Original Article

Can Legal Pluralism Advance Human Rights? How International Development Actors Can Contribute

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Abstract This article discusses how international development actors providing aid to the justice sector in legally plural contexts can support reforms to the normative framework for legal pluralism that contribute to advancing human rights. Based on the case of Mozambique, the article argues that reforms to the normative framework for legal pluralism should be grounded on empirical realities of legal pluralism and their human rights implications. The article suggests that international development actors can contribute to this end at the level of process. This can be done by financing empirical studies on legal pluralism and human rights, and by facilitating informed and participatory dialogue to define policies and legislation.

Cet article examine comment les acteurs du développement international apportant de l'aide au secteur judiciaire dans des contextes juridiques pluralistes peuvent promouvoir les réformes du cadre normatif allant dans le sens du pluralisme juridique, et contribuant à faire avancer les droits de l'homme. En s'appuyant sur le cas du Mozambique, l'article soutient que les réformes du cadre normatif pour le pluralisme juridique devraient être fondées sur la réalité empirique du pluralisme juridique et leurs implications pour les droits de l'homme. Nous avançons l'idée que les acteurs du développement international peuvent contribuer à cette objectif au niveau de la procédure, en finançant des études empiriques sur le pluralisme juridique et les droits de l'homme, et en facilitant un dialogue éclairé et participatif pour élaborer des politiques et une législation.

European Journal of Development Research advance online publication, 28 November 2013;

doi:10.1057/ejdr.2013.46

Keywords: human rights; legal pluralism; justice sector aid; Mozambique; legal reform

Introduction

Legal pluralism, that is, the coexistence of two or more legal orders in the same field of social relations, is often considered to threaten human rights.¹ This is the case as non-state legal orders tend to be associated with discriminatory practices, corporal punishments and disregard for guarantees of a fair trial (Wojkowska, 2006, p. 23). For this reason, international development actors have traditionally excluded non-state law institutions from justice sector aid.² However, legal pluralism continues to be prominent in the developing world, constituting a reality that is difficult to repress or ignore. Perhaps in recognition of this state of affairs, in recent years there has been an apparent shift in these actors' position towards legal pluralism. In the African continent in particular, concerns with improving access to justice as a means to fight poverty have led these actors to acknowledge that most states in this region lack the capacity to provide their populations with justice services and the majority of disputes are handled by customary law institutions (Department for International Development (DfID) 2004; World Bank, 2008). As a result, there is an emerging interest in how international aid can engage with legal pluralism and promote human rights within the structures of dispute processing that most Africans use (Kipfer-Divadi *et al*, 2005; Piron, 2005).³

Many leading donors have issued documents addressing this new area of intervention that discuss programmatic options and provide guidance for practitioners (DfID, 2004; UNDP, 2005; Danida, 2010). Reforms to the normative framework for legal pluralism (that is, reforms in the links between state and non-state legal orders as foreseen by state law) are common interventions put forward by these documents. This is because the normative framework for legal pluralism defines the official relationship between state and non-state legal actors, norms and processes. Therefore, it can potentially contribute to overcoming many of the drawbacks associated with legal pluralism by enhancing clarity and certainty over the applicable law and introducing oversight mechanisms (Harper, 2011, p. 89; Ubink and Van Rooij, 2011).

In line with this, the UK DfID considers that understanding the linkages between state and non-state legal orders is part of an effective strategy towards enhancing the cooperation between different justice providers so that users are better served (DfID, 2004, pp. 10,16). The Ministry of Foreign Affairs of Denmark also sees the clarification of links between state and non-state justice forums as a programmatic entry point for improving monitoring of human rights compliance (Danida, 2010, p. 5). In other words, interventions addressing the normative framework for legal pluralism may have a positive effect on two human rights areas – access to justice and compliance with human rights legislation. They can potentially do this by enhancing the way in which different legal actors interact, improving access to justice, or by developing oversight mechanisms for referral and appeals procedures that lead to better compliance with human rights more generally.

Nevertheless, this strategy has been criticized on several fronts. First, if state justice remains weak or inaccessible, referrals and appeals may not be viable or deliver the expected results (Harper, 2011, p. 49). Second, political will to implement oversight mechanisms may be lacking where non-state justice providers function as vote brokers or have a strong national power base (Ubink and Van Rooij, 2011, p. 14). Finally, reforms to the normative framework for legal pluralism are normally embedded in national politics where international development actors play a limited role (*ibid.*). Yet such reforms are taking place in a number of countries where international actors provide aid to the justice sector, such as in Liberia, Malawi, Mozambique and South Sudan (Deng, 2011; Rawls, 2011; Manda, 2012). This raises pertinent questions regarding their role in these processes. How do donors and international NGOs position themselves in practice with regard to the normative framework for legal pluralism? How can they contribute so that processes that aim at organizing legal plurality lead to better human rights protection?

