

Customary Law in Lusophone Africa (Angola, Guinea-Bissau and Mozambique)

Direito costumeiro na África lusófona (Angola, Guiné-Bissau e Moçambique)

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Abstract: The relevance of customary law and traditional power structures during the period prior to the independence of Angola, Portuguese Guinea and Mozambique was the result of the very small enforcement of Portuguese law with regard to local populations. The first example of any codification of customary law took place in Mozambique, by means of the *Código ou regulamento dos Milandos Cafreaes do Governo de Inhambane* (1852). The recent constitutions of Angola (2010) and Mozambique (2004) make an explicit statement about customary law as being a source of law in their legal orders, but the collection and codification of customary norms in the twenty-first century took place systematically only in Guinea-Bissau (2008-2011). The assessment of the compatibility between the written law of the State and the different customary legal orders in Guinea-Bissau should be done in accordance with the use of the legal mechanisms of special and exceptional legislation.

Keywords: Angola; customary law; Guinea-Bissau; Lusophone Africa; Mozambique

Resumo: A relevância do direito costumeiro e das estruturas tradicionais de poder no período anterior à independência de Angola, Guiné Portuguesa e Moçambique era o resultado de uma aplicação muito circunscrita da legislação de origem portuguesa às populações locais. O primeiro exemplo de uma codificação de direito costumeiro teve lugar em Moçambique através do *Código ou regulamento dos Milandos Cafreaes do Governo de Inhambane* (1852). As recentes constituições de Angola (2010) e de Moçambique (2004) declaram expressamente a aceitação

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do direito costumeiro como integrando as fontes de direito aplicáveis na sua ordem jurídica, mas a recolha e a codificação de normas de direito costumeiro no século vinte e um apenas teve lugar na Guiné-Bissau (2008-2011). A apreciação da compatibilidade entre o direito escrito do Estado e os diversos sistemas jurídicos de direito costumeiro existentes na Guiné-Bissau deverá ser feita em conformidade com a utilização dos mecanismos da legislação especial e excecional.

Palavras-chave: África lusófona; Angola; direito costumeiro; Guiné-Bissau; Moçambique

1. Introduction

Lusophone Africa includes five African countries: Angola, Cape Verde, Guinea-Bissau, Mozambique and São Tomé and Príncipe. These countries are former Portuguese colonies, which adopted Portuguese as their official language¹ and which structure their legal systems on the legal orders in place previous to their independences, which occurred in the seventies of the last century.

The five Portuguese-speaking African states include two large territorial States – Angola and Mozambique; two small archipelagos – Cape Verde and São Tomé and Príncipe; and a small coastal state (Guinea-Bissau).

To understand and analyse the functioning of the legal systems of the three continental Lusophone African States, Angola, Guinea-Bissau and Mozambique, correctly it is necessary to take into consideration customary law, traditional authorities and the mechanisms they use to solve conflicts. At the same time, it is important to stress that customary law is not relevant in the two insular African Lusophone States, viz. Cape Verde and São Tomé and Príncipe.

The content of the legal systems of Angola, Guinea-Bissau and Mozambique is not limited to the written law of Western origin, whether domestic or international. Parallel to the written law, there is also a system of customary law in force in each of the ethnic groups. The existence of a system of customary rules has been maintained over time regardless of the position taken by the centralized political power, whether either after the proclamation of independence or during Western colonization.

¹ The choice of Portuguese as the official language has a constitutional basis for the following Lusophone African States: Angola, paragraph 1 of Article 19° of the 2010 Constitution; Cape Verde, paragraph 1 of Article 9° of the 1992 Constitution; and Mozambique, article 10° of the 2004 Constitution.

In order to have an effective understanding of the States concerned, consideration should be given to the following data relative to the territorial dimensions and estimated populations, as follows: i) Angola: 1,246,700 km² with a population of twenty five million and seven hundred eighty-nine thousand and twenty four inhabitants (according to 2014 census INE – *Instituto Nacional de Estatística* official data)²; ii) Guinea-Bissau: 36,125 km² with a population of one million five hundred and eighty-four thousand and seven hundred and ninety-one inhabitants (according to 2018 Guinea-Bissau INE – *Instituto Nacional de Estatística* official data)³; and iii) Mozambique: 799.380 Km² with a population of twenty seven million and nine thousand and ninety-eight inhabitants (according to 2017 census INE – *Instituto Nacional de Estatística* official data)⁴. Equally important for an understanding of each of these States and their particularities in terms of legal order is their large number of ethnic groups⁵ and the variety of local languages used in parallel and in addition to Portuguese⁶.

With regard to the constitutional texts in force in these states, the following data must be taken into account⁷: i) Angola: the Constitution of February 5, 2010 (henceforth CRA), with 244 articles; ii) Guinea-Bissau: the Constitution of Feb-

² Estimate number provided by the World Bank for 2018: 30,809,760 inhabitants.

³ Estimate number provided by the World Bank for 2018: 1,874,310 inhabitants.

⁴ Estimate number provided by the World Bank for 2018: 29,495,960 inhabitants.

⁵ In relation to Angola, see the historical survey made by Virgílio COELHO, “A classificação etnográfica dos povos de Angola (1ª parte)”, *Mulemba. Revista Angolana de Ciências Sociais*, vol. 5, 2015, pp. 203-220. According to the data available on the PeoplesGroups website for 2019: i) Angola has forty four different population groups (<http://www.peoplesgroups.org/explore/CountryDetails.aspx?genc0=AGO#topmenu>); ii) Guinea-Bissau has twenty five different population groups (<http://www.peoplesgroups.org/explore/CountryDetails.aspx?genc0=GNB#topmenu>); and iii) Mozambique has forty nine different population groups (<http://www.peoplesgroups.org/explore/CountryDetails.aspx?genc0=MOZ#topmenu>).

⁶ According to the data available on the Ethnologue – Languages of the World website for 2018: i) “The number of individual languages listed for Angola is 46. Of these, 45 are living and 1 is extinct. Of the living languages, 40 are indigenous and 5 are non-indigenous. Furthermore, 6 are institutional, 17 are developing, 19 are vigorous, and 3 are in trouble” (<https://www.ethnologue.com/country/AO>); ii) “The number of individual languages listed for Guinea-Bissau is 23. All are living languages. Of these, 18 are indigenous and 5 are non-indigenous. Furthermore, 1 is institutional, 8 are developing, 9 are vigorous, 3 are in trouble” (<https://www.ethnologue.com/country/GW>); and iii) ii) “The number of individual languages listed for Mozambique is 43. All are living languages. Of these, 41 are indigenous and 2 are non-indigenous. Furthermore, 2 are institutional, 24 are developing, and 17 are vigorous” (<https://www.ethnologue.com/country/MZ>).

