

The risks of repeating history: The new land law in Mozambique.

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Abstract

After almost two decades of socialist experiments and civil war, Mozambique has embarked on the road to peaceful construction and capitalism, although seeds of conflict remain present. As part of the current reform in 1997 a new land law was introduced. Contrary to previous legislation, this law recognizes traditional and community rights to land. The paper argues that the new law rests on a simplified image of community and traditional rights. It also defends that the law, instead of being an innovation, signifies a return to the legal dualism that in the colonial era formed the backbone of indirect rule. Such a return might prove disastrous. Recent Ugandan and South African history suggests that current ethnic conflicts in Africa can be traced back to the failure to dissolve the divide that was produced by colonial indirect rule. For the same reason, the new law may contribute to the rekindling of conflicts in Mozambique.

1. Introduction

Mozambique has recently introduced legislation on land, the environment, and forests and wildlife, which stresses the rights of peasant communities to land and other natural resources, and the use of traditional rules for the organization of tenure within and by these communities. The new legislation has had a positive reception in society in general and among academics in particular. Yet, one question has

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remained without a satisfactory answer: what is a community? The answer to this question is not only the academics' concern, but also the lawyers': Mozambican law still hasn't found a way to incorporate this community as a legal entity (Kloeck-Jensen, 1997; Dias, Filemão and Mansur, 1999: 29).

This situation is symptomatic of a more general problem: the way in which scholars and legislators perceive rural communities, property and tradition. Their approach is often tainted by misconceptions: "These terms not only conjure up an image of unchanging, antiquarian, and immutable normative system but also imply more coordination in production and social egalitarianism than is supported by historical evidence" (Migot-Adholla and Bruce, 1993: 3-4). Moreover, the representation of tradition is characterized by the existence of multiple interpretations, representations, and interests. Chanock's (1982) widely known description of the codification of tradition in colonial Zambia is a good illustration of this point.

In this paper I intend to expose some of the conceptual weaknesses of the current land law reform as well as pinpoint possible risks of its implementation. The paper starts with a short description of the country's recent history, its current political condition and the contents of the ongoing legal reform. It continues with a brief summary of preceding land laws in an attempt to show the similarities and differences between the various approaches that characterized statutory tenure. Next, it presents case material on past and present tenure arrangements in the South of Mozambique. Finally, it addresses the societal implications of the current law, basically by emphasizing Mamdani's (1995, 1996) analysis of ethnical conflicts in the region.

2. Mozambique – recent history

When Mozambique became independent from Portugal in 1975, the liberation movement Frelimo (Frente de Libertação de Moçambique) created a single-party state with Marxist-Leninist tendencies. As a result, Mozambique became snared in the conflict between the USA and the USSR, which involved into a protracted war

between the Frelimo government and the Rhodesia-created and South Africa-supported insurgency movement Renamo (Resistência Nacional Moçambicana).

Despite the ideological discourse that surrounded the conflict, ultimately, it depended on the vested interests of the global and regional superpowers (the Soviet Union, the USA, South Africa) (Hall, 1990; Hanlon, 1997; O’Laughlin, 1992; Olson, 1990). The over-riding importance of these ambitions became particularly clear after the fall of the Berlin Wall in November 1989 and the liberation of Nelson Mandela in February 1990. Both widely televised events symbolize the transition to new global and regional political orders, wherein the USA and a democratic South Africa assume the roles of global and regional hegemonic powers. The concomitant demise of the Soviet Union and the Apartheid regime implied that both Frelimo and Renamo lost their foreign supporters more or less at the same moment (Hall and Young, 1997: 203-5). Only six months after Mandela’s release, both parties met officially for the first time to start talks on a peaceful settlement. Two years later, in 1992, they signed a peace treaty, and in October 1994 the country organized its first multi-party parliamentary elections. As a result of these elections, Frelimo stayed in power, but now with a democratic mandate (Hanlon, 1997).

Despite Frelimo’s initial allegiance to socialism, the Mozambican government already made its first moves towards a market economy in 1983. In 1984, Mozambique was admitted as a member to the IMF. In 1987, the government accepted IMF prerequisites for additional financial support and embarked on a structural adjustment program according to the Bretton Wood Institutions’ guidelines. These guidelines basically consisted of the abolishment of state market control and state monopolies such as the national agricultural and grain boards (AGRICOM, ICM). As part of Economic Rehabilitation Program (PRE – Programa de Reabilitação Económica), the government revised almost every aspect of its economic legislation². It privatized the companies it had nationalized before: between 1989 and 1995, 423 enterprises were sold (Hanlon, 1997: 95). It liberalized private foreign investments (Law 3/93) and created a legal basis for the establishment of duty-free industrial development zones

² For example: Law 17/91, which revised earlier legislation on state-owned enterprises; Decreto 21/89, which regulated the privatization of enterprises and rural and urban real estate nationalized under Decree-Law 16/75. For further examples, see Vasques (1996).

(Decree 18/93). After the 1994 Peace Agreement, the economy was liberalized further in an attempt to attract foreign investments, resulting for instance in the construction of the MOZAL aluminum plant, the pivot of the first duty-free zone in the Maputo area, in 1998-2000. Currently, Mozambique with an 11.3% growth of its GDP between 1997-1998, is one of the World Bank's and IMF's model cases for successful implementation of structural adjustment reforms (World Bank, 2000; Clinton, 2000).

