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**ACTUALITY OF TRADITIONAL LAW IN THE LEGAL SYSTEM  
OF GUINEA-BISSAU.  
SYNERGY PERSPECTIVES ON CRIMINAL REPARATION.**

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## **Actuality of traditional law in the legal system of Guinea-Bissau. Synergy perspectives on criminal reparation.**

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### **1. Introduction.**

Guinea-Bissau is a complex and fascinating juridical reality which along the centuries has constantly been modifying the relationship between positive law and traditional law. If the former has followed the evolution of colonialism and the post-independence autonomy of the State, the latter has evolved according to the adaptations and fragmentations of the autochthonous ethnic groups settled down on their territory of reference.

The coexistence of the sources of law mentioned above is an extremely interesting example of legal pluralism to be studied. That is because one of the two sources, positive law, has considerably changed in the last five centuries; on the contrary the other one, traditional law, originating from the consolidation of ethnic uses and customs, has been subject to relatively few modifications due to the little influence of external factors, which require a slow process of acceptance for being absorbed.

These opposite tendencies explain a relationship difficult to define, due also to the haziness of the limits of definition and to the ambiguity of State law (formerly, colonial law), which formally has somehow always recognised traditional law but substantially has never taken it too much into consideration.

This work starts from the definition of traditional law and the survey of the interconnections with State law, trying to highlight the critical points, deriving essentially from the uncertainty that a double perception of law can cause in a system not free from frictions. Then we move to the description of the criminal institute of reparation, which is the instrument that allows us to delve into the description of the traditional penalties adopted by four ethnic groups to sanction the medium gravity crimes of theft and violence. The choice has to be identified in the fact that the vast majority of those penalties contains the constitutive elements or represents the concrete

expression of the reparation, as conceptualized in Europe three decades ago; and the provision of the institute in Bissau-Guinean legislation is the means for arriving at proposing an integrative solution of the two sources of law and to formulate critical conclusions, which could offer an incentive for further researches and applications.

## **2. The historical roots of the sources of law.**

The history of positive law evolved on the basis of the power that imposed itself along the time, beginning with the Crown and imperialism, the outcome of colonization, and continuing with the Republican power, consequence of the independence from Portugal. The peculiarities of Portuguese colonial history marked the perspective of the applied law in that area for about five centuries.

The illustration of Lusitanian colonialism can be displayed using two main concepts, given by Maria Da Conceição Neto<sup>2</sup>.

On the one side, ‘colonial ideology’, which designates the body of philosophical ideas that “*gave global coherence and furnished justification to the expansionism of Europe in Africa*”<sup>3</sup>. It was equivalent for all the European colonizers and was based on the superiority of the “white race” and of the “western civilization”. The Portuguese did not make very different arguments from their counterpart colonial powers, marking with worthless persistence their plans of conquest with the paternalistic justification of missions of civilisations, based on the idea that Africa had to be saved from itself<sup>4</sup>.

On the other side, the ‘colonial doctrine’, that is how was named the administrative strategy that determined the sort of the legal (but also political and economic) framework of relationship in which colonizers and colonized had to move. The administration system formally adopted by Portugal for the overseas dominions, similarly to the one implemented by France, was aiming at assimilation: a centralized and uniform policy pursuant to the principle of incorporation within the indivisible Republic<sup>5</sup>. The method of assimilation had to be applied through the ‘direct administration’, opposite of the British ‘indirect rule’; this meant that the institutional model implanted in the colonies had to be shaped on the one in force in the motherland, equally applied to the whole empire, almost totally ignoring the pre-existing logic of local traditional powers.

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<sup>2</sup> Maria da Conceição Neto, *Ideologias, contradições e mistificações da colonização de Angola no século XX*, in: *Lusotopie (Lusotropicalisme. Idéologies coloniales et identités nationales dans les mondes lusophones)*, Paris, 1997, pp. 327-359.

<sup>3</sup> Ibidem, p. 339.

<sup>4</sup> Ibidem, p. 340.

<sup>5</sup> On the contrary, Great Britain adopted the system of indirect administration; it meant that local government, was devolved to traditional authorities. *De facto*, the result was that everywhere the indigenous were organized on a separate (and inferior, for the colonizers’ perspective) level.

We will see throughout the course of the paper that concretely the Portuguese could not realize that form of administration, but they had to limit themselves to indirect government; it was not the result of a choice indeed, but the consequence of the shortage or inadequacy of several resources (economic, human, material). And this fact had positive repercussions on the survival of traditional law.

When we talk about traditional law we refer to the combination of rules of the distinct ethnic groups living on the territory of Guinea-Bissau, which followed the evolutionary path of society in the area.

The ethnographic history reports that nearly two thousand years ago in North-West Africa, in the region seated between Senegal and Níger rivers, there were various communities, generically called Mandê, assembled in independent towns.

Between the IV and the VIII century the groups started merging together, probably for defending themselves from nomads of the north-eastern regions, to eventually create the Gana Empire. The new realm became so solid along the decades that in the XI century it turned out to be one of the wealthiest and most prosperous on earth, also called the Land of Gold. But in 1076 its capital Kumbi-Saleh<sup>6</sup> was conquered and plundered by the Berbers, signing the beginning of the fragmentation of the empire.

The northern part of Gana Empire, after wars and feuds between peoples of those territories, was united again and obtained its autonomy. This new empire, called Mali Empire, started growing and in less than three centuries it completely took over the (also territorial) heritage of the decayed Gana Empire.

The group who headed the renaissance of that wide dominion was the Mandingas, belonging to Mandê family, which is still today living in Guinea-Bissau.