⁷ An updated synthesis about the constitutions of the Portuguese-speaking African states can be found in Jorge MIRANDA and E. KAFFT KOSTA, *As Constituições dos Estados de Língua Portuguesa. Uma visão comparativa*, Editorial Juruá, Lisboa, 2013.

ruary 26, 1993, as amended by five modifications to the text of the constitution of May 16, 1984, with 133 articles⁸; and iii) Mozambique: the Constitution of December 22, 2004, as amended by Law n° 1/2018, of June 12, 2018, with 313 articles.

2. The constitutional and legal framework for the relevance of customary law during the period prior to the independence of Angola, Guinea-Bissau and Mozambique

The relevance of customary law and traditional power structures during the period prior to the independence of Angola, Portuguese Guinea and Mozambique was the result of the very small enforcement of Portuguese law with regard to local populations. During the constitutional monarchy, until 1910, later in the First Republic, between 1910 and 1926, and, finally, in the period of the Second Republic (*Estado Novo*) until 1974, the regulation of the legal relations between members of the different indigenous populations was made according to a principle of the speciality of the legal orders of the overseas provinces and the abstract acceptance of local customary law. Extending for more than a century, a significant number of examples of this form of regulating a substantial part of the legal relationships that took place in the colonial territories can be found.

During the period of the constitutional monarchy (1820-1910), article 15° of the Additional Act of 5 July 1852 to the Constitutional Charter of 29 April 1826 stipulated that the “Overseas Provinces may be governed by special laws, as required by their convenience”. Accordingly, article 9° of the Law of 1 July 1867, approving the Civil Code, determined its application in the overseas provinces “with such changes as the special circumstances of the provinces require”. In the same sense, the first paragraph of article 8° of the Decree of 18 November 1869, on the application of the Civil Code of 1867 to the overseas provinces, provided for a number of exceptions to its application on the grounds of respect for local customary law, namely: “(d) In Guinea the usages and customs of the natives called *grumetes* in matters between them”, and “(e) in Mozambique the usages and customs of the baneares, bathiás, parses, moors, gentiles and indigenous in the ques-

⁸ About the Constitution of the Republic of Guinea-Bissau, see Fernando LOUREIRO BASTOS, *The Republic of Guinea-Bissau: introductory note*, available at Oxford Constitutions of the World.

tions between them”. The third paragraph of the same article expressly provided that committees should be created for the “codification of the usages and customs provided for in § 1 and not yet codified, subjecting their projects to the approval of the government”.

After the implementation of the republic (1910), article (*Base*) 18° of the Organic Law of the Civil Administration of the Overseas Provinces, approved by Law 277 of 15 August 1914, was particularly detailed with regard to the way local customs and political institutions could be used by the Portuguese colonial institutions. Paragraph 2 provided that civil relations would be “governed by local usages and customs, in all that would not be contrary to the fundamental rights of life and human freedom”, adding that “changes in these usages and customs, in order to improve them, will only be introduced gradually, so that they can be fully understood and assimilated”. Regarding the respect for local political institutions based on democratic participation, paragraph 3 established that “[a]lways, however, that in the race uses or traditions, tribe, or other indigenous groupings, exists the notion or practices of rudimentary institutions aimed for collective deliberation, or otherwise predicting the interference of the will of the majority of individuals in the govern[ing] of the group or in the administration of their collective interests, actions to be taken shall seek to maintain and perfect such institutions, gradually orienting them for the sake of the development of the territory and the general administration of the colony”. Paragraph 6 states the need to adopt rules “simple and easy to understand, appropriate to the special conditions of the life of the indigenous” in the field of civil and criminal procedural law. Finally, in accordance with paragraph 7, the codification of the usages and customs of the natives was established as an objective to be achieved “as soon as possible”.

The legislation issued in the *Estado Novo* (1926-1974) period is much less detailed. The Political, Civil and Criminal Statute of the Indigenous Peoples of Angola and Mozambique, approved by Decree n° 12533 of 23 October 1926, provided, in its article 2°, that “the codification of indigenous usages and customs shall be made by administrative districts or regions, according to the circumstances, and in them shall be accepted all the usages and customs of the indigenous social life which [do] not offend the sovereignty rights or do not repudiate the principles of humanity”. The Political, Civil and Criminal Statute of the Indigenous Peoples, approved by Decree n° 16473 of 6 February 1929, which extended its territorial scope to Portuguese Guinea, added, in a paragraph to its article 4°, that “as a rule, in the codification of the traditions of civil law should at the beginning only adopt the provisions that are indispensable to regulate, in a general way, the legal relations amongst the natives”. As long as the indigenous usages

and customs of each region were not “reduced to writing”, the sole paragraph of article 8º of the aforementioned Statute provided that their evidence in trial would be obtained by the statements of two advisors, to be chosen “from among the chieftains or other natives of recognized prestige and knowledge of the local legal traditions”, in accordance with article 15º.

Article 22º of the Colonial Act, considered as having constitutional value under article 132º of the Portuguese Constitution of 1933, established that “[i]n the colonies, taking into consideration the state of evolution of the native peoples, [there] will be special statutes for indigenous peoples, establishing for them, under the influence of the Portuguese public and private law, legal regimes to compromise their uses and individual, domestic and social customs, which are not inconsistent with morality and the dictates of humanity”.

Accordingly, in the Overseas Administrative Reform, approved by Decree nº 23229 of 15 November 1933, paragraph 2 of article 54º included, among the information duties of administrators of the district (*circunscrição*), “[t]o study the indigenous social environment, its characteristics, organization, groupings, prejudices, predilections, usages and customs, writing, whenever they deem it convenient, reports on these subjects, which will be presented to the superior authorities”. In consonant terms, article 98º expressly stated that “native chieftains have the privileges that the indigenous usages and customs may confer upon them. However some of them may be denied to them, whenever this is convenient to the indigenous policy and administration”. The submission of traditional political structures to colonial power was reinforced in paragraph 4 of article 96º as it was stated that “indigenous customs and traditions related to the choice of chieftains and the manner of their investiture should be respected, provided they do not contradict law and the principles of humanity”.