3. The 1997 land reform

The call for economic liberalization, the abolishment of state ownership within the framework of the transition to capitalism and increased concern for the fate of the peasantry were the basic conditions for the land law reform. Land is one of the key natural resources (Resolução 10/95) and capital goods, making the land law one of the fundamental elements in economic legislation to be revised. The revision of the Land Law started in 1992 with the first conference on land tenure issues, which was organized by the Land Tenure Center (LTC) of the University of Wisconsin. The Ministry of Agriculture created a special ad hoc commission on land tenure. In 1994, this commission and the LTC organized a second conference, which addressed experiences in Mozambique with tenure and conflicts over land (Weiss and Myers, 1994). A new inter-ministerial commission created in 1995 prepared a national land policy document, which was approved in 1995 by the Council of Ministers through Resolução 10/95³. The document stated, among other things, its intention to design tenure arrangements appropriate for the "new phase of economic and social development characterized by a market economy" (Resolução 10/95). The new land law was passed and published in 1997 (Lei 19/97); its regulation was published in 1998 (Decree 66/98). In 1999, the inter-ministerial commission completed the reform through the publication of a "technical annex" to the law and regulation, which should guide the land titling in practice (Comissão de Terras, 1999).

³ The LTC still maintains a nucleus for the study of land issues with the country's sole state university, the Universidade Eduarde Mondlane.

According to the 1997 Land Law, all land is property of the state, but can be handed out in (temporary) concessions to private persons or enterprises. Smallholders are not required to register their land – although they are entitled to do so –, but are automatically seen as the owners of the land they occupy (art. 9 of Decree 66/98). To protect the rural population from unscrupulous investors, bureaucrats and politicians, requests for land require consultation of the local community proven by a written document with the signatures of between three and nine community representatives as well as owners of bordering areas (art. 24 and 27 of Decree 66/98).

In comparison with previous Post-Independence legislation, the new law brings two important innovations, both already announced in the 1995 National Land Policy document (Resolução 10/95). The first is the official attribution of ownership rights to communities:

“Can be subject of the right to use and explore land, national entities, individuals or organizations, men and women, as well as local communities” (art. 10 of Law 17/97).

Communities receive further a role in natural resource management, conflict resolution, the process of land titling, and the identification and definition of the limits of the area occupied by them (art. 24 of Law 17/97).

The second innovation is the recognition of customary norms and practices as a source of individual and community ownership rights in addition to state law:

“The right to use and exploit land is acquired through:

- a) occupation by individuals and by the local communities according to customary norms and practices that do not contradict the Constitution;
- b) occupation by individual persons, who, in good faith, use the land for at least ten years;
- c) honoring requests of individual or collective persons as established in the present law” (art. 12 of Law 17/97).

Communities are supposed to use, among other things, customary norms and practices in natural resource management and conflict resolution (art. 24 of Law 17/97).

4. The land law and political hegemony

The current legal reform is part of the transition towards a capitalist free-market economy. In addition, it has a party-political dimension. It is part of Frelimo's ambition to recover the power and popular support base it lost during the civil war. Many authors have stressed the role of external actors in the war in Mozambique, notably the conflict between the USA and the USSR and the Apartheid regime and the ANC. Without denying the overriding importance of these external factors, one should recognize the role of certain domestic factors. The importance of these factors became clearly visible during the 1994 elections. In five provinces, Renamo won a majority vote (table 1).

Table 1: Distribution of seats as result of the 1994 and 1999 parliamentary elections in Mozambique. Source: *Mozambique Peace Process Bulletin 24* – National elections – e-mail edition.

| Province | 1994 | | | 1999 | | Change in number of seats per province |
|-----------------|------------|------------|----------|------------|------------|--|
| | Frel. | Ren. | UD | Frel. | Ren. | |
| Niassa | 7 | 4 | 0 | 6 | 7 | +2 |
| Cabo Delgado | 15 | 6 | 1 | 16 | 6 | 0 |
| Nampula | 20 | 32 | 2 | 24 | 26 | -4 |
| Zambézia | 18 | 29 | 2 | 15 | 34 | 0 |
| Tete | 5 | 9 | 1 | 8 | 10 | +3 |
| Manica | 4 | 9 | 0 | 5 | 10 | +2 |
| Sofala | 3 | 18 | 0 | 4 | 17 | 0 |
| Inhambane | 13 | 3 | 2 | 13 | 4 | -1 |
| Gaza | 15 | 0 | 1 | 16 | 0 | 0 |
| Maputo province | 12 | 1 | 0 | 12 | 1 | 0 |
| Maputo city | 17 | 1 | 0 | 14 | 2 | -2 |
| Total | 129 | 112 | 9 | 133 | 117 | 0 |

Frel. = Frelimo; Ren. = Renamo; UD = Democratic Union.

