, N. (2017) 'The language of justice: when the colonial past is invited into the courtroom', *Études de lettres,* 3-4, pp. 155-172.

Teubner G. and Korth P. (2009) 'Two kinds of legal pluralism: collision of transnational regimes in the double fragmentation of world society', in Young M.A. (ed) *Regime Interaction in international law. Facing fragmentation*. Cambridge University Press, Cambridge, pp. 135-176.

Tharoor, S. (2017) *Inglorious Empire. What the British did to India*. New Delhi: Aleph Book Company. Meredith, M. (2005) *The State of Africa: A History of the Continent since Independence*. UK: Simon & Schuster.

The South Africa Judiciary (2020) *Judiciary Annual Report 2019/2020*. South Africa. Available at: https://www.judiciary.org.za/index.php/documents/judiciary-annual-reports (accessed 14 January 2021).

Thomaz do Nascimento, F. (2011) 'Que justiça deve-se aplicar? Dois tribunais coloniais privativos para os 'africanos' em Moçambique', *Métis: história & cultura,* 10(19), pp. 81-98.

Thomaz do Nascimento, F. (2012) *Casaco que se despe pelas costas: a formação da justiça colonial e a (re)ação dos africanos no norte de Moçambique, 1894 - c. 1940.* Tese de Doutoramento. Universidade Federal Fluminense. Available at: https://www.historia.uff.br/stricto/td/1419.pdf (accessed 16 January 2021).

Tribunal Supremo (2021) *Anual dos Tribunais Judicias (2020)*. Available at: http://www.ts.gov.mz/images/pdf_files/relatorios/Relatorio%20Anual%20dos%20Tribunais%20Judiciais%202020%20.pdf (accessed 9 April 2021)

Twining, W. (2010) 'Normative and legal pluralism: a global perspective', *Duke Journal Comparative and International Law*, 20, pp. 472-517.

Ubink, J. and Mclnerney, T. (2011) *Customary Justice: Perspectives on Legal Empowerment.* International Development Law Organization.

Ubink, J. and van Rooijc, B. (2011) *TRADITIONAL JUSTICE: PRACTITIONERS' PERSPECTIVES. Towards Customary Legal Empowerment: An Introduction*. WORKING PAPER SERIES. International Development Law Organization, p. 5. Available at https://www.files.ethz.ch/isn/137095/WP2UBINK.pdf (accessed 16 January 2021).

Umbreit, M. (1995) 'Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime', *Crime & Delinquency*, 41(3), pp. 296-316.

United Nations Development Programme (2015) Informal Justice Systems. Charting a course for Human Rights-based Engagement. *United Nations Development Program.* Available at: http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruleoflaw/informal-justice-systems.html (accessed 16 October 2019).

United States Department of State (2018) *Mozambican 2018 report on Human Rights Practices*. Available at: https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/mozambique/ (accessed 4 January 2020).

Universidade de Lisboa (2011) *Projecto de Recolha e Codificação do Direito Consuetudinário Vigente na República da Guiné-Bissau*. Programa de Desenvolvimento das Nações Unidas.

Uweru, B. C. (2008) 'Repugnancy doctrine and cus- tomary law in Nigeria: A positive aspect of British colonialism', *African Research Review*, 2(2), pp. 286-295.

Vanderlinden, J. (1971) 'Le pluralisme juridique: essai de synthèse', in Gilissen, J. (ed.) *Le pluralisme juridique*. Bruxelles: Université Libre de Bruxelles, pp. 19-56.

Von Sicard, S. (2008) 'Islam in Mozambique: Some Historical and Cultural Perspectives', *Journal of Muslim Minority Affairs*, 28(3), pp. 473 — 490.

Watanabe, K. (1988) 'Acesso à Justiça e Sociedade Moderna*',* in Grinover, A. P.; Dinamarco, C. R. and Watanabe, K. (coord.), *Participação e Processo*. São Paulo: Editora Revista dos Tribunais, pp. 128-135.

Wemmers, J. M. (1996) *Victims in the Criminal Justice System. Studies on crime and justice*. Dutch Research and Documentation Centre of the Ministry of Justice.

