Washington International Law Journal

Volume 31 | Number 1

12-30-2021

New Rules of the Game: The Politization of Community Courts in Mozambique

Molly Utter

NEW RULES OF THE GAME: THE POLITICIZATION OF COMMUNITY COURTS IN MOZAMBIQUE

Molly Utter*

Abstract: After a fifteen-year civil war, the Mozambique government turned to customary justice to address the conflicts that emerged during the war by creating Community Courts. The goal of the Community Courts was to mimic their successful grassroots predecessors, the Popular Courts, and to bring justice to the people, by the people. Yet one year before the creation of the Community Courts, the Mozambican government implemented the Law on the Organization of the Judiciary, which limited formal jurisdiction to the district level and excluded grassroot courts from the official judicial structure. Grassroot courts, most significantly the Popular Courts, ceased to run and were disbanded. This article discusses the question: if the Mozambican government excluded grassroot courts, why did the Frente de Libertacao de Mocambique (FRELIMO) government create the Community Courts? This article argues that the new FRELIMO government created the Community Courts as a tool of political control. This article then explores several recommendations to avoid misuse of customary courts by courts in post-conflict states. First, states should consider placing customary courts under the judicial branch to prevent post-conflict governments from using community courts as a tool of political control. Second, community courts must operate on a continuum between partial-incorporation and non-incorporation into the formal justice system, depending on the cases being adjudicated. Third, the role of codification of customary laws should be reevaluated considering codification's effect on community culture. Despite the advantages of codification, it allows central governments to take away a community's culture and halt the progressive and flexible nature of customary law. Lastly, international scholars must accept that customary justice is necessary and compatible with state-building in post-conflict societies.

* I would like to thank Professor Lenga-Long for her invaluable guidance and feedback, and the entire *Washington International Law Journal* editorial team for their patience, insight, and support. I would also like to thank friends, colleagues, and family who helped brainstorm ideas when there were roadblocks and offered valuable feedback.

INTRODUCTION

After a bloody, violent civil war from 1977 to 1992 between the FRELIMO (Frente de Libertacao de Mocambique) and RENAMO (Resistencia Nacional Mocambicana) parties, Mozambique's government granted amnesty to all involved, turning inward to Community Courts to resolve disputes stemming from the war and to facilitate reconciliation.[1] The Community Courts were created as institutionalized tribunals for conflict resolution; its judgments were in accordance with good sense and equity, bearing in mind the social and cultural values existing in Mozambique, with respect to the Mozambique Constitution.[2] Under this framework, the Community Courts dealt with conciliation, processing, judging, and implementing cases arising from issues stemming from the community. These issues typically were family relationships, cases of other natures whose claims and value were not greater than three times the national minimum wage, and offenses against property.[3]

---

[1] PEZU C. MUKWAKWA, MOZAMBIQUE CONFLICT INSIGHT 10 (Dr. Mesfin Gebremichael ed., 2020), https://media.africaportal.org/documents/MOZAMBIQUE-Conflict-Insights-vol-1-Conflict-Insight-and-Analysis-1.pdf.

[2] João Carlos Trindade, *Rule of law and judicial independence* 19 (United Nations Univ. World Institute for Dev. Econ. Rsch., Working Paper No. 134, 2020), https://www.wider.unu.edu/sites/default/files/Publications/Working-paper/PDF/wp2020-134.pdf.

[3] *Id.* at 20.

Customary courts in Mozambique have enjoyed widespread acceptance and use because of their ability to bring justice to the people, by the people.[4] The Popular Courts—a type of customary court—enabled people to "resolve all problems and difficulties which emerge in the life of the community, the local area, the village or the neighborhood." These courts were considered a guarantee of unity for Mozambican people.[5] Yet towards the end of the civil war, the FRELIMO party considered Popular Courts to be revolutionary, due to their socialist nature, and abolished them.[6] In 1992, FRELIMO reconstituted the Popular Courts as Community Courts, making them hybrid institutions that functioned in the same way as Popular Courts.[7] However, these new Community Courts implemented by FRELIMO centralized power.[8]

The use of Community Courts to centralize power by the new government is a pattern frequently seen in post-conflict states. This article will address the broader question of why post-conflict governments create customary courts. To better understand this pattern, this article will answer the question: if FRELIMO felt threatened by the Popular Courts, why did FRELIMO mimic the Popular Courts by creating the Community Courts after the civil war, despite abolishing the Popular Courts several years earlier?

Customary courts are popular because they typically are a more accessible, culturally relevant, and legitimate venue for resolving disputes. There is also growing recognition that customary courts are more effective at fostering post-conflict reconciliation than formal court systems or tribunals in

---

[4] In this paper, I use the term "customary courts" and "community courts" to mean institutions designed in accordance with customary law to settle disputes between members of a traditional community. Customary law includes the laws, practices, and customs of indigenous people and local communities that are often not written down and gradually change over time. This definition is different from the idea of "customary international law," which refers to the aspects of international law that are based on customs or practice between States. The customary law I refer to is based on the life and custom of indigenous people and local communities; it varies depending on how communities recognize principles and apply them to all aspects of their lives. There can be multiple forms of customary law within one state, making it a non-heterogenous concept. The Community Courts implemented by FRELIMO are a type of customary court, but not the only customary court in Mozambique. I focus on the Community Courts because they offer a clear example of a new central government using customary law and courts to consolidate power. *See* Ewa Wojkoskwa, *Doing Justice: How Informal Justice Systems Can Contribute*, UNITED NATIONS DEV. PROGRAMME, OSLO GOVERNANCE CENTRE 1, 9 (2006), https://www.un.org/ruleoflaw/files/UNDP%20DoingJusticeEwaWojkowska130307.pdf; *see also Customary Law*, INT'L COMM. OF THE RED CROSS, https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law (last visited Sept. 6, 2021).

[5] Aase Gundersen, *Popular Justice in Mozambique: Between State Law and Folk Law*, 1 SOC. & L. STUD. 257, 259 (1992), https://journals.sagepub.com/doi/10.1177/096466399200100209.

[6] *Id.*

[7] The definition of hybrid institutions used herein comes from Professor Boaventura de Sousa Santos. Boaventura de Sousa Santos defines hybrid institutions as legal entities or phenomena that mix different, and often contradictory, legal orders or cultures, giving rise to new forms of legal meaning and action. Boaventura de Sousa Santos, *The Heterogenous Sate and Legal Pluralism in Mozambique*, 40 L. & SOC. REV. 39, 60 (2006), https://www.ces.uc.pt/bss/documentos/Heterogeneous_State_and_Legal_Pluralism.pdf.

[8] *Id.*

post-colonial and post-conflict settings.[9] Customary courts often benefit society in ways formal courts cannot. For example, customary courts are more accessible to citizens, they reflect the traditions and attitudes of the local community, and have both civil and criminal components.[10] Unfortunately, many customary courts in colonized countries became a legal experiment for colonizing powers and were changed to match the colonist nations' preconceptions of culture.[11] The new customary courts established by colonist rulers "crystallized unalterable customary law that would allow them little room to adjust the law in order to control local courts and by extension society."[12] Even where customary courts in post-colonial societies were shaped by the colonizing power, they still tend to reflect the attitudes of the local community.[13]

However, the general international community, scholars of peace, and law-building institutions have failed to recognize the trends that accompany the implementation of customary courts, for three reasons. First, many customary courts have operated largely under the radar of international monitoring groups.[14] This has been possible in part because customary courts are considered "informal" judicial systems, separate from the formal judicial structure.[15] Second, Mozambique has been hailed as a "successful" post-conflict state by the United Nations (UN) because of its free elections, exponential growth rates, and continued peace.[16] This "successful" label has shielded Mozambique from the typical involvement of international monitoring groups. Third, because the Community Courts function as a hybrid institution, not formally recognized by the Mozambique Constitution, the central government can manipulate the norms of the Community Courts. For

---

[9] Rekha Kumar, *Customary Law and Human Rights in Botswana* (Univ. of Denver Hum. Rts. & Hum. Welfare Working Papers, Working Paper No. 52, 2009), https://www.du.edu/korbel/hrhw/workingpapers/2009/52-kumar-2009.pdf.

[10] *Id.*

[11] Brendan Tobin notes that during the colonial period, one of the first colonial experiments with codification was the customary code for Natal (a former province in South Africa). The codification mainly concerned family law and succession. But some scholars believed that Natal's codes were out of touch with African practice and was injurious to custom. Likewise, in Fiji, the British colonists' inability to understand the country's complex political relations resulted in individual land rights being designated as communal title. This codification created new community power structure that was changed by the colonist and served the colonial purpose of forming "near, simple, and governable groups and empowered leaders." Brendan Tobin, Why Customary Law Matters: The Role of Customary Law in the Protection of Indigenous Peoples' Human Rights (Sept. 2011) (Ph.D. dissertation, National University of Ireland Galway) (on file with author).

[12] *Id.* at 67–68.

[13] *Id.*

[14] Leila Chirayath et al., *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems*, WORLD DEV. 1, 3 (2005), https://openknowledge.worldbank.org/handle/10986/9075.

[15] *Id.*

[16] Jeremy Weinstein, *Mozambique: A Fading U.N. Success Story*, 13 J. OF DEMOCRACY 141, 141 (2002), https://muse.jhu.edu/article/17188.

example, the central government manipulated the Community Courts by taking the customary law out of the hands of communities and giving control over customary law to the central government. It is important to understand the interplay between customary and formal courts in post-conflict states to raise red flags when post-conflict states co-opt customary courts, as witnessed in Mozambique.