Several factors have been mentioned to explain Renamo's popular support. One is ethnicity. Officially Frelimo always denied the political importance of ethnic identities in the country. Frelimo's leader and Mozambique's first president Samora Machel's slogan was "kill the tribe to give birth to the nation" (Zacarias, 1996). However, in practice, Frelimo's ruling elite comes principally from the Gaza and Maputo provinces in the South of the country and belongs to the ethnic group Tsonga/Xangana. The Renamo leadership is from the central province of Sofala and belongs to the Shona subgroup Ndaou. Hall (1990) and Hall and Young (1997: 183) attribute a large part of Renamo's success to the mobilization of ethnic identities and discontentment of the population in the Center and North with the Southern rulers, who allegedly favored their own home areas over the rest of the country. Today, ethnic and regional differences continue to constitute an important part of Renamo's discourse (e.g., Mudivela, 2000).

Other factors mentioned as possible explanations for support for Renamo are the Ujamaa-styled resettlement of farmers in villages and Frelimo's attitude towards traditional chiefs (Geffray, 1990 cited by O'Laughlin, 1992: *passim*; Hall and Young, 1997: 85-88). However, O'Laughlin (1992) argues quite convincingly that such an analysis is unduly simplified. First, it overestimates the importance of resettlement. Indeed, according to Isaacman and Isaacman (1983) cited by Kyle (1991), by 1982 only 20% of the farm population lived in these villages. She also argues that people still had vivid memories of the way in which the chiefs had had been instrumental in forced labor recruitment, tax collection and the imposition of forced crops (e.g., cotton). Moreover, Frelimo's negative policy towards the chiefs had different impacts at the local level. In some areas, the traditional chiefs were forcefully repressed, whereas in others they were allowed or able to maintain a certain degree of independence towards the state (Myers, Eliseu and Nhachungue, 1993: 38).

Rather than the communal villages and the government's attitude towards tribal leaders the real reason for Renamo's popularity in certain regions and among certain sections of the population was Frelimo's agrarian policy. Frelimo alienated itself from rural society in the marginal regions, where Renamo could recruit soldiers among the discontent rural poor, because its agricultural policy favored areas and sectors that had already been favored by the colonial regime (O'Laughlin, 1992: 138; Hanlon,

1997: 165-166; Castel-Branco, 1994). This analysis seems to be confirmed by recent assessments by the Mozambican Ministry of Finance and Planning (Simmler *et al.*, 1998; Datt *et al.*, 1998), which shows that the areas where Renamo won in 1994, are also the ones, which have benefited least from post-war economic growth.

The 1997 land reform clearly bears the signs of an attempt to try to honor at least part of the claims made by the peasantry that supported Renamo (Kloeck-Jensen, 1997). The law offers better protection to the peasantry, the sector which had least benefited from earlier agrarian policies and according to many critics had been exposed to arbitrary intervention in favor of the state and cooperative sectors under the previous legislation (Preface of Pereira and Alves, 1994; Myers, 1994)⁴. In a clear attempt to amend Frelimo's earlier policy, it officially recognizes customary rules and traditional authorities, as well as procures to offer better protection to the peasantry. It seems that the law should also be seen as a venture to regain hegemony over the country. The question remains, whether the strategy to strengthen traditional community structures is really appropriate.

5. Pre-history – colonial and socialist legacies

In order to understand what the 1997 reform means and what its possible consequences are, one should make a comparison with the preceding colonial and socialist legislation. The colonial land law rested on two foundations: the claim of all land as state property; and the economic and political organization of the overseas territories in two different domains, the European and the (dependent) African, both governed by different economic, political and legal principles. The first relevant decree relating to land tenure in Mozambique dates from 21 May 1892. It distinguished between land for the foundation of settlements, uncultivated land destined for agricultural or industrial development, and uncultivated land with the same destiny but inhabited by native settlements. In each of the areas, different rules applied. Portuguese law organized the areas for white colonization through the granting of land concessions in land of the first two categories. As to land of the third

⁴ The victim was the peasant sector. According to Martins (1994: 110), "[I]nsecurity in land tenure was institutionalized. State farms did not have defined or registered limits."

category, the colonial government made no special regulations for the way in which the indigenous population should organize its tenure. However, it determined that at any moment it could make land available for colonization through the transfer of land from this category to the second. In this way, Portuguese law in the end always superseded indigenous rights (*Boletim Oficial de Moçambique*, nr. 33, p.338).

The natives' legal position as to land tenure improved slightly through Decree 3,983 of 1918. This decree transformed the third category of land into so-called "indigenous reserves". The land was now expressly designated for the native population. According to Decree 33,727 of 1994, the native population could even acquire a "title" by registering the land it occupied with the colonial authorities. However, occupation of land in these areas by natives still would not result in property rights (Moiane, 1994: 59-61). The Governor of the Colony could repeal such a title at any moment (art. 228 number 12 of Decree 33,727). Article 32 of this Decree was even more explicit:

"In the indigenous reserves the indigenous people are allowed to occupy any parcel of land, but that occupation will never confer on them property rights and will be regulated through their usage and customs."

Article 35 of the 1954 Indigenous Statute of 1954 (Decree 39,666) reiterated this clause.