Following the constitutional revision of 1951, with the introduction of a Title VII dedicated to Portuguese Overseas territories, article 149º of the 1933 Constitution explicitly enshrined the principle of the speciality or peculiarity of the legal orders of the colonial territories⁹ by providing that “overseas provinces shall be governed, as a rule, by special legislation, emanating from the legislative bodies from the metropolis or, for each of them, by the provincial legislative bodies, according to the competence norms established by law”.

⁹ About the principle of the speciality or peculiarity of the legal orders of the colonial territories see Joaquim da SILVA CUNHA, “Fontes de direito colonial português”, *Revista da Ordem dos Advogados*, Ano 13, nº 1-2, 1953, pp. 69-71.

At a time when the independence movement of the colonized peoples had already begun, Decree-law n° 39666, of 20 May 1954, applicable to “indigenous people of the provinces of Guinea, Angola and Mozambique”, in accordance with its article 1°, regulated the matter in a manner that was tending towards the assimilation of the native populations into a westernised civilizational way of living and behaving. Accordingly, in terms consonant with the previous regulations, article 3° provided that “[u]nless otherwise provided by law, indigenous people shall be governed by the usages and customs proper to their societies”, and, in accordance with paragraph 1, the “compromise with indigenous usages and customs is limited by morality, by the dictates of humanity and by the superior interests of the free exercise of the Portuguese sovereignty”. The main innovation was to foresee that “[i]n applying indigenous usages and customs, authorities will seek, whenever possible, to harmonize them with the fundamental principles of Portuguese public and private law, seeking to promote the cautious evolution of native institutions in the sense indicated by these principles (paragraph 2), and that “[t]he measure of the application of indigenous usages and customs shall be regulated taking into account the degree of evolution, moral qualities, professional aptitude of the indigenous person and the alienation or integration of this in tribal society” (paragraph 3)¹⁰.

The so-called Statute of the Indigenous Peoples, approved by Decree-Law n° 39666, of 20 May 1954, was repealed by Decree-Law n° 43893, of 6 September 1961, allowing the legislator a considerable amount of justification for justifying the cessation of the legal regime previously applicable to the populations of the larger Portuguese colonial territories. On the same date, through Decree-Law n° 43897, the relevance of local customary laws was strengthened in the legal orders of Angola, Portuguese Guinea and Mozambique. In this sense, article 1° provided that “local usages and customs, applicable to legal private relations, whether already compiled or not compiled and in force in the local communities [*regedorias*], shall be recognized”. In innovative terms, article 2° determined that “usages and customs of private law constitute a personal status which must be respected in any part of the national territory and whose application will be limited only by the moral principles and the fundamental and basic rules of the Portuguese legal system”.

¹⁰ A contemporary commentary to article 3° can be found at José Carlos Ney FERREIRA and Vasco Soares da VEIGA, *Estatuto dos Indigenas Portugueses das Provincias da Guiné, Angola e Moçambique*, 2° ed., Lisboa, 1957, pp. 20-26.

3. Attempts at customary law codification during the period prior to the independence of Angola, Guinea-Bissau and Mozambique

3.1. Angola

In Angola there was no systematic work of codifying local usages and customs, and references to customary law were found only in works written by officials of the colonial administration.

The most comprehensive study was prepared by José de Oliveira Ferreira Diniz who was Secretary of Indigenous Affairs and General Curator of the Province of Angola. The book *Indígenas da Província de Angola*, published in 1918 by the Press of the University of Coimbra, is divided into three parts with twenty-two annexes. In Part I there is an “ethnographic study of the black race tribes” which describes the main features of more than twenty ethnic groups. Part II is devoted to the “ethnographic study of the Boschimane race”. Part III provides an “ethnological study of the indigenous populations of Angola”, with general reference to the origins of the indigenous populations of Angola, the size of population, their ethnic characteristics, economic life, intellectual life, religious life, and social life. The annexes include, among other things, the draft of the Civil and Political Statute of the Indigenous Peoples (with 5 articles), the draft rules of the Justice Administration (with 42 articles), and the Indigenous Justice Code (with 276 articles).

In 1947, Captain Ivo de Cerqueira published the book *Vida Social Indígena na Colônia de Angola (Usos e Costumes)*, through the Agência Geral das Colônias. The study had been drawn up in 1930, when Ivo de Cerqueira was Director of Indigenous Affairs and General Curator General of the Colony of Angola, but it did not appear in print at the time. The work is divided into two parts, the first devoted to the “social organization” and the second to the “uses and customs governing civil relations between indigenous people and between them and the gentile community”, and it was intended to present an overview of the customary law in force in Angola. An adequate understanding of customary law in the territory of Angola would imply, according to Ivo de Cerqueira, taking into account the fact that “the indigenous customary law does not have *positive* or *negative* prescription, nor mere possession. Practically, at all times, it is time to claim rights or re-enter into their enjoyment”¹¹. In the same way “there is no differentiation between crimes of a *public* or *private* nature. Better: in the end, all of them should be considered

¹¹ *Vida social*, p. 40.

private, apart from the crime of the *offences to the chief*, which is prosecuted by bailiffs and tried at the assembly of the “macotas”¹². It follows that murder was “once repaired with a heavy indemnity payable by the perpetrator to the deceased’s family. Evidently, today, only some rare cases of homicide came to the attention of the authority, being judged by our courts. However, the vast majority of them must still be settled by the compensation scheme, without being reported to the authority. The gentilic family does profit from it, besides [there being] the condemnation of the criminal by our courts and the application of our penalties”¹³⁻¹⁴.

3.2. Portuguese Guinea

There are four attempts at collecting and codifying the uses and customs applicable in Portuguese Guinea. They are: i) the “Ethnography Survey”, published in 1918 and containing one hundred and fourteen questions, which had the aim of creating a Code of Indigenous Justice; ii) in 1927 the “Questionnaire Survey of the races of Guinea and their ethnic character” aimed at the drafting of legislation specifically applicable to the indigenous people in criminal and civil matters but intended also to provide a better understanding of the peoples which inhabited the territory; iii) in 1934, the “Ethnographic Survey” of that year contained an eleven pages long questionnaire; and iv) in 1946, there was an “Ethnographic Survey”¹⁵.