This article contends that the FRELIMO government created the Community Courts after its civil war to codify customary law and use the courts as a tool of control. Section I explains (1) how the Community Courts in Mozambique were created and shaped from the disbanded Popular Courts; and (2) how the FRELIMO government has been able to change the rules of the Community Courts to make them political tools. Section II introduces the theories of transitional justice.[17] Section III discusses how new governments in post-conflict societies can use state control to manipulate and codify community-based laws formed by tradition. Section IV provides general recommendations for how post-conflict states can insulate customary courts from overreaching central governments.[18] These recommendations may vary, as they depend on the unique and evolving situation in each post-conflict setting. They are not meant to be prescriptive, but to push the conversation of post-conflict rule of law forward. The article concludes by discussing the consequences of politicized customary courts.

[17] Transitional justice "is the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, to ensure accountability, serve justice and achieve reconciliation." U.N. Secretary-General, Guidance Note of the Secretary-General*: United Nations Approach to Transitional Justice* (Mar. 2010), https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf

[18] In post-conflict state building, decisions on decentralization versus centralization come as a strategic choice, where decentralization is often put forward as a solution to governance challenges. One reason for this is because a central state, the power and authority are concentrated in the hands of the central government while regions and local authorities have little to no power. This means even though a country may have three different branches of government (executive, legislative, and judiciary), the transfer of power between the executive and/or legislative power is minimally delegated to subunits such as state, country, municipal. Therefore, in this article when I talk about the central state, I am referring to the executive and legislative branches of government. *See* Giulia Squadrin, *Difference Between Centralization and Decentralization*, DIFFERENCEBETWEEN.NET, http://www.differencebetween.net/miscellaneous/politics/difference-between-centralization-and-decentralization/ (Sept. 6, 2021).

I. THE RISE OF COMMUNITY COURTS IN MOZAMBIQUE

Mozambique has been deemed a "successful" post-conflict society by the United Nations.[19] The country has experienced consecutive free elections, exponential economic growth rates, and continued peace, despite granting amnesty to all parties involved in the civil war.[20] Mozambique granted universal amnesty based on the belief that both parties to the conflict committed equally atrocious crimes against humanity and that both parties used highly localized mechanisms of violence.[21] Because civil war violence was localized and because the State wanted to avoid the formal judicial system, Mozambique focused inward and used customary courts to implement measures of reconciliation that would best suit the communities.[22] Due to its heavy reliance on customary courts after the civil war, Mozambique appeared to offer a positive example of a localized post-conflict reconciliation model. Mozambique provides a useful case study for analyzing how customary courts in post-conflict societies—even when deemed successful—can be used as a tool of political control. To better understand the role of Community Courts in Mozambique, it is important to fully understand both the civil war and the Popular Courts, which led to the establishment of the Community Courts.

A. The Civil War

The civil war can be understood in three separate time periods. The first part took place from 1977 to 1980, when FRELIMO was placed on the front line of attack from two neighbors, South Rhodesia (now Zimbabwe) and South Africa.[23] South Rhodesia sponsored a small group of anti-government protestors, called RENAMO, which was dominated by disgruntled Portuguese individuals who fled Mozambique after the country's independence.[24]

The second part of the conflict took place from 1981 to 1984. During this period, RENAMO operations spread from central provinces into the southern regions of Mozambique. Major transportation and communication arteries were targeted and destroyed, and agricultural production was

---

[19] Weinstein, *supra* note 16, at 142.
[20] *Id*.
[21] *See generally* NATALIA BUENO, MEMORIES AND RECONCILIATION: AMNESTY IN MOZAMBIQUE (2015).
[22] *Id*.
[23] World Peace Foundation, Mozambique: Civil War, MASS ATROCITY ENDINGS (Aug. 7, 2015), https://sites.tufts.edu/atrocityendings/2015/08/07/mozambique-civil-war/.
[24] The RENAMO forces fighting FRELIMO were a subdivision of the Rhodesian security force.

disrupted by mines.[25] A serious drought, rising oil prices, a world economic recession, and a sudden hike in interest rates escalated the conflict.[26] The first attempts to negotiate peace took place in March 1984, when President Samora Machel of Mozambique met with Prime Minister Pik Botha of South Africa.[27] This negotiation failed when South Africa reengaged their support of RENAMO.[28]

The third and final part of the conflict took place from 1984 to 1992 and was marked by negotiation attempts. However, these negotiations failed because the mediators lacked impartiality and did not engage in thorough consultations with either side.[29] An atmosphere of mistrust permeated the talks and statements were misinterpreted.[30] In 1984, a ceasefire with South Africa broke down.[31] The civil war came to an end with the signing of the Rome Peace Accord in 1992, which granted full amnesty to both RENAMO and FRELIMO forces.[32] The civil war resulted in one million deaths and five million persons displaced—a devastating outcome, given that Mozambique's population totaled approximately fourteen million people at the time.[33]

B. The Popular Courts

Throughout the conflict, the Popular Courts served as the primary judicial system. These courts were in existence from 1978 to 1992.[34] After the civil war, Mozambique focused on building a new legal system that was popular and democratic. This was because popular justice was an essential component of Mozambican culture.[35]

---

[25] *See* David Robinson, *Curse on the Land: A History of Mozambican Civil War* (2006) (Ph.D. dissertation, University of Western Australia) (on file with author).

[26] *Id.* at 329.

[27] *Id.* at 171.

[28] Martin Rupiya, *Historical Context: War and Peace in Mozambique*, AN INT'L REV. OF PEACE INITIATIVES: ACCORD 5, 55 (1998), https://www.c-r.org/accord/mozambique/historical-context%C2%A0war-and-peace-mozambique.

[29] Alan Cowell, *Mozambique Truce Accord Reached*, N.Y. TIMES (Oct. 4, 1984), https://www.nytimes.com/1984/10/04/world/mozambique-truce-accord-reached.html.

[30] *See generally* Rupiya, *supra* note 28.

[31] *See* Rupiya, *supra* note 28, at 13.

[32] *General Peace Agreement for Mozambique*, KROC INSTITUTE FOR INTERNATIONAL PEACE STUDIES, https://peaceaccords.nd.edu/accord/general-peace-agreement-for-mozambique (last visited Oct. 16, 2021).

[33] *See Mozambique: Civil War*, *supra* note 23.

[34] João Carlos Trindade & João Pedroso, *The Judicial System: Structure, Legal Education and Legal Training*, *in* LAW AND JUSTICE IN A MULTICULTURAL SOCIETY: THE CASE OF MOZAMBIQUE 113, 115 (Boaventura de Sousa Santos et al. ed., 2006), http://www.codesria.org/IMG/pdf/6-trindade.pdf.

[35] Popular justice was a popular component of restructuring the judicial system in Mozambique because the legal system was based on the principle that laws and legal systems would be placed at the service of the people through an administration that included the participation of the people themselves; Gundersen, *supra* note 5, at 259.

The Popular Courts were created through the Law on the Organization of the Judiciary of Mozambique, Law No. 12/78 of 2 December 1978.[36] They were implemented at six levels: locality, community village, neighborhood, district, province, and Supreme Court.[37] The level of jurisdiction varied between courts.[38] At the district level, the courts could only deal with cases pertaining to family matters and those with financial sums that did not exceed 50,000 metical, the Mozambican currency.[39] At the provincial level, the courts could handle civil and criminal matters that could not be heard at the locality, neighborhood, or district level.[40] At the Supreme Court level, the courts could hear appeals from lower courts, standardize jurisprudence, settle disputes between the lower courts and other authorities, and judge criminal proceedings of those involved in high positions of the FRELIMO party.[41]

The role of judges in Popular Courts merits close consideration because judges were used to ensure popular participation.[42] At each level (except the locality, community village, and neighborhood levels) judges were a combination of professional judges appointed by the Ministry of Justice, judges elected by the Popular Assemblies, and lay judges.[43] The elected judges were lay citizens who had the confidence of the citizens and the FRELIMO party.[44] Lay judges were community members with no formal judicial training, whose function was to mediate and ensure "the people's sense of justice" was reflected in the courts.[45] Each judge exercised authentic jurisdictional functions and could intervene in decisions, in criminal cases.[46]

The Popular Courts contributed to the presence of a new independent state institution by promoting the transition from the colonial state apparatus to a legal system based on popular justice and democracy.[47] The courts allowed for "new" characteristics of Mozambique to be reflected in a new

---

[36] Trindade & Pedroso, *supra* note 34, at 114.
[37] *Id.* at 115.
[38] *Id.* at 115.
[39] *Id.* at 116; Constituição da República de Moçambique [CONSTITUTION] Nov. 30, 1990, art. 32 no. 1a (Mozam.). Today, 50,000 metical equals $784.01 USD. However, I was unable to find the conversion from 1978. *50,000 MZN to USD to Metical to US Dollar Exchange Rate*, MONEYEXCHANGERATE, https://money exchangerate.org/currencyexchange/mzn/usd/50000 (last visited Oct. 5, 2021).
[40] LAW NO. 12/78, ART. 32, NO. 2, a and b.
[41] Trindade & Pedroso, *supra* note 34, at 117.
[42] Gundersen, *supra* note 5, at 259.
[43] Trindade & Pedroso, *supra* note 34, at 116–117.
[44] *Id.* at 115.
[45] *Id.*
[46] *Id.*
[47] Gundersen, *supra* note 5, at 257.

legal framework.[48] Despite the Popular Courts' success, FRELIMO claimed that the Popular Courts were associated with the revolutionary process and linked to socialism.[49] FRELIMO wanted the democratic culture that they were trying to establish to be the only legitimate cultural reference for Mozambicans, which meant formally rejecting the socialist culture of Mozambique.[50] The ideological link to socialism allowed FRELIMO to disband the Popular Courts and create new community-based courts, where FRELIMO could influence the law itself and the ideology of the justice system.[51] This allowed FRELIMO to ensure all those involved with the Community Courts had loyalty to FRELIMO.