The formal exclusion of Africans from European-style tenure rights was only abolished in 1961. Decree 43.987 stated that land was the collective property of the "neighbors" living in a chief's territory. Membership of such a community did not confer individual property rights, although the governor, on request of the chief and his councilors, could authorize private appropriation of land by individual community members. "Only the members of the chief's community are entitled to acquire real estate in land previously destined for collective use" (art. 8 of Decree 43,987; compare Moiane, 1994: 61).

The tenure system was closely connected to the function of the indigenous population and its territories in the colonial economy. The 1892 law delegated hut tax collection to colonists. In the case when an African was unable to pay the tax in money or kind, it could be substituted by working for the colonial landowner, who

would pay the equivalent amount to the state (art. 47 n° 1). In this way, the land law connected land tenure and the recruitment of labor for the colonial economy, providing a typical example of the functional relation between the African and the European domains of colonial society, with the African sector providing labor, subsistence and commodities to the colonial sector (Moiane, 1994; Castel-Branco, 1994).

Four years after Independence, the Frelimo government issued a new land law (Law 6/79), slightly amended in 1986 (Law 1/86) and completed by the publication of a regulation in 1987 (Decree 16/87). The new legislation abolished the colonial division between black and white territories. It maintained, however, state property, now within a framework of state socialism. It also maintained the system of temporary concessions. Moreover, the abolishment of the “colored” categories inherited from the colonial era did not imply the extinction of functional dualism. Post-Independence legislation merely replaced the colors by new labels, juxtaposing the smallholder family sector – which substituted the former indigenous populations in the native reserves in colonial law – and the so-called “commercial” sector comprised by private, cooperative and state-owned farms – erstwhile the European farmers and plantations (Castel-Branco, 1994).

The difference between the Pre- and Post-Independence law thus is neither the qualification of land as state property, nor the abolishment of dualism. The main difference is the franchising of the indigenous population through the formal elimination of the limitations on the acquisition of land titles by (black) smallholders. These automatically received the right to use and exploit their land, and were, contrary to the modern enterprises, not required to file a formal request for a concession or to pay for their plot (art. 8 and 9 of Law 6/79).

6. Reform or restoration

The 1997 legal reform’s effort to protect the peasantry’s access to land represents a rupture with both the socialist and colonial models. However, the new legislation is also a return to the colonial perspective of the farming family as part of a traditional

community. Its recognition of land as community property corresponds with a clause in Decree 43,987 of 1961. Moreover, similar to all laws passed during the colonial era, it allows the co-existence of different legal systems for the regulation of access to land, the state's civil law system and the so-called traditional systems. While abolishing economic dualism, it recreates legal dualism. The emphasis of tradition signifies a rupture with the earlier monistic and unifying aspirations of the creation of a nation state governed by one single law. It opens the possibilities for regional variation in land "law" matters within the country's territory (Resolução, 1995). In this respect, the current changes are not so much a reform but a restoration.

The restoration concerns mostly the assumptions on the embedded-ness of the smallholder families in a corporate rural community structured and governed through traditional norms on use, access and property of land, which underlay the 1997 reform. The documents that constitute the current land reform legislation present a specific conception of the (African) peasant community. Peasants and peasant families are not seen as individuals or independent production units, but as elements of a wider social body, the community. Whereas the 1979 law defined the family farm through its internal organization of the production process labor (art. 15 of Law 6/79)⁵, the recent reform hardly pays any attention to the household and its structure. As a result, community organization, culture, and identity become the key to resource access. Illustrative of this emphasis on the community rather than on the individual family farm is the 1995 National Land Policy statement. The chapter dedicated to the family sector contains not a single reference to individual farms, but makes many allusions to community, community rights, traditional norms and practices, local culture, and lineage groups in relation to access to and management of land (Resolução 10/95, p. 52(3)).

⁵ The first land law that was passed by the Frelimo Government, presented the peasant's family farm as a self-sufficient, subsistence-oriented, isolated, unit based on family:

"Smallholder family farms are agricultural forms of using and exploiting land, which, with the objective to satisfy the needs of the family household, do not employ paid labor" (art. 15 of Law 6/79).

In subsequent legislation, the Mozambican a slightly different perception of the peasantry appeared. Family farms were seen as embedded in a social tissue. Thus, article 49 of Decree 16/87 specified that labor provided by others than family members in cases such as illness, migration and old age and seasonal mutual aid "are not considered wage labor".

The current emphasis on the rural community is accompanied by a specific, romantic, perception of the nature of that community. The definition of “community” provided by the current land law offers a good illustration of this romanticism:

“Local community: group of families and individuals living in a territorial unit at the level of the locality or smaller, which desires to preserve communal interests through the protection of residential areas, farm land, cultivated or fallow, forests, sites of cultural importance, water sources, and areas for expansion” (art. 1 of Law 17/97).

The definition shows no sign of concern with or awareness of conflicts of interests and power, which might exist within the community. It seems to assume that such conflicts are either non-existent or irrelevant. It also seems to assume rural communities are fundamentally interested in protection and not in exploitation of its resources, running in contrast with the generalized perception of the ecological devastating impact of slash and burn farming and the unrestrained felling of trees for woodfuel production (e.g., Chonguiça, 1989; Muchangos, 1991). The same romantic perspective emanates from the National Land Policy document, the regulation of the land law and its technical annex (Resolução 10/95, Decree 66/98, Comissão de Terras, 1999).