On the basis of a case study on Mozambique, this article addresses these questions in three sections. Following the introduction, the section analyses how human rights relate to the normative framework for legal pluralism and outlines the elements of a ‘grounded and human rights informed’ approach to legal reforms in this area. The section after that describes the justice landscape of Mozambique, the content of recent reforms initiatives and how development actors relate to them. This illustrates the relevance of the approach presented in the following section and some of the factors that seem to hinder its implementation. The subsequent section then elaborates on international development actors’ entry points for overcoming the identified obstacles and concludes that they should play a proactive role at the level of process. This can be done not only by financing empirical studies, but also by facilitating informed and participatory policy dialogue.⁴

Normative and Empirical Legal Pluralism: Two Sides of the Coin in Advancing Human Rights

Normative frameworks for legal pluralism, that is, policies and legislation establishing the link between different normative orders, can take many forms. In defining the official status of

non-state legal orders, they may deal with non-state laws, with non-state mechanisms of dispute processing or both (Morse and Woodman, 1987; Connolly, 2005; Forsyth, 2007). When state policies take a 'positive' stance towards non-state legal orders, that is, state law does not abolish or ignore them, accommodation can consist of state courts applying non-state laws, non-state justice forums being integrated into the state court hierarchy or the state granting non-state legal orders formal recognition and a varying degree of autonomy. Although no single model offers better human rights protection *per se*, it is important to assess how these frameworks impact on human rights in practice (ICHRP, 2009, p. 92).

For this purpose, it is necessary to draw a distinction between legal pluralism seen from a normative and from an empirical viewpoint. The former is embodied in legislation stipulating how different non-state legal orders are accommodated within the state and interact with each other, whereas the latter refers to an empirical reality, namely, what sources of law coexist *de facto* in a given society and how they relate to each other, independently from whether a state gives them official recognition. This distinction allows for more specificity when studying the relationship between international standards and legal plurality. From the perspective of empirical legal pluralism, one would ask questions such as who are the actors that people encounter on their pathways to justice? Do they operate in a way that respects human rights? How do they articulate with each other? How do these forms of interaction affect people's possibilities to claim their rights? This means that empirical legal pluralism calls for an analysis of the extent to which the legal orders that regulate behaviour in practice are in line with human rights, whether they are official or not.

Normative legal pluralism points instead to whether the state ensures that official non-state legal orders comply with human rights and mechanisms for redress are in place. From this viewpoint, the questions shift towards the role of the state. If the state grants non-state legal actors and/or norms official status, how does it guarantee that they abide by human rights? What kind of mechanisms are in place in order to implement compliance? Although the responsibilities of the state are more straightforward when it comes to guaranteeing that official non-state legal orders respect human rights, the state also has the duty to protect its citizens from human rights violations committed by unofficial legal actors and to take active steps to fulfil human rights. This means that both normative and empirical legal pluralism need to be taken into account in policies and interventions that seek to advance human rights within disputing processes.

Moreover, the normative framework for legal pluralism may impinge on empirical legal pluralism. This is the case because, in the same way as any law, it can be mobilized as a resource to assert and contest authority (Lazarus-Black and Hirsch, 1994). First, it can be used by state officials to regulate non-state justice providers. Second, non-state justice providers may draw on their official status in order to boost their position vis-à-vis other legal actors and justice seekers. And third, justice seekers may resort to it in order to challenge norms, authorities and the power relations they sustain (Kyed, 2009). Therefore, it is necessary to examine whose interests this 'resource' serves. In this sense, a vital issue is that official non-state legal orders are made accountable for human rights. For example, in Sierra Leone, Zimbabwe, Kenya and Lesotho customary laws are recognized by state law but exempted from the constitutional prohibition of discrimination on the basis of gender (Harper, 2011, p. 81). This results in lack of protection of constitutional guarantees for certain groups of citizens who fall under the jurisdiction of customary law and hence in discrimination (Nyamu-Musembi, 2003; Odinkalu, 2006, p. 155).

In addition, the type of relationship established by law between various legal orders can affect the way legal actors interact and the effectiveness of justice (Von Benda-Beckmann F, 1981; Von Benda-Beckmann K 1981). When several parallel institutions compete to settle disputes, society's members have the possibility to choose between forums, which diminishes their

willingness to accept disadvantageous decisions, decreasing a forum's authority and effectiveness (ibid.). This is particularly the case when several law institutions coexist at the same level (ibid.). Where justice providers are illegitimate or coopted by elite interests, competition among different actors can offer alternatives to disadvantaged justice seekers (Oomen, 2005). However, it is often the most powerful who take greatest advantage of 'forum shopping'.⁵ This means that where non-state legal actors are official, lack of regulation, such as clarification of jurisdictional boundaries and appeals and referral procedures, is detrimental for access to justice. This tends to affect marginalized groups, such as women, in particular as they are less able to have their case heard in a forum that will favour them (UN Women, 2011, pp. 70, 71). At the same time, appropriate forms of articulation between state and non-state forums have the potential to advance human rights. Recent research in Northern Mozambique shows that when non-state forums uphold women's rights, they often lack the capacity to enforce such decisions (Corradi, 2011). This could be remedied by improving the collaboration between these and state courts so that the latter intervene in this kind of situation.⁶