C. Community Courts in Mozambique

A year before the end of the Civil War, the FRELIMO government abandoned the judicial system of Popular Courts in the 1990 Mozambican Constitution. The FRELIMO government wanted to disassociate itself with a socialist identity and to create a new and just society.[52] After the civil war, FRELIMO began a radical state-building and societal transformation, which focused on creating a FRELIMO-dominated state apparatus.[53] These efforts impacted the justice system when the FRELIMO government abandoned the Popular Courts, failed to regulate Law No. 4/92, which created the Community Courts, and codified customary norms and processes to create the Community Courts.

---

[48] These new characteristics were based on an alternative form of administration of justice. In the case of the Popular Courts justice was administered in an unofficial format which was dissociated from state power, and the substantial and procedural rules are imprecise, flexible, ad hoc. *Id.* at 259.

[49] Popular courts were "like a weapon permanently aimed at the class enemy, the reactionaries, the traitors, saboteurs of the economy and unscrupulous exploiters, criminals and outlaws throughout the country." Therefore, the Popular Courts were considered a guarantee of consolidation and unity of the Mozambican people to create a new law. This purpose was one reason the Popular Courts were linked to socialism. Another reason the courts were linked to socialism is because they were created during the socialist period in Mozambique. Therefore, when FRELIMO was trying to construct a new democracy in 1994, they wanted the democratic culture to be the only legitimate cultural reference. This meant disassociating with socialist thinking and institutions, such as the Popular courts. de Sousa Santos, *supra* note 7, at 49; Helene M. Kyed, *Legal Pluralism in Post-War Mozambique*, 39 J. OF S. AFR. STUD. 989 (2013) (reviewing Boaventura de Sousa Santos, *The Heterogeneous State and Legal Pluralism in Mozambique*, 40 L. & SOC'Y REV. 39 (2006)); KAPICUA MAPUTO, THE DYNAMICS OF LEGAL PLURALISM IN MOZAMBIQUE (Helene M. Kyed et al. eds., 2012); *see also* Stephen Lubkemann et al., *Dilemmas of Articulation in Mozambique: Customary Justice in Transition*, *in* CUSTOMARY JUSTICE AND THE RULE OF LAW IN WAR-TORN SOCIETIES 13 (Deborah Isser ed., 2012)); Gundersen, *supra* note 5, at 259.

[50] de Sousa Santos, *supra* note 7, at 49.

[51] *Id.*

[52] *See* Gundersen, *supra* note 5, at 263.

[53] Bjorn Bertelsen, *Multiple Sovereignties and Summary Justice in Mozambique A Critique of Some Legal Anthropological Terms*, 53 SOC. ANALYSIS 123, 125 (2009).

To further its mission, FRELIMO created the Organic Law of the Judicial Courts, which stated that this new judicial structure was "consistent with the new philosophy of the organization of the state and many democratic institutions in the country."[54] Yet community courts were not mentioned in the Organic Law of the Judicial Courts. The 1992 Constitution provided the legal framework for the Community Courts; however, the Community Courts were not legally recognized until Law No. 4/92 was implemented. [55] Law No. 4/92 "indicated the need to value and deepen [community style justice], taking into account the ethnic and cultural diversity of Mozambican society."[56] FRELIMO justified the creation of Community Courts by claiming they were able to "resolve small differences within the community and contribute towards harmonizing the various practices of justice and enriching rules, habits, and customs, thus leading to a creative synthesis of Mozambican laws."[57]

Through the implementation of Law No. 4/92, FRELIMO was able to codify community justice and cultural norms and processes. When customary law is codified well and thoughtfully, cultural norms can still exist within the law. However, the process of codification by FRELIMO froze cultural norms in a particular point in time. This made customary law the property of FRELIMO because the party determined which cultural norms would be used in customary law.[58]

After creating the Community Courts, FRELIMO was able to politicize the Community Courts in three main ways: through judges, the appeal process, and through the choice of locations of the Community Courts. The FRELIMO government never provided the regulations needed to implement the law that created the Community Courts, Law No. 4/92.[59] Because these regulations were not promulgated to implement Law No. 4/92, the central

---

[54] Conceição Gomes et al., *Community Courts*, *in* LAW AND JUSTICE IN A MULTICULTURAL SOCIETY: THE CASE OF MOZAMBIQUE 203, 203 (Boaventura de Sousa Santos et al. eds., 2006), https://dataspace.princeton.edu/handle/88435/dsp012z10wt03k.

[55] *Id.* at 203.

[56] *Id.*

[57] PREAMBLE TO LAW NO. 4/92.

[58] *Id.*

[59] "Regulated" for purposes of this paper is akin to "enforced." Law No. 4/92 was enacted in 1992 to allow citizens to resolve minor disputes within the community, to contribute to the harmonization of different legal practices, and to enrich the rules, habits, and customs that lead to a creative synthesis of Mozambican law. However, Law No. 4/92 was never effectuated. It did not include all the details needed to explain how individuals, businesses, state, or local governments might follow the law. It lacked the regulations needed for successful implementation. The Mozambican government never created a regulation, leaving Law No. 4/92 to go unenforced.

government was able to change the rules of the courts.[60] For example, after creating the Community Courts and codifying the laws of the Community Courts, the FRELIMO government decided judicial vacancies would be filled directly by individuals connected with the FRELIMO party.[61] This allowed FRELIMO to politicize the Community Courts and ensure the courts did not create a legal framework that might delegitimize the government.

1. Politicization of community courts through judges

Article 7 of Law No. 4/29 stipulates that Community Courts are to be composed of eight judges, consisting of five full members and three substitutes. In practice, however, the number of judges is not uniform across courts; some courts have fewer judges. [62] Law No. 4/92 determined that the judges of the local and neighborhood courts would continue to exercise their function until the first election, the dates or frequency of which were not stated in the law.[63] In the absence of regulation, there were no elections. This meant judges who previously served on the Popular Courts kept their positions on the Community Courts.[64] Some judges left their positions because they felt a loss of social prestige attached to the position and felt abandoned by their government.[65] Judges who left or died during the civil war were not always replaced.[66]

With no regulatory law to govern the process, replacement of judges was governed by the socio-political environment.[67] New judges were elected through the local *grupos dinamizadroes* (dynamic groups), proposed by neighborhood structures, or by direct intervention of individuals connected with the FRELIMO party.[68] With this structure, almost all the judges belonged to the FRELIMO party.[69] They participated in party organizations such as the

---

[60] Today, Mozambique is ranked 112th across 128 countries in terms of regulatory enforcement based on the World Justice Project Rule of Law Index. Regulatory enforcement measures the extent to which regulations are fairly and effectively implemented and enforced. Regulations, both legal and administrative, structure behavior within and outside the government. When looking at the data from the World Justice Project, the government of Mozambique has a pattern of not fairly and effectively implementing and enforcing regulations. *See WJP Rule of Law Index*, WORLD JUST. PROJECT, https://worldjusticeproject.org/rule-of-law-index/country/2020/Mozambique/Regulatory%20Enforcement/ (last visited Oct. 5, 2021).

[61] *See* Gomes et al., *supra* note 54, 54at 206.

[62] *Id.*

[63] *Id.* at 205.

[64] *Id.*

[65] de Sousa Santos, *supra* note 7, at 56.

[66] *Id.*

[67] *Id.* at 57.

[68] *See generally* de Sousa Santos, *supra* note 7, at 57.

[69] *Id.*

Organizaco da Mulher Mozambicana (Organization of Mozambican Women, which is part of FRELIMO) and local *grupos dinamizadores*.[70] Since new judges had ties to the FRELIMO party, the Community Courts were increasingly seen as instruments of FRELIMO. The perceived politicization of the Community Courts undermined their legitimacy and often created issues with the communities. In Mocimboa de Praia, supporters of RENAMO created their own parallel community court.[71] In Angoche, a municipality won by RENAMO in 2003, the Community Courts struggled to attract litigants because of their political affiliation.[72] The result was a profound distrust of the Community Courts' ability to judge cases with the impartiality parties required.[73] With judges' direct association with the FRELIMO party, Community Courts became a tool for FRELIMO to centralize their political control.

2. A lacking appeal process

Moreover, Law No. 4/92 did not provide for an appeal process to appeal cases from the Community Courts to the official courts.[74] This further delegitimized the courts and centralized FRELIMO's power. Appeals serve two important functions in the Mozambican court system. The first is to correct errors by the initial decision maker.[75] An appellate court often has greater experience, fewer time pressures, a collegial decision-making process, and the ability to correct mistakes of lower courts.[76] Published appellate decisions provide information about erroneous decisions and aid in clarifying the law.[77] Without an appeals process, the decisions of Community Court judges were final. Over time, people simply stopped using the Community Courts in locations dominated by RENAMO supporters due to the politicized nature lack of the appeals process.[78]

---

[70] Gomes et al., *supra* note 54, at 215.
[71] *Id.* at 207.
[72] *Id.*
[73] 54*Id.* at 208.
[74] de Sousa Santos, *supra* note 7, at 56.
[75] Christopher Drahozal, *Judicial Incentives and the Appeals* Process, 51 SMU L. REV. 469, 469–470 (2011).
[76] Susan Haire, et al., *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 L. & SOC'Y REV. 143, 145 (2003).
[77] *Id.* at 470.
[78] *See generally* Gomes, *supra* note 54, at 207.