Mali Empire started going into decline at the end of the XIV century and in the land of the actual Guinea-Bissau, at that time territory of Gabu Kingdom (autonomous region of the Empire), several ethnicities flowed, such as Fulas, who were living in the neighbouring areas, and Balantas, who migrated in small groups from eastern African lands (now Sudan and Ethiopia).

Henceforth, for multiple causes, these entities split into smaller groups coming to compose the current reality; each one with its own tradition, but with various affinities with one another.

The evolution of traditional law followed an autonomous way, characterized by a certain homogeneity, due to the sturdy roots of the socio-cultural system of the ethnic groups and to their resistance to be affected by external factors, as we are going to describe in the next section.

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<sup>6</sup> Town in present southern Mauritania, close to Mali border.

### 3. History and definition of traditional law.

Before the colonization and the beginning of the so-called ‘Estado de Direito’<sup>7</sup>, the social groups living in the Bissau-Guinean territory were organised exclusively on the basis of customs and traditions. This meant that regulatory sources of law had to be identified in the tradition practiced by everyone for a long time and perceived as legally binding.

Giving a general definition of traditional law, which can be valid for that historical period but also for the present age, it is possible to say that it identifies itself with the common relations generally followed in social interactions.

The implied customary rule is integrated with ethical tenets, which express unconditional duties, unaffected by evaluations of convenience. Therefore, individuals’ conscience to comply with the fundamental principles of society assumes a prominent role.

But also religious precepts come into consideration: in a society established far from Christian and Islamic influences (succeeded later with the arrival of Europeans on one

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<sup>7</sup> The expression is let on the original language because there is a discrepancy, not a full overlap, between the Anglo-Saxon paradigm of ‘Rule of Law’ and the Romanist conceptions descending from the original ‘Rechtsstaat’.

According to Michel Rosenfeld (*Lo stato di diritto e la legittimità della democrazia costituzionale*, in [www.dirittoquestionipubbliche.org/page/2004\\_n4/mono\\_M\\_Rosenfeld.pdf](http://www.dirittoquestionipubbliche.org/page/2004_n4/mono_M_Rosenfeld.pdf)), ‘Rechtsstaat’ and ‘Rule of Law’ are often considered equivalent concepts in two different legal traditions. In practical terms, they have some important elements in common, deriving from original affinities; the principal is the link between the State and the institutionalization of a juridical regime, that is the obligation for the State to exercise its power in conformity with the principle of legal equality and recognising the fundamental rights of persons.

Apart from this, the two concepts diverge significantly, in particular for the interpretation of the relationship between State and law. The Anglo-Saxon idea is based on an antagonistic relation between State power and law; on the contrary, German counterpart clearly proclaims a symbiosis between law and State. In general terms, for ‘Rechtsstaat’ law is the only instrument through which the State can exercise its power. Consequently, the word ‘Rechtsstaat’ could be appropriately expressed with the locution ‘State power through the law’.

If we want to give a definition of ‘Estado de Direito’, we can take the actual explanation of the French ‘État de droit’: born as a translation of the German ‘Rechtsstaat’, it was transformed from the XIX century German positivist connotation, meaning “constitutional State as legal guardian of the fundamental rights (against the violations coming from the acts of Parliament)”.

The most intuitive discrepancy between the Romanist and the Anglo-Saxon vision is represented by the role of the judge: for the first, he is submitted to the law, which becomes the focal element of the system; for the second, he is the guarantor of rights and liberties concerning normative acts, which means that concretely he makes law. Albert Venn Dicey (quoted by Roberto Bin in *Stato di diritto*, in [www.robertobin.it/ARTICOLI/StatodidirittoEDD.pdf](http://www.robertobin.it/ARTICOLI/StatodidirittoEDD.pdf)) said apropos of the topic that constitutional law is not the source, but the consequence of individual rights as they are defined and guaranteed by the Courts of justice.

However, today these definitions are mediated by two considerations: on the one hand, also in Romanist systems judges make law, so the jurisprudence can be everywhere considered a source of law; on the other hand, Anglo-Saxon systems are bending to the prevalence of the law with legislative origin.

side and with the flow of merchants coming from eastern Africa on the other side), faith was placed in forefathers' souls, which guided individuals' lives and were beseeched for having enlightenment regarding behaviours and dispute resolutions. Even today ancestors' spirits are a crucial component of personal and social living; they fully participate in the formation of guaranteed rules, spread through the mouths of 'Regulos' (supreme authorities of hierarchical ethnic groups), 'Chefes das tabancas' (heads of the villages) and of 'Djambacosses' (shamans with supernatural and magical powers), who are the people able to communicate with them.

Although it could appear incompatible with the static idea of a constant repetition of conducts or behaviours, now as then traditional law is subject to a modification process which, precisely because of the weight of the tradition in the communities, has necessarily to be the result of a slow internal alteration ensuing from the rise of new convictions, that are innovations inspired by multiculturalism of the surrounding society and the inevitable changes it takes.

In the light of the foregoing, traditional law results as a source of law typified by precepts, corresponding to consensual, moral and religious customs equally followed with the certainty of their imperativeness; these practices assume a juridical consolidation when their value is recognised and they gain full force because of the acceptance of the receivers.

Before the arrival of the colonists, what has just been expounded was the only source of law existing in the area of Guinea-Bissau.

As mentioned in the previous paragraph, Portugal's colonization between the XV and half of the XX century was not highly oppressive because its economic and human resources were not up to what was required to fully dominate the overseas possessions. This factor also had repercussions on imposed rules. Despite the proliferation of the *ad hoc* legislation for the colonies, Portuguese administrators preferred *de facto* to delegate, as much as possible, conduct regulations to local authorities, which were officially designated for citizens' dispute resolutions and for mediation between communities and Crown's officials.