West, H. G. and Kloeck-Jenson, S. (1999) 'Betwixt and Between: 'Traditional Authority' And Democratic Decentralisation in Post-War Mozambique', *African Affairs*, 98(393), pp. 455-484.

White, C. M. N. (1965) 'African Customary Law: The Problem of Concept and Definition', *Journal of African Law*, 9(2), pp. 86-89. Available at: http://www.jstor.org.ezproxy.uct.ac.za/stable/pdf/745334.pdf (accessed 5 January 2020).

Wojkowska, E. (2006) 'Doing Justice: How informal justice systems can contribute. Oslo Governance Centre', *The Democratic Governance Fellowship Programme*. Available at: http://www.albacharia.ma/xmlui/bitstream/handle/123456789/30535/0280Doing_Justice__How_informal_justice_systems_can_contribute_(2007)7.pdf?sequence=1 (accessed 10 January 2020).

Women and Law in Southern Africa (2008) *A Ilusão da Transparência na Administração da Justiça*. Maputo.

Woodmann, D. G. (1988) 'Unification or continuing pluralism in family law in Anglophone Africa: past experience, present realities, and future possibilities', *Lesotho Law Journal*, 4(2), pp. 33-79.

World Bank (2018) 'Strong but nor broadly Shared Growth. Mozambique Poverty Assessment', *World Bank.* Available at: http://documents1.worldbank.org/curated/en/248561541165040969/pdf/Mozambique-Poverty-Assessment-Strong-But-Not-Broadly-Shared-Growth.pdf (accessed 14 January 2021).

Annexes

1. Focus group discussion: Community court judges

1. Could you give some information about the neighbourhood where the court operates?
2. Where does the court operate? When?
3. How many judges work at this court? How old are they? What is their professional activity?
4. How were they elected? When?
5. What are the proceedings to open a case at this court? What kind of cases come here in court?
6. What does the court apply to make their decisions?
7. What languages do you speak at the court with the people?
8. How long does it take for a decision to be made?
9. How do you decide on a case?
10. Do you transfer cases to other instances? Which ones?
11. How is the relationship with the government? And the relationship with the municipality? And the relationship with the secretary of the neighbourhood?
12. How is the relationship with the state judges and prosecutors?
13. How is the relationship with other non-state mechanisms of conflict resolution?
14. What would you need to improve your work?

2. Interview: Government institutions

1. How does the Mozambican population solve its disputes other than the police and the courts?
2. What are the informal mechanisms of dispute resolution in Mozambique? What mechanisms can be found in Maputo?
3. Would you describe the major legal reforms around informal mechanisms of dispute resolution in the country?
4. What is the development that these mechanisms underwent during the different countries' historical phases?
5. How has the relationship with the criminal justice system developed?
6. What are the differences and similarities which can be encountered between the urban Maputo and a suburb area?
7. What are the legal implications of the debate on informal mechanisms of dispute resolution for the reform of the criminal justice system in Mozambique?

8. How does the debate around informal dispute resolutions and their relationship with the criminal justice systems differ or is similar to the regional and international debate?

3. Interview: State judges

1. How do you decide about a sentence? Do you evolve other parties not directly involved with the case? Do you make visits to the sites where the case occurred?
2. What is your relationship with the community courts of the district?
3. What do you believe are the strengths of the community courts and community court judges?
4. What do you believe are the weaknesses of the community courts and community court judges?
5. Do you receive cases from community courts? How? What kind of cases do you receive? Do you consider the decision that eventually was already made at the community level?
6. Do you transfer cases to community courts? How? What kind of cases do you transfer? Why?

4. Interview: Civil society organisations and development actors

1. Have you been supporting the development of informal mechanisms of dispute resolution in Mozambique?
2. What are the informal mechanisms of dispute resolution that you have been supporting in Mozambique? And in Maputo?
3. Description of major projects around informal mechanisms of dispute resolution in the country.
4. How have the projects developed?
5. How has the relationship with the government been?
6. How do you consider the relationship between the government and the informal mechanisms of dispute resolution?
7. What are the legal implications of the debate on informal mechanisms of dispute resolution for the reform of the criminal justice system in Mozambique?
8. How does the debate around informal dispute resolutions and their relationship with the criminal justice systems differ or is similar to the role of your organisation in the regional and international debate?