3. Politization through physical location

The physical location of the Community Courts made them vulnerable to politicization because court proceedings were frequently disrupted by weather and because FRELIMO leased and controlled many of the court buildings.[79] Court locations were not regulated by Law No. 4/92, so many of the Community Courts operated on the same premises as the former Popular Courts.[80] And because the courts operated in open air, court activities were at the mercy of the weather.[81] Sessions were interrupted any time it rained, effectively making the courts seasonal.[82] The Community Courts that operated indoors faced precarious conditions. The buildings were provided by the *grupo dinamizador*, the FRELIMO party, the Administrative Post, the school director of the Municipal Councils, and some even functioned in the homes of the presiding judges.[83] With Community Courts operating in buildings loaned by the FRELIMO party, the courts often had to be shared by the local *grupo dinamizador*.[84] The shared space greatly affected the working hours of the courts, and if the parties were not on time, trials were sometimes operated by members of the *grupo dinamizador*.[85] Without a stable location to operate, document storage was impossible—judges often had to take their files home with them.[86]

To better understand the process of politicizing community justice, it helps to explore how the Community Courts were used as a form of transitional injustice and how legal pluralism allowed FRELIMO to disenfranchise the courts through the codification of customary law. Through these theoretical understandings, it becomes clear how FRELIMO was able to control the Community Courts and use them as a tool of political control to centralize their power in Mozambique's post-conflict state.

II. THEORETICAL FRAMING

The implementation of Community Courts by the FRELIMO government in Mozambique is an example of how a post-conflict government can manipulate transitional justice systems into systems of injustice. This

---

[79] *See id.* at 208.
[80] de Sousa Santos, *supra* note 7, at 57.
[81] Gomes et al., *supra* note 54, at 208.
[82] *Id.*
[83] de Sousa Santos, *supra* note 7, at 57.
[84] Gomes et al., *supra* note 54, at 208.
[85] *Id.*
[86] de Sousa Santos, *supra* note 7, at 57.

section discusses the meaning of transitional justice by examining how a post-conflict state can co-opt transitional justice systems to consolidate power.[87] Section A discusses the normative ideas of transitional justice, including the use of customary courts as a form of dispute resolution. Section B then exposes the normative ideas of transitional justice for their inaccuracies and discusses "transitional injustice."

A. Judicial Systems and Transitional Justice

When post-conflict states do not have an effective justice system, there cannot be an effective regime. [88] An effective judicial system allows for the punishment of injustice and the creation of a strong rule of law.[89]These two characteristics grant the government legitimacy. If the state can show through the judicial branch that they are making strides towards building trust within the fractured society, this highlights that the new regime depends on the fair and impartial administration of law.[90] Thus, individuals within society can see that the state is taking the protection of human rights seriously through a properly functioning legal system. This further shows external international institutions that the state is making strides to become a democracy.[91]

Since the early 1990's, judicial reform in post-conflict societies centered around reestablishing the rule of law.[92] The rule of law, as defined by the UN, is "a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards."[93] Interventions often used to bolster the rule of law includes

---

[87] Transitional injustice is when governments implement transitional justice without maintaining an interest in truth, peace, or democracy but rather with the intention of promoting denial and forgetting, perpetuating violence, and legitimating authoritarianism. *See generally* Cyanne E. Loyle & Christian Davenport, *Transitional Injustice: Subverting Justice in Transition and Postconflict Societies*, J. OF HUM. RTS. (2016).

[88] Jessica Vapnek et al., *Improving Access to Justice in Developing and Post-Conflict Countries: Practical Examples from the Field*, 8 DUKE F. FOR L. & SOC. CHANGE 27, 31 (2016).

[89] *Id.*

[90] *Id.*

[91] *Id.* at 34.

[92] Patricia Lundy & Mark McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom Up*, 35 J. OF L. AND SOC'Y 26 (2008).

[93] *What is the Rule of Law*, UNITED NATIONS AND THE RULE OF LAW, https://www.un.org/ruleoflaw/what-is-the-rule-of-law/. In addition to the United Nations definition of the Rule of Law, The World Justice Project defines the rule of law as a durable system of laws, institutions, norms, and community commitment that delivers accountability, just law, open government, and accessible and impartial justice. These four principles constitute a working definition of the rule of law.

training judges and other legal professionals, supporting the formation of police forces, and establishing human rights commissions.[94]

When the rule of law approach is applied in post-conflict societies, judicial institutions are supposed to become dispute resolution mechanisms that apply rules mechanically and without discretion.[95] There has been an increased reliance on judicial institutions to address direct injustices against individuals, including, human rights abuses, war crimes, and crimes against humanity.[96] To fully address injustices against individuals, the "truth" about past injustices and wrongdoings must be uncovered. This rationale has expanded the definition of judicial reform to include non-formal judicial institutions.[97] Thus, judicial reform has now garnered the title "transitional justice" in post-conflict societies.[98] Transitional justice "is the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, to ensure accountability, serve justice and achieve reconciliation."[99]

The result is the creation of a multi-layered approach to judicial reform, which can include international, national, hybrid, or local institutions.[100] One approach to address judicial reform through transitional justice is to focus on local justice initiatives.[101] The overall goal of local justice initiatives is to set up customary courts that are able to handle cases, such as land disputes, estate disputes, stock-theft cases, and petty criminal matters in an effective, inexpensive manner.[102] These local justice initiatives look different depending on the state and the conflict.

The most common form of a local justice initiative is exemplified in the Gacaca courts in Rwanda. After the 1994 genocide in Rwanda, the prisons

---

[94] Richard Sannerholm, *Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template*, 12 J. OF CONFLICT AND SEC. L. 65, 66 (2007). For example, the UN created a Judicial ethics training curriculum for judges in Nigeria to provide the judges with a framework for analyzing and resolving ethical issues. *Judicial Ethics Training Manual for the Nigerian Judiciary*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, https://www.unodc.org/documents/nigeria//publications/Otherpublications/Judicial_ethics_training_manual_for_the_Nigerian_judiciary.pdf (last visited Sept. 20, 2020).

[95] Balakrishann Rajaopal, *Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination*, 49 WILLIAM & MARY L. REV. 1347, 1363 (2008).

[96] Lundy & McGovern, *supra* note 92, at 266.

[97] *Id.*

[98] *Id.* at 268.

[99] *See* U.N. Secretary-General, *supra* note 17.

[100] Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice*, 34 J. OF L. AND SOC'Y 411, 411 (2007).

[101] Naomi Roht-Arriaze & Laura Arriaza, *Social Reconstruction as a Local Process*, 2 INT'L J. OF TRANSITIONAL JUST. 152, 172 (2008).

[102] Jennifer Widner, *Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case,* 95 THE AM. J. OF INT'L L. 64, 65 (2005).

were bursting with genocide suspects, and conventional courts were overrun with cases.[103] Two years after the genocide, the conventional courts had only managed to try 1,292 genocide suspects, with 130,000 prisoners crammed into a space meant for 12,000.[104] At that rate, tens of thousands of suspects would have been awaiting trial for years.[105] To address this issue, the Rwandan government proposed setting up community-based courts to try genocide-related crimes through the customary Gacaca model.[106] The Gacaca courts were run by local judges and encouraged community participation, making ordinary citizens the main actors in dispensing justice and fostering reconciliation.[107] Customary courts can play an important role in filling the gap of formal courts in post-conflict settings. By providing access to multiple layers of courts, judicial reform has enabled fragile post-conflict societies to rebuild the trust of the civilians and ensure justice for those who endured horrific crimes against humanity.

The government of Mozambique made no effort to create courts like the Gacaca in Rwanda. Mozambique proceeded with a "deny and forget" approach, with wartime crimes given blanket amnesty, leaving no room for truth and reconciliation.[108] With the entire judicial system reimagined, FRELIMO created Community Courts to allow local ethics and procedures to address wartime disputes.[109] Through a critical analysis of normative assumptions regarding truth, peace, and democracy associated with the implications of transitional justice, a new narrative emerges.[110] The next section discusses a new framework for analysis and the shifting of the transitional justice narrative.