The romantic idea of rural communities is accompanied by a specific perception of property and tradition. Land is seen as owned by the community, which distributes it through its chief and his advisory council among the individual members according to certain clearly defined traditional rules and norms. This notion is explicit in the two articles of Law 17/97 cited in section 3 of this paper.

This idea not only typifies the colonial legislation in Mozambique – the clause of the 1961 land law cited above is quite illustrative – but a large proportion of the colonial discussion on African societies. Schapera (1967: 139) writes for example on tribes in South Africa:

“In theory all the land occupied by the tribe belonged to the chief, not, however, in the sense of a personal possession of which he could dispose freely, but vested in him and administered by him as the representative and head of the tribe. He parceled it out in large areas to various powerful

headmen, and by these the other headmen were granted land to cultivate and upon which to build their kraals”.

Cheater (1990) cites several authors of the post-independence, colonial and pre-colonial eras (Moyana, 1984; Holeman, 1952; Bullock, 1913; Thomas, 1973) to illustrate that this opinion was common during a long period and among many observers in Zimbabwe as well.

Cheater (1990) also shows that a shared opinion is not necessarily true. At least in Zimbabwe, the authority of the chiefs over land before colonial occupation was much less than the colonial administrators were inclined to believe. Levin (1997) comes to the same conclusions as to the chiefs in Swaziland, who today intervene in the distribution of land (Russel, 1993). Earlier, authors such as Bohannan (1967), Allott (1969) and Vanderlinden (1969) have also argued against the perception of “native” land tenure as communal. These dissident views call for a more detailed assessment of so-called “traditional” tenure relations Mozambique.

7. Tradition revisited.

An assessment of tenure in Mozambique is almost an impossible task. The country, which stretches for about 2,500 km along the East Coast of Africa, is home to many ethnic and linguistic groups, with different cultures and normative traditions. For example, the groups of the North are matrilineal, whereas those of the South are patrilineal. Recent research conducted by the author in the area just South of Maputo City, the country’s capital, can serve as an example of the complex nature of land relationships⁶.

The population of the South of Mozambique belongs to the ethnic group of the Tsonga, which was intensively studied by the Swiss missionary Henri Junod, who lived in the region between approximately 1889-1896 and 1913-1920. The first period coincided with the subjugation of the African polities by the Portuguese colonial government (Feliciano, 1996). One of these polities, the kingdom of Maputo,

⁶ I’m not aware of the existence of many detailed regional studies on the rest of Mozambique. An exception is José Negrão’s (1995) doctorate thesis on land tenure in the Zambezi delta, which

originally occupied the area between the Delagoa Bay and Saint Lucia in South Africa (approximately 10,000 km²). The Portuguese occupied its northern half in 1896, when the king abandoned the royal kraal in Macassane (see map) and sought refuge in the area which became incorporated in the British colony of Natal (AHM, Fundo do Século XIX, Governo do Distrito de Lourenço Marques, Caixa 11/89, 24-1-1896; Alberto, 1958; Liesegang, 1987; Pélissier, 1994: 312-313).

According to Junod, the population of the South of Mozambique had a strong notion of private property. As an illustration, he describes how one day, the chief who had ceded the plot to construct the mission post where Junod was working at that moment, came by and asked permission to pick a fruit which was growing on a tree standing in the land of the post. Neither his authority as a chief nor the fact that previously he had been the owner the land, gave him the right to collect the fruit without permission of the current owner (Junod, 1996: Volume II, p.16).

Another example illustrating that it would be incorrect to understand land among the Tsonga as part of common property administered by the chief dates from 1890/1. In 1890, a conflict arose between the queen of Maputo and a Portuguese settler on the Island of Inhaca (see map). The Portuguese garrison on the Island became involved in the conflict, and the reports its commander wrote to his superiors still exist in the national archive. When at a certain moment, a Portuguese settler tried to establish himself on Inhaca, the queen's representative on the island sent a message to the court in Macassane. A few days later, she sent an envoy demanding that the white man would bring the *saguete* "as is usual". The Portuguese didn't have the requested sum and the envoy returned empty-handed. When two months later the *saguete* still had not been paid, the messenger returned, this time with the assignment to destroy the hut the colonist had build. However, instead of doing so immediately, he informed the commander about the nature of his mission, maybe because he hoped that this representative of the Portuguese government would be able to settle the matter peacefully. The commander convinced the messenger to postpone his action and talk again with the settler. After their conversation, the settler sent a boat to the city

provides a detailed understanding of the variety of arrangements that developed in the centre of Mozambique.

on the other side of the Bay, apparently to go and fetch the money. The commander's report concludes:

“I'm certain that, if the *saguete* will not be sent rapidly, the blacks will destroy the house and I will not oppose their action with force, because, if I would do so, I would involve the Government in serious problems at such a critical moment. So, everything can be avoided with handing over the *saguete*, which is just a continuation of old habits that until today never were interrupted (AHM, Fundo Século XIX, Governo do Distrito de Lourenço Marques, Caixa 9/102, Carta 17/1/1891).