In other words, empirical realities of legal pluralism and their human rights implications form a good point of departure for analysing how the normative framework for legal pluralism can contribute to advancing human rights. This is not to say that the official relationship between state and non-state actors as foreseen by law will be automatically translated into reality. Rather, the normative framework for legal pluralism may 'steer' empirical legal pluralism in a certain direction as it constitutes a structure affecting people's possibilities and strategies for action (Giddens, 1984). Therefore, legal reform proposals should be 'grounded' in a good understanding of the realities people experience when seeking justice and informed by the human rights challenges they entail. But normative legal pluralism should not necessarily reflect empirical legal pluralism. Normative legal pluralism aims instead at intervening in social realities. This should happen in a way that allows justice seekers to draw on this framework to challenge exclusionary practices, which may lead to the progressive alignment of empirical legal pluralism with human rights.

Given that the legitimacy of human rights is not accepted in all societies, discussions of how different legal actors interact should be intertwined with dialogue on human rights (An-Na'Im, 1995; Eberhard, 2001; Hellum *et al*, 2007). This would allow the implementation in practice of one of the main insights generated by the 'universality debate', namely, that neither human rights nor local contexts and cultures are fixed but evolve so that tension between both may be overcome (Brems, 2001; Cowan *et al*, 2001; Merry, 2006; Donnelly, 2007). Cross-cultural dialogue on human rights may identify how international standards can incorporate contributions from different cultures and contexts and become more inclusive (Brems, 2001). It can also show how human rights can be flexibly interpreted in order to respond to local needs (ibid.). In addition, it can facilitate exchanges on the social purpose of practices that are problematic and whether and how they could be modified while taking the wider social environment into account (An-Na'Im, 1995; Isser, 2011). Finally, it may allow justice seekers to appropriate the human rights framework as an avenue to channel local concerns and demands (Merry, 2006; Hellum *et al*, 2007). This requires a shift from unidirectional approaches that 'bring' pre-defined human rights to local communities towards bi-directional processes that engage local knowledge in the definition, interpretation and implementation of international standards (Eberhard, 2001; Corradi, 2012).

Reforming Normative Legal Pluralism in Mozambique: A Missed Opportunity?

Mozambique provides a good illustration of how empirical and normative legal pluralism relate to each other and to human rights. As a country that is currently reviewing laws that affect the

normative framework for legal pluralism, it is also a good case study to explore two questions, namely, to what extent are these reforms grounded in empirical realities of legal pluralism and informed by their human rights implications? and what can we learn from the position of international development actors working in Mozambique on legal pluralism?

Empirical Legal Pluralism in Mozambique

Mozambique is a predominantly rural country with a rich cultural, ethnic and linguistic diversity. Legal plurality is one of the defining features of its justice landscape, though the actors and normative repertoires involved in dispute processing vary significantly depending on the region (Santos De Sousa and Trindade, 2003). According to a recent study, 'customary law and the traditional authorities who administer it constitute the primary form of justice for the overwhelming majority of Mozambique's population' (Lubkemann *et al*, 2011a, p. 24). This covers familial and marital disputes, adultery, petty theft, drunkenness and disorderly behaviour, land and resource disputes, cases of sorcery and physical aggression (ibid, p. 26). Customary law processes are oral and their main objective is the restoration of community harmony taking account of collective rather than individual interests. For this purpose, traditional authorities, assisted by elders, lead community discussions that seek to arrive at consensual decisions on how to settle disputes, provide compensation and, if possible, achieve reconciliation (Lubkemann *et al*, 2011a, pp. 24–25). Overall, these justice mechanisms enjoy considerable social legitimacy as they are embedded in the symbolic orders that inform life in the communities where they operate. As highlighted by several authors, there is an important connection between the different ontological orders coexisting in Mozambique and the way conflict is defined and resolved (West, 2005; Jacobs, 2010; Lubkemann *et al*, 2011a). Nevertheless, customary law processes tend to reflect and reproduce social hierarchies and inequality, most notably in the area of gender (Lubkemann *et al*, 2011a, b, p. 60). For example, women are often dispossessed of their property upon divorce, their inheritance rights are seriously curtailed and they are discriminated against in the areas of reproductive rights, education and public decision making (Andrade *et al*, 2001).