The “Ethnographic Survey” of 1946 was organized by Avelino Teixeira da Mota (who later turned out to be one of the most prolific and important authors to have written on Portuguese Guinea during the colonial period), in conjunction with the scientific review of Professor António de Almeida from the School of Higher Colonial Studies (*Escola Superior Colonial*). Thirty-three responses were received

¹² *Vida social*, p. 69.

¹³ *Vida social*, pp. 69-70.

¹⁴ In 1954, Carlos Antunes CABRITA had printed *Em Terras de Luenas: Breve Estudo sobre os Usos e Costumes da Tribo Luena* also through the Agência Geral do Ultramar. The study was completed in 1934, during Cabrita’s exercise of the function of Chief of Circumscription of the Frontier of Dilolo. Despite its length, almost two hundred pages, it did not provide relevant data relevant to the knowledge of the customs in force at the time that it was prepared.

¹⁵ On the question, in a detailed description, Fernando LOUREIRO BASTOS, “The collection and codification of customary law in force in the Republic of Guinea-Bissau”, in Salvatore Mancuso and Charles M. Fombad (editors), *Juta*, 2015, pp. 143 to 146 (also published in Portuguese as “A recolha e a codificação do direito costumeiro vigente na República da Guiné-Bissau”, in *Estudos em Homenagem ao Professor Doutor Jorge Miranda*, vol. I: *Direito Constitucional e Justiça Constitucional*, 2012, pp. 697 to 722).

out of the fifty-four that initially had been planned. This survey, and the answers given to it, provided a significant part of the colonial anthropological work that was published between the forties and the seventies of the last century by the Centre for the Study of Portuguese Guinea (*Centro de Estudos da Guiné Portuguesa*), particularly in the one hundred and ten numbers of the *Bulletin of the Centre for the Study of Portuguese Guinea* (*Boletim Cultural da Guiné Portuguesa*)¹⁶.

3.3. Mozambique

The first example of any codification of customary law in the former Portuguese colonies took place in Mozambique, by means of the *Código ou regulamento dos Milandos Cafreaes do Governo de Inhambane*. Dated 29 September 1852, although it was not approved by the Governor General of Mozambique. It contains

¹⁶ In this field mention may be made of the studies devoted to the following ethnic groups: i) Balantas: António CARREIRA, “Manjacos-Brames e Balantas (Aspectos demográficos)”, *Boletim Cultural da Guiné Portuguesa*, volume XXII, Janeiro-Abril de 1967, nº 85-86, pp. 41-92; ii) Bijagós: Augusto SANTOS LIMA, *Organização económica e social dos Bijagós*, Centro de Estudos da Guiné Portuguesa, Publicação Comemorativa do V Centenário da Descoberta da Guiné, 1947; iii) Fulas: a) Eduíno BRITO, “Notas sobre a vida familiar e jurídica da tribo fula. Instituições civis I – A família”, *Boletim Cultural da Guiné Portuguesa*, volume XII, Janeiro de 1957, nº 47, pp. 301-314; e “Notas sobre a vida familiar e jurídica da tribo fula. Instituições civis II – O casamento”, *Boletim Cultural da Guiné Portuguesa*, volume XIII, Janeiro de 1958, nº 49, pp. 7-23; b) José MENDES MOREIRA, *Fulas do Gabú*, Centro de Estudos da Guiné Portuguesa, Bissau, 1948; “Os fulas da Guiné Portuguesa na panorâmica geral do mundo Fula”, *Boletim Cultural da Guiné Portuguesa*, volume XIX, nº 75, Julho de 1964, pp. 289-327; and “Da ergologia dos fulas da Guiné portuguesa”, *Boletim Cultural da Guiné Portuguesa*, volume XXVI, Janeiro de 1971, nº 101, pp. 113-148; c) Artur Augusto da SILVA, “O direito penal entre os fulas da Guiné (Apontamentos)”, *Boletim Cultural da Guiné Portuguesa*, volume IX, Julho de 1954, nº 35, pp. 481-495; “Direitos Reais e das Sucessões entre os Fulas da Guiné Portuguesa (Apontamentos)”, *Boletim Cultural da Guiné Portuguesa*, volume XI, Abril de 1956, nº 42, pp. 7-24; *Usos e costumes jurídicos dos fulas*, Bissau, 1958 (2ª edição, 1980); e *Usos e costumes jurídicos dos mandingas*, Centro de Estudos da Guiné Portuguesa, Bissau, 1969; iv) Mandingas: Artur Augusto da SILVA, *Usos e costumes jurídicos dos mandingas*, Centro de Estudos da Guiné Portuguesa, Bissau, 1969; v) Manjacos: António CARREIRA, *Vida social dos manjacos*, Centro de Estudos da Guiné Portuguesa, Publicação Comemorativa do V Centenário da Descoberta da Guiné, 1947; and “Manjacos-Brames e Balantas (Aspectos demográficos)”, *Boletim Cultural da Guiné Portuguesa*, volume XXII, Janeiro-Abril de 1967, nº 85-86, pp. 41-92. Some general works should also be mentioned, such as: António CARREIRA, “O infanticídio ritual em África”, *Boletim Cultural da Guiné Portuguesa*, volume XXVI, Janeiro de 1971, nº 101, pp. 149-216; Fernando ROGADO QUINTINO, “Os povos da Guiné”, *Boletim Cultural da Guiné Portuguesa*, volume XXIV, Outubro de 1969, nº 96, pp. 861-915; e “Os povos da Guiné”, *Boletim Cultural da Guiné Portuguesa*, volume XXII, Janeiro-Abril de 1967, nº 85-86, pp. 5-40.

seventy-four articles, structured as follows: chapter 1, On Marriages, articles 1° to 9°; chapter 2, On inheritance and estate, articles 10° to 16°; chapter 3, On weddings of “bitongas” with slaves and slave with “bitonga”, articles 17° to 20°; chapter 4, On adultery, articles 21° to 25°; capítulo 5, On rape, articles 26° to 28°; chapter 6, On beating, injuries and death, articles 29° to 31°; chapter 7, On loans and things stored, articles 32° to 36°; chapter 8, On debts, articles 37° to 42°; chapter 9, On reign and sucession, articles 42° to 53°; chapter 10, On theft, articles 54° to 56°; chapter 11, On arson, article 57°; chapter 12, On emigrants and out-laws, articles 58° to 62°; chapter 13 – On the oath of the “mavi”, articles 63° to 74°¹⁷.