In March 1891, the resident ambassador at the royal court in Macassane mentions that the conflict was resolved and the Portuguese settler had received a license to produce the chalk (AHM, Fundo Século XIX, Governo do Distrito de Lourenço Marques, Caixa 8/107, 12/3/1891).

Two years later, the resident ambassador at the Court in Macassane refers to another conflict over land. This conflict involved the Queen of Maputo and three white settlers, Sommerschild, Costa and Brühheim. The settlers had paid a certain number of heads of cattle to the Queen in exchange for a license to prospect for gold. When the three men involved did not find the expected gold reserves, they decided to claim the land “as a compensation.”

“However, she, the Queen, the *Régulo* and their captains (*indunas*), contested this action and will continue to contest their claim, as originally they did not concede the ownership of the land, but only the license to procure in it precious materials” (AHM, Fundo Século XIX, Governo do Distrito de Lourenço Marques, Caixa 8/107, 16/10/1983).

The three examples show first of all, that the chief did not have absolute control over the land in his territory. Once handed over, it was the owner who controlled its use and its resources. They also show that the chief, or, in this case, the queen, could not hand out land freely. As to the Portuguese settler on Inhaca, the queen did not interfere with the size or the location of the plot. The only thing she demanded was the payment of the *saguete*, which is a gift expressing submission and friendship, not the price of the land. In the conflict with the gold seekers, she explicitly declared she had no right to alienate land.

The private nature of traditional tenure is repeated in a 1941-1943 monograph on the former Maputo kingdom made as part of a codification effort of “native” law. Maputo was no exception. According to the description of Panda in the province of Inhambane (about 500 km to the north of Maputo) made during the same effort, “[i]n the past the *régulo* conceded land to the citizens for farming (...) The land would be perpetually the trustee’s property, whether he cultivated it or not” (AHM, Direcção dos Serviços dos Negócios Indígenas, Secção M, Caixa 1643)⁷.

8. Traditional tenure today

The previous sections dealt with historical evidence pointing at a strong private element in traditional tenure relations. The strength of that element is confirmed by data I collected between 1995 and 1999 in the district of Matutuíne. This district corresponds roughly to the part of the Maputo kingdom annexed by the Portuguese in 1896. My fieldwork concentrated on two locations in this district: Machangulo and Zitundo (see map). Machangulo is a Peninsula reaching north to the Island of Inhaca. Zitundo lies more to the south. It is an administrative area on the border with South Africa. Here research focused on the area’s main village and its immediate surroundings.

The areas were selected originally in order to compare the impact of the war. Civil war affected both, although in different manners. When Renamo raids intensified in 1987, the population of Machangulo fled to Inhaca and the city of Maputo; only a few were actually killed during the raids. Renamo controlled the Peninsula, but never occupied it on a permanent basis and never ruled over its population. After the cease-fire, people returned and reoccupied their former homesteads. As a result, the current distribution homesteads more or less corresponds to the pre-war situation. I found topographic maps from 1956 showing the approximate location of homesteads still useful, and people still apply toponyms also used over forty years ago.

⁷ The same source mentions that it was common to lend land for free for one year. If somebody refused to abandon the land after the agreed period, the owner would have to call upon the *régulo* to

Zitundo passed through a different experience. When troubles increased most of the population of the rural areas surrounding the village fled to South Africa. A smaller part took refuge in the village itself, where the government maintained a garrison. Many continued to cultivate their dispersed farms, a phenomenon known as *shoshorona*, a word that recalls the sound of the leaves when a person passes hidden by the darkness of the night (compare: O’Laughlin, 1992: 120). In 1991 Renamo attacked the village. The garrison fled and many of the unprotected civilians who were left behind were killed. In 1993, after the cease-fire, Renamo reoccupied the village and administered it until 1995, when the Government succeeded in transferring its own administrator from the nearby village of Ponta de Ouro to Zitundo⁸. A group of about 25 Renamo soldiers still stays in the village, occupying land and houses of people who had fled or perished during the conflict.

The results of the fieldwork indicate that in many respects, people in Matutuíne follow roughly the same rules as those identified by Junod (1996) in the late nineteenth century. In both areas, people explained that after having received the land, the receiver is complete master, and not even the chief can dispose over its fruits without recognizing the owner’s rights. This does not mean that all fruits belong solely to the owner. It is common practice that the members of his lineage and other members of the community collect firewood, stakes and wild fruits on his fallow and bush land. There exists a complex of private and communal entitlements at different scale and levels according to the character of the land and the resource (for details, see Brouwer, 1998).