But traditional authorities are not alone in this arena. Depending on the locality, they collaborate or compete with an array of other justice providers, such as religious authorities, spirit mediums, community courts, local administrative authorities, the police, community policing councils and paralegal organizations (Santos De Sousa, 2006; Meneses, 2007; Lubkemann *et al*, 2011a). That some of these bodies represent a state authority does not necessarily mean that they always apply state law. For example, local administrative authorities and the police perform dispute processing functions where they combine state and non-state normative orders (Araújo, 2010). Jacobs (2010, p. 132) points out that crime victims consult spirit mediums in the Gorongosa district in order to reveal the identity of their perpetrator(s). The victim subsequently informs the police who may use the information during the interrogation of the accused.

Other examples such as the community courts defy the state versus non-state dichotomy. These tribunals, which are composed of lay judges, were created by the state in order to mediate and seek reconciliation between the parties in minor criminal and civil cases by means of applying 'good sense and justice' (Law 4/92 art. 2, 3). They are the successors of the popular tribunals, which were created in 1978 as the lowest echelon of the socialist legal system established by the Front for the Liberation of Mozambique (FRELIMO) after independence from Portugal.⁷ With the adoption of multi-party democracy and liberal market economy in the early 1990s, popular tribunals were seen as incompatible with the rule of law (Trindade, 2003, p. 117). In order to circumvent this problem, the Mozambican government uncoupled these courts from

the state structures and renamed them 'community courts'. According to the last national mapping, there are 1694 community courts in the country (GoM, 2008). However, they are not part of the official legal system and their regional coverage and levels of popularity are uneven (Santos De Sousa, 2006, p. 58). Although the law that created the community courts (Law 4/92) stipulates that the provincial governments will remunerate community court judges and be responsible for these courts (art. 11, 12), they receive no financial, material or human resource support from the government or the formal courts. Moreover, they are often suspected of political affiliation to the ruling party (OSISA, 2006; Santos De Sousa, 2006).

Although not always associated with judicial functions, traditional healers and spirit mediums act both as a forum for truth seeking and as expert witnesses within disputing processes officiated by other justice providers when a spiritual dimension is at stake (Jacobs, 2010, p. 122). Their intervention is often required in order to identify individuals who induce evil powers, mostly women. This may entail inflicting severe physical violence on the supposed perpetrator to make her confess, and depending on the case her punishment, cleaning and redemption (Meneses, 2007, p. 28; Jacobs, 2010, p. 129). Christian and Muslim religious leaders also play a role as advisers and mediators within their faith group, particularly in the context of familial conflicts (Casimiro and Fonseca, 2009; Jacobs, 2010). In this process, they resort to a combination of local customs and religious values, which do not always respect women's rights (Casimiro and Fonseca, 2009).

In recent years, legal plurality has been further compounded by the creation of Community Policing Councils (Meneses, 2007). These forums present their own challenges. Created by the Ministry of the Interior in 2000 to involve citizens in crime prevention, the Community Policing Councils were left to function by themselves and started to compete with the official police by solving cases on their own, including illegal recourse to the use of force (Meneses, 2007, p. 35). Many paralegal organizations not only offer legal advice, but also settle disputes out of court. Although these organizations may provide alternatives for accessing justice, their quasi-judicial function raises questions of accountability and articulation with other legal actors.

Formal courts are out of reach for the majority of the population because of distance, costs and cultural reasons (OSISA, 2006). Formal state justice was inherited from the Portuguese colonial administration, but was never fully deployed throughout the country because of a lack of financial and human resources. As a result, it is mainly used by middle classes and business people in urban centres (Lubkemann *et al.*, 2011a, b, p. 37). These courts present major operational challenges, such as poor physical infrastructure, lack of access to legislation and jurisprudence, and charges of corruption and political interference (OSISA, 2006). In addition, lack of capacity results in serious case backlogs and breaches of fair trial guarantees, such as exceedingly long pre-trial detention periods and lack of legal counsel (*ibid.*). Overcrowded prisons lack minimal health and safety conditions (*ibid.*). On top of this, the police is reported to handle a significant proportion of crimes out of court, leading to many abuses (Lubkemann *et al.*, 2011a, b, p. 39). All of this contributes to a general distrust of formal state justice institutions, which are perceived as inefficient and illegitimate (*ibid.*).

