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**!FIRST DRAFT – NOT FOR QUOTATION!**

## **Negotiating the formalisation of community land rights in Mozambique: National policies and local processes of Land Law implementation in a 'traditional' community**

### *Abstract<sup>1</sup>*

The Mozambican Land Law of 1997 has been widely acclaimed – but also contested – for its way of codifying into an official tenure system, the recognition customary rights in combination with equal rights for women, flexible rules of access, and the promotion of external investments in agriculture. Land Law and Policy implementation in Mozambique requires not only 'real' local participation, but also considerable process-related resources, and has at a national scale been relatively slow. Furthermore – and for good reasons – there is a lack of in-depth studies of the complex and time-consuming local processes of community land tenure formalisation. This paper gives an insight into one such process in Manica province in central Mozambique.

Manica province borders with Zimbabwe. Historically the people in this region have sought to adapt to distinct British and Portuguese colonial policies of African land and labour, and to different post-independence state policies. People also have the experience of permeable borders during the struggles for liberation and the periods of civil war in Mozambique, and later periods of political conflict and economic disaster in Zimbabwe. On the Mozambican side, external investments in agricultural development seem to be on the increase, and may contribute to changes in local livelihoods, as well as increasing pressure on land.

The paper focuses on the formalisation of land rights in a community located in the buffer zone of a larger Transfrontier Conservation Area. It is a locality with its own history of civil war, international labour migration and post-conflict in-migration, but at the same time characterised by the presence and power of traditional authorities, practices and rituals. The analysis of the community land formalisation process focuses on the negotiation of roles, relationships, and authority in settings where the articulation of legal principles meets with contradictions and pragmatism at the interface of state policy implementation and local-level concerns and interests.

### **The Mozambican Land Law of 1997 – basic elements**

The Mozambican Land Law (*Lei de Terras, Lei No 19/97*) has received widespread acclaim. It has even been referred to as one of the 'best' in Africa (DfID 2008), in particular with reference to its inclusive orientation and its use of participatory methods in the delimitation of 'community land' (Tanner 2001, Chilundo 2004). But right from the start the law has also been subject to

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<sup>1</sup> A research grant from the Research Council of Norway (NFR) through the programme 'Poverty and Peace' provided funding for fieldwork in Mozambique; this gave the author the opportunity to collect the empirical data upon which this paper is based.

contestation. In fact, the process leading up to this land law being passed by the Mozambican parliament in 1997 may itself – in Polanyi’s terms – be called a ‘countermovement’ (Polanyi 1957). Its objective was to transform the legal framework for land tenure in a situation of post-colonial, post state-socialism, and post-war devastation in ways that could secure the livelihoods of the majority of people – in a country at the time categorised as the poorest in the world; and further provide a basis for future economic development.

Mozambican independence in 1975 had very soon been followed by a rural-based insurgency. Officially called the ‘war of destabilization’, it was a conflict armed and boosted up by international cold-war and late-colonial struggles in the region.<sup>2</sup> With the end of both the cold war and *apartheid* in South Africa, a negotiated peace accord for Mozambique was finally signed in 1992. By then, a structural reform package was already being implemented in the country, and a new Constitution of 1990 (*Constituição da República de Moçambique*) provided a basis for a legal re-definition of rights of access to land. In 1995, a set of revised basic principles governing access and land rights were spelled out in a new National Land Policy. Here, according to Calengo (2009), the government sought to harmonize the interests of local communities with private-sector interests, including the promotion of new investments aiming at economic growth. In the political process leading up to the enactment of the new Land Law in 1997, there were, however, contending views and interests, also within the governing party FRELIMO<sup>3</sup>. These are still present today, and provide at least part of the explanation for the slow and fragmented implementation of the Mozambican Land Law in terms of *formalising* community land rights. Contending views and interests may also, in part, account for the current ‘freeze’ of various land-tenure formalisation processes in Mozambique – including the one to be discussed in more detail here.