People who receive land may pass it on to others who wish to establish themselves in the area. Local chiefs and modern authorities intervene in this process to a very

use physical force for his removal, “as he was the original owner of the land”. It seems to me that here property and sovereignty are confused. Why not assume that the chief had the monopoly of violence?⁸ The Government, however, never accepted this occupation. It argued that the occupation was “illegal”, as it took place after the cease-fire, which automatically implied that the area should remain under Government control. In Protocol V of the General Peace Agreement, it had been agreed that until the newly elected Government would take over for local government of Renamo-held areas solely local citizens, possibly (but not necessarily) Renamo members, would be nominated (Mozambique 1992:48). As the agreement did not specify on how to decide whether a zone was Government or Renamo controlled, at a meeting September 1993, President Chissano and Renamo leader Dhlakama agreed that the decisive criterion would who controlled the local government seat (Balóí, 1996).

limited extent. They may for instance act as an intermediary between a newcomer and the community, helping him to identify a person willing to give the newcomer some land. Transactions also occur within the community. In Machangulo, several persons had abandoned their own land close to one of the lakes in the area, because of crop loss due to continuous invasions by hippopotamuses. Instead, they moved to areas, where these attacks were less frequent or didn't occur. The landowner ceded the land without any interference from traditional or modern administrative structures. In total, 12% out of a 48-person sample had obtained land from a third person, who was not a relative.

Transactions may be temporary (e.g., for one season or as long as the hippo attacks continue) or permanent. In the second case, the land stays in the hands of the person who received it as long as he and his descendents are considered its residents. As a result, within one family's estate one may find enclaves belonging to other families. Theoretically, when such a "dependent" family abandons the land, it returns to the original owner. As a result, at least theoretically, a chain of derived entitlements exists which connects the original owning lineage to the actual occupying family. This does not preclude rights of absent landowners. One day I passed through a plot which was covered with a dense regrowth of shrub and trees. I was told that a family currently absent had farmed the land in the past. People collect firewood and wild fruits on the plot, but they do not occupy it, because, as they told me, the owner still may want to come back.

Whereas in Machangulo, the population reoccupied its original plots, in Zitundo many local people did not return to their areas of residence. Instead, they occupied land of people who had been killed or didn't want to return closer to the village or wells or preferable for other reasons. In this area, the 1956 map proved hardly useful: even the local chief did not recognize the toponyms that appeared on the map.

Table 2: Principal ways of access to land in Zitundo.

| Way of access to land | Number | Percentage |
|------------------------------|---------------|-------------------|
| Traditional chief number 1 | 32 | 70 |

| | | |
|--|-----------|------------|
| Traditional chief number 2 | 8 | 17 |
| Local government administrator | 2 | 4 |
| Without contact with local authorities | 4 | 9 |
| Total | 46 | 100 |

Table 2 contains a summary of the results of 46 interviews in the area of Zitundo village. The data show the profound impact of the war on local tenure. Only four of the interviewed households (9%) occupied land without the interference of any local authority. These were the families that returned to their original plot. Local so-called traditional chiefs played an important role in the post-war resettlement. However, they did not act as the owners or managers of the land, but as intermediaries, making for instance inquiries among the refugee community in South Africa to find out whether the original owners were still alive and intended to return or objected to their land being occupied by others. At no point in this process, the land was considered community-owned and administered. The government's representative in the village played an insignificant part in the process, largely because due to the presence of Renamo, government administration returned only in 1995, when most of the returnees had already established themselves⁹.

A striking point in table 2 is the existence of two "traditional" chiefs. However, neither of the two claiming the position, is in a direct line connected to the original *régulo* of the colonial era. Current ambivalence is the result of the war as well as strife among the heirs of the last chief from ruling lineage. One of the so-called traditional chiefs is the former Renamo administrator who cloaked himself in tradition in order to maintain at last part of the statute he lost when the government appointed administrator arrived (for further details, see Figueiredo, 1999). Moreover, one should remember that the chiefs who ruled over the territories during the colonial era had been appointed by the colonial administration. The original chiefs had abandoned the area with their king in 1896. The chiefs were part of the colonial system of indirect rule.

⁹ It should be stressed that land transfers normally do not require any monetary or material compensation. Land is given, not sold or rented, usually with everything growing on or in it. In Machangulo, I identified two cases, wherein the original landowner claimed the fruits of the trees standing on the land he ceded. These cases were generally seen as extremely exceptional. In Zitundo, despite the many changes in land occupation, nobody of the interviewed community

9. Indirect rule

The system the colonial powers applied to reign over the native subjects in their overseas territories was the system of indirect rule. This system of indirect rule emerged in consequence of the occupation of Africa by the European powers after the Conference of Berlin in 1894 and 1895. In the beginning, the relations between African polities and the European powers had been entirely commercial. Through harbors in Mozambique, Portugal traded ivory, slaves and gold with the Zimbabwean kingdom of Monomotapa and the tribes that populated the area between the Zimbabwean highlands and the coast (Hall and Young, 1997: 2; Serra, 1988). In the seventeenth century, mercantilism became gradually substituted by incipient colonialism, when the Portuguese king started to “legalize” land occupied by traders and soldiers in the Zambezi valley by transforming them nominally into fiefs (*prazos*) (Serra, 1988). Colonial occupation intensified in the late nineteenth century, when during the Scramble for Africa all major European powers tried to occupy as large a portion of the continent as possible.

The Scramble implied a profound change in the relationship between Africa and Europe. Until then, that relation had basically been based on treaties between sovereigns. Now, the power balance shifted in favor of the colonial rulers. The colonial powers (Britain, France and Portugal) installed a system of indirect rule. Chiefs, who accepted a subjected position as the vassals of colonial rule, stayed in power. Their subjects would remain governed by their own laws and rules – their tradition – as far as these didn’t conflict with the interests or moral values of the colonial power (Berry, 1992; Migoy-Adholla and Bruce, 1993: 7; Migot-Adholla, Place and Oluocho-Kosura, 1993: 123; Mamdani, 1995, 1996).