This means that, as a party to the main African and international human rights instruments, Mozambique faces a number of challenges if it wants to bridge the distance between the standards it adopted in law and the practice of the justice providers that Mozambicans encounter when seeking justice.⁸

Normative Legal Pluralism in Mozambique

The current normative framework for legal pluralism in Mozambique is ambiguous as it gives official status to a number of the above-mentioned non-state legal actors without defining how the

latter relate to each other and to the formal courts. The National Constitution (2004) recognizes ‘the various normative orders and mechanisms of dispute resolution that exist in the Mozambican society as long as they do not contravene the values and fundamental principles of the Constitution’ (art. 4). Additional legislation would render this provision operational (art. 212.3), but so far the existing laws on the topic are silent on many issues. Law 4/92 creates the community courts but does not foresee any form of articulation between them and the formal courts. The Organic Law of the Judicial Courts (Law 24/2007) states that the judicial courts ‘may articulate with other existing conflict resolution instances’ without stipulating which ones or how (art. 6). Article 86, 1–a, 2 states that the district courts will hear appeals from the community courts ‘in accordance with the principles established by the legislation on community courts’, but these principles are not specified. Decree 15/2000 defining the articulation between local state bodies and community authorities limits itself to recognizing the role of village secretaries, traditional authorities and other local leaders (art. 1–1) in maintaining peace, justice and social harmony (art. 4-a), but it does not mention any concrete implementation plan. Regarding the status of customary laws, the Family Law (Law 10/2004) grants official status to traditional marriages that are registered (arts 16, 17, 18, 25, 51) and the Land Law (Law 19/97) recognizes land held according to customary forms of land tenure (art. 12, 24). In other words, these customary laws are applicable in so far as they respect the National Constitution but there exists no legislation or jurisprudence indicating how conflicts between them should be assessed.

From a human rights perspective, this framework presents several gaps. First, it recognizes a number of non-state legal orders as official without clarifying how compliance with the National Constitution can be demanded or monitored. Second, it assigns overlapping jurisdiction to different non-state justice providers, such as the community courts and the traditional authorities, which may generate competition among these actors and diminish their effectiveness. Third, it ignores certain non-state justice providers such as traditional healers, paralegals and Community Policing Councils, whose interventions remain outside the purview of human rights. Finally, this framework provides no guidance on how to address conflicts between customary norms and human rights in the light of the different symbolic orders that coexist in Mozambique.

These lacunae reflect the ambivalent position that the government of Mozambique adopted towards non-state forms of authority in the post-war era.⁹ After years of banning traditional authorities because they were perceived as backward and collaborators with the colonial regime, the Frelimo government recognized the role of chiefs in local governance as part of decentralization reforms that were introduced in the aftermath of the civil war. This shift in Frelimo’s policy constituted a strategy to create political alliances with chiefs, which had been traditionally associated with the opposition (Buur and Kyed, 2006). However, in the absence of a clear framework for legal pluralism, questions about jurisdiction remain unanswered, deterring devolution of power, while *de facto* forms of articulation between non-state justice providers and local state officials allow for political instrumentalization of local justice processes (Kyed, 2009, p. 95). In addition, lack of accommodation and regulation also means less pressure to share the scarce resources of the justice sector with non-state actors.

Current Legal Reform Proposals

There are currently two law reform proposals in Mozambique affecting the normative framework for legal pluralism. First, there is a draft law to replace Law 4/92 in the community courts because of its lack of clarity as regards articulation with the formal courts. Different stakeholders also consider it necessary to replace Law 4/92 because it is outdated and has never been regulated on several points. For example, the amounts that community court judges can request as penalties

and taxes were never updated (art. 3, 2 and art. 5) and the form of remuneration of community court judges was never specified (art. 11). Moreover, many community courts have seen no re-election of their judges since 1987 as the government still has to devise mechanisms for this (art. 13). Nevertheless, the existing draft has been retained at the Council of Ministers for several years and seems not to advance as certain issues remain controversial. For example, the budgetary impact of the law, the procedure for the re-election of judges and whether regulation of community courts will result in an unwanted formalization of their practices.¹⁰

Second, the Criminal Code and the Code of Criminal Proceedings are currently under revision. The draft that is up for legislative consideration contains a number of provisions that modify Law 4/92. For example, all criminal summary proceedings will fall under the jurisdiction of the community courts. This includes corporal injuries that prevent a person from working up to 20 days, robbery up to 60 000 MZN (about USD 2000) and damages up to 60 000 MZN, except for traffic accidents (art. 115). In these cases, community courts are to administer alternative penalties short of imprisonment, such as community work and fines (art. 117). The Ministry of Justice launched this initiative as it is expected that it will relieve the formal courts from case backlogs and contribute to solving the problem of overcrowded prisons, while at the same time reflecting the Mozambican tradition of reconciliation.¹¹ It remains unclear whether this development will prompt more attention to the operation of the community courts from the government, donors and/or civil society. These institutions, which have long been neglected, will suddenly see their jurisdiction expanded, but so far there is no sign that they are being prepared for the task. Moreover, this measure seems not to be accompanied by a commitment to regulate the operation of these tribunals. In other words, the benefits that this reform may bring about could be undermined if no attention is paid to the conditions under which community courts operate. Finally, these reforms only concern the community courts and there is no indication that the gaps in the normative framework for legal pluralism will be filled in any time soon.