What are currently the basic elements in the Mozambican land legislation? The Constitution of 1990 maintained land as State property. This can be seen as a legacy of the former one-party socialist state and People’s Republic, but is also a legal provision shared by a number of neighbouring countries in the region. The Land Law of 1997, on its part, guaranteed customary access to and use of land for local populations, but also access to land for external investors. Article 12 in the Land Law more specifically states that land rights can be acquired in the following ways:

- Through occupation by individuals and local communities, according to those customary rules and practices that do not contradict the Constitution;
- Through occupation by Mozambican individuals who have been using the land in good faith for at least ten years;
- As a grant by the state, authorizing an application presented by individuals or corporate bodies in a form defined in the Land Law.

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<sup>2</sup> The rebel forces forming RENAMO – *Resistência Nacional Moçambicana*, on their part, would legitimize the insurgency and the disastrous civil war through a discourse of ‘true democracy’ in opposition to a ‘one-party state’.

<sup>3</sup> The former Liberation Front fighting for independence, which under the same name, *Frente de Libertação de Moçambique*, has been the governing party in Mozambique since 1975.

The first bullet point above recognizes and accommodates ‘traditional community’ land rights according to local customs and practices, as well as individuals’ land rights based on traditional use and occupation. The second bullet point was specifically targeted for recognising rights to land acquired through use and occupation outside ‘traditional’ (inherited) family and community land. It provided a basis for recognising rights to land for the large numbers of internally displaced people during the civil war in Mozambique, and thus to protect their livelihoods after the war. Finally, the third bullet point opens up for access to land through long-term leases to nationals, as well as to foreign investors and companies with concrete investment plans (cf. Tanner 2001, Quadros 2004, Ikdahl et al. 2005:47-48).

Regulations on the implementation of the Land Law in rural areas was passed in 1998, with a Technical Annex approved through a *Diploma Ministerial (No 29-A/2000)* in March 2000. Article 13 in the Land Law states that the absence of a title shall not prejudice (traditional) rights of land use, but also provides for a procedure for formalising local communities’ customary land rights. The Annex deals specifically with the procedures for identifying such rights. The Annex also sets out the procedures for delimitation, demarcation, and titling of community land (Quadros 2004). As ownership of all land in Mozambique – in the last instance – is vested in the State, the property rights of individuals, communities, and corporations are formally called ‘land use and benefit rights’ – or DUATs.<sup>4</sup>

Calengo (2009:39) holds that, according to the law, the land-use rights of a private investor acquired through official approval of an application with an investment proposal, and represented in a legally acquired DUAT, in legal terms is equal to the land rights of a community acquired by means of traditional use and occupation. DUATs acquired through state grants should, however, be formalised through the process called *demarcation*, which in principle will end up in the issuing of a land title document (De Wit, Villanueva and Norfolk 2010:20). The formalisation of such a grant through a land title depends not only on the presentation of an investment proposal, but also on such plans being implemented in practice. Land rights acquired through the forms of (traditional or de facto) use and occupation recognised in the Land Law<sup>5</sup> can, on the other hand, be formalised through a simpler and less resource-demanding process called *delimitation*, leading to the issuance of a *certificate*.

### **Access to land – regulation and legitimation**

The local and customary land rights recognised in the Mozambican Land Law, as well as the land rights formalised through *demarcation* or *delimitation* processes, are all so-called DUATs, that is ‘land use and benefit rights’.<sup>6</sup> Land rights in a Mozambican legal context are in this way defined very much in line with what Ribot and Peluso (2003:153) conceptualise in terms of *access*, i.e. ‘the ability to benefit from things’ – in this case the ability to benefit from land. In the land-rights formalisation process to be described in some detail in this paper, access rights

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<sup>4</sup> DUAT – *Direito de Uso e Aproveitamento de Terra*/ Land Use and Benefit Rights

<sup>5</sup> Cf. bullet points 1 and 2 above.

