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Artigos

From substantive pluralism to procedural pluralism: a proposal beyond analytical questions for Portuguese- speaking African realities

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Abstract

At first, the approach of this article is linked to the various concepts of legal pluralism, which illustrate the theoretical differences between high and low density, weak and strong, independent and autonomous, prescriptive and descriptive pluralism. On the other hand, the article seeks to understand the manifestation of legal and sociological pluralism, which in Africa has a strict relationship with the models of colonial domination that were present in Portuguese and English-speaking countries, in which certain models conditioned the regression of the recognition of the normative plurality of these states, through a colonial positive theory, imposed without assessing the sociological and cultural framework of the African peoples. Finally, the article presents a conception of an adjective pluralism, also known as procedural pluralism, which involves a series of structures for the formation of an institutional and procedural plurality that is capable of maintaining links with functional elements of the traditional justice system, with the aim of a systemic and peaceful dialogue that feeds back into the formal state system, especially in the jurisdictional sphere.

Keywords: procedural legal pluralism; African families of law; epistemic coloniality; the crisis of legal positivism.

Do pluralismo substantivo ao pluralismo processual: uma proposta além das questões analíticas para as realidades africanas de língua portuguesa

Resumo

Em um primeiro momento, a abordagem deste artigo está ligada aos diversos conceitos de pluralismo jurídico, que ilustram as diferenças teóricas entre pluralismo de alta e baixa densidade, fraco e forte, independente e autônomo, prescritivo e descritivo. Por outro lado, o artigo busca compreender a manifestação do pluralismo jurídico e sociológico, que na África tem estrita relação com os modelos de dominação colonial presentes nos países de língua portuguesa e inglesa, em que determinados modelos condicionaram o retrocesso do reconhecimento da pluralidade normativa desses Estados, por meio de uma teoria positiva colonial, imposta sem avaliar o quadro sociológico e cultural dos povos africanos. Por fim, o artigo apresenta uma concepção de pluralismo adjetivo, também conhecido como pluralismo processual, que envolve uma série de estruturas para a formação de uma pluralidade institucional e processual capaz de manter vínculos com elementos funcionais do sistema de justiça tradicional, com o objetivo de um diálogo sistêmico e pacífico que retroalimenta o sistema estatal formal, especialmente na esfera jurisdicional.

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Palavras-chave: pluralismo jurídico processual; famílias africanas de direito; colonialidade epistêmica; a crise do positivismo jurídico.

Del pluralismo sustantivo al pluralismo procedimental: una propuesta más allá de las cuestiones analíticas para las realidades africanas lusófonas

Resumen

En un primer momento, el enfoque de este artículo está vinculado a los diversos conceptos de pluralismo jurídico, que ilustran las diferencias teóricas entre pluralismo de alta y baja densidad, débil y fuerte, independiente y autónomo, prescriptivo y descriptivo. Por otro lado, el artículo pretende comprender la manifestación del pluralismo jurídico y sociológico, que en África tiene una estricta relación con los modelos de dominación colonial que estuvieron presentes en los países de lengua portuguesa e inglesa, en los que determinados modelos condicionaron la regresión del reconocimiento de la pluralidad normativa de estos estados, a través de una teoría positiva colonial, impuesta sin valorar el marco sociológico y cultural de los pueblos africanos. Por último, el artículo presenta una concepción de pluralismo adjetivo, también conocido como pluralismo procesal, que implica una serie de estructuras para la formación de una pluralidad institucional y procesal que pueda mantener vínculos con elementos funcionales del sistema de justicia tradicional, con el objetivo de un diálogo sistémico y pacífico que retroalimente el sistema estatal formal, especialmente en el ámbito jurisdiccional.

Palabras clave: pluralismo jurídico procesal; familias africanas del derecho; colonialidad epistémica; la crisis del positivismo jurídico.

Du pluralisme substantiel au pluralisme procédural : une proposition au-delà des questions analytiques pour les réalités africaines lusophones

Résumé

Dans un premier temps, l'approche de cet article est liée aux différents concepts du pluralisme juridique, qui illustrent les différences théoriques entre le pluralisme de haute et de basse densité, faible et fort, indépendant et autonome, prescriptif et descriptif. D'autre part, l'article cherche à comprendre la manifestation du pluralisme juridique et sociologique qui, en Afrique, a une relation stricte avec les modèles de domination coloniale présents dans les pays portugais et anglophones, dans lesquels certains modèles ont conditionné la régression de la reconnaissance de la pluralité normative de ces États, à travers une théorie positive coloniale, imposée sans évaluer le cadre sociologique et culturel des peuples africains. Enfin, l'article présente une conception d'un pluralisme adjectif, également connu sous le nom de pluralisme procédural, qui implique une série de structures pour la formation d'une pluralité institutionnelle et procédurale qui peut maintenir des liens avec des éléments fonctionnels du système de justice traditionnel, dans le but d'un dialogue systémique et pacifique qui se répercute sur le système étatique formel, en particulier dans la sphère juridictionnelle.

Mots clés : pluralisme juridique procédural ; familles africaines du droit ; colonialité épistémique ; crise du positivisme juridique.