B. Shedding New Light on Transitional Justice and Uncovering Transitional Injustices

The central underlying normative assumption in transitional justice is that the law is an impartial source of justice.[111] But beyond normative

---

[103] Leslie Haskell, *Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts*, HUM. RTS. WATCH (May 31, 2011), https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *See* Bueno, *supra* note 21.
[109] *Id.*
[110] Loyle & Davenport, *supra* note 87, at 127.
[111] Susan Thomson & Rosemary Nagy, *Law, Power, and Justice: What Legalism Fails to Address in the Functioning of Rwanda's Gacaca Courts*, 5 THE INT'L J. OF TRANSITIONAL JUST. 11, 13 (2011).

assumptions of transitional justice, a new critical narrative of transitional justice emerges. Even though transitional justice is implemented with "good intentions," governments often misuse mechanisms of transitional justice to subvert the commonly prescribed normative goals previously identified.[112]

The same processes used to promote peace and democracy through the transitioning regime can have very different outcomes than those reported in mainstream media.[113] In reality, these processes often perpetuate conflict by process-specific violence, which includes the targeting of judges or witnesses through death threats.[114] Transitional justice processes have also perpetuated violence when these justice processes target certain groups. For example, violence resulted in Rwanda when the Gacaca courts only tried Hutu nationals.[115] The targeted groups may feel a need to resume violence to avoid the sanctions placed on them.[116]

In addition, if the new regime has a weak rule of law and is not moving towards democracy, the system of transitional justice can legitimize authoritarianism.[117] The term used to describe this critical approach to transitional justice is "transitional injustice."[118] Transitional injustice shows evidence of a state-centric and top-down mechanism used in post-conflict societies because the law allows states to control institutions designed to deliver justice.[119] If the institutions that deliver justice are co-opted by politics, then the rules of the game change. Rules may already exist on paper, but if they are implemented by weak institutions, they may not be enforced due to insufficient resources, capacity, or due to the lack of respect for the rule.[120] Thus, institutions offer elites an arena to maximize political advantage positions, further eroding trust.[121] While there are numerous examples of

[112] Loyle & Davenport, *supra* note 87, at 97.
[113] *Id*. at 132.
[114] *Id.*
[115] *Id*.
[116] *Id*. at 141.
[117] *Id.* at 142.
[118] *Id.* at 127.
[119] *See generally* KIERAN MCEVOY & LORNA MCGREGOR, TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE 411 (1st ed. 2008) (discussing how transitional justice is a heavily politized process and traditionally was applied in a limited and linear time period, yet transitional justice is no longer a linear process and needs to be critiqued from below and above).
[120] Janine Aron, *Building Institutions in Post-Conflict African Economies*, 15 J. OF INT'L DEV. 471, 475 (2003).
[121] Milli Lake, *Building the Rule of War: Post-conflict Institutions and the Micro-Dynamics of Conflict in Eastern DR Congo*, 17 INT'L ORGS. 1, 2 (2017).

transitional injustice, there are no clear examples of a transformative system that avoids the manipulations used by new post-conflict governments.[122]

III. POLITICAL CONTROL THROUGH COMMUNITY COURTS IN MOZAMBIQUE

After the creation of the Community Court, the FRELIMO government used these community-based adjudicatory bodies as a form of transitional injustice and began manipulating the process of justice in the post-conflict state. FRELIMO did this by creating a culture of denial and forgetting (granting amnesty to all involved) and consolidating the autocratic state (intentionally weakening the rule of law by placing judges in the Community Courts who were FRELIMO party members or supporters). But how did the FRELIMO government create a judicial system that gave them the power to delegitimize the Community Courts? In Mozambique, this was done through the "Superior State Approach," which allowed the FRELIMO government to remove customary traditions from communities and make community justice practices the property of the state through codification of customary laws.

A. How the Superior State Approach Allows a State to Politicize Customary Courts

Civil wars or mass conflicts are rarely resolved with clear distinctions between the winner and loser.[123] Despite this unclear distinction, the international community forces newly failed states to transition to democracy.[124] As such, one group (whether this is a dominant political party, religious, or ethnic group) is placed in power over another. Many times, this is done through the influence or selection of these "winner" or "loser" by the international community. Once a new party gains power, it is typically, and also paradoxically, rendered weak because this new government will have lower levels of capacity and legitimacy than is needed to secure buy-in by

[122] As noted above, on the surface the efforts taken by the Rwandan government are normally associated with transitional justice. However, Rwandan transitional justice efforts have been used by the Rwandan government to promote denial and forgetting, renew violence, and legitimize an autocratic regime. These efforts taken by the Rwandan government through transitional justice provide an example of the ways in which the transitional justice process can be subverted for other goals, revealing transitional injustice. *See* Loyle & Davenport, *supra* note 87.

[123] *See generally* Katie Paul, *Why Wars No Longer End with Winners or Losers*, NEWSWEEK (Jan. 11, 2010, 7:00 PM), https://www.newsweek.com/why-wars-no-longer-end-winners-and-losers-70865.

[124] Derick Brinkerhoff, *Rebuilding Governance in Failed States and Post-Conflict Societies: Core Concepts and Cross Cutting Themes*, 25 PUB. ADMIN. & DEV. 3, 13 (2005).

those skeptical of the state.[125] Therefore, creating an unstable environment where the power of the state is contested.

Moreover, post-conflict states are pressured by the international community to administer justice and adhere to the rule of law.[126] After a conflict, establishing a viable justice system is vital to the success or failure of state-building.[127] A state's inability to function justly and effectively can generate conflicts that spill across borders, facilitating criminal networks and transitional violent extremism.[128] However, new governments do not have the capacity to administer justice justly and effectively. To ensure justice is administered, new states often seek to establish rule of law in plural legal systems.[129]

Legal pluralist systems develop in many post-colonial states. These systems typically develop when newly independent states attempt to balance the preservation of their cultural heritage through customary law with that of modern constitutional regimes.[130] Legal pluralism, defined as "two or more legal systems coexist[ing] in the same social field," allows a new state to develop formal judicial systems and use customary forms of justice. [131] There are two forms of legal pluralism. The first one is state law pluralism, where the state incorporates part of non-state law, such as customary law, into its legal hierarchy.[132] The second one is deep legal pluralism, where there is no hierarchy of legal systems, meaning state law and non-state law exist without any formal relationship.[133] New governments adopt one of these two types of legal pluralism after a colonial power departs or a conflict ends because customary courts are the dominant form of legal order. In Mozambique, the use of state pluralism allowed FRELIMO to justify the codification of customary law. In turn, this bolstered FRELIMO's power because FRELIMO was able to dictate how Community Courts would operate but disguise them as customary courts.

The rules that comprise customary courts stem from custom, tradition, religion, and family lineage, which have equal or greater influence in

---

[125] Geoffrey Swenson, *Legal Pluralism in Theory and Practice*, 20 INT'L STUD. REV. 438, 439 (2018).
[126] Sannerholm, *supra* note 94.
[127] *See generally* Office of the U.N. High Commissioner for Human Rights, Rule of Law Tools for Post Conflict States Mapping the Justice Sector, HR/PUB/06/2 (2006).
[128] Swenson, *supra* note 125, at 439.
[129] LAURA GRENFELL, PROMOTING THE RULE OF LAW IN POST-CONFLICT STATES 62 (2013).
[130] David Pimentel, *Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique*, 14 YALE HUM. RTS. & DEV. J. 59 (2011).
[131] Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869, 870 (1988).
[132] GRENFELL, *supra* note 129, at 61.
[133] Merry, *supra* note 131, at 870.

communities recovering from conflict than state law.[134] It is estimated that 80% to 90% of disputes in developing economies are handled outside the state justice system.[135] One reason for this is that, in many post-conflict states, the formal courts are corrupt, overwhelmed, or merely inadequate, in addition to being too far geographically removed to be accessible or meaningful.[136] For these reasons, customary courts may sometimes be the only or better alternative.

The new pluralistic legal system allows parties to select dispute resolution forums based on accessibility, efficiency, cost, and perceived legitimacy.[137] But allowing multiple justice systems to coexist also creates a challenge to the state's claim on a legitimate resolution of legal disputes and the uniform application of the law. This leads to a sustained struggle between the state and customary actors for legitimacy, resources, and authority.[138] Despite state's needing customary systems to gain legitimacy, states have the ability to co-opt the power dynamic and undermine customary courts., as explained in the following paragraphs.

One way a state can remove power from customary courts is through the "Superior State Approach."[139] As noted above, when a new government is appointed the ruling party of a post-conflict state, they assume the role of ultimate authority.[140] Even though a state implements a system of legal pluralism to gain legitimacy, the state is ultimately in charge of rewriting the constitution. This rewriting allows the state to distribute power. To ensure a state has a unified national identity and can effectively address atrocities, it often recognizes the validity of customary law.[141] By framing customary courts as part of the judicial structure, but with limited powers, the state asserts

---

[134] Swenson, *supra* note 125, at 439–440.

[135] I use the term "Developing Economies" instead of "Developing Countries" because the World Bank has stated it no longer makes sense to distinguish countries according to their level of development. Tariq Khokharumar & Sera Juddin, *Should We Continue to Use the Term "Developing World"?*, WORLD BANK BLOG (Nov. 16, 2015), https://blogs.worldbank.org/opendata/should-we-continue-use-term-developing-world; Swenson, *supra* note 125, at 439.

[136] *See generally* Swenson, *supra* note 125.

[137] *Id.* at 440.

[138] *Id*.

[139] Pimentel, *supra* note 130, at 75.

[140] *Id.* Based on the World Justice Project Rule of Law Index, Mozambique is ranked 101st across 128 countries in terms of constraint on government powers. Constraints of government power measures the extent to which those who govern are bound by law. It looks at how the powers of the government and its agents are limited and held accountable under the law. In Mozambique, government powers are not effectively limited by the legislature nor the judiciary. In addition the transition of power is rarely subject to the law based on their score of .39. *See Mozambique*, WORLD JUST. PROJECT, https://worldjusticeproject.org/rule-of-law-index/country/2020/Mozambique/Constraints%20on%20Government%20Powers/ (last visited Oct. 16, 2021).