<sup>6</sup> In Portuguese: *Direito de uso e aproveitamento da terra*. De Wit, Villanueva and Norfolk (2010:20) use the translation ‘right of use and enjoyment of land’.

will be analysed with reference to the articulation and interaction of *regulation* and *legitimation*. In using these as operating ‘powers’ – and as distinguishable, but related aspects of access – I here draw upon the analytic framework presented by Hall, Hirsch and Li in *Powers of Exclusion* (2011). In their terminology, *regulation* refers to the formal and informal rules that govern access to land, as well as *exclusion* from the ability to use and benefit from it (Hall, Hirsch and Li 2011:15). Regulation defines boundaries, prescribe kinds of – acceptable – land use, and ‘determine the kinds of *ownership* and *usufruct* claims that may be made with respect to different areas of land’ (Hall, Hirsch and Li 2011:15). Regulation further defines as *who* are entitled to make such claims. *Legitimation* both refers to ‘what is’ and ‘what should be’, the normative expressions of what is right and appropriate in terms of regulation. Concerned with *exclusion*, Hall, Hirsch and Li emphasize that legitimations are never unopposed. They hold that legitimation always addresses an audience, and sustain that its effects to a great extent depend on actors sharing a common ‘discursive frame’ (op.cit. 2011:19).

### **Land and access in Mchele**

*Mchele* is here used as a designation for a ‘community’ of people and their land; an area of approximately 10.000 ha in the central Mozambican province of Manica.<sup>7</sup> Part of the Mchele area is forested, while people on the cleared land basically grow maize and manioc for subsistence, and bananas and some tomatoes as cash crops (Nhabomba and Krüger n.d.). In this setting, I was able – through repeated fieldwork visits – to follow a *land delimitation* process starting in 2008, with most of the practical work, meetings, negotiations, mapping and geo-referencing of the area being carried out during 2009.<sup>8</sup> A local NGO, ACACIA had developed a proposal, applying for funding to carry out such a process to *ITC*, a multi-donor funded project established to facilitate community land formalisation.<sup>9</sup> Over the last years, a number of both local and national NGOs in Manica Province have taken initiatives to initiate, organise and/or implement land delimitation processes. Such processes have up to this point in particular been carried out in the communities close to the Chimanimani Transfrontier Conservation Area in the border zone between Mozambique and Zimbabwe. Among the locally-based implementing NGOs, ORAM<sup>10</sup> has for many years been the major and most experienced organisation. The particular strength of ACACIA’s proposal for land delimitation in this context was, however, considered to be its close linkage to a concrete community development project.<sup>11</sup> This local development initiative, with real prospects for local income generation opportunities, had also

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<sup>7</sup> Before using proper names of localities and people, I want to discuss parts of the contents of this paper with various local stakeholders.

<sup>8</sup> In this data collection, I joined the process together with Stefaan, Milagre, Malunguisse, Celcio, and a number of other people from Manica province.

<sup>9</sup> *Iniciativa para Terras Comunitárias*, in English called the Community Land Fund; established with KPMG Mozambique as the implementing agency.

<sup>10</sup> ORAM – *Associação Rural de Ajuda Mútua*, which was initially created to promote and implement the Land Law at a national level.

<sup>11</sup> Cf. Dondeyne, Kaarhus and Allison (in press).

made the delimitation gain support among – at least some of the most influential – local people in the Mchele area.

As has been amply demonstrated, both theoretically (Ostrom 1990) and empirically (e.g. Lund 2008), the absence of formal property rights in no way implies ‘open access’ to land. In the Mchele area, *regulation of access* seems before the formal land delimitation process started to have been strongly embedded in local beliefs and practices, and closely articulated with the power structure of traditional authorities. Thus the concrete carrying out of the delimitation processes, complying with the prescriptions in the Technical Annex to the Land Law, not only involved a series of events of (mutual) cultural translation and negotiation, but also a process of negotiating different roles of influence and power, and a process of articulating and combining rules and procedures belonging to different ‘audiences of legitimation’ in order to secure the legitimacy of this particular delimitation process.