The Position of International Development Actors

Most international development actors providing aid to the justice sector in Mozambique endorse the objective of promoting human rights and improving access to justice. For instance, the European Union has a specific budget line to finance human rights activities and includes 'structured dialogue on pro-democratic governance and human rights policies' in its Country Strategy Paper and National Indicative Program agreed with the Republic of Mozambique for the period 2008–2013 (RoM and EC, 2008, p. 46). Access to justice is one of the areas in justice reform assistance supported by the World Bank in Mozambique (World Bank, 2009, p. 27) and Danida's programme for the justice sector is based on the Danish strategy on democratization and human rights (Danida, 2008, p. viii). However, multilateral and bilateral donors tend to ignore legal pluralism.¹² Consequently, there is at present no policy dialogue between these actors and the government on the ongoing reforms in this area.

The official development strategy adopted by Mozambique aims at improving access to justice as a means to fight poverty and includes the promotion of human rights and gender equality as cross-cutting issues in the justice sector. This is envisaged by strengthening formal justice institutions, and when references are made to legal pluralism this is limited to the community courts (GoM, 2006; GoM, 2009). Donors providing support to the government in the justice sector operate according to these official policies, that is, with a focus on state justice institutions, and in a few cases the community courts.

The main actor in this group is Danida, the only donor in Mozambique that incorporates non-state providers in its justice sector programme. Since 2009, the Ministry of Justice in partnership with the local organization 'Centre for Research and Support to Informal Justice' (CEPAJI) has trained about 400 (out of 8470) community court judges on the National Constitution and Law 8/2003 on the local state bodies with financing from Danida.¹³ Danida also supports the Ministry of Justice in the establishment of new community courts in areas where they are absent and it provides funding for civil society organizations that carry out research activities, such as mapping of community courts and studies on legal pluralism. Community court judges and local administrative authorities have also been involved in civic education initiatives on an *ad-hoc* basis. For example, between 2007 and 2009 the EU in partnership with UNDP provided six civic education seminars for community court judges and local administrative authorities on the occasion of the inauguration of new state court buildings.¹⁴ UNDP welcomes the initiative to reform the criminal code so that alternative measures to prison penalties are introduced and promises to support the community courts if the law is passed.¹⁵

However, the absence of a normative framework regulating these tribunals seems not to be a concern for these donors. The adoption of a new law to replace Law 4/92 on the community courts was one of the performance indicators in the field of access to justice, which was considered in the 2009 Joint Review of the Justice Sector by the government and donors, but despite this indicator never being achieved it was simply dropped from subsequent joint reviews.¹⁶ As pointed out by analysts, official development strategies play a negligible role in Mozambique in defining how resources are allocated in practice (Castel-Branco, 2008). Moreover, when it comes to sectors that are politically sensitive, such as the justice sector, the government resists reform while it maintains an appearance of cooperation (Di Renzio and Hanlon, 2007). For their part, donors are lenient on these issues as long as Mozambique remains politically and economically stable and displays satisfactory levels of spending on social indicators, such as health and education, which are more readily associated with poverty reduction, although they remain aid dependant (De Tollenaere, 2006; Di Renzio and Hanlon, 2007; Castel-Branco, 2008).

Other donors, such as the Embassy of the Netherlands, the Embassy of Norway and the Embassy of Sweden, as well as international NGOs, such as Action Aid, Save the Children and Oxfam International, support local civil society organizations working in the area of women's and children's rights.¹⁷ These organizations are financially and technically supported to act as legal service providers in their respective fields. For example, by offering legal counsel and mediation services, contributing to awareness raising and conducting research. Although they collaborate with a broader spectrum of non-state justice providers, including traditional authorities and spiritual leaders, these organizations tend to adopt a thematic approach, such as focusing on access to land, sexual and reproductive rights and domestic violence. Thus far, this has not resulted in articulated positions on how local justice provision and the ongoing reforms to normative legal pluralism affect human rights.

This means that there is at present no demand from donors, government offices, international NGOs or local civil society organizations for a public debate on this issue. At least two factors seem to constrain demand. First, the fact that the government seems unwilling to embark on reforms to the justice sector involving a redistribution of power and resources, while bilateral and multilateral donors do not exert much pressure on these issues as long as some progress can be shown in poverty reduction and peace and stability are maintained. Second, a thematic rather than a cross-cutting view of human rights, which means that, despite their relevance, local justice processes and the normative framework for legal pluralism remain disconnected from mainstream human rights discussions.