The first set of rules to be applied specifically to indigenous people also came into existence in Mozambique, viz. the *Código dos Milandos Inhambanenses*, approved by Provincial Order (Portaria Provincial) n° 269, dated 11 May 1889. The justification for its elaboration was that it resulted from “the urgent need to revise and reform the code in question and amend it in all that it has that is absurd and retrograde”, since “the code formulated in 1852 cannot continue to exist because of all of the extravagant, anachronist and immoral views that it contains, and it is therefore a document that would shame us in the eyes of those who wished to use it as a weapon of combat to deprecate the ceaseless efforts committed by Portugal to the just purpose of civilizing the African peoples that are their vassals”. Accordingly, it was not a codification of customary law but a set of rules organized on a westernized perspective of the norms that should be applied to the natives of a part of the colonized territory. Containing one hundred and sixty articles and two annexes, it was organised as follows: First part, On the application and execution of this code; chapter I, Preliminary provisions, articles 1° to 12°; chapter II, On the organization of circumscriptions and the personnel responsible for their implementation, articles 13° to 32°; Second part, On contracts and obligations in general; Chapter I, Preliminary provisions, articles 33° to 37°; Chapter II, On the conditions and clauses of the contracts, articles 38° to 41°; chapter III, On the effects and fulfilment of the contracts, articles 42° to 47°; chapter IV, On marriage between indigenous people, articles 48° to 51°; chapter V, On the rights and obligations of the spouses, articles 52° to 54°; chapter VI, On divorce with the dissolution of marriage, articles 55° to 60°; chapter VII, section 1, on legitimate succession and inheritance, articles 61° to 66°; section 2, on the hierarchical suc-

¹⁷ The text of the *Código ou regulamento dos Milandos Cafreaes do Governo de Inhambane* was reproduced in Albano de Magalhães, *Estudos coloniaes, I Legislação colonial. Seu espírito, sua formação e seus defeitos*, F. França Amado, Editor, Coimbra, 1907, pp. 277-299, which includes a glossary of bitongas words contained in the cafreial code (pp. 299-304).

cession of *régulos* and *cabos*, articles 67° to 70°; chapter VIII, On the contract of sale, articles 71° to 75°; chapter IX, On the contract of leases, articles 76° to 85°; chapter X, On loan agreements, articles 86° to 96°; chapter XI, On the contract for the provision of services, article 97°; chapter XII, On civil registry, articles 98° to 108°; Third part, On crimes, or delicts, and contraventions and their punishment; chapter I, Preliminary provisions, articles 109° to 117°; chapter II, On criminal liability, articles 118° to 125°; chapter III, On correctional penalties and their application, articles 126° to 135°; chapter IV, Criminal provisions, articles 136° to 154°; chapter V, On costs and fines, articles 155° to 160°; and the First table of the emoluments of the personnel in charge of the application and execution of the code of the *milandos inhambanenses*, with six articles; and the Second table of the salaries of the lesser employees created by this code.

O Código dos Milandos Inhambanenses appeared following the work of Joaquim de Almeida e Cunha, general secretary of the province of Mozambique, published as *Estudo acerca dos usos e costumes dos baneanes, tathiás, mouros, gentios e indígenas*, in 1885. Previously, commissions of study had been appointed by Governors Francisco Maria da Cunha (1877-1880) and Agostinho Coelho (1882-1885) but they did not produce any results.

In 1907, Governor Freire de Andrade arranged for the preparation of ethnographic reports in order to prepare a new code of *milandos*, and this led to a number of studies which formed the basis of a draft regulation for the judgment of *milandos*, prepared by Albano de Magalhães, the President of the Court of Appeal of Lourenço Marques¹⁸.

In 1941, General Tristão de Bettencourt, Governor-General of Mozambique, assigned José Gonçalves Cota to prepare the projects for Indigenous Civil and Criminal Codes (as a result of the *Missão Etognósica da Colónia de Moçambique*)¹⁹. The definitive drafts of the projects of the Private Law Statute and of the Penal

¹⁸ *Projecto de Regulamento para o Julgamento de Milandos*, Lourenço Marques, Imprensa Nacional, 1907.

¹⁹ Some of the work conducted by the “Missão Etognósica da Colónia de Moçambique” was published as Gonçalves COTA, *Mitologia e direito consuetudinário dos indígenas de Moçambique. Estudo de Etnologia mandado elaborar pelo Governo Geral da Colónia de Moçambique*, Imprensa Nacional de Moçambique, Lourenço Marques, 1944. About the studies of Gonçalves Cota see Fernanda do Nascimento THOMAZ, *Casaco que se despe pelas costas: a formação da justiça colonial e a (re)ação dos africanos no norte de Moçambique, 1894 – c. 1940*, PhD thesis, Universidade Federal Fluminense, Niterói, 2002, pp. 125-136; and Osmundo PINHO, “O Código dos Indígenas: a inscrição da nativa e a razão etnológica em Moçambique”, *História: Questões e Debates*, vol. 62, n° 1, 2015, pp. 125-136.

Code of the Indigenous Peoples of Mozambique were published five years later²⁰, but without being given and legal effect²¹.

4. Customary law as a source of law in the constitutional law of Angola and Mozambique

The recent constitutions of Angola and Mozambique make an explicit statement about customary law as being a source of law in their legal orders. It should be stressed that, at present, being part of a culturally-distinct ethnic group, whatever its specific characteristics, is the result of individual consciousness of belonging, of self-identification, often enhanced by the existence of uses and customs applicable as the result of legal criteria of a personal nature. At an International Law level, although the number of ratifications does not exceed twenty three states, Convention 169 on Indigenous and Tribal Peoples, 1989, of the International Labour Organisation (ILO), into force since 5 September 1991, can assist in understanding the importance of a State's recognizing the cultural identity of the various ethnic groups that it comprises because this represents the eradication of the previous perspective of assimilation of minority groups by the cultural model prevailing in a given society (as provided for in Convention 107 on Indigenous Peoples and Tribal Peoples, 1957 of ILO).