[141] Swenson, *supra* note 125, at 441.

that it is the proper guardian of local culture.[142] With customary courts in the hands of the state, the state can begin to codify customary law into State law and assert the primacy of statutory courts over that of customary adjudication.[143]

When states codify customary law in new regimes, they are often faced with multiple versions of customary law practiced throughout a country.[144] For example, there are at least sixty customary law systems, and corresponding conflicting value sets, in the region of South Sudan.[145] States often face backlash from indigenous communities when attempting to codify customary law. This is because codified customs are difficult to change and may be used as tools of the state to restrict the application of previously used oral laws.[146] Despite this backlash, states move forward with codifying customary law by identifying common underlying traits or recognizing one preferred rule over another.[147] The result is a system of customary law that undermines its traditional application or results, in the boycott or ignorance of the code by the local populace. Thus, customary law "ceases to be a living law that adapts to suit the community it serves."[148]

By taking custom out of the hands of communities and placing it into the hands of the state, customary law becomes the state's property.[149] Without codification, law is often internalized by the community; unwritten laws enjoy public acceptance of both legal rules and institutions. [150] Unwritten laws also allow for flexibility in their application because as norms change, so do the laws.[151] Yet when these rules and customs are codified, communities cease to be the owners and guardians of customary law.[152] When the state intervenes in the customary process, it controls the custom and takes it away from communities.[153] At that point, customary law is no longer a reflection of community norms and values, but a law defined and imposed by an external authority, ensuring the superiority of state institutions over customary ones.

---

[142] *Id*.
[143] Pimentel, *supra* note 130, at 78.
[144] *See generally Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues*, WORLD INTEL. PROP. ORG., https://www.wipo.int/export/sites/www/tk/en/resources/pdf/overview_customary_law.pdf.
[145] Tobin, *supra* note 11, at 70–72.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.* at 78.
[151] *Id.*
[152] *Id.* at 79–80.
[153] *Id.* at 79.

As part of the Rome General Peace Accord, FRELIMO wrote the 1990 Mozambican Constitution.[154] The Constitution created a multiparty system and recognized the independence of judicial courts from executive and party control.[155] The courts gained their structure from the 1992 Organic Law of the Judicial Courts. The law established three levels of judicial courts—district, provincial, and a Supreme Court.[156] Despite these three levels of judicial courts, the Open Society Initiative reported that, "for Mozambicans, the judicial courts are inaccessible, blocked by a range of obstacles including financial constraints and their physical location. As a result, many citizens continue to rely on alternative mechanisms of dispute resolution, including community courts."[157] As discussed above, the issue in Mozambique was that FRELIMO disbanded the previous customary courts, called Popular Courts. But with most Mozambicans relying on customary justice to address their conflicts, FRELIMO was forced to rely on legal pluralism to maintain power.[158]

The evolution of legal pluralism in Mozambique was not linear. The new government went from relying on a system of no legal pluralism—by disbanding the Popular Courts—to a state law pluralism structure. FRELIMO incorporated customary law by creating the Community Courts, which took on the legacy of Popular Courts by drawing on socio-cultural norms of local communities that emphasized justice for the people, by the people.[159] However, the Community Courts' laws were codified by the state, meaning FRELIMO was able to control the type of justice (such as decisions due to judge selection) within communities. In addition, there was no appeals process to the official courts from the decisions of the Community Courts.[160] The law that created the Community Courts (Law No. 4/92) established how courts could operate and a new law would define their jurisdiction and institutionalization. However the new law did of the Community Courts did not pass until 2005. This meant that until 2005, if a party wanted their case reviewed, they had to bring the existing case to the state courts. Otherwise, the decision rendered by the Community Courts was final.[161]

---

[154] *General Peace Agreement for Mozambique*, *supra* note 32.

[155] *See* ROBERT LLOYD, COUNTRIES AT THE CROSSROADS 2011: MOZAMBIQUE, FREEDOM HOUSE (2011), https://freedomhouse.org/sites/default/files/inline_images/MozambiqueFINAL.pdf.

[156] Trindade & Pedroso, supra note 34, at 120.

[157] OPEN SOC'Y FOUND., MOZAMBIQUE: JUSTICE SECTOR AND THE RULE OF LAW, 15 (2006), https://acjr.org.za/resource-centre/Mozambique%20Justice%20report%20-Eng.pdf.

[158] Trindade & Pedroso, *supra* note 34, at 119.

[159] Paula Rainha, *Update: Republic of Mozambique—Legal System and Research*, GLOBALEX (Apr. 2013), https://www.nyulawglobal.org/globalex/Mozambique1.html#III13; de Sousa Santos, *supra* note 7, at 56.

[160] de Sousa Santos, *supra* note 7, at 56.

[161] *Id.*

Thus, in Mozambique, legal pluralism was used as a political tool to consolidate power and influence. By centralizing influence over both the judicial courts and Community Courts, FRELIMO was able to stay in power.[162]

B. Using Community Courts as Legal Hybrid Institutions

Customary courts fall within the broader "Western" definition of informal justice systems, which are dispute resolution mechanisms that fall outside the scope of formal justice systems.[163] Customary courts are widespread in developing economies. [164] They are the dominant form of dispute resolution, "covering up to 90% of the population in parts of Africa."[165] Characteristics of customary courts include problems and disputes viewed as relating to the whole community, a high degree of public participation, an emphasis on reconciliation and restoring social harmony, a voluntary process, and a flexible procedure.[166] Despite the vast reach and importance of these courts, they are frequently disconnected from the formal judicial systems.[167] Several factors contribute to this disconnect, such as a lack of funding, lack of communication between judges in the formal and informal courts, and no common system of appeals between the customary and formal courts.

Even though customary courts can be de-linked from the formal judicial system and receive no monetary contributions from the government, they are often still tied to the central government.[168] It is often a strategic political decision to delink customary courts from the formal judicial system because it allows the central government to avoid regulating newly implemented customary courts. The government can implement unregulated customary courts as a form of reconciliation after mass atrocities. Governments can also use aspects of the courts as a form of monitoring. A central government can monitor customary courts by deciding the courts' jurisdiction, how judges are elected, whether there are appeal processes, and the locations of the courts.

---

[162] *See generally* Lucas & Samuel Issacharoff, *Constitutional Implications of the Cost of War*, 83 U. CHI. L. REV. 169 (2016).

[163] Formal justice systems involve civil and criminal justice which uses state-based justice institutions and procedures such as police, prosecution, courts, and custodial measures. Wojkoskwa, *supra* note 4, at 15.

[164] *Id.*

[165] Leila Chirayath et al., *supra* note 14, at 3.

[166] Wojkoskwa, *supra* note 4, at 16.

[167] U.N. HUM. RTS. OFF. OF THE HIGH COMMISSIONER, HUMAN RIGHTS AND TRADITIONAL JUSTICE SYSTEMS IN AFRICA, U.N. Doc. HR/PUB/16/2, U.N. Sales No. 16.XIV.1 (2016), https://www.ohchr.org/Documents/Publications/HR_PUB_16_2_HR_and_Traditional_Justice_Systems_in_Africa.pdf.

[168] *Id.*

With the central government redefining customary courts power, the central government can create a new legal scope for the customary courts.[169] This new legal scope allows customary courts to become legal hybrid institutions that governments can use to maintain power.[170]

Mozambican Community Courts became a legal hybrid institution with the creation of the Mozambican Constitution of 1990. The Constitution abandoned the "Popular Justice" system and created a new framework. The Constitution also allowed courts to be sovereign bodies, empowering them to reinforce the legal order and the legal interests of the different governing bodies and entities.[171] The judicial system was no longer accountable to the Popular Assembly and could create its own statutes. The judicial system began to define its power structure through the Law on the Organization of the Judiciary (referred to as Organic Law of the Judicial Courts), which made changes to the judicial system. The first change was that new judicial organizations were to limit formal jurisdiction to the district level (the first level of judicial courts).[172] Through this law, the grassroot courts created under previous judicial organizations, such as the Popular Courts, were excluded from the official judicial structure.[173] At the same time, the judiciary passed Law No. 4/92, creating the Community Courts.[174] The Community Courts were created as "bodies which enable citizens to resolve small differences within the community and contribute towards harmonizing the various practices of justice and enriching rules, habits, and customs, leading to a creative synthesis of Mozambican law."[175] As a type of community justice, the Community Court were to "bear in mind the ethnic and cultural diversity of Mozambican society."[176] Judges were expected to decide cases "with impartiality, good sense, and equity."[177] The Community Courts were assigned to the Ministry of Justice, which was responsible for legal reform, prison services, and registry and notary public services.[178] Having the Ministry of Justice oversee the Community Courts excluded the courts from

[169] de Sousa Santos, *supra* note 7, at 46.
[170] *Id.*
[171] Trindade & Pedroso, *supra* note 34, at 119. Article 167 of the 1990 Mozambican Constitution lists the courts in Mozambique: The Supreme Court and other courts of justice, the Administrative Court, court-martial, customs courts, discal courts, maritime courts, and labor courts. Constituição da República de Moçambique [CONSTITUTION] Nov. 30, 1990, art. 167 (Mozam.).
[172] Trindade & Pedroso, *supra* note 34, at 119.
[173] *Id.*
[174] *Id.*
[175] PREAMBLE LAW NO. 4/92.
[176] *Id.*
[177] CODE CIVIL [C. CIV.] [CIVIL CODE] ART. 2, NO. 2, LAW NO. 4/92.
[178] Trindade & Pedroso, *supra* note 34, at 133.

the official justice bodies, which were under the direction of the Chief Justice of the Supreme Court.