In this region, especially on the Zimbabwean side of the Mozambique-Zimbabwe border, a history of land alienation and technical land-use planning has, according to Hughes, directed rural conflict toward ‘cadastral boundaries and claims to land’ (Hughes 1999:538). Whereas in Mozambique, it has been argued, traditional authority is rather expressed in terms of power over people. On the Zimbabwean side, historical processes have led to a social construction of *land* as *the* scarce resource, while in Mozambique, local power in rural areas still seems to be based on claims to authority over people. Schafer and Bell’s study in Manica province of Mozambique reports on ‘a basic acceptance of the idea that a chief ruled over a portion of territory, as well as over people who were bound to him as subjects through a symbolic contract, mediated through spiritual practices’ (Schafer and Bell 2002:405). Current land formalisation processes may, however, contribute to shifts in the balance towards increase the *value* of – power over – land.

Here it will be argued that *regulation of access* to land in the locality where we followed a land delimitation process is – still – closely connected to the *legitimacy* of local authorities’ position and power. How these ‘powers’ are articulated in practice, will however be subject to negotiations and, at times, fairly pragmatic solutions. Experience during the fieldwork indicated that *regulation of access* more generally – and not only traditional authorities’ power over people as ‘subjects’ – according to still-practiced norms ‘should be’ mediated through specific ritual practices. These served to evoke the links between the ancestral guarding spirits, contemporary ‘traditional’ authorities who represent the main local lineages, and specific places in the landscape.

In the Mchele area, a main site in this regard was ‘the source of two streams’. Access for newcomers to the Mchele area should, in principle, be regulated through several ritual steps, involving first a ceremony at the ‘source’, followed by women brewing local beer, and finally a closing drinking ceremony, where also neighbouring authorities are invited to take part. My own first visit to the area – fortunately – coincided with the closing step of such a ceremony. It had been initiated for another group of people, a team who wanted to film in the area. But as film-making these days is a high-cost business, the film team had not had the time to wait for the beer to brew, and had left before the drinking ceremony started. That was when I happened to arrive with a driver, and was invited to take part. In a secluded opening in the forest, men formed a circle to pass around the drink, while the women sat together in a group on the ground outside

the circle. The men made an opening in the (male) circle to make room for me and my male driver, we were invited to drink, and in ritual terms it was communicated that our presence in the area was – tolerated. My understanding of the event was that it served as a – in part – adaptive and pragmatic approach to required ritual procedures for ‘newcomers’ getting legitimate access to the area. At the same time, of course, it communicated who had legitimate authority to mediate such access.

It seems worth noting that this markedly ‘traditional’ character of the local authorities’ regulation of general access does not seem to have been precluded by a turbulent regional and local history; a history of colonial administration and post-colonial struggles, including forced labour schemes, trans-national labour migration, serious hunger periods, armed struggle and the local effects of larger-scale economic crises (Hughes 1999, Tornimbeni 2007). After independence in 1975, the FRELIMO Government nationalised land, and in 1979 formed a ‘communal village’ into which local people in the area were compelled to move. Already in 1980, however, the first attacks by the rebel RENAMO forces led part of the local people to disperse into the forested areas, while part of the population crossed the border to Zimbabwe as refugees (Schafer and Bell 2002:407). According to local history, FRELIMO then established a military base on a sacred site –without proper ceremonial legitimation – and ended up by suffering ‘a military disaster’ (Schafer and Bell op.cit.). The area then became a RENAMO stronghold till the end of the civil war.

Both the end of the civil war and, more recently, the economic crisis in neighbouring Zimbabwe have resulted in new immigrants taking up residence in the Mchele area. With the end of the civil war in 1992, new development actors and initiatives also entered the rural scene in Mozambique. Mchele was specifically targeted for a project promoting Community-Based Natural Resource Management starting up in 1996. Schafer and Bell (2002) give an interesting and revealing account of the unwelcoming response to this project on the part of the local traditional authority (‘the Chief’). After postponing meetings and discussions for half a year, he finally presented the project with ‘a detailed set of instructions concerning interactions with the spirits of the area’ (Schafer and Bell 2002:411). In the period that followed, the Chief continued to show in various ways his reluctance to ‘open his area to the project’ (op.cit.), and together with several instances of what project staff clearly experiences as local ‘resistance’.