Towards 'Grounded and Human Rights Informed' Reforms: The Role of International Development Actors

A first step in overcoming the above-mentioned constraints requires development actors to understand better the connection between the normative framework for legal pluralism and access to justice and human rights. This is not to say that international actors should adopt a position on how legal plurality has to be organized. Rather, their main role lies at the level of process. First, multilateral and bilateral donors can provide financial assistance to local experts, universities and civil society organizations in order to conduct regional network analyses of local justice provision and participatory assessments of the ways in which these networks operate (Forsyth, 2011). International NGOs can collaborate in these processes by providing technical advice and facilitating communication and coordination between the different actors involved. On the basis of this empirical knowledge base, multilateral and bilateral organizations can use policy dialogue to convince governmental actors of the benefits of reviewing the normative framework for legal pluralism as state justice is also affected by it. For example, if state courts disregard how conflicts are processed at the non-state level, non-state justice providers may feel that their work is useless and litigants may be punished twice for the same crime, which can undermine the legitimacy of state justice (*ibid.*). Moreover, competition among non-state justice providers may result in their ineffectiveness and hence cases being also brought to state courts, which overburdens them. Empirical studies can show these effects and demonstrate how improving articulation among all the legal actors involved in a certain locality can be in the interest of state and non-state justice providers, as well as justice seekers. For their part, international NGOs can support local civil society organizations in generating a local demand for reform to change the current *status quo*.

In order to avoid reforms to the normative framework for legal pluralism neglecting important regional differences and resulting in unwanted standardization and uniformity (Kyed, 2011), a three-pronged approach could be followed connecting local realities to national policies and legislation, and back to local regulation. Inspired by the participatory reform process of the Land Law that took place in Mozambique in the mid-nineties, this approach could start by generating the above-mentioned knowledge base, which could subsequently inform participatory regional and national dialogue on the best national policies and legislation (Tanner, 2002). The dialogues could define a number of general issues that are of relevance throughout the territory, while leaving more specific regulation to regional and local levels of decision making (*ibid.*). For example, the national framework for legal pluralism could generate a consensus on intercultural approaches for the resolution of conflicts between local normative orders and human rights and a participatory methodology to be followed for the adoption of subsequent local regulations defining links between legal actors. Multilateral and bilateral donors could finance these dialogic processes at national and local levels, whereas international NGOs and UN organizations could play an important role in the area of monitoring and technical assistance.

One of the lessons learnt from the reform of the Land Law in Mozambique is that instead of adopting laws that are disconnected from local needs and expecting them to change these realities, legislation can serve to strengthen policies that are based on sound social analysis and adopted with some degree of consensus (*ibid.*). Therefore, reforms to the normative framework for legal pluralism need not follow a 'legalistic approach' (Lubkemann *et al.*, 2011b) but should be based on dialogic processes that generate spaces for contestation and arriving at efficient and legitimate agreements (Sage *et al.*, 2010; Wiuff Moe, 2011). It has to be acknowledged that it is not easy to find a formula that ensures all interests are equally represented in such arenas. However, ensuring the participation of local stakeholders and a wide range of actors is a first step

in this process (Tanner, 2002). International NGOs, civil society organizations and local experts can provide some measure of accountability so that the views and interests of marginalized groups are taken into account (Forsyth, 2011). In addition, these actors can contribute to building local capacity to participate in such deliberations (Cornwall, 2002).

Conclusion

Starting from the observation that international development actors recognize the importance of the links between state and non-state law for the protection of human rights in legally plural contexts, this article examined how these actors position themselves in practice when reforms to such links are undertaken in the countries where they provide aid and how they could contribute to ensure processes that aim at organizing legal plurality lead to better human rights protection. The experience of Mozambique shows that, for different reasons, multilateral and bilateral organizations, as well as international NGOs, may overlook this topic despite the existence of ongoing reforms. The reasons for this are fourfold: development actors not fully acknowledging the connection between legal pluralism and human rights, the Mozambican government not seeing the benefits of addressing this issue in depth, donors' priorities lying with classical indicators of poverty reduction and NGOs following a thematic approach to human rights. In other words, there is no articulated view of how the normative framework for legal pluralism interplays with human rights and these actors' interests.

This article illustrates why addressing this issue is in line with their interests. First, these frameworks address the interaction between different legal actors and may prevent unclear articulation between justice providers, resulting in double jeopardy and powerful litigants exerting pressure to have a case heard in a forum that will favour them. At the same time, adequate forms of articulation between different legal actors can lead to more effective justice provision, benefiting both justice seekers and providers. Second, revising these frameworks can enhance mechanisms for demanding human rights compliance and constitute an excellent opportunity for engaging in dialogic processes at local and national levels, resulting in more critical views of how international standards can be (re)defined, (re)interpreted and implemented in ways that respond to local needs. Therefore, reforms in this area may serve as entry points for challenging exclusionary practices that perpetuate poverty and enhancing the legitimacy and effectiveness of justice processes, not least state justice.