从实质性多元化到程序性多元化：针对非洲葡语区现实问题的建议

摘要

本文首先关注法律多元主义的各种概念以及它们之间的联系，阐明了高密度与低密度、弱与强、独立与自治、规定性与描述性多元主义等理论差异。作者试图理解非洲的葡萄牙语国家和英语国家的诸多法律学说和社会学说里面普遍存在的多元主义的现像。由于这些国家曾经遭受过严酷的殖民统治，历史上的葡萄牙和英国的殖民模式制约了当前非洲的法律多元主义。当代的后殖民主义理论虽然承认了这些国家法律的多元性，但是它没有充分评估非洲国家的社会、文化和历史背景。最后，本文作者认为，法律程序多元化问题，它涉及到一系列制度性的结构，这些结构应该与传统司法系统进行和平的、系统性的对话，并将对话结果反馈到正式的司法领域，以便改善国家的治理体系。

关键词：程序法律多元化；非洲法系；认知殖民性；法律实证主义的危机。

Vom substantiellen Pluralismus zum prozeduralen Pluralismus: ein Vorschlag jenseits analytischer Fragen für portugiesischsprachige afrikanische Realitäten

Zusammenfassung

Der Ansatz dieses Artikels ist zum einen mit den verschiedenen Konzepten des Rechtspluralismus verbunden, die die theoretischen Unterschiede zwischen hohem und niedrigem, schwachem und starkem, unabhängigem und autonomem, präskriptivem und deskriptivem Pluralismus verdeutlichen. Andererseits versucht der Artikel, die Manifestation des rechtlichen und soziologischen Pluralismus zu verstehen, der in Afrika in enger Beziehung zu den Modellen der kolonialen Herrschaft steht, die in den portugiesischen und englischsprachigen Ländern herrschten, in denen bestimmte Modelle den Rückschritt der Anerkennung der normativen Pluralität dieser Staaten durch eine koloniale positive Theorie bedingten, die aufgezwungen wurde, ohne den soziologischen und kulturellen Rahmen der afrikanischen Völker zu bewerten. Schließlich stellt der Artikel eine Konzeption eines Adjektivpluralismus vor, der auch als Verfahrenspluralismus bekannt ist und eine Reihe von Strukturen für die Bildung einer institutionellen und verfahrensrechtlichen Pluralität umfasst, die Verbindungen zu funktionellen Elementen des traditionellen Rechtssystems aufrechterhalten kann, mit dem Ziel eines systemischen und friedlichen Dialogs, der in das formale staatliche System zurückfließt, insbesondere im Bereich der Gerichtsbarkeit.

Schlüsselwörter: Verfahrensrechtlicher Pluralismus; afrikanische Rechtsfamilien; epistemische Kolonialität; die Krise des Rechtspositivismus.

Introduction

Firstly, it must be stressed that this work seeks to present a proposal based on dialogical, procedural and institutional legal pluralism, between formal law and other African rights, combined with post-positivist arguments, capable of overcoming pure normativist legal positivism, which fails to alleviate the truculent issues that characterize the African legal system, characterized as hybrid. In this context, the idea of a minimal relationship between law and African legal families, supported by morality, is emphasised. In order to achieve the proposed objectives, the research will be conducted using a method based on a bibliographical review and a deductive empirical approach to the reality of African countries, especially Portuguese-speaking countries.

Returning to the central scope of this article, it is reasonable to state in an introductory way that the issue of legal pluralism can be seen from two fundamental perspectives: the first concerns human nature, which groups together and lives in society; in this, pluralism unfolds in sociological, anthropological, normative and political dimensions, which spring up spontaneously, constituting a phenomenological heterogeneity, in other words, a de facto situation, the formation of which is independentof any institutional recognition. On the other hand, pluralism is the result of a conceptual and methodological improvement stemming from theoretical constructions that describe,interpret and apply plural phenomena. Legal recognition is the result of these theoreticalformulations.

The legal pluralism consists of the coexistence of two or more normative orders in the same geopolitical space. The formal recognition of these different norms by the state is the result of a democratic institutional process, which takes place with the opening up of a constitutional political system, which comes to support and legitimize this diversity of normative orders.

Pluralism is understood in three essential senses: pluralism as a fact, as an ideal and as a technical dimension. Pluralism understood as a fact is present in every society, that is, all societies have microcosms of social groupings. The centrepiece of pluralism as a fact is social life placed in conflict and equilibrium between social groups. Pluralism as an ideal translates human freedom, both collective and individual, understood as reciprocal harmony between the values of groups and individuals; it is a democratic conception of social forces. And pluralism as a technical dimension comprises the methodical effort to realise the freedom of individuals and democratic values.

For Griffiths (1986), they identify the characteristics of pluralism by listing features such as decentralisation, participation, localism, diversity, tolerance and autonomy. Decentralisation corresponds to the shift ofpolitical administrative power away from the centre to other local institutions, which can be formal or informal. Participation consists of involving social groups in the organisational and decision-making sphere of the state, i.e. the democratic form of governance. Autonomy means the power that groups or collective entities have to expressthemselves independently of their normative conventions, giving them the power to regulate themselves, as long as they conform to state norms. While diversity and toleranceare forms of alterity that conceive the differences of others and accept them, seeking to realise the negative freedoms of individuals or groups with different beliefs, cultures andideologies.

For Griffiths (1986), pluralism can only be spoken of when it is a question of corporate legal pluralism, admitting the existence of norms of non-state origin, however, as long as they are derived from associations that have a personality recognised by the state, in which case their norms should conform to state normativity. Griffith's thesis, however, presents pluralism in its weakened form, where the legitimacy and validity of anorm is left to the exclusive judgement of the state, jeopardising the emancipation of groups with a normativity distinct from that of the state. And the other criticism of this current is brought up by Griffiths (1986) who sees a deficiency in this thesis, when it confuses the state order and the legal order, which are distinct phenomena, but which must coexist harmoniously.

Griffiths (1986) also differentiates between strong pluralism and weak pluralism. In the former, the state does not interfere in the emergence of extra-state normative diversity, while in weak pluralism, the state intervenes in the process of recognising normative orders, creating a taxonomy or cataloguing groups according to their origins, ethnicity or religious beliefs. This model is associated with a colonial experience, in which customary law had to be under the control of the colonial political and administrative power, which is similar to corporatist pluralism, in which the existence of normativity other than that of the state becomes valid if it is authorised by the state.

Griffiths (1986) considers two classifications, highlighting Independent Legal Pluralism and Controlled Legal Pluralism. Controlled Pluralism is one in which the plurality of laws is absorbed by state force, with a complementary legality, because its elements can be reconciled with the unity of the state's laws, while Independent Legal Pluralism may or may not be antagonistic to the state, but its elements are autonomous and mutually contradictory. And in Africa, there is a predominance of independent pluralism, of an anthropological nature, which consists of a diversity of social units that generate rights, which are constantly in conflict with state laws.

The idea of legal pluralism translates into a diversity of orders, some of which are state and others smaller, and the latter are responsible for producing social norms, as long as they can coexist in a harmonious environment. The persistent problem in Africa is the lack of harmony between customary and state law, in which the latter claims to be hegemonic and monistic, whose operational language excludes other informal norms belonging to traditional rights.

The methodological theorisation of legal pluralism aims to identify mechanisms capable of giving legitimacy to the manifestations of non-state orders, allowing them a minimally functional autonomy, which should be called into question when a relevant colliding situation affects positivised fundamental or human rights.

The theories mentioned above are based on the statocentric conception of the Western model, the fruit of the 18th and 20th century Enlightenment, such as Locke, Kant, Hegel, Hans Kelsen and Hobbes, which places the state as the only absolute agent of normative production and with the legitimacy to express the general will. Nevertheless, normativist positivism creates exclusionary norms, which therefore invalidate norms from other non-state systems.

In reality, the state's wishes are formulated by a handful of people who control parliament, sometimes exercising this right without legitimate democratic representation. From these rules come concepts associated with a dogmatic positivist

and normativist hermeneutic that is closed to the state's normative environment, and therefore centralised, which exclusively authorises the state as the sovereign entity capable of producing, justifying and saying what are valid legal norms in a state. In this respect, any source of norm production would lead to a problem of ineffectiveness, selling out the emancipatory possibility of norms for traditional groups to express themselves in the democratic orderthrough self-regulation (Rouland,' 2003).

This conception of the state, founded in Western modernity and perfected by the French Revolution, also brought with it the process of codification, as a unambiguous way of expressing and revealing the legal character of norms. To a certain extent, this model is partially contradictory to the oral culture impregnated in African states, characterised by formal written and unwritten rules that bind their informal institutions. This single version, centred on written norms, calls into question the sociological and anthropological pluralism (Rouland,' 2003) inherent in the groups present there.

To perceive the state as the only source of normative production is undoubtedly to assume an exclusionary agenda that favours systematisation and codification as the exclusive criterion of rationality.

It is important to emphasize that the legal order should not be confused with the state order, as they are different objects. Various norms emanate fromthe state, and the legal order derives norms produced by the competent bodies, observingthe proper procedural rite.

In this debate, it is essential to compress legal monism, which absorbs the principle of statehood and positivist formalism, which demonstrates weaknesses in dialogue with informal and local political institutions that, in a way, implode peripheral problems for the Centre (State). Various social groups are socially demanding normative emancipation, in which classical legal dogma does not fully recognise the demands of African rights.

With the rise of multicultural and intercultural theories ofhuman rights, the idea of legal pluralism as an emancipatory element became unveiled (Kymlicka, 2007, p. 23-24) and was characterised as important in the context of participatory democracy and the inclusion of groups marginalised by the logic of colonial epistemology.

Plurality of normative sources

Legal dogmatics conceives of sources of law as forms of revelation or manifestation of legal norms, in which a distinction is made between mediate and

immediate sources. And in the context of African normative dogmatics, mediate sourcesinclude customs and uses that constitute repeated practices, categorised as subordinate sources and consequently of lesser value than immediate sources, being legal normative acts approved by parliament and which have observed the legal rite. In the countries analysed here, there is a tendency to discredit informal sources, i.e. customary law, due to the colonial roots of colonialism, which sought to ignore the relevance of customary rights. Therefore, the idea of legal pluralism is moribund in the light of a one-dimensional,formal paradigm that predominates to this day. Legal dogma does not fully embrace the idea of customary law as valid, which creates space for the marginalisation of African rights (Roda, 2023).

Arménio da Roda (2023) also embraces the idea of more than two legal orders coexisting in one space is not a problem. In fact, the core problem lies in the staggered structuring of the sources of law, which prioritises some sources to the detriment of others and often disregards the wishes of the people. The formalist legal culture will create a hypostasisation of legal science, transformed into something methodological, mathematical, pure and rigid.

Undoubtedly, the hierarchisation of sources calls into question the idea of a plurality of autonomous normative orders, which depend entirely on state legitimacy in order to be valid. On the other hand, there are problems with the production of norms, monopolised by the state, which will generate a conflict between formal entities and other social subjects belonging to the extra-state sphere, such as ethnic groups that accept endogenous norms linked to their ancestry, who don't even participate in the legislative process that concerns them, such as land, family and property law, among others.

Historical process of pluralism on the African continent

Narrowing the debate down to the African continent, especially Portuguese-speaking countries, the problem is not a theoretical one, but rather a pragmatic one, which arises when we talk about procedural pluralism, which consists of moving from merely substantive analyses to a practical and procedural compression that demands institutional arrangements. In this sense, the debate would shift towards a vision of prescriptive intentions on legal pluralism. And for this, it will be essential to understand the historical foundations of African states (Roda, 2023).

One of the issues that led to the massification of intersystemic conflict has to do with the state model of colonial heritage, which subordinated social groups through the

systemic reducibility of indigenous (native) peoples. The Portuguese colonial state had a right-wing administration of the colonies and, at the same time, forced the natives to deny their cultures, which were considered “primitive”, in order to be considered citizens, which, in a way, applied the exclusion of manifestations related to indigenous rights, which continue to be marginalised by this logic of legal monism, supported by normativist positivism in countries such as Angola, Cape Verde and Mozambique, where traditional chiefs or authorities are only symbolic bodies that cannot assert their legal families in the face of the legal system (Araújo, 2008).

The models of colonisation had a direct impact on the implementation of legal pluralism in Africa, and it should be noted that there were two models of colonial governance, characterised by direct and indirect governments. In the first model, the colonies were directly bound by the laws of the metropolises, so there was no indigenousadministration parallel to that of the state and; any attempt by indigenous peoples to manifest customary norms was repressed and ignored by the state, and it was later that attempts were made to implement norms of the Indigenato regime, i.e. specific norms fornative peoples, which included norms of personal status, such as family, inheritance, etc.Portugal and France are typical examples of direct colonisation. Hence, in these states, there is a predominance of institutional and legal centralism that is still in force today (Araújo, 2008).

In indirect governments, traditional institutions could run parallel to European government institutions. Traditional chiefs were responsible for administration and jurisdiction. This process was consolidated in the 20th century and put into practice afterthe First World War, spreading to West Africa, East Africa and Southern Africa. Examples of this governance are South Africa, Nigeria and Uganda, all countries colonised by England. A distinction was made between the natives and the non-natives. In these terms, there were two sets of rules, one of a formal nature and the other customary law. The colonial government dealt with general issues of resource management, while the indigenous governments took care of certain issues relating to the indigenous population, and had a relationship with the organs of the colonial administration. The acceptance of customary norms and traditional institutions in these countries are integrated as a fundamental part of society, and even today, these countries enjoyfundamental plural jurisdiction, recognised by the Constitution and a set of ordinary laws(Araújo, 2008, p. 15).

In African societies, groups with distinct identities have always coexisted, with totally diverse beliefs, religiosities and forms of political organisation. However, the subalternisation of these traditional normative orders was engineered by the dominant colonial elite, who instrumentalised hegemonic concepts in various ways to deny the nature of indigenous orders, by inventing universalist formulas that rejected the plural dimensions of law.

In this model of administrative management, each ethnic group was guided by itsown customary law, administered by tribal chiefs, who mitigated conflicts over family, labour and land issues, guaranteeing peace and social cohesion. The survival of traditionalrights is an act of resistance.

Procedural and procedural pluralism

Most pluralist proposals are limited to a merely substantive and descriptive dimension, which recognises the ideas of pluralism and identifies its anthropological, sociological and legal structure. Myriad concepts have been formulated around the themeof pluralism in its multifaceted aspects, but there is a lack of a precise framework for howpartially antagonistic systems can operate dialogically. The main criticism of legal pluralism, especially in Portuguese-speaking countries, is that it is difficult to apply, as there are no pre-prepared prescriptive, procedural or procedural parameters that organize customary entities in detail at a structural level, making it possible to combine the various normative systems fully. The analytical pluralism of a vague structure, as presented by various authors, is exhausted in an indenitarian and descriptive reading, but it does not offer procedural or procedural content for technical and parallel functioning alongside indigenous networks and state law (Roda, 2023).

This proposal of legal pluralism stripped of its formula does not reveal ways of constructing a methodological approach to the application of the multiple indigenous and religious rights present on the African continent, which are capable of providing an environment of communicability between the different normative orders, with the capacity to coexist institutionally and legislatively, reducing the complexity of conflicts. The substantive pluralisms of mere legal provisions also open up great scope for *arbitrary pluralism*, which can culminate in disrespect for basic fundamental goods, of which there is a minimum consensus on the preservation of these values, such as fundamental rights.

In order to materialise a procedural pluralism, first of all the state's positive law must give way to the General Theory of Law, expanding the semantic, interpretative

dimension of the state's positive law, which will codify procedural instruments for the integration and cooperation of the multiple African systems, starting with the Constitution itself and other ordinary normative acts, providing a clear explanatory structure of how the norms of customary law should be applied in different situations. for example: a traditional or religious court should refer a situation to the state's judicial courts. What mechanisms can be put in place to prevent arbitrariness?

On the other hand, the informal bodies linked to traditional justice lack a methodological apparatus that prescribes steps and techniques for applying customary law, in order to guarantee the proper functioning of these institutions. In our view, family *status* laws should be regulated in a way that takes into account the ethnic identity of the individual, while general laws can be applied autonomously or independently throughoutthe state.

Structural mechanisms for implementing procedural pluralism

There are huge challenges and the need to solidify the pluralism of procedures incountries like Angola, which has sobas (Feijó, 2012), Mozambique and Cape Verde, which also have community courts. And to make these systems truly plural, many authorsagree that the following foundations are necessary:

a) Integration of traditional courts into the organic sphere of the state. Although traditional courts are provided for in the Constitution and other ordinary laws, they are not considered to be part of the judicial power, i.e. they are not associated with the organic structure of the state's jurisdictional power. In this context, the problem arisesfirst of all of knowing the nature of these customary instances of justice, which prove to be dubious, divided between administrative and judicial which,in turn, has the implication of knowing whether they are binding decisions or not, administrative or judicial, contentious or voluntary.

On the other hand, the fact that the courts are not organically integrated makes institutional co-operation difficult, and most of them are unable to initiate appeals to higher levels of the judiciary. It should be noted in advance that, at least in Mozambique, the issue of appeals has been minimally addressed in the legislation in force (Law nº 4/92 of 6 May - Moçambique, 1992), which provides for the possibility of the community

judge or the parties submitting the decision to the courts.[1] However, from a practical point of view, there are many difficulties, because community judges complain about the slowness of the formal public system and that their demands are not effectively accepted by the courts. In Angola, Cape Verde and Guinea-Bissau, there is still a need for more regulation of the community courts. In Angola, there are traditional authorities who have the power to judge certain claims according to customary law (Feijó, 2012, p. 13).

The lack of this dialogue with the formal apparatus prevents the systematic formation of a line of legal precedents that can subsequently be used in similar cases by both systems of justice, in order to build a coherent chain of interpretation and argumentation. Therefore, it is pertinent when judging *hard* cases (Dworkin, 2010). Furthermore, the organic exclusion of these customary courts from the judicial organisation methodologically hinders the process of judicial review, both from the point of view of gauging legality and constitutionality in relation to cases judged by customary justice. And on the system of review or control of legality, constitutionality and conventionality are excluded from the legal landscape of these countries.

In Mozambique, for example, this exclusion can be identified by Law nº 24 /2007 of 20 August, which provides for the organic structure of the state courts (Moçambique, 2007). Article 5 of the same law reads as follows:

> The Community Courts are institutionalised, independent, non-judicialconflict resolution bodies that judge according to common sense and fairness, in an informal, unprofessionalised way, favouring orality and taking into account the social and cultural values that exist in Mozambican society, with respect for the Constitution (Moçambique, 2007, art. 5, own translation).

Article 29 of the same law does not list the courts as community courts as part of the hierarchical judicial systems, as can be seen in the following normative statement:

> (Categories of courts.)
> I. Under the terms of this Law, the judicial function is exercised by the following courts:
> a) Supreme Court;
> b) Superior Courts of Appeal;
> c) Provincial Judicial Courts;ti) District Judicial Courts (Moçambique, 2007, art. 29, own translation).

[1] Article 4 of LAW No. 4/92 of 6 May provides for speaking on matters of disagreement with the measure adopted by the community court. Any party may bring the matter before the competent court. 2. In relation to the issues indicated in paragraph 2 of the previous article, whenever there is a lack of agreement with the measure adopted, the community court shall draw up a record and refer it to the competent District court.

Article 17 of Law no. 24/2007 of 20 August establishes the level of participation of elected judges (non-professional judges), who are judges chosen to sit on the State's judicial tribunals in order to represent the interests of society. They are therefore people who have a knowledge of customary law and have the task of giving an opinion on the applicability of certain questions of fact inherent in customs, in order to guarantee a pluraljudgement. Without embargo, elected judges are those who have a restricted or diminished participation. This reduces the possibility of judicial tribunals functioning with a greater degree of legal plurality.

> 1.0 Elected judges can only take part in trials at first instance.
> 2. The participation of elected judges is determined by the judge in thecase, promoted by the Public Prosecutor's Office or requested by one ofthe judges of the parties to the proceedings.
> 4. The participation of elected judges is restricted to discussing and deciding matters of fact (Moçambique, 2007, art. 17, own translation).

In Angola, the scenario is no different from Mozambique. The exclusion of the sobas in the organic sphere is perceived in the same way as the Mozambican context the organisation and jurisdiction of the courts, does not allude to categories of these customary bodies in the sphere of the state's jurisdictional power, as can be seen from the following content below for example:

> 1.There are the following categories of courts of ordinary jurisdiction which are distinguished into:
> a) Supreme Court
> b) Courts of Appeal
> c) District Courts.

With regard to the regulation of local power or traditional authorities in Angola, it can be said that there are still huge gaps in relation to the degree to which these local institutions act (Feijó, 2012, p. 12-13). However, some rules, such as the Angolan Republic the context is similar, the law recognise the applicability of custom as a means of resolving conflicts when one of the parties claims it as a source of evidence in a dispute. In this respect, there is a lack of a specific regime that better regulates the dynamics. From another perspective, it seems to us that there is no community court as such in Mozambique. However, there are separate laws that deal with questions of customary law.

Kapoco and Nojiri (2019) refer to Law No. 7/2010, which establishes the legal regime of the state's local administration: provincial government, municipal administration and communal administration, in which they identify the role of local authorities as merely consultative. The same author recognises that the law says nothing concrete about their social and normative reality, nor about their competences and attributions. According to

the same author, local authorities merely have a consultative role in matters that have to do with their respective populations. In view of this, one can draw inferences, since the nature of the local powers manifested by the sobas is of an administrative nature. However, the sobas also perform jurisdictional acts, especially in cases involving issues of witchcraft and magic (Feijó, 2012).[2]

Still on the subject of legislation, the Angolan Supreme Court of Justice, in Case No. 79, defined these authorities as *entities that integrate and direct the respective communities, being respected, among other virtues and powers, for being people with the authority to decide on witchcraft* (Feijó, 2012). It is assumed that in Mozambique the implementation of community courts has made significant progress compared to other Portuguese-speaking countries such as Guinea-Bissau, Cape Verde and Angola. In Mozambique, there is a clear definition and a specific regime for community courts and even the limits of their jurisdiction, although their functioning still needs improvement.

In Guinea-Bissau, Sara Guerreiro (2018) states that the idea of a traditional courthas not yet been institutionalised, nor is there a legal system that regulates the different forms of traditional justice that operate in the different regions of the country. Notwithstanding the formalisation of these institutions from a legal point of view, it has to be said that there are various levels of traditional justice in Guinea Bissau, such as: régulo, who are hierarchically superior authorities and are responsible for judging decisions by other chiefs or other lower traditional authorities on appeal. On the other hand, there are tabanca chiefs who resolve minor issues, while the heads of the Tabanca committees are responsible for judging issues inherent to the community. Furthermore, there are Morraça chiefs who limit themselves to settling family disputes (Guerreiro, 2018, p. 6-14).

b) The need to implement a dual control system: in order to avoid decisions that go beyond the limits of human rights, sometimes triggered by traditional or community courts, there is a need for a stable inter-institutional exchange, in which the bodies responsible for justice in the state can devise mechanisms in which a professional judge or other public officials with legal knowledge of the state's positive law and international human rights standards must be appointed. This is so that in the judgement sessions of the community courts, they can give opinions on issues that differ from or go beyond positive public order. This reasoning is based on the premise applied to elected

[2] The soba are holders of local (traditional) administrative power, who make decisions, organise special events, act as judges and act to prevent problems from arising outside the community.

judges, who work alongside professional or legal judges in judicial courts, who give opinions on issues related to customary law. In this way, the protection of women's and children's rights, which have been violated to some extent, would be safeguarded.

Furthermore, some abusive and violent methods of evidence against human dignity would also be safeguarded. In Mozambique, the acts of the community courts minimally obey the principle of the double degree of jurisdiction, established in Article 04(1) of Law 4/92, which minimally allows for control of constitutionality and legality, but in a very precarious way, because in practice many of the appeals from the communitycourts do not reach the formal courts of the state, that is, the judicial courts.

In this context, the opportunity to expand the due process of law and various forms. However, if there were the possibility of co-participatory sessions, with both teams working on the community side and the formal side of the state, many permanent institutional conflicts would be avoided.

And with co-participatory sessions, there would be scope for prior scrutiny of the operation of traditional or community courts. This would enable technical assistance from the professional judge to strengthen the arguments for justice of community court judges, providing them with argumentative and legal means in relation to positive laws on human or fundamental rights. In addition, the judge or public legal professional who was tasked with providing this technical and legal assistance would be able to produce reports on how the session of a particular trial or other act of a jurisdictional nature went. In our view, this would not reduce the autonomy of the community courts, but it would maximise the issues of preventing arbitrariness and abuses of rights, such as violence against women's rights in the parity of due process of law, the prevention of the application of methods of producing evidence contrary to human dignity, such as the consumption of poisonous substances or the use of hot irons to prove innocence (Roda, 2023).

This perspective of inter-institutional dialogues would also include the question of the mutual cross-cutting of hard cases (Dworkin, 2010), which could be used by state courts in matters involving customary law, for which the court does not have a ready-made decision. In this way, a decision emanating from a jury or a traditional authority would serve as a precedent for future cases. As a result, there would be a symbiosis of jurisprudence between the two institutions, thus corroborating a pluralism of procedure and process, due to the fact that there are organised and concatenated methods or stages for achieving a certain end or applying a rig. It is obvious that each right has its own formulas or path to realisation, however, it must be borne in mind that every right

undergoes evolution and mutations that come from society itself. Given this premise, it would be partially correct to admit that the techniques of customary law are dynamic and subject to improvement, so much so that this act must be legitimised by the democratic will involving the participating subjects, in order to confer plausible techniques.

Often these issues are not implemented not because of a lack of material or human resources, but because the state does not have these agendas as a fundamental agenda foraccess to justice, which is monopolised by the state courts, which are generally deficientin delivering justice.

c) Public investment by traditional courts. Firstly, it should be noted that community leaders currently enjoy merely symbolic political power, which ends up affecting the jurisdictional role of their institutions. In the past, these institutions had autonomous financial means, the fruit of commercial bargains and taxes collected in theirgeographical circumscriptions, which guaranteed the full functionality of these societies. With independence in 1975, countries such as Angola, Cape Verde, Mozambique and Guinea-Bissau experienced new political structures of the sovereign state, in which theytook control of the state's economic policy. At this time, the traditional or local authorities, including the community courts, lost all administrative, political, economic and financialautonomy and were placed on the margins of the state. And interaction with local state bodies was subsequently improved. Although there was an improvement, the power and autonomy of these local bodies, such as the Rulers, was reiterated, and they are only historical symbols of modern states.

And in the current situation, traditional authorities are often seen as the symbolic representation of the state at local level, but without the economic and financial conditionsto carry out the administrative and political functions assigned to them. In this sense, thecommunity leaders and judges of these localities or neighbourhoods are disempowered figures in the political sense, whom governments manipulate at election time by offeringthem uniforms and derisory salaries.

When it comes to the organisation and functioning of the traditional courts, they operate without conditions capable of ensuring the development of their daily activities. One part of these courts, the judges, do not enjoy a fair and equitable salary in relation tothe costs of living in these countries. Sessions take place most of the time outdoors, undertrees, with chairs improvised for the session, sometimes on the premises of primary schools, and sessions take place on Saturdays, days when the rooms are unoccupied .If there are physical establishments, they are usually precarious. An interview conducted by a community judge in the Marromeu District, Sofala province,in

2021, by the name of Laurindo Mwanamwanga, revealed that Law which regulates community courts, stipulates that the costs inherent in the courts must be borneby the provincial government. However, community courts often operate without any budgetary assistance from the government, whether district or provincial.

In an interview conducted in Mozambique with one of the community court judges in Marromeu District, Katema Verniz, in 2021, she reported that they go months without receiving salaries or allowances and they resolve the disputes that are brought to them, because they have a duty to the community to ensure peace and justice. And if they had to rely on their salaries, the community would fall into social chaos. Sometimes it's the plaintiffs who cover the cost of the trial.

The realisation of the law requires a cost to put it into effect. And in a scenario such as Cape Verde and Mozambique, which are countries where we have gathered more information, we can see that the budgets transferred by the one-party central governments are amounts that do not guarantee the proper functioning of the community courts, thereby weakening the idea of legal pluralism that is provided for in the Constitution.

***Figure 1**: Community court in Mozambique*

***Source**: Centre for social studies laboratories associating Coimbra University: Community Court (2001).*

Figure 1 illustrates the precariousness of the infrastructure covering the Community Courts in Mozambique, and this scenario is not peculiar to Mozambique, butto the other Portuguese-speaking countries that we have pointed out so far, and they havethe same problems regarding the lack of material means of operation.

d) Participation of EU authorities in legislative processes. In order to materialise a procedural pluralism capable of easing the complexities of the norms existing in Portuguese-speaking countries and reducing the harsh institutional relations that often occur in these territories, it is necessary to create a space for high-density participatory democracy with the power to include groups marginalised by the hegemony of the liberal state.

The proposal of procedural legal pluralism does not ignore the process of interaction between the two orders, and therefore seeks to realise a sense of complementarity between the two systems, even if in certain dimensions they are different from an ideological and procedural point of view. And these internormative conversations cannot just be a spontaneous syncretic result. Without embargo, participatory democracy opens the way for subalternised groups to express their legislative will in the context of creating norms. One of the fundamental premises of legal pluralism is acceptance of the diversity of sources of law, as we emphasised earlier.

Therefore, the idea of legal pluralism should not just be limited to a constitutional article or an ordinary law that states that the state is plural and accepts all forms of cultural and normative manifestation in the country, without outlining institutional and procedural guidelines that are adequate to ensure that this pluralism is realised. However, there is an urgent need to create a participatory opening within the legislative process, so that traditional or indigenous groups are represented and can minimally express their desire for legislation. This can happen through invitations to community leaders from different ethnic groups or the creation of standing committees in the parliaments of the countries mentioned here for traditional groups from different spheres. However, Brazil and other Latin American countries have been an example of this in terms of parliamentary representation of indigenous groups, which can be seen in laws relating to the defence of indigenous peoples. Although there are issues to be overcome, it is important to emphasise that, in the Brazilian context, there is minimal coordination between the government and indigenous groups, culminating, for example, in reasonable balances between the interests of indigenous peoples and those of the Union. In addition, the Constitution of Ecuador of 28 September 2018, in Chapter VIII, provides for the rights of nature, through which legal personality is attributed to nature

and this matter derives from the substratum of the customary laws of indigenous peoples, referring to Latin America, which has created democratic spaces (Ecuador, 2018). It can be seen that indigenous perspectives are the ones that best safeguard sustainability issues to the detriment of the liberal law present in these spaces.

Based on an empirical analysis of Portuguese-speaking African states, it is possible to see the prevalence of a common denominator in which legislative processes are not inclusive. The functioning of parliament or assemblies at the central level does not work in a participatory way with authors or indigenous (traditional) groups to create constitutional and ordinary normative acts in which the population itself has an interest. There are reasons for this: firstly, the members of parliament follow the ideologies of their elected parties, and this in the plenary. However, we find it unreasonable that there is no representation at the level of the Special Commission, focused on issues that concern the rights of indigenous groups, taking into account the plurality of groups that exist in those countries and are constitutionally recognised.

The idea of including the representation of indigenous peoples in the municipal council, provincial assemblies and parliament aims to reduce truculent relations around traditional systems that can be safeguarded a priori, without waiting for future antinomy in the area of the application of laws.

With the legislative participation of unworthy groups, it is hoped to minimally ensure legal certainty through the predictability of certain more pronounced cultural behaviours in society, such as issues of *lobolo* in Mozambique or *alabamento* in Angola. which should be seen as a marriage and find a dialogical mechanism that balances the antagonistic aspects of normative cultures. And with this mechanism, the free will of the judge or other law operator would be avoided at the level of their conscience, or subjectivity to randomly declare *counter-legal* customs.

e) Expansion and reformulation of the law course curriculum. The model of the law course in these countries is, par excellence, a purely colonial tradition, which does not reflect the African cultural reality either, since the whole structure of the curriculum is based on the imported concept of Roman *law*, the basis of which is *civil law*, which often ignores the living customary law that deals with African social relations. This is an epistemologically colonial model, the foundations of which lie in de facto material colonialism .

A plurality of knowledge is essential for the emancipation and valorisation of customary rights in Africa. And this can only be achieved in Africa with the introduction

of a diversified teaching model that captures all forms of legal knowledge existing within the state. Most curricula do not have subjects aimed at a comprehensive study of the different normative and customary cultural manifestations of African legal families. For these reasons, judicial tribunals, lawyers, public prosecutors and public defenders have exorbitant difficulties in knowing the merits of certain controversial cases that concern customary rights, and this is due to the fact that magistrates do not have contact with traditional African rights as part of their training. We conjecture that the essays in the sociology of law do not accurately grasp this epistemic dimension of social reality, so as to perfect African legal dogmatics, to project a plurality of knowledge.

The model of the law course taught in Africa shows a continuation of the epistemicide of the past, which reveals a contradiction with the constitutional postulates that accept and recognise legal pluralism, but without including it in the teaching methodologies of the law course. Something that would be possible with the intervention of traditional authorities.

Analytical pluralism or substantive legal pluralism can be summed up as an idea of mere legal recognition, whether it be typified in constitutional law or ordinary law, without providing sufficient means for the materialisation of a structural pluralism. The idea of pluralism must be adapted to a sum of organic administrative and epistemological structures, in order to include social authors from different categories.

The lack of a curriculum on indigenous rights in universities or academia is not only a problem in Portuguese-speaking countries; even countries with a plural system, with an expanded jurisdiction of indigenous and Islamic courts as part of the judiciary, such as Kenya, still face problems with legal representation, because most lawyers do not have a solid knowledge of customary or religious laws.

f) Community police apparatus. It should be noted at the outset that this idea is divergent, given that the police apparatus is an idea constructed from the liberal, authoritarian and controlling perspective of an oppressive colonial model. However, the functioning of the community courts in Mozambique, Cape Verde and Guinea-Bissau is triggered by the absence of a police force, which in fact portrays the original nature of these institutions. And the question of integrating a police force into these courts has been somewhat paradoxical, because historically they have not had a police force to ensure that the decisions of these courts are effective. However, we have to consider the current scenario of globalisation and the immersion of modernity in the cycle of the state's social life, which imposes new demands on these informal bodies.

The interaction of urbanised and globalised city models creates a dynamic political relationship that requires a model of police power if the decisions of these courts are to be taken seriously. Empirically, it can be seen that the population has minimal knowledge of how decisions in formal courts become coercive. And this perspective of the *polis* or city environment, in which the state is the legitimate holder of violence or force, has permeated citizens, who resort to informal justice to conceive of these same parameters, whether in the context of a vertical or horizontal relationship.

Let's be clear from the outset that traditional restorative justice has always workedwithout the need for a police apparatus. And invoking it in the current scenario could be seen as a way of distorting its essence. However, globalisation has forged new dynamicsin social relations, in which singular cultural identities are transformed into a modern political cosmopolitanism.

Hence the need to understand new forms of power, which influence the limitation of individuals' freedoms in the face of public power, which calls for the subjection of the individual in the face of institutionalised public power. And it is in this sense that the existence of the police apparatus is evoked, as a form of manifestation of power, capable of subjecting citizens to the decisions taken by these local justice administration bodies. In turn, it has no intention of introducing a prison institute within the scope of community justice.

Customary justice is part of local power, which in turn is part of the State's administration and not an independent power parallel to the State, hence the need for a police force becomes necessary, allowing the decisions of these jurisdictions to become binding. The idea of local power must manifest itself with the same attributes that guide the State Public Administration (Araújo, 2008). The idea of giving the community court the power to pass judgement must be aligned with the state's police power. Often the decisions handed down by these bodies are not followed by the population due to thelack of a legitimate apparatus with coercive force.

However, in the case of Mozambique, this perspective would be questioned for the following reasons: the community courts enjoy voluntary jurisdiction. This is true in legal terms, but this limit on judicial competence does not derive essentially from the communities, and therefore from the formal state. In this context, it would be reasonable to assume that the rural collective conceives of these instances of traditional justice as real courts with *Iuris imperi* power. In other words, local bodies with coercive power. On the other hand, the communities believe that the resolution of conflicts triggered by these

courts is of a contentious nature, and if local bodies are part of the power of the state, then it is logical that their decisions would be contentious and legally coercive. This depends entirely on a power, in the sense of enforcing its will.

Power, therefore, refers to the means necessary to achieve desired ends, which would be better suited to the presence of the judicial apparatus.

The power in the specific sense of "political" Power,as the "general capacity to ensure compliance with the relevant obligations in a system ofcollective organisation. In short, the police apparatus materialises the ends of power to acertain extent.

Considerations

The existence of a diversity of normative orders is a de facto situation in which the formal system must not ignore, but rather develop communication mechanisms through a structural framework of prescriptive and adjective intentions, capable of mitigating existing conflicts. For this to happen, a structural reformulation of the justice system and epistemic model is essential.

The idea of legal pluralism in the contexts of the countries discussed here requires a procedural structure to allow for the participation and inclusion of normative types belonging to traditional groups. To achieve this, it is necessary to move away from a descriptive, substantive standard to issues that organise rites, stipulate institutions and the way they work. The first is the integration of community courts into the organic bodyof formal courts, secondly, it will be necessary to work in dialogue between both institutions, and thirdly, it is necessary to improve the forms of control to ensure human rights, due process of law, among other fundamental issues.

And plural manifestation also involves a break with colonial models, which preach epistemicide of African rights, once seen as primitive cultures devoid of logical rationality. To do this, it is necessary to question positivism as a colonial imposition and a closed theory of exclusion, created for European liberal states, which enjoy a homogenous cultural quality. However, this permission is also associated with breaking away from purely European curricula in law courses, which should include a section on African legal systems, which are currently being studied extensively in Anglophone African countries.

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