According to article 7º (Custom) of the 2010 Constitution of Angola²², “[t]he validity and legal force of custom which does not contradict the Constitution and

²⁰ Gonçalves COTA, *Projecto definitivo do Estatuto do Direito Privado dos Indígenas. Precedido de um estudo sumário do direito gentílico pelo autor*, Imprensa Nacional de Moçambique, Lourenço Marques, 1946; and from the same author, *Projecto Definitivo do Código Penal dos Indígenas da colónia de Moçambique*, Imprensa Nacional de Moçambique, Lourenço Marques, 1946.

²¹ On the codification of customary law in Mozambique during the colonial period see MAGALHÃES, *Estudos coloniais*, pp. 139-141; Cristina NOGUEIRA DA SILVA, ““Missão civilizacional” e codificação dos usos e costumes na doutrina colonial portuguesa (séculos XIX-XX), *Quadreni Fiorentini per la storia del pensiero giuridico moderno*, n°s 33/34, 2004/2005, tomo II, Giuffrè Editore, Milano, pp. 899-919; Rui Mateus PEREIRA, *Conhecer para dominar. O desenvolvimento do conhecimento antropológico na política colonial portuguesa em Moçambique, 1926-1959*, PhD thesis, Faculdade de Ciências Sociais e Humanas, Universidade Nova de Lisboa, 2005, pp. 185-278; and Gildo ESPADA, “Codificação de usos e costumes em Moçambique no século XIX – inícios do século XX”, *ReDiLP – Revista do Direito de Língua Portuguesa*, n° 5, 2015, pp. 97-133.

²² On customary law as a source of law in the Angolan legal order see Carlos Burity da SILVA, “O costume como fonte de direito na ordem jurídica plural angolana”, *ReDiLP -Revista do Direito de Língua Portuguesa*, n° 5, 2015, pp. 7-64.

does not threaten human dignity shall be recognised”. In the same sense, articles 223° to 225° CRA, brought together in Chapter III, on “Institutions of traditional power”, of Title VI (Local government), constitute a significant manifestation of the constitutional recognition of the relevance of customary law and traditional authorities²³. Paragraph 1 of article 223° CRA states that “[t]he State recognizes the status, role and functions of the institutions of traditional authorities founded in accordance with customary law which do not contradict the Constitution”, and paragraph 2 of the same article states that “public and private entities” are obliged to respect “the values and norms of customary law that are observed within traditional political and community organisations and do not conflict with the Constitution or the dignity of the human person. Article 224° CRA also states that traditional authorities exercise power “in accordance with the values and norms of customary law”.

Consistently, article 4° of the 2004 Constitution of Mozambique provides that “[t]he State recognizes the different normative systems and mechanisms for conflict resolution that exist within the Mozambican society, insofar as they do not contradict the fundamental values and principles of the Constitution”.

The constitutional framework of these issues is, however, only the starting point for an appropriate approach to the problems that are posed by the existence of customary law and also by the traditional mechanisms of conflict resolution based on those norms. It should be emphasized that the use of traditional mechanisms of conflict resolution based on customary law does not seem to be a way to counteract a judiciary system of western origin but rather a way to overcome their inadequacy, or their absence, in many parts of the territories of Angola and Mozambique. Because of its consonance with the cultural identity of the people they cover, the traditional mechanisms of conflict resolution have functioned without their institutionalization being necessary, despite the incompatibilities that they may have in relation to the written law of western origin.

It should also be noted that an adequate understanding of the role of traditional authorities in the contemporary political organization of Angola, Guinea-Bissau and Mozambique and any recognition of the way in which they can play a relevant part in conflict resolution is affected quite considerably by the effective knowledge of the content of customary norms in force. Indeed, in spite of their fundamental im-

²³ Presidential Decree n° 115/12, of 8 June, establishes the payment of subsidies and tax exemptions to traditional authorities. According to paragraph 1 of article 1, the most important local chieftain (*Soba grande*) receives a monthly subsidy of 24.357,03 Kwanzas, and all the traditional authorities have a tax exemption of labour income until 25,000 Kwanzas (article 3°).

portance, current debates about the legitimacy of the exercise of power by traditional authorities and their intervention as judicial decision-makers in litigation involving persons belonging to a particular ethnic group ignore the issue of effective knowledge of customary rules, as if access to the content of these rules outside the community in question were irrelevant. Actually, in most cases, the discussion on the subject starts with an erroneous assumption relative to the existence of listings, collections or codifications of customary norms of the various ethnic groups. In fact, as has already been stated, the collection and codification of customary rules was not achieved during colonial times, except in very limited and circumscribed cases. Just as, owing to the very recent acceptance of legal pluralism in these States, the collection and codification of customary norms in the twenty-first century took place systematically only in Guinea-Bissau, in terms that may constitute an example for similar activities to be undertaken in Angola and Mozambique.

5. Customary law as a source of law in Guinea-Bissau²⁴

The legal order of Guinea-Bissau, despite its many weaknesses, is much more complex than would normally be expected in a state of its social and economic development. To understand the legal order properly it is necessary to take into consideration the combination of normative written acts of diverse origin. In this context four different written sources of law must be taken into consideration: i) written internal law enacted after independence, published in the Official Bulletin of the Republic of Guinea-Bissau, whose first number was printed on January 4, 1975; ii) written internal law of Portuguese origin in force at the time of the proclamation of the sovereign State of Guinea-Bissau, received in the legal order of Guinea-Bissau by Law n° 1/73 of 24 September 1973; iii) conventional international law, being the bilateral and multilateral international commitments assumed by the Republic of Guinea-Bissau after the independence; and iv) the law of regional integration which originated from the participation of the Republic of Guinea-Bissau in three organizations of regional integration: ECOWAS – Economic Community of West African States; WAEMU (UEMOA) – West African Economic and Monetary Union; and OHBLA (OHADA) – Organization for the Harmonization of Business Law in Africa.

²⁴ On the question, with a more detailed description, LOUREIRO BASTOS, “The collection and codification”, pp. 146-154.