The situation of tolerance that was created had the effect of guaranteeing the integrity of traditional law, thanks to its continuous application over time<sup>8</sup> and also where colonial influence was stronger.

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<sup>8</sup> Reiterated practice was not the only factual medium of transmitting customs. Younger members of the community were relentlessly educated so they could become guarantors of the rules and they could apply them in a common and respected way as in the past.

An example of customs transmission is narrated by Calmicia Sohres, eminent woman of Bijagó ethnic group in Inorei, village on the island of Canhabaque: "*every time they are called to decide, the judges have to summon two persons of different 'camada' (age group), generally one of more than thirty years old and the other of less than sixteen years old, so that they can watch how the justice is administrated;*

Independence completely changed the context.

First of all, the new State's representatives considered the traditional authorities "*traitors to the fatherland*"<sup>9</sup> because of their collaboration with Portugal, so the loss of formal recognition of their power was the consequence (even if they continued exercising their typical prerogatives applying customary law).

Secondly, the birth of a Constitutional State presumed the creation of the classical sources of law from the European continental perspective, namely the Constitution and the substantive and procedural codes with their complementary acts, which have been issued in succession in the last decades.

The analysis of these sources reveals where the problem between positive and traditional law exists. The present Constitution of Guinea-Bissau, in use since the 16<sup>th</sup> of May 1984, does not include any reference to customary law; the same can be said for the Criminal Code. Only the Organic Act of District Courts<sup>10</sup>, which regulates the operation of first instance courts for civil and criminal "*pequenas causas*"<sup>11</sup>, and the Civil Code consider respectively in Article 2: "*In the administration of justice District Courts will privilege: a) solutions based on consensus and equity; b) customs and practices not in contrast to State law*"<sup>12</sup>, and in Article 3, Paragraph 1 (which is written exactly as Article 3 of Portuguese Civil Code): "*Customs which will not be contrary to the principles of good-faith are legally reliable when the law determines it*"<sup>13</sup>.

These legal provisions, merely quote customs, but they do not even provide definitions. Therefore, actually traditional law can be described as the law arising from factual

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*this happens because tomorrow a judge could die, but someone would always possess the knowledge. It is a cycle which is repeated from generations to generations*".

From the interview with Ms. Calmicia Sohres of the 17.03.2012 - Canhabaque (Guinea-Bissau), Audio n. 4.

Advices for the reader: (i) This and all the quotations included in the present paper have been translated in English by the author; (ii) The audios mentioned in the present paper are filed at the University of Trento (Italy) as support documents of the master degree thesis of Samory Badona Monteiro, *L'equità e la riparazione nel diritto penale della Guinea-Bissau*, Academic year 2011/2012.

<sup>9</sup> United Nation Development Programme and Ministry of Justice Republic of Guinea-Bissau, *Access to justice assessment in Guinea-Bissau: Regions of Cacheu and Oio and Bissau autonomous sector*, April 2011, p. 30.

<sup>10</sup> Decree Law n. 6/1993.

<sup>11</sup> Trans.: "*Low value lawsuits*". Ref. Article 12, Paragraph 4, Organic Law of Courts, Law n. 3/2002. The fact that the law which disciplines the organization and coordination of the judiciary, the Organic Law of Courts, entered in force nine years after the promulgation of the specific regulations, such as the Organic Law of District Courts, is due to the aim of creating the conditions for the adequate administration of justice, as outlined in the preamble of the same Law n. 3/2002.

<sup>12</sup> "*Na administração da justiça os Tribunais de Sector privilegiarão: a) Soluções baseadas no consenso e na equidade; b) Os usos e costumes que não contrariem lei expressa.*".

<sup>13</sup> "*Os usos que não forem contrários aos princípios da boa fé são juridicamente atendíveis quando a lei o determinar.*". According to the provision, where it is said "*when the law determines it*", State law would be the source of applicability for local customs; it is a particular situation because factually there is a reference also to those customs which arise after the entry into force of the Code.



customs of each ethnic group and practiced in the single social context but not defined in any legislative provision.

#### **4. Coexistence between traditional law and State law.**

The relationship between the sources of law in Guinea-Bissau has been historically subjected to continuous alterations due to political and institutional events, on the one side, and constant evolution of traditional law on the other side.

Until the first half of the XIX century the only reference to positive law was possible considering exclusively the Crown's rules which were regulating the administration of overseas territories; these were fundamentally formalized for the purpose of representing an external guarantee to avoid interferences of the other colonialist States moving on the scene of the recently discovered continent, rather than with the aim of creating an effective legislative synergy between the motherland and the colony.

The first Portuguese Constitution, promulgated in September 1822, merely established that Portuguese legislation had also to be applied in the present Guinea-Bissau, part of the United Kingdom of Portugal, Brazil and Algarve (Article 20 of the Charter mentioned Bissau and Cacheu, the headquarters of Portuguese Harbourmasters). In the last twenty years of the XIX century, not even the institution of an autonomous government in Guinea-Bissau, with the creation of an *ad hoc* legislation for the colony, led to a specific regulation of the sources of law.

Thereafter, the Portuguese Republican Constitution of 1933, differing from the previous Charter, provided for an innovation: the Colonial Act was attached as an addition to Article 132, which precisely prescribed the administrative autonomy of the colonies. If this constitutional annex represented the highly ranked document containing the principles, the regulatory integration arrived with the Organic Charter of the Portuguese Colonial Empire.

As defined in Article 10 of its preliminary provisions, this Organic Charter first of all *"Revokes the organic bases of colonial administration [...], all the organic charters and further regulations that, expressly or implicitly, are in contrast to its dispositions"*<sup>14</sup>.

In considering the applicable law, Article 199 declared: *"Referring to the facts submitted to judgement, colonial courts cannot apply laws, decrees or other regulations which violate the provisions of the Constitution and the Colonial Act or which are inconsistent with the principles contained in thereof, as how they are interpreted in the*

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<sup>14</sup> Original: *"revoga as bases orgânicas da administração colonial [...], todas as cartas orgânicas e a mais legislação que, espressa ou tácitamente, fôr contrária às suas disposições."*



present *Organic Charter of the Empire*<sup>15</sup>; this rule is linked to Article 208, which established that: “*The criminal regime applicable to indigenous people will correspond in each colony to its social status and individual way of being. The criminal and penitentiary law reform has to particularly consider this principle*”<sup>16</sup>, and to Article 209, which affirmed that “*Regulative ordinances could apply the penalties mentioned in article 486 of Penal Code to the offenders, with the modifications in force in the ‘metropolis’*”<sup>17</sup>. As a result, it is possible to infer that, at the time, in Guinea-Bissau the local colonial legislator promulgated a dedicated set of rules adapted to suit contingent requirements and with particular consideration to the original social characterization which historically marked the autochthonous population.

Explicit acknowledgement of traditional law by Portuguese colonial legislation is found in Article 36 of the aforementioned source of law: “*It belongs to the governor’s authority, as natural protector of indigenous people and main responsible for policy direction: [...] 2º A superior verification on the application of law and rules disposed to protect ... customs and practices of indigenous people which do not offend national sovereignty rights or repudiate the principles of humanity*”<sup>18</sup>; even if it is general, the provision can be interpreted as an imposition on the local governor in order to formalize customary rules which are not conflicting with homeland’s sovereignty and principles of humanity<sup>19</sup>. In the historical evolution of the relationship between traditional law and

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<sup>15</sup> Original: “*Nos feitos submetidos a julgamento não podem os tribunais das colónias aplicar leis, decretos ou quaisquer outros diplomas que infrinjam o disposto na Constituição e no Acto Colonial ou ofendam os princípios nêles consignados, tal como na presente Carta Orgânica do Império são interpretados*”.

<sup>16</sup> Original: “*O regime penal aplicável aos indígenas corresponderá em cada colónia ao seu estado social e modo de ser individual. A reforma das leis penais e prisionais ultramarinas deve ter em atenção êste princípio essencial*”.

<sup>17</sup> Original: “*As portarias regulamentares da colónia poderão cominar aos contraventores es penalidades mencionadas no artigo 486.º do Código Penal, com as modificações vigentes na metrópole*”.

<sup>18</sup> Original: “*Compete ao governador, como protector nato dos indígenas e principal responsável pela direcção da política: [...] 2.º Fiscalizar superiormente o modo como são cumpridas as leis e preceitos tendentes à defesa...dos usos ou costumes dos indígenas que não ofendam os direitos da soberania nacional ou não repugnem aos princípios da humanidade*”.

<sup>19</sup> From the colonial perspective, the principles of humanity cannot be associated with the modern fundamental human rights, but to the general standards of civilization of the time.

We have to consider, on the one hand, that the Colonial Act was one of the first laws promulgated by the Portuguese dictatorial government led by António Salazar and, on the other hand, that in 1933 we still did not have neither the Universal Declaration of Human Rights, nor the ECHR or the Charter of Fundamental Right of the EU as landmarks.

It is symptomatic the idea of Armindo Monteiro, Minister of the Colonies between 1930 and 1940, main ideologist of the ‘Imperial Misticism’, son of the ‘Social Darwinism’: he did not conceive a harmonious and fraternal relationship between black and white persons; he actually conferred to Portugal the ‘historical duty’ to civilize the ‘inferior races’ under its dominion, because it is matter of protection of indigenous, converting them to Christianity, educating them to work and for work, and elevating them intellectually, morally and materially.

colonial law, at this point the maximum acknowledgement of the first one by the second one was reached.

At the conclusion of the short excursus of the colonial period, it is possible to assert that in spite of an even more detailed legislation, there was not a corresponding atrophy of traditional law for a series of factors: Portuguese's worries have always been focused on maintaining the dominion on the conquered colonies and on the profits produced by the colonial commercial system; administration was not so branched out on the territory as to guarantee an integral and permanent application of the regulation officially imposed; the recognition of juridical customs, also in its most explicit expression, was generic and uninterested; finally, although the executive authorities also held the judicial power, in most cases the decision was referred to local authorities that judged applying their own law<sup>20</sup>.

Legislative activity that followed the birth of the Republic of Guinea-Bissau reshaped the framework of the sources of law and now it is one of the most fascinating issues within Bissau-Guinean law. The State system did not stand out totally; on the contrary, it is perceived far apart from ethnic realities. The relationship between the two entities is conflicting and unstable because of the absence of a harmonized regime: that is why it is possible to speak about autonomy and integration at the same time, assuming the two distinct perspectives.

On the one hand, we can talk of autonomy assuming the point of view of traditional law. It originated many centuries before State (and previously colonial) law, following the evolution of ethnic communities, and also today it proudly maintains its typical profiles, which have not been undermined even under the spread of the law of the State. On the other hand, we talk about integration when we assume the point of view of positive law.

As far as civil law is concerned, reading Article 3 of the Civil Code of Guinea-Bissau, Professor José Carlos Rodrigues da Fonseca says: "*we can observe that in Bissau-Guinean legal system the main source of law is State law, but customs are recognised as long as they are not in opposition to the very State law*"<sup>21</sup>.

In the criminal field, Bissau-Guinean Criminal Code establishes that exclusively State legislation in force before the fact is the basis of the State's right to punish, declaring in Article 2, Paragraph 1 that "*Only a fact described and declared to be a crime by the law*

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From Cláudia Castelo, *O luso-tropicalismo e o colonialismo português tardio*, in [www.buala.org/pt/aler/o-luso-tropicalismo-e-o-colonialismo-portugues-tardio](http://www.buala.org/pt/aler/o-luso-tropicalismo-e-o-colonialismo-portugues-tardio).

<sup>20</sup> Further demonstration that, as we have seen in the previous paragraphs, even if Portugal formally declared to apply the colonial principle of assimilation, most situations factually represented the principle of separation.

<sup>21</sup> Interview with Professor José Carlos Rodrigues da Fonseca, former legal adviser of Parliament's Presidency and professor at Bissau Faculty of Law, of the 25.04.2012 - Bissau (Guinea-Bissau), Audio n. 12.

*or sanctioned with a penalty provided in the present Code constitutes a crime.*”<sup>22</sup>, which follows the penal enactment of the Romanist principle of legality, but nevertheless District Courts can resort to customs and practices on the subjects or profiles not regulated by the law, assuming that they are consistent with the latter, as established in Article 2 of the Organic Act of District Courts mentioned earlier<sup>23</sup>.

The former President of the Supreme Court of Justice of Guinea-Bissau, Honorable Justice Maria do Céu Silva Monteiro, says that, in concrete terms, judicial cases demonstrate that a ‘judicialization’ of District Courts has been reached, so they rarely apply customs and practices and tend to comply with State legislation<sup>24</sup>. So, at the end, the integration simply remains an abstract legal provision.

The analysis of the relationship between the two legal systems shows that another problem often occurs, and it is the contradiction between customs and State law, the so-called ‘*contra legem* custom’.

Considering that the formal background is represented by a modern State in which the hierarchy of the sources of law places State law as primary and customs as secondary and complementary, Augusto Silva Dias<sup>25</sup> explains what concretely happens: on the applicative level generally intended, which means taking into account the application done not just by the judicial authorities (both traditional<sup>26</sup> and State), but also by people in the daily acts with juridical significance, in case of contrast custom remains the most widely enforced legal rule, thanks to the special practical power which links it with the social cognition and perception.

In case of disagreement then we speak about ‘symbolic legislation’, meaning the loss of substantive value by State law, and its consequent ineffectiveness. It does not mean that traditional rule always prevails over State rule, but rather that it is necessary to find the compromise which combines the two of them within the scope of the fundamental

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<sup>22</sup> Original: “*Só constitui crime o facto descrito e declarado como tal por lei o que esta sancionar com uma das penas previstas no presente Código.*”.

<sup>23</sup> This legislative configuration of the criminal field, which discloses traditional law as an integrative source, leads to the fact that the very codified State law entails an automatic exception to the principle of legal (statutory) reservation, from which descend the alteration of the guarantee of legal certainty.

<sup>24</sup> Interview with Honorable Justice Maria do Céu Silva Monteiro of the 16.11.2012 - Lisbon (Portugal), Audio n. 15.

<sup>25</sup> Augusto Silva Dias, *Problemas do direito penal numa sociedade multicultural: o chamado infanticídio ritual na Guiné-Bissau*, in [www.fd.ulisboa.pt/wp-content/uploads/2014/12/Dias-Augusto-Silva-PROBLEMAS-DO-DIREITO-PENAL-NUMA-SOCIEDADE-MULTI-CULTURAL-O-CHAMADO-INFANTICIDIO-RITUAL-NA-GUINE-BISSAU.pdf](http://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Dias-Augusto-Silva-PROBLEMAS-DO-DIREITO-PENAL-NUMA-SOCIEDADE-MULTI-CULTURAL-O-CHAMADO-INFANTICIDIO-RITUAL-NA-GUINE-BISSAU.pdf), p. 6.

<sup>26</sup> When we talk about traditional authorities, we have to keep in mind that we refer to an innumerable category because in the ethnic systems the judicial power is held by heads of the families, heads of the villages, the supreme authorities of each ethnic group, or other particular figures who vary from a group to another. See Samory Badona Monteiro, *L’equità e la riparazione nel diritto penale della Guinea-Bissau*, University of Trento, Academic year 2011/2012, pp. 36-49.

constitutional values; especially in the field of criminal actions where legal goods as life and physical integrity, protected by the Constitution, come into account.

The territorial and personal standards of application in the interactive context of traditional law and State law are the last points to be examined for understanding the coexistence of the two sources.

From the examination of territorial limits of application, we know that State law is enforced in the entire territory of the Republic defined by international treaties, while ethnic laws are effective in the areas considered properties of the different groups by a shared understanding of what the limits are. The consequence is that State law and customs inevitably interfere with one another and application problems occur not just between the two of them, but also among ethnic laws themselves, considering that ethnic territories are not clearly outlined, they are not necessarily bordering and there are many lacunae in the land registers.

Considering the personal standard of application, first of all it is to be noticed that the peculiarity of traditional law has to be considered, which is the individual's recognition of its supremacy because of the ethnic connotation of people's behaviour, which is a matter of education, tradition and pride that are scarcely erased by personal habits. However, today there is an expansion of knowledge of positive law, so most of the Guinean population (except for a few groups which are still living in isolated places very far from the urban areas) have a double perception: of State law and of his/her own ethnic law. The primacy of one or the other varies in accordance with the person's living area; the closer we are to a town, the easier it is for the State law to be known and to be a normative reference for human action. Anyway, in Guinea-Bissau the State presence is not so marked and therefore ethnic peculiarity maintains a relevant importance: *"first of all people identify themselves with their fatherland and secondly with the political nation, which means that ethnic devotion is stronger than national consciousness"*<sup>27</sup>.

Concerning the connectedness of the two sources of law on the applicative level, from the outset of the colonial period until today there has always been a coexistence between State law and traditional law, even though through time applicative proportions changed less and less. If in the past, also in the towns built by Portuguese colonists, customs were predominant, nowadays the coincidence of urbanization (with an ethnic melting-pot) and codification factors (already increased before the State constitution) are the reason why positive law in urban areas is applied, at least for significant disputes and cases with a strong social disvalue. On the contrary, juridical customs are used only in rural areas or forestland: villages are built on ethnic basis, so the members experience

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<sup>27</sup> Ibidem, p. 2. Original: *"as pessoas identificam-se em primeiro lugar com o seu 'chão' e só depois com a nação política, ou seja, é mais forte a fidelidade étnica do que a consciência nacional"*.

the same culture, and there are also territories in which people do not even have knowledge of State law; this is why the application of uses and customs is integral. Furthermore, State Courts are located far apart and the lack of public transportation and infrastructures makes them scarcely available.

We have seen that when customs are applied, they have to be coordinated with positive law, so their interpretation can be proposed in a particular meaning, namely as a comparative criterion that anticipates the practical phase<sup>28</sup>.

The regulation of the Organic Law of District Courts, combined with application, has value if we consider State judge's prerogatives. He acts like a 'laic judge', who *"has to mediate a communicative process between two extremes represented by legal language [...] and the running language in the offender's way of life, with the objective of establishing correspondences between the two. These correspondences can never be established on an identity level but always on a similarity level. In other words, the judge has to enter the current representations of the offender's life world and verify if these correspondences are or are not convertible into law words"*<sup>29</sup>.

On the contrary, if we assume the position of traditional authority the consequence is the use of customs independently from the possible contradiction with State law; a preliminary verification about compatibility is not contemplated.

As underlined by judge Alberto Carlos Leão, *"the lack of harmonization is exactly in the absence of a common rule, of common uses and customs which regulate these interethnic situations. At this point traditional law of Guinea-Bissau creates problems. There are no common solutions yet."*<sup>30</sup>.

This consideration can be interpreted in different ways: it can be interpreted in the sense that in each ethnic regulatory system there is not a prescription which regulates the relationship between different customs; but it can otherwise be interpreted to mean that traditional authorities have never met in legislative assemblies with the aim to create one or more 'supersystemic' *ad hoc* rules which could summarize the disciplines wherever integration was possible, or indicate the one applicable in case of contrast;

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<sup>28</sup> This particular meaning is something different and additional compared with the basic interpretative activity carried out by the authorities appointed for their application.

<sup>29</sup> Augusto Silva Dias, *Problemas do direito penal numa sociedade multicultural: o chamado infanticídio ritual na Guiné-Bissau*, in [www.fd.ulisboa.pt/wp-content/uploads/2014/12/Dias-Augusto-Silva-PROBLEMAS-DO-DIREITO-PENAL-NUMA-SOCIEDADE-MULTI-CULTURAL-O-CHAMADO-INFANTICIDIO-RITUAL-NA-GUINE-BISSAU.pdf](http://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Dias-Augusto-Silva-PROBLEMAS-DO-DIREITO-PENAL-NUMA-SOCIEDADE-MULTI-CULTURAL-O-CHAMADO-INFANTICIDIO-RITUAL-NA-GUINE-BISSAU.pdf), p. 18. Original: *"tem de mediar um processo comunicativo entre dois pólos constituídos pela linguagem legal [...] e a linguagem corrente na forma de vida do agente, com vista ao estabelecimento das correspondências entre ambas. Essas correspondências nunca se podem estabelecer ao nível da identidade mas sempre e só ao nível da semelhança. Dito de outro modo, o juiz deve penetrar nas representações correntes do mundo da vida do agente e verificar se elas são ou não convertíveis nas palavras da lei"*.

<sup>30</sup> Interview with Judge Alberto Carlos Leão, judge of the Regional Court of Bissorã, of the 26.04.2012, Bissau (Guinea-Bissau), Audio n. 13.

finally, focusing on the concept of ‘common law’, the judge’s remark can be construed in the sense that the State legislator did not provide for a legislative text which would integrate Article 2 of the Organic Law of District Courts, regulating territorial limits of application, personal limits of application and the combined limits of applications of single traditional laws.

A common solution would have consequences also in the procedural field because jurisdictional conflicts would have been solved *ex ante* or on the preliminary phase of the trial.

In a comparative perspective the research aimed at finding and proposing a synergistic solution in the criminal field, which could link the two main sources of law, State law and traditional law. In particular, the result will affect the system of penalties and for this reason the reparation will be explored.

## 5. The reparation.

Influenced by the philosophical idealism, from the XIX century criminal policy started to dissociate from subjective rights and from a personalist vision (referred to concrete victims) of the crime, orienting itself to the more extensive reality of the society, which consequently claimed the right to punish. In so doing, the transition to a conceptual abstraction in which the State undertakes a predominant role was marked, and as the outcome of this process a new category was built, one that had to be protected by the law: the category of ‘legal goods’. They were normatively created and they assumed a communitarian, impersonal, moral and religious features<sup>31</sup> (the focus is now on the potential victim, while the concrete victim loses the leading role and his rights deriving from the crime fade away).

For reacting to this transformation of criminal law, from the ‘80s of last century a debate started on the opportunity to introduce into the criminal system a new institute as a juridical solution, differing from the civil compensation deriving from a crime, but also as alternative way to trial resolution and to punitive consequences of the crime: namely reparation.

This solution would have had a double convenience: “*one with a substantive nature because, being the third degree alongside penalties and safety measures, it would allow to achieve the function of criminal law; the other one, with judicial nature, would allow*

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<sup>31</sup> Albin Eser, *Bene giuridico e vittima del reato - Prevalenza dell’uno sull’altra? Riflessioni sui rapporti tra bene giuridico e vittima del reato*, pp. 1062 e 1063 of *Rivista italiana di diritto e procedura penale*, 1997 (pp. 1061 e ss.); in <http://www.freidok.uni-freiburg.de/volltexte/3775/>, pp. 3 e 4.



*to conclude the (criminal) action avoiding the trial, with undeniable benefits for the promptness of the trial system*<sup>32</sup>.

The reparation is defined in general terms as *“the reinstatement, to the extent possible, of the legal order violated by the commission of a criminal action”*<sup>33</sup>. A formulation of this tenor certainly affects the material profile of the institute, as it comes from the private law regulation of criminal responsibility, by which we have the direct reparation of the principal victim with a compensation, but also the direct reparation of the community generally through the payment of an amount of money to a social institution; but a non-substantive feature is further included, considering the possibility of a symbolic reparation towards the principal victim and the community which can be accomplished by the apologies, the acceptance of the admonishment, a conciliatory gesture, the execution of a work for the victim or a community service<sup>34</sup>. This will ensure the compensation of the effects of the crime and, at the same time, the restoration of the juridical order is accomplished.

The definition is well outlined by Martin Wright, who says that the reparation is represented by *“actions to repair the damage caused by the crime, either materially (at least in part) or symbolically. Usually performed by the offender, in the form of payment or service to the victim, if there is one and the victim wishes it, or the community, but it can include the offender’s co-operation in training, counselling or therapy. Reparative actions can be undertaken by the community.”*<sup>35</sup>.

The reparative model revitalises some elements, which we briefly list below, that have been more and more set aside by the classical system.

First of all, the offender plays an active role in the decision of the restoration of the effects of his criminal action and this circumstance allows him to be aware of what he did, taking consciousness and consequently understanding the disvalue of the unlawful action<sup>36</sup>.

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<sup>32</sup> Mário Ferreira Monte, *Da reparação penal como consequência jurídica autónoma do crime*, in *Liber Discipulorum Jorge de Figueiredo Dias*, Coimbra Editora, Coimbra, 2003, p. 132. Original: *“uma, de cariz substantivo, porquanto ela sendo o terceiro degrau ao lado das penas e das medidas de segurança, permitiria cumprir a função do Direito penal; outra, de cariz processual, judicial, porquanto permitiria colocar termo ao processo de forma a evitar o julgamento, com inegáveis ganhos para a celeridade processual”*.

<sup>33</sup> Pablo Galain Palermo, *La reparación del daño como equivalente funcional de la pena*, Facultad de Derecho de la Universidad Católica del Uruguay, Konrad Adenauer Stiftung, Montevideo, 2009, p. 106. Original: *“el restablecimiento, dentro de lo posible, del orden jurídico perturbado por la comisión de una infracción penal”*.

<sup>34</sup> Ibidem, p. 107.

<sup>35</sup> Martin Wright, *Justice of victims and offenders*, p. IV; in Grazia Mannozi, *La giustizia senza spada. Uno studio comparato su giustizia riparativa e mediazione penale*, Giuffrè Editore, Milano, 2003, p. 88.

<sup>36</sup> Claus Roxin, *Derecho Penal Parte General Tomo I Fundamentos. La estructura de la teoría del delito*, Translation of the second German edition and notes by Diego-Manuel Luzón Peña, Miguel Díaz García Conlledo, Javier de Vicente Remesal, Editorial Civitas, S. A., 1997, p. 109: *“The reparation of the*



Secondly, the victim turns to play a main role with a return in the foreground of his interests and with an active participation to the process. From this point of view, the concept of penal ‘victimology’, born in the middle of the past century, constitutes a solid root for the analysed model<sup>37</sup>.

Thirdly, the participation by the community to the entire criminal process, as the figurative place where the crime happens, as the secondary victim of the offence, but also as the supporting player in the evaluation of the restoration of the damage and the recovery of the social balance<sup>38</sup>.

Lastly, the attention reserved by the reparation to the community has a repercussion on the structure of the damage, which necessarily achieves a social connotation<sup>39</sup>.

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*damage [...] constrains the author to confront with the consequences of his action and to learn about the legitimate interests of the victim.”; original: “La reparación del daño [...] obliga al autor a enfrentarse con las consecuencias de su hecho y a aprender a conocer los intereses legítimos de la víctima.”.*

<sup>37</sup> The following extract of the analysis expounded by Josep Tamarit Sumalla summarizes very well the features of victimology related to reparative justice: “*Victimology, being a discipline grounded on the empirical knowledge of the victim and shaped under the influence of a ‘feminine rationality’, careful of the ethic of the cure or of the typical contents of the emotive intelligence to the detriment of the traditional juridical rationality with ‘justicialism’ and idealistic tones, allows us to stop considering the reaction against the criminal offender as the primary objective of the social intervention preceding the crime. Besides strenghtening prevention, victimology tends to establish other mechanisms of compensation in the victim’s favour, through solidarity and assistance, oriented to reach the abandoning of playing the victim, which reduce the ‘punitive impulses’ of the victims, whereby victimology ultimately possesses a potential for reducing the punitive pressure. Reparative justice can remember us that in front of a deep rooted conception which associates, more or less explicitly, the fact of ‘making justice’ to vindictive reactions, such aspects as the recognition of the crime and its victim and the reparation presupposes another way of ‘making justice’, maybe far from a certain idealist tradition but closer to the necessities of social pacification. A criminal policy oriented to the victim is an empirical based policy, and therefore the development of victimology makes evident the possibilities and advantages of a reparative juridical culture.*”. Original: “*La victimología, como disciplina fundada en el conocimiento empírico de la víctima y conformada bajo la influencia de una ‘racionalidad feminizada’, atenta a la ética del cuidado o contenidos propios de la inteligencia emocional en detrimento de la racionalidad jurídica tradicional de tono justiciero e idealista, nos permite dejar de considerar la reacción frente al delincuente como el objetivo prioritario de la intervención social ante el delito. Amén de potenciar la prevención, la victimología llama a establecer otros mecanismos de compensación a favor de la víctima, a través de la solidaridad y la asistencia, dirigidos a lograr la desvictimación, que reduzcan los ‘impulsos punitivos’ de las víctimas, por lo que la victimología tiene, en definitiva, un potencial de reducción de la presión punitiva. La justicia reparadora puede recordarnos que frente a una muy arraigada concepción que asocia, de modo más o menos explícito, el hecho de ‘hacer justicia’ a reacciones vindicativas, aspectos como el reconocimiento del delito y de su víctima y la reparación suponen otro modo de ‘hacer justicia’, quizás más alejado de cierta tradición idealista pero más cercano a las necesidades de pacificación social. Una política criminal orientada victimológicamente es una política criminal con bases empíricas, pues el desarrollo de la victimología pone de manifiesto las posibilidades y las ventajas de una cultura jurídica reparadora.*”. From Josep Tamarit Sumalla, *Política criminal con bases empíricas en España*, in *Política Criminal* n. 3, 2007, pp. 1-16; in [www.politicacriminal.cl/n\\_03/a\\_8\\_3.pdf](http://www.politicacriminal.cl/n_03/a_8_3.pdf), p. 15.

<sup>38</sup> Grazia Mannozi, *La giustizia senza spada. Uno studio comparato su giustizia riparativa e mediazione penale*, Giuffrè Editore, Milano, 2003, pp. 62 to 72.

<sup>39</sup> Pablo Galain Palermo, *La reparación del daño como equivalente funcional de la pena*, Facultad de Derecho de la Universidad Católica del Uruguay, Konrad Adenauer Stiftung, Montevideo, 2009, pp. 115-

All these elements will come back into consideration once we will speak about traditional penalties.

The reparative model was duly elaborated by a group of German, Austrian and Swiss professors in the early '90s of the past century. Under the leadership of Claus Roxin, the 'Alternativ-Entwurf Wiedergutmachung', literally Alternative Project on Reparation (hereinafter 'AE-WGM'), was created in order to define legal nature and setting of reparation.

The uncertainty given by the two previous definitions, the first which considered the institute as a mere application of the civil compensation on the penal procedure<sup>40</sup> and the second which put it within the framework of penalties as an authentic sanction<sup>41</sup>, was resolved by the introduction of a third-way, clearly in the criminal domain, which acknowledges the reparation as having its own status with regards to the two classical consequences of the crime, such as penalties and security measures.

The result of the project was drawn up in a body of rules composed by twenty-five provisions, which systematize the institute under the substantive and procedural aspects.

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116: *"The crime, besides a material or moral prejudice, provokes the violation of the legal system (formal unlawfulness) and produces a social damage (substantial unlawfulness), sometimes against a defined victim, some other times with prejudice to widespread victims, but always in detriment to society in general. Social damage is a concept which protects the relation with the concept of 'legal good'. [...] The social damage caused by the crime can affect a person in particular, who has the possibility to intervene in the criminal trial for defending his/her interests and rights, but it is also a damage which harms people in general, having detrimental effect on the legal system."* Original: *"El delito, además de un perjuicio material o moral, provoca la vulneración del ordinamiento jurídico (antijuridicidad formal) y produce un daño social (antijuridicidad material), unas veces, contra una víctima determinada, y otras veces, en perjuicio de víctimas difusas, pero siempre en menoscabo de la sociedad en general. El daño social es un concepto que guarda relación con el concepto de bien jurídico. [...] El daño social causado por el delito puede afectar a una persona en particular, quien tiene la posibilidad de intervenir en el proceso penal en defensa de su interés o de sus derechos, pero también es un daño que atenta contra la generalidad, al lesionar el ordinamiento jurídico."*

<sup>40</sup> Theory already criticized before the 'AE-WGM' by Jorge de Figueiredo Dias, *Sobre a reparação de perdas e danos arbitrada em Processo Penal*, Coimbra Editora, Coimbra, 1966, pp. 21-22, who quoted Enrico Ferri: *"the damage originated from a crime is different from the ex contractu damage because the crime belongs to public law and it is not a legal transaction which has to be confronted with private law rules"*, *"the reparative sanction (damage compensation) has public nature and it is State's function, as the other form of crime prevention and repression"*. Originals: *"o dano ex delicto è essencialmente diverso do dano ex contractu, já que o delito