Therefore, by delinking the Community Courts in Mozambique from the formal judicial system, FRELIMO was able to determine the structure of the courts in their favor. FRELIMO created a new court under the guise of incorporating "tradition" and "culture" into the justice system, even if this was not the true motivation.[179] For example, Law No. 4/92 did not clarify how judges would be appointed. With uncertainty surrounding the appointment process, FRELIMO changed the rules: judges were to be selected from FRELIMO organizations, there was not an appeals process, and courts were to be placed in buildings with FRELIMO party members. These attempts to incorporate customary norms by codification allowed FRELIMO to reaffirm its monopoly over legal norms, taming customary law by co-opting it. Community Courts became a weapon that FRELIMO could use to protect their wider interests.[180]

IV. LESSONS LEARNED FROM MOZAMBIQUE: INSULATING CUSTOMARY COURTS FROM POLITICAL CAPTURE IN POST-CONFLICT STATES

Mozambique presents an all too familiar pattern—a new government in a post-conflict state creates a new judicial system that includes both formal and informal courts under the guise of gaining legitimacy in a fragile environment. But this new judicial system is merely a tool used to consolidate power. This is potentially devastating because customary law and courts are a critical aspect of many states. For millions of local communities and indigenous people, customary law is their primary source of law and customary legal institutions are their only viable, trusted option for dispute resolution.[181] Customary law offers internal regulations to communities and defines the rights of those within communities, making customary law integral in countries with weak central governments.[182] Customary law is also flexible and can adapt to the community it serves, making it a living law that gradually changes over time.[183]

---

[179] INT'L COUNCIL ON HUM. RTS. POL'Y, WHEN LEGAL WORLDS OVERLAP: HUMAN RIGHTS, STATE AND NON-STATE LAW, 1, 113 (2009), https://reliefweb.int/sites/reliefweb.int/files/resources/69BEA7340C43DCCEC125766A0045F49A-ICHRP_Nov09.pdf.

[180] *Id.*

[181] Tobin, *supra* note 11, at 7.

[182] *Id.*

[183] *See generally Customary Law*, LEGAL ASSISTANCE CENTRE, https://www.lac.org.na/projects/grap/Pdf/Law_5-Customary_Law.pdf.

Because customary courts and laws are frequently abused, guarding customary courts from co-option as political tools needs to be at the forefront of the rule of law reform. Addressing this issue can provide valuable insights for countries facing a similar situation and help those countries in preserving the independence and legitimacy of their customary courts.

In this section, I argue that to protect customary courts, there must be an understanding about which part of the government oversees customary courts, the process of codifying customary law, how codification can be accomplished while protecting the ability for community norms to develop and evolve, and how the international community should approach rule of law reform. However, it is important to note that each post-conflict state will be faced with different circumstances that will impact how customary courts should be insulated from the central government. The recommendations below might not be applicable for all post-conflict states. The goal of these recommendations is to push the conversation of insulating customary courts forward.

A. Placing Customary Courts Under the Judicial Branch

To ensure that customary courts are insulated from the central government, they should be placed under the judiciary branch. When customary courts are placed under the legislative or executive branch, courts become politized. In Mozambique, the central government placed the Community Courts under the legislative branch, which resulted in the political manipulation of customary law used by the Community Courts. Placing customary courts in the judiciary branch ensures their insulation from an overreaching central government, assuming that the judiciary enjoys some degree of independence.[184]

The Popular Courts in Mozambique, which preceded the post-conflict Community Courts, provide an example of a court placed under the judicial branch. The Popular Courts were successful in part because they were under the judicial branch and there was clear separation of the judicial system from the legislative branch. Popular Courts were created at all levels of Mozambique's administrative divisions, with professional lay judges; each level of the Popular Courts had clear instructions on the types of cases they could hear and punishments they could hand out.[185]

[184] If the judiciary is not independent from the central government, then the central government will be able to use customary courts as a political tool.

[185] Trindade & Pedroso, *supra* note 34, at 115.

With respect to jurisdiction, the Popular Courts had a clear description of the criminal and civil cases they could hear at each level. For example, the local level Popular Courts could hear criminal matters dealing with only minor infractions liable to lead to sanctions such as public warning, community service for up to thirty days, and fines not exceeding 1,000 metical.[186] In civil matters, the Popular Courts could only deal with cases involving amounts not exceeding 10,000 metical.[187] On the other hand, district level Popular Courts dealt with any criminal case that could lead to a prison sentence of up to two years, and with infractions committed by judges from the locality, community village, or neighborhood popular courts.[188] For civil matters, the district level Popular Courts could deal with cases pertaining to family matters and all other cases in which the dispute at issue did not exceed 50,000 metical.[189]

Judges became the most important part of the Popular Courts. The Popular Courts employed professional judges trained by the formal judicial system who could bring formal law principles into the communities.[190] Mixed in with the professional judges were lay judges who would ensure that the people's sense of justice was reflected in the court's practice.

Based on lessons learned from the Popular Courts, if customary courts are to be under the judicial branch, there are several prerequisites:

- Independence of the judicial branch
- Customary courts are available at all levels throughout the country
- Partnership between professional and lay judges, with lay judges carrying the trust and respect of community members
- Each court has clear jurisdiction over defined classes of cases and punishments that match the purpose of the courts.

Even when situated under the judicial branch, the Popular Courts ended up being a vehicle for the imposition of state power because the judiciary wasn't independent from the central government. Unfortunately, the downfall of the Popular Courts is an all too familiar story for customary courts in centralized, authoritative states. If a State has a strong, authoritarian leaning central government, the judicial branch will tend to be less independent because there is little division between branches of government and the central government can dictate which judges serve on the judiciary. With a less independent

[186] *Id.* at 116.
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *See* Gundersen, *supra* note 5.

judiciary, central governments are able to politicize the courts by appointing judges who have no judicial training, accept bribes that impact or determine outcomes, and determine the rules for how a court will function.

While many believe the judicial branch is the best place for customary courts to be situated, every post-conflict country is different; customary courts should be placed within the judicial branch only if the judicial branch shows signs of independence. To further insulate customary courts from an overreaching central government, one must consider the level of incorporation and ensure constitutional provisions recognize customary law and courts.

1. Appropriate level of incorporation

Once customary courts are placed under the judiciary branch, the next challenge is deciding the extent to which customary courts are incorporated within the formal court system.[191] There are three types of incorporation: full incorporation, non-incorporation, and partial incorporation.

Full incorporation is when the state fully integrates customary justice with a dedicated and defines the role vis à vis a formal system.[192] Full incorporation is rarely the appropriate option for customary courts because it gives full power to the central government to define the laws that the customary courts will implement.

Non-incorporation is when a state grants full reign to local communities to apply and follow their local values, norms, and customs.[193] Informal and formal courts coexist but operate independently with strict jurisdictional boundaries between them.

Partial incorporation is when a state blends the advantages and disadvantages of both formal and informal justice.[194] Formal and informal justice systems operate relatively independently, but informal justice receives recognition, resources, and oversight from the state.[195]

The recent trend in post-conflict states has been to use a system of non-incorporation. One of the advantages of non-incorporation is that it builds on pre-existing structures. To build on pre-existing structures, the constitution

---

[191] Incorporation in this article refers to how customary courts are incorporated into the formal judicial system.

[192] Matt Stephens, *Typologies, Risks and Benefits of Interaction Between State and Non-State Justice Systems*, *in* CUSTOMARY JUSTICE AND LEGAL PLURALISM IN POST-CONFLICT AND FRAGILE SOCIETIES CONFERENCE PACKET 143, 146 (2009).

[193] *Id.*

[194] *Id.*

[195] *Id.*

and laws must recognize the existence of customary law.[196] Additionally, formal courts must consider the outcomes of customary courts in their deliberation. Another advantage of non-incorporation is that it allows for regional autonomy, which can enhance recognition of local customary forms of governance.[197] But non-incorporation has downsides, too. For instance, non-incorporation can result in customary courts being exploited by elders, men, and elitists. Women's rights can be compromised when customary courts are fully independent.[198] Women's rights can be compromised in customary courts when the courts are be located in patriarchal societies or women's rights are not considered human rights in a State.[199] Incorporation underscores that in order for legal pluralism to be successful, reform must integrate formal and customary justice and the importance of building on pre-existing legal systems.

Intuitively, when deciding which level of incorporation to adopt, partial incorporation seems like the structure that would allow customary courts to flourish. However, under this structure, customary systems face challenges with state overreach, formalizing the informal, and limitations on scale and resources. Yet non-incorporation can diminish the rights of women. The optimal approach is highly contextual and may vary from community to community within a country. Therefore, the best approach for a post-conflict state may be to allow customary courts to operate on a continuum between partial and non-incorporation, depending on the cases being adjudicated.

2. How customary law should be addressed in a constitution

Even if customary courts can insulate themselves through incorporation, the constitution of a post-conflict state must still reflect the power of customary courts. Constitutions allow post-conflict states to assert their sovereignty, even if the state is a legal pluralistic one.[200] Even when States allow for legal pluralism in their constitutions, customary courts can be

---

[196] *Id.* at 152.

[197] *Id.*

[198] *See generally* U.N. HUM. RTS. OFF. OF THE HIGH COMMISSIONER, WOMEN'S RIGHTS ARE HUMAN RIGHTS, U.N. Doc HR/PUB/142, U.N. Sales No. E.14.XIV.5 (2014), https://www.ohchr.org/documents/events/whrd/womenrightsarehr.pdf; *see also Legal Standards: Gender Equality and Women's Rights*, INTER-AMERICAN COMM'N ON HUM. RTS. (2015), https://www.oas.org/en/iachr/reports/pdfs/legal standards.pdf.