The Constitution in force in the Republic of Guinea-Bissau, which combines the initial text of the Constitution of 1984 with the constitutional transition of 1993 and subsequent constitutional amendments, does not deal explicitly with the question of the acceptance of customary rights as a source of law. In the Constitution of 5 April 2001, voted for unanimously but not enacted, the problem was adequately solved by a specific provision in article 15° (Customary law) with the following text: “1. The State recognizes and respects the value of the rules of customary law. 2. The forms of traditional power are recognized and respected. 3. The state articulates its acts, as well as the acts of local government, with the acts of traditional power, when they conform to the Constitution and the laws”.

Article 5° of the 2001 Constitution was simply giving express constitutional recognition to the relevance of usages and customs of the various ethnic groups in the legal order of Guinea-Bissau. In fact, in the written law of Guinea-Bissau in force at the time it was already possible to find several cases of the express acceptance of customary law as part of the legal order of the State. Relevant examples are the references to customary law that can be found in: i) the Organic Law of Courts of Sector and the Statute of its Judges, approved by Decree-Law n° 6/93, 13 October 1993; ii) the Forest Law, approved by Decree-Law n° 4-A/91, of 29 October 1991; iii) the Legal Regime of the Private Use of Land Integrated in the Public Propriety of the State (Land Law), approved by Law n° 5/98, of 28 April 1998; and iv) the Legal Regime of Protected Areas, approved by Decree-Law n° 3/97, of 26 May 1997.

The Organic Law of Courts of Sector and the Statute of its Judges, approved by Decree-Law n° 6/93, 13 October 1993, which is still in force, provides: i) in subparagraph b) of paragraph 1 of article 2° (consensus, equity and custom) that the “uses and customs that do not conflict with an express law” will be privileged in the administration of justice by the Courts of Sector; ii) in subparagraph a) of paragraph 2 of article 12° (jurisdiction in the matter) that instructs the Court of Sector, irrespective of the value of the claim, “to know of the conflicts relating to small rural properties, based on the uses and customs not contrary to law, and where the State is not involved”; iii) in subparagraph b) of paragraph 2 of article 12° (jurisdiction in the matter) that the Court of Sector, irrespective of the value of the case, is “to decide questions of succession on the death of person whose family was organized exclusively in accordance with the uses and customs”; iv) in paragraph 2 of article 12° (jurisdiction in the matter) that the Court of Sector, irrespective of the value of the cause, is “to judge applications for separation or divorce of married people only according to the usages and customs, and damages caused by such events”; and v) in subparagraph a) of paragraph 2 of article 21° (suspension of imprisonment) that “any uses and customs that do not offend human dig-

nity” can be used as the penalties imposed on the defendant to allow the suspension of imprisonment, provided that they facilitate the rehabilitation of criminals and reparation of the evil caused by the crime”.

6. Project for the Collection and Codification of Customary Law in Force in the Republic of Guinea-Bissau (2008-2011)

At the end the first decade of the current century, the task of revealing unwritten law in force was undertaken by the *Project for the Collection and Codification of Customary Law in Force in the Republic of Guinea-Bissau*²⁵. This task was undertaken over more than three years between 2008 and 2011, covering the period from its initial conception until the writing of the final report. The study included the six most representative ethnic groups in terms of population in Guinea-Bissau, *Balantas* (about thirty per cent of the population), *Fulas* (about twenty per cent of the population), *Mancanhas* (about three per cent of the population), *Mandingas* (about thirteen per cent of the population), *Manjacos* (about fourteen per cent of the population), and *Papeis* (about seven per cent of the population). The Republic of Guinea-Bissau, according to the estimates previous referred to, has a population one million eight hundred thousand inhabitants and, despite the community being relatively small, cultural diversity is very important in the country, taking into account the high number of distinct ethnic groups in its territory, currently estimated at between twenty and thirty.

The *Project of the Collection and the Codification of Customary Law in Force in the Republic of Guinea-Bissau* was divided into two phases. The first phase was completed by the writing of a first draft of the codification of existing customary norms. The second phase ended with the drafting of a final version of the lists of the customary rules in force and the preparation of a matrix of the existing customary rules and the written law in force in the Guinea-Bissau that is applicable to the same matter. The final work produced was the result of the combination of knowledge and skills of the Faculty of Law of Bissau (*Faculdade de Direito de Bissau*, FDB) and the National Institute of Studies and Research (*Instituto Na-*

²⁵ Part of the result of the project were published as *Direito Costumeyro Vigente na República da Guiné-Bissau. Balantas. Fulas. Mancanhas. Manjacos. Mandingas. Papéis*, [Bissau], [2011] (available online), and *Relatório Final do Projecto de Recolha e Codificação do Direito Consuetudinário Vigente na República da Guiné-Bissau*, Bissau, 2011.

cional de Estudos e Pesquisa, INEP) in areas of law, anthropology, and sociology. The survey was designed and implemented basically from a legal perspective, which can be observed on three different levels: i) the surveys used in field work of data collection were developed, based on the law in force in the Republic of Guinea-Bissau; ii) the teams of researchers who collected the data were composed primarily of Bissau-Guineans with legal training obtained in the Faculty of Law of Bissau; and iii) the processing of data collected during field work was carried out by legal experts, mostly members of staff of the Faculty of Law of Bissau or people with previous involvement in legal work related to Guinea-Bissau.

Although undertaken by academic institutions, the study of the collection and codification of the customary law contemporaneously in force in the Republic of Guinea-Bissau had, since its inception, two eminently practical purposes. Firstly, it was to help to clarify the actual content of the customs referred to in some of the written law in force in the legal order of Guinea-Bissau. And, secondly, it was to help to determine the areas of compatibility and incompatibility between the various customary legal orders in force in the Republic of Guinea-Bissau and the written law of the State, particularly in the context of fundamental rights enshrined in the constitutional law.

The collection of customary law applied by each of the ethnic groups started from the consideration of three distinct but interrelated aspects, i) the societal matters (or social relations), ii) the existing mechanisms for resolving conflicts, and iii) the assessment of some aspects of the status of women. For the collection of data, eleven questionnaires were used, with eight hundred and nine questions, formulated on the basis of the written law in force in Guinea-Bissau. The questions included in the questionnaires were prepared taking into account legal regimes provided for in Civil Code, the Penal Code, the Code of Civil Procedure, and the Code of Criminal Procedure²⁶, so as to allow for a further comparison between customary law and the written law of the State.