### **Concrete steps in a formalisation process**

A key question in this particular context was, of course, how would a process of formal land delimitation in the same area proceed, and what would be the local responses along the way? I can in no way claim to have participated in all the meetings that were held locally to prepare, discuss, plan, and discuss again how to go about in the land delimitation process in Mchele. Though I have participated in a fair number of such meetings, there have been many more; in addition to, no doubt, series of informal and formal discussions only among local people. But in the meetings where I have been present, two crucial issues have repeatedly been brought up by representatives of the local community: *Why really* carry out such a delimitation? And what are the necessary conditions to do so properly? These are, I would say, precisely questions bringing up issues of proper *regulation* and *legitimation*.

On the one hand, it seems that the local *Jefe* or ‘traditional authority’ in Mchele considers that such a delimitation process may strengthen his position in relation to formal state authorities, and

thus consolidate or even strengthen his local power as a traditional authority (cf. Dondeyne *et al.* in press). On the other hand, he seems to have recognised these potential advantages with some reluctance. This ambiguous attitude had in practice, however, also led to challenges to his role and position as a local authority. Let me just illustrate some of the complexities in the process through an account from one 24-hours session of *delimitation* in the field.

Spending the night in tents at the camp-site in the forest together with the team from the provincial capital – including the representative of the Provincial Cadastral Services, the driver-facilitator, and the contracted process facilitator – I was kept awake by chants and drumming. It was completely dark, and there is no electricity, so it was impossible to say where exactly the ceremonies and partying were taking place. Only the following day we learnt that *Jefe Mchele* had carried out a ceremony for the ancestral spirits. In the morning we waited eagerly for the *Jefe* to appear, since for this particular day a series of arrangements had been made to carry out a joint identification of part of the boundaries of Mchele together with local authorities in several neighbouring communities. No *Jefe* appeared. As we had made the last agreements with him only the day before, the team at the camp started to get a bit impatient. And as the morning hours passed, I suggested to go and visit the *Jefe* at his homestead. At the camp we discussed it; was it the proper thing to do? Finally I went off together with the facilitator.

At the *Jefe*'s beautifully located homestead at the top of a hill we met two of his wives, who indicated that he himself was working in the banana field. When he appeared he, ceremonially and together with his wife, handed over to me a big load of bananas. We asked if he was ready to start the day's 'identification' process, and soon we were on our way walking back to the camp. Then, several hours later, we drove off from the camp to the place in the shadow of a large tree where we had agreed to start the day's 'identification' through walking along the boundaries. We arrived about three hours later, and nobody was there. We learnt that those who had waited had gone to have some drinks at a nearby place, and when they were located a first dispute arose: How could *they* start drinking when the plan was to work on the delimitation? And conversely: How could the *Jefe* of Mchele spend the night drinking and arrive so late when the agreed plan was to work on the delimitation? After some time we went off to meet a higher-ranked traditional authority of the larger area of which Mchele forms part. Arriving there, a new dispute over the same issue – how could the *Jefe* of Mchele not comply with commitments and keep people – even superiors – waiting? His explanation was that he had to carry out ceremonies to communicate with the ancestors the night before; then he necessarily got drunk... As outsiders to the local authority structure, the team from the camp did not take part in these disputes.

After some time, it was agreed that we should proceed to identify a key site defining the boundary between Mchele and the neighbouring area to the south-east, and thus a central point for geo-referencing and mapping of the area. The exact point should be somewhere between the road and a small river; there were some argument about exactly where, and when it was finally identified in a swampy place with reeds and running water, it turned out to be just at the source of a small stream. Since this was also a site of ritual importance, arriving there we first had to perform a 'greeting' ceremony of hand-clapping.<sup>12</sup> Then the driver-facilitator used his GPS to do the geo-referencing, and the site was identified on the map by the representative of the Cadastral Services. After that, we proceeded to walk along the paths that by common agreement by all present – that is, the 'walking group' formed by local authorities and representatives from both sides of the boundary – marked the legitimate boundary between Mchele and the neighbouring community to the south-east, from the source of the stream and to point where it reached a larger river. The area on the other side of the river had already been delimited. The river marked the

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<sup>12</sup> In principle, hand-clapping is performed only by men. Women are expected to bow their heads while the men clap their hands in a specific sequence and rhythm.

boundary of the Mchele area to the west; that boundary was already registered, and accepted by all people present. The south-western point of the Mchele area was then identified on the ground by the group of local people, identified on the map of the Cadastal Services and geo-referenced by our driver-facilitator; and we started walking back to the car.