[199] *See Legal Standards: Gender Equality and Women's Rights*, INTER-AMERICAN COMM'N ON HUM. RTS. (2015), https://www.oas.org/en/iachr/reports/pdfs/legalstandards.pdf.

[200] Tobin, *supra* note 11, at 98.

forced to negotiate and reconcile the culture and norms that are the foundations of customary law and courts.[201]

To insulate customary courts from a central state government, constitutional provisions must explicitly grant and recognize customary law and traditional institutions. Recognition can include, but is not limited to:

- Including a definition of customary law
- Establishing procedures for proof of customary law
- Recognizing customary law as forming part of national law
- Recognizing traditional authorities and traditional practices for their establishment guaranteeing, promoting, and/or recognizing rights to culture and/or cultural integrity
- Establishing requirements regarding application of customary law by courts
- Establishing or maintaining traditional or local courts
- Requiring customary courts to include judges versed in customary law
- Creating advisory bodies or councils formed by traditional authorities to participate in decision-making directly and provide for expert advising on national law and its effect on customary law
- Defining the relationship between customary law and common, constitutional law, and/or national law
- Setting forth procedures to ensure, to the extent possible, that customary laws do not conflict with human rights as set forth in national (and international) law.[202]

The first step to ensuring that customary courts are insulated from the heavy hand of central governments is to engage in partial or non-incorporation, place customary courts under the judicial branch, and confirm that constitutions have a clear recognition of customary courts and laws.

B. What Does Codification Mean?

The situation in Mozambique demonstrates that codification of customary law gives power to the state. Codification is an extremely controversial course of action yet has been practiced for thousands of years. Codification is the formulation and reduction of customary law to a written

[201] *Id.* at 99.
[202] *Id.*

version of rules of law that establish doctrines and precedents.[203] In comparison, customary law is typically an unwritten source of law. Customary law tends to be oral law, allowing the law to respond to shifts in priorities and experiences within a community.[204] Further complicating codification is the fact there is not an agreed upon universal process of codification, leaving each state in charge of determining how to codify. To add to the complexity of codification, each community has its own customary law. This can result in codification of the laws of a dominate tribe or ethnic group that may be inconsistent with that of other tribes or groups, effectively devaluing other forms of customary law.[205] For example, in Tanzania, the customary laws that were codified were largely based upon the practices of the Bantu tribes, which conflicted with other groups' customary laws.[206]

In the colonial period, there was an "obsession with rules and a continued failure to understand customary law."[207] During decolonization, newly independent states inherited a diverse body of customary law composed of official codified custom, court custom, and living custom. This resulted in a desire to respect customary law but also to do away with distinctions and secure one law for all. To create one governing law required some form of codification of the legal system.[208]

There are advantages to codification, such as transparency, consistency, and regulation of research resource collection of customary law to ensure human rights are incorporated into customary laws.[209] However, the advantages do not outweigh the problems. Below is a list of the issues that codification of customary laws entails:

- Locks in one interpretation of local norms. The issue with this is there are always varied customary legal regimes, and harmonization undermines customary laws traditional approach.
- Culture and custom become the property of the state. Codification occurs within the legislature, which means only the legislature can be fully empowered to amend it. Thus, communities that produce the law are deprived of their role in shaping the law. Without change by

[203] Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995, 1003 (2012).
[204] Pimentel, *supra* note 130, at 77.
[205] T.W. Bennett & T. Vermeulen, *Codification of Customary Law*, 24.2 J. OF AFR. L. 206 (1980).
[206] *Id.*
[207] Tobin, *supra* note 11, at 68.
[208] *Id.*
[209] *Id.* at 72.

communities, customary law ceases to be a living law that adapts to suit the community it serves.[210]

- Without change, customary law becomes a tool of the state to restrict the application of the living law of the people. Without the growth of custom, customary rights stop.[211]
- Courts may not arrive at the same interpretation of the customary rights once they are codified if they follow strict construction or functional interpretation.[212]
- Codification legitimizes the illegitimate and entrenching saying of "poor justice for the poor."[213]

C. Rethinking the Role of International Monitoring

Lastly, the example of Mozambique suggests that the international community and scholars of peace and law-building institutions should reevaluate the role and implementation of customary courts in post-conflict states. When the UN hailed Mozambique as a "successful" post-conflict state, the central government was shielded from involvement by international monitoring groups. Reevaluating the framework in which the international community engages with post-conflict societies includes encouraging reform that protects customary institutions from political capture. Rethinking justice may include:

- Recognizing that justice reform is not just a technical exercise; it is surrounded by complex cultures, socio-economic realities, and is inherently political.[214]
- Focusing on sharing information, equipment, training between customary courts.[215]

---

[210] *Id.* at 71.
[211] *Id*.
[212] *Id*.
[213] *Id*.
[214] *See* Deborah Isser, *Re-thinking Legal Pluralism and the Rule of Law in Post-Conflict and Fragile Countries*, *in* CUSTOMARY JUSTICE AND LEGAL PLURALISM IN POST-CONFLICT AND FRAGILE SOCIETIES CONFERENCE PACKET 13 (2009).
[215] *See* Helen Maria Kyed, *On the Politics of Legal Pluralism: The Case of Post-War Mozambique*, in CUSTOMARY JUSTICE AND LEGAL PLURALISM IN POST-CONFLICT AND FRAGILE SOCIETIES CONFERENCE PACKET 155 (2009).

- Having a multi-layered strategy that offers support to state and nonstate systems, acknowledging that plural legal systems are inevitable in many post-colonial, post-conflict settings.[216]
- Viewing customary justice as viable homegrown alternatives to standard western templates.[217] This can be done in four ways:
    (1) Place customary courts under the administration of the judicial branch if the judiciary enjoys adequate independence.
    (2) Constitutions should clearly recognize customary courts and laws.
    (3) Reconsider the codification of customary law, which can allow allows a central government to use customary law as a political tool of control; and
    (4) Have the international community rethink justice reform to ensure it is not just a technical exercise but is a multi-layered strategy that does not see customary justice as an obstacle, but instead as an opportunity for homegrown alternatives that can allow a post-conflict state to have a chance at a successful transition to non-conflict.

CONCLUSION

In the beginning of this article, I asked why FRELIMO created Community Courts after the Mozambique civil war, despite abandoning previous forms of customary justice in the 1990 Constitution. Throughout this paper, I argued that the FRELIMO government implemented Community Courts after the civil war as a tool of political control. The FRELIMO government created Community Courts through Law No. 4/92, accomplishing two objectives. First, by creating the Community Courts, the government used state law pluralism to incorporate customary law used by the Popular Courts into its legal hierarchy. Second, through the state law pluralism, the FRELIMO government was able to codify customary law, meaning that the legislative branch was able to determine and change the laws of the Community Court, making laws a political tool for the FRELIMO government.

To limit customary courts' power, the new government can codify the customary law on which customary courts depend on. Codification of customary law allows a state to assert primacy over customary adjudication.

---

[216] *See* Bruce Baker, *Hybrid Policing in Sub-Saharan Africa*, *in* CUSTOMARY JUSTICE AND LEGAL PLURALISM IN POST-CONFLICT AND FRAGILE SOCIETIES CONFERENCE PACKET 170 (2009).

[217] *See* Isser, *supra* note 214.

In essence, through codification, a government can take customs out of the hands of communities and place them into the hands of the state. By having control over Community Courts, the FRELIMO government was able to determine the role of judges, judges' scope, how judges are elected to the courts, and the location of courts. These actions allowed the FRELIMO government to politicize the Community Courts and use them as a form of control over opposition members in rural areas that threatened the stability of the new FRELIMO government.

The system of legal pluralism in Mozambique enabled the FRELIMO government to change the rules of the Community Courts to use laws as a political tool. The politicization of Community Courts changed Community Courts from being justice for the people, by the people, to justice determined by the dominate political party in Mozambique. With Community Courts being a FRELIMO backed judicial system, those in support of RENAMO lost trust in Community Courts and stopped using them. Without access to justice via the Community Courts, a many in Mozambique were left with no avenue for redress. By creating a system in which courts were politized, the FRELIMO government created a post-conflict state rife with underlying conflict. Between 2002 and 2016, Mozambique faced political unrest, which stalled peace negotiations and intensified small scale conflict. These examples of intensified conflict highlight the importance for post-conflict societies to create customary courts independent of the new central government.

First, to ensure independence of customary courts, states should consider placing customary courts under the judicial branch. To do this, the degree of independence of the judicial branch needs to be carefully evaluated. If the judicial branch is independent from the executive and legislative branch, then the customary courts should be placed under the judicial branch. Second, the level of incorporation between the customary court and formal judicial system, and recognition of customary law in the constitutional recognition will further ensure customary courts are insulated from a central government trying to politicize and manipulate customary courts. The optimal approach for level of incorporation into the formal judicial system is highly contextual and may vary between communities within a country. The best approach for a post-conflict state may therefore be to allow customary courts to operate on a continuum between partial and non-incorporation, depending on the cases being adjudicated. Third, the role of codification needs to be reevaluated. Despite the advantages of codification, it permits central governments to take culture out of the hands of communities and halt the progressive nature of customary law. Lastly, international scholars must accept that customary justice is important, view customary justice as compatible with the mission of

state-building in post-conflict societies, and incorporate these core principles into new ideas of justice reform.