The methodology used to pursue the project was as follows: i) the creation of a coordinating team with members of the Faculty of Law of Bissau and the National Institute of Studies and Research functioning during both phases of the project; ii)

²⁶ For this purpose the versions of the texts contained in the collections of laws published by the Faculty of Law of Bissau were used: i) *Código Civil (com anotações) e Legislação Complementar* (Civil Code (annotated) and Complementary Legislation), 2nd ed., 2007, 1099 pages; ii) *Código de Processo Civil e Legislação Complementar* (Civil Procedure Code and Complementary Legislation), 2007, 875 pages; iii) *Colectânea de Legislação Fundamental de Direito Penal*, (Collection of the Basic Criminal Law), 2007, 303 pages; e iv) *Colectânea de Legislação Fundamental de Direito Processual Penal*, (Collection of Basic Criminal Procedural Law), 2007, 322 pages.

the formation of teams of members of the student body and members of the Faculty of Law of Bissau involved in data collecting during both phases of the project; iii) the preparation of the surveys with the questions that were used to collect data through field work by the Faculty of Law of Bissau during the first phase of the project; iv) the selection of the *tabancas* (villages) where the activities of the collection of data would be carried out by the National Institute of Studies and Research in the first phase of the project; v) the organization of the travels for field work by the Faculty of Law of Bissau during both phases of the project; vi) the activities of data collection in the selected *tabancas* during both phases of the project; vii) the compilation and processing of the data obtained in the activities of data collection on customary practices in force by the Faculty of Law of Bissau during the two phases of the project; viii) analysing the validity of the data obtained in the data collection activities which led to the preparation of the first codification of customary rules in force in the Republic of Guinea-Bissau, with the intervention of the National Institute of Studies and Research and the Faculty of Law of Bissau, during both phases of the project; ix) the preparation of lists of customary law in force in the Republic of Guinea-Bissau by the Faculty of Law of Bissau during both phases of the project; and x) the preparation of comparative tables between the written law in force and customary law in force in the Republic of Guinea-Bissau by the Faculty of Law of Bissau in the second phase of the project.

Data collection was always done by teams consisting of faculty members and students of the Faculty of Law of Bissau, with the predominance of native speakers of each of the selected ethnic groups, and with the methodological support of a member of the National Institute of Studies and Research. Given the numbers of questions in each survey, data collection was done in open and extended meetings with the persons who were knowledgeable about the legal matters in each of the selected *tabancas*. Those gatherings were organized as traditional *djumbai*, in accordance with the proposal of the National Institute of Studies and Research. Using a model of a traditional community meeting, the questions were posed successively to all the people present and answered by the persons who had knowledge of the matter. Because of this method of collecting data, the validity of which was fully confirmed by the results obtained, it was possible to prolong the working sessions for two or more hours, and receive a very significant amount of data during each field visit.

The intention of facilitating the reading of the lists of customary rules and their possible practical use, especially by judges of the Courts of Sector, led to a systematization of the final text of the matrices of comparison between the customary law and the written law of the State based on some of the central laws of the legal system of Guinea-Bissau. The Constitution of the Republic of Guinea-Bissau in

force, the Organic Law of the Courts of Sector, the laws applicable to the use of land, and the laws governing administrative activity were also used to understand the similarities and incompatibilities among the various sources of law in force in the legal order of Guinea-Bissau.

The lists of codified customary rules were divided into six parts in the final version of the study: i) traditional power; ii) property and land use; iii) family and succession (sub-divided between family and succession); iv) crimes and punishments; v) mechanisms for the resolution of conflicts, with a distinction between the mechanisms for the resolution of conflicts of a private nature and mechanisms for resolution of conflicts of a criminal nature; and vi) the status of women.

The subjection of oral customary norms to writing and their systematization according to the traditional organization of legal matters which can be found in the texts Guinea Bissau's written law and produced in accordance with a Western perspective does not affect its nature, nor will it prevent possible future modification as a result of the dynamics of social life. It follows that the final results of the *Project for the Collection and Codification of Customary Law in force in the Republic of Guinea-Bissau* cannot be viewed as a statutory codification. The final result of the project was not the equivalent of a source of written law enacted by the State, able to make definitive the meaning of customary practices. It was an academic research study that aimed to contribute to a possible formulation of written rules and to the disclosure of rules that are usually known only by those who share the same cultural identity.

For this reason, regarding the lists of customary rules provided by the project, it is important to conceive of the idea that the final result was of a number of "photographs" collected at a particular moment in time, from March to August 2009, with regard to the first phase of data collection, and from January to April 2011, for the stage of the validation of the first drafts of lists of customary law rules. Accordingly, reading and understanding the customary rules in force in the *Balanta*, in the *Fulas*, in the *Mancanhas*, in the *Mandingas*, in the *Manjacos*, and in the *Papeis*, must take into consideration that their customary rules are manifestations of the very significant cultural diversity that exist in the Republic of Guinea-Bissau, and that they correspond to specific and coherent ways of organizing social life in accordance with their own rationales and with world views which are very different from those of the Western cultural pattern.

The assessment of the compatibility between the written law of the State and the different customary legal orders should, thus, be done in accordance with the use of the legal mechanisms of special legislation and exceptional legislation, justified by regional specificities, provided that they do not subvert the structural principles

of the law of the Republic of Guinea-Bissau, especially those in the constitutional catalogue of fundamental rights.

The results of the study reinforce the certainty that the existing customary rules in force in Guinea-Bissau have the dynamics of rules the validity and individual effectiveness of which depend on the existence of obligatory beliefs that are reinforced or contradicted by continued respect or disrespect. Their assessment must take into account that they are the result of a systematic reading of the rules from a Western legal perspective, with preconceptions and reasoning that are distinct from the specific reasoning that legitimizes and gives them coherence.

In summary, the results of the collection and codification of customary law applied in the six major ethnic groups of Guinea-Bissau are relevant because they made it possible to reach three important conclusions in this area. Firstly, customary law is not static and adapts to the dynamics of the life of the populations to which it applies. Secondly, members of a particular ethnic group are properly aware that the use of the rules of conduct available in the written law of western origin is an option which may be exercised, particularly when they understand that customary law does not adequately safeguard their interests. And, finally, thirdly, the resolution of conflicts is usually understood as an integrated task in the exercise of traditional power and there is no institutional distinction between members of the traditional authorities who govern and members of the traditional authorities who solve disputes.