However, the process by which these frameworks are adopted is crucial (Tanner, 2002; Wiuff Moe, 2011). If devised as a response to local needs and adopted by means of informed and inclusive deliberation and decision making, the normative framework for legal pluralism may contribute to overcoming existing barriers in access to justice and human rights. Moreover, these frameworks may contain different levels of regulation, so that flexibility and adaptability to regional and local realities is built in. International development actors providing aid to the justice sector can play a constructive role in supporting precisely these kinds of processes. Multilateral and bilateral actors can provide financial aid to support the generation of solid social analysis and advocacy so that governments see the benefits of reforms. They can also finance the organization of participatory debates leading to the adoption of consensual policies and legislation at the national and local levels. International NGOs can also contribute by building local capacity in the areas of research and policy dialogue, and by providing technical advice and logistical assistance in the coordination of activities. However, on its own, the normative framework for legal pluralism will not solve all challenges involved. Therefore, it is as important that international development actors invest in complementary strategies that foster peoples' capacities to

‘navigate’ these structures by providing legal information and supporting paralegals who know how to mobilize these laws (Jackson, 2011; Leonardi *et al*, 2011).

Notes

1. On the concept ‘legal pluralism’, see Griffiths, 1986; Merry, 1988; Woodman, 1998; Tamanaha, 2000; Von Benda-Beckmann, 2002.
2. Other reasons are the perception that the coexistence of competing sets of laws creates legal uncertainty and that non-state law institutions are not easily compatible with the programming approaches of development agencies (Harper, 2011, p. 34).
3. See, for example, the ‘Justice Sector Development Programme Sierra Leone’ (2003–2011, DfID), the ‘Malawi Safety, Security and Access to Justice Programme’ (2001–2011 DfID) and the ‘Support for Rule of Law and a Culture of Human Rights in Liberia’ programme (2007–2009, USAID).
4. These findings are based on qualitative research carried out in Mozambique in August and September 2009 and in February and March 2012. The methods of data collection included semi-structured interviews with a wide array of justice sector stakeholders including officials from bilateral and multilateral development agencies, governmental bodies, international and national NGOs, local experts, state and non-state justice practitioners, community leaders and traditional healers. In addition to the fieldwork, an international forum was organized in Cape Town from 23 to 25 March 2010, which brought together representatives of donor agencies, governmental bodies and civil society organizations identified during the field research. The forum served as a platform to discuss preliminary findings and explore further questions. Invited representatives were asked to present their views and reflect on their experiences regarding the normative framework for legal pluralism and reform proposals dealing with state recognition and regulation of legal plurality, as well as the role of development actors in relation to these issues. A desk review of legislation and programme documents complemented these data, and academic sources provided further insights for the final analysis.
5. The term ‘forum shopping’ refers to the ability to navigate legal problems strategically by calculating which forums will provide the most favourable response according to one’s interests (Von Benda-Beckmann, K. 1981).
6. Local civil society organizations working in the area of gender are exploring the possibility that community courts punish domestic violence with community work in collaboration with district courts, which would intervene if the accused would not fulfil the penalty. Interview with Dr Casimiro, Maputo, February 2012.
7. In the post-independence socialist period (1975–1994), Frelimo followed a policy of abolition of traditional authorities, which were considered collaborators of the Portuguese colonial regime, and installed the popular tribunals in order to replace them (Sachs and Welch, 1990). However, these tribunals were not evenly implemented throughout the territory and traditional authorities continued to have a *de facto* role in the administration of justice (O’Laughlin, 2000).
8. The exception is the International Covenant on Social, Economic and Cultural Rights, which Mozambique has not signed, though Mozambique’s National Constitution protects this category of rights.
9. Mozambique experienced a brutal civil war from 1977 until 1992.
10. Interviews with state officials, civil society organizations and local experts. Maputo, August, September 2009, February, March, 2012.
11. Interview with Mr Carimo, Technical Unit for Legal Reform, Maputo, 17 February 2012; interview with Mr Ragu and Mr Elias, Commission of Constitutional Affairs, Human Rights and Legality, Mozambican National Parliament, Maputo 28 February 2012; Interview with Mr Salimo, Ministry of Justice, Maputo 27 February 2012.
12. Interviews with representatives from the Justice and Legality Donor Working Group (the Embassy of the Netherlands, USAID, the Embassy of Denmark, UNDP, UNICEF, the Embassy of Norway, the Embassy of Sweden, the Embassy of Portugal, UNIFEM, the Italian Cooperation, and the European Commission). Maputo, August–September 2009 and February–March 2012.
13. Interview with Mr Salimo, Ministry of Justice, Maputo, 27 February 2012; Interview with Mr Bitone and Mr Casimiro, CEPAJI, Maputo, 04 March 2012.
14. Project ‘Support to the Citizen in Access to Justice’ 2005–2009 (EU/UNDP/00039005/006).
15. Interview with Ms. Rodolfo, UNDP, Maputo, 28 February 2012.

16. Interview with Mr Dumas, Embassy of Denmark in Mozambique, Maputo, 29 February 2012.
17. Interview with officers of the embassies of The Netherlands, Sweden, and Norway and of Action Aid, Save the Children and Oxfam International, Maputo, August and September 2009.

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