The Portuguese formalized their system of indirect rule in 1926 (and not in 1930 as Cruz (1988) argues) through Decree 12,533 of 23/10/1926. This Decree distinguished clearly between the European (and emancipated individuals of other races) and the native black population. While this law “guaranteed to the indigenous

members mentioned the necessity of compensating or paying the original owners or their heirs if these could be found.

all rights concerning liberty, individual security and property”, it also established that “the indigenous will not be granted political rights in relation to institution of a European character”. The natives would remain under the control of their “pagan authorities as such recognized by the [colonial] administration” (art. 8 of Decree 12,533). It created separate judicial systems for both groups, with private courts for the indigenous. Colonial control was guaranteed by having these courts chaired by the local colonial administrators. These courts would rule in civil and commercial cases between natives and in criminal cases in which both the victim and the accused were natives. In the case either “one of the offended or the accused were non-indigenous, the case would be dealt with by normal courts (art. 14 of Decree 12,533)¹⁰.

The way in which the Portuguese granted limited autonomy within the confines of a certain form of tradition is typical for indirect rule. Tradition was supposed to take care of tenure within the black reserves, as well as part of civil and criminal law. Decree 39,666, the 1954 Statute of Indigenous Portuguese in the Provinces of Guinea, Angola and Mozambique, was quite explicit at this point: “... the indigenous rule themselves through the uses and customs that belong to their respective societies” (art. 3). The same decree contained many restrictions of the natives’ autonomy: Moving from one into another chiefdom required authorization by the administrative authorities (art. 9). Chiefs ruling over chiefdoms were selected according traditional rules, but their investiture depended on approval by the Provincial Governor, who could also dismiss them “when they do not conveniently execute the functions of the office” (art. 11). The populations could not “unseat traditional chiefs installed by the administrative authorities, nor reinstall those who have legally been dismissed” (art. 14). The natives didn’t have “political rights in relation to non-native institutions” (art. 23).

The system the Portuguese introduced in Mozambique is a typical example of indirect rule. However, there is one essential difference with the British imperial system as put into practice in for example South Africa and Zambia. Whereas the British enlisted paramount chiefs or kings, the Portuguese governed through a

¹⁰ The redaction of Decree 12.533 is slightly modified by Decree 16.473 of 6/2/1929.

decapitated structure, from which the paramount chiefs had been removed by force. The king of Maputo, for example, exiled himself in what is today KwaZulu-Natal, whereas many others were killed or exiled to remote corners of the Portuguese empire.

Indirect rule had, according to Mamdani (1995, 1996), the effect of excluding the peasantry from the political stage and imprisoning it in tribal reserves, traditions and identity. Post-independent governments failed to resolve this situation. The politically disenfranchised peasantry remained dependent on its tribe for its self-esteem, its political and cultural identity and its access to land. This situation constitutes, still according to Mamdani, the seed of recent ethnical conflicts in Rwanda, Burundi, Uganda and also in South Africa.

Mozambique is one of the countries where the government failed to emancipate the peasantry after Independence. The Frelimo government did not substitute the colonial order by a democratic system. It stripped the traditional chiefs of their administrative and juridical powers because of their role in colonial administration (Hall and Young, 1997: 51). Despite vocal emphasis on *poder popular* (people's power), the regime and party were highly centralized and top-down. No countervailing power was created that would represent local interests (see for examples O'Laughlin, 1992: 134-135). Consequently, the Post-Independence political system was to a large extent a continuation of the previous monistic autocratic regime. "Frelimo never engaged in constructing a 'new type of state'" (Hall and Young, 1997: 81).

10. The risks of repeating history

The previous sections provided the basis for a critical analysis of the Mozambican land law reform. The analysis demonstrates that in certain aspects the new land law starts from the wrong premises about property, by assuming (as was done during the colonial era), that land is essentially held in common by the community ruled by its traditional chief. Moreover, it recreates the legal dualism, which characterized the colonial system of indirect rule. Finally, evidence indicates that exactly this system, if

not transcended by the post-independence state, is the main culprit of the ethnical violence, which during the past decade caused so many deaths.

Mozambique, until now, never was the stage of ethnically-based conflicts. Yet, as I've mentioned earlier, ethnic divides did play a role during the recently ended civil war. It is my contention that the phantasm of "ethnicism" is alive and capable of becoming more important, in particular due to the already strong regional fragmentation of the state inherited from the colonial era (Hall, 1990). The recent elections confirm the regional character of party support in Mozambique. Renamo, dissatisfied with the results of the 1999 elections, refuses to recognize the elected government and threatens to create its own government structure for the central provinces, where it had a majority vote (Anonymous, 2000; Chaúque, 2000). Renamo and other opposition politicians overtly demand the federalization of the country. These events underscore that the individual ambitions of political parties and their leaders may well try to exploit ethnical and regional divides. In such a context, a law that reproduces legal pluralism according to tribal principles may well prove the road to disaster. These are indeed the risks of trying to repeat history.