We reached the road and were back at the car in the late afternoon. Nobody had had anything to eat during the day, but we had some water and biscuits in the car, which were shared among all. Then the question came up: Why was there no proper food? Why did not we – the driver-facilitator and myself – provide some food to those who had participated in the long walk? Which again raised the question: Whose process *was* this actually? The *Jefe Mchele* kept quiet. The driver-facilitator said very clearly that it was not ‘our’ (the two white-people-present’s) process; it was theirs! But the norms and expectations linking the ‘owner’ of the process with the responsibility to provide participants with food had been equally clearly expressed in a group of tired and fairly hungry people.

At this point in the delimitation as a whole, however, there seemed to be a turn to a more active ‘appropriation’ of the process as a locally situated process of regulating access and legitimating powers. A couple of days later, a large meeting of ‘all stakeholders’ had originally been planned to be carried out at the central place of the officially appointed *Jefe de Localidade*<sup>13</sup> of the larger area. But early in the morning, in Mchele a local meeting had been called, where the question if all who really needed to be informed about the process had been properly informed. After intense discussion, it was concluded that that was not the case. A number of local authorities to the north of the Mchele area also had to be properly informed. Since two cars were available that day, it was possible for a larger group to go and start informing those people right away. And off we went, while the large meeting was postponed for two days.

### **A preliminary conclusion – or what next?**

As provided for in the Mozambican Land Law of 1997 and further specified in the Technical Annex of 2000, the events accounted for above correspond to the second phase, the ‘Participatory identification and designation’, of the prescribed delimitation process. In *Manual de Direito da Terra*, Quadros (2004:77-79) sets out the prescribed phases as follows:

- Information and divulgation
- Participatory identification and designation
- Outline of map with a written description
- Devolution of collected information
- Publication in the National Cadastre

In the account given above, we started out with the second phase, but then the local people involved made a halt to question if phase one had been properly completed through information to all concerned. It was then agreed that it was necessary to re-do and complete the ‘Information and divulgation’ before proceeding with the ‘Participatory identification and designation’.

This, of course, also meant that the whole process would take more time than planned. And unfortunately I was not able to be present at the event marking the ‘Devolution of collected information’. But I know this phase was completed in due time, by the end of 2009. What about the final step of the formalisation process as set out in the *Manual de Direito da Terra*, the official recognition and authorisation of the whole process by the Mozambican state authorities?

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<sup>13</sup> This position is the base-line position in the decentralised administration of the Mozambican state.



In October 2007, an amendment to article 35 of the 1997 Land Law in Mozambique was passed as a Presidential Decree (*Decreto No 50/2007*), involving the following changes. It redefines the Government's role in relation to land rights, in the sense that instead of formal *recognition*, the Government's role is the *approval* of formal 'land use and benefit rights' (DUATs). A *DUAT certificate* for an area up to 1000 ha, according to the Decree, requires approval by the Provincial Governor, while a DUAT certificate of rights to an area exceeding 10.000 ha requires the approval of the Council of Ministers – in Maputo. The Mchele area turned out to be just a little larger than 10.000 ha, and the completed process therefore had to be sent to Maputo for final approval.

And so far, the story ends there. At present, not only the publication of the process in the National Cadastre and the issuing of the certificate for the Mchele area have reached a state of 'freeze'. A number of parallel processes of formalisation of community land rights in other provinces have also been halted (De Wit, Villanueva and Norfolk 2010). There is no official statement of explanation on the Government's side, which means that different possible interpretations are put forward at provincial levels. And at the level of the Mozambican Government – different policy options with regard to rural communities' land rights are probably still being discussed and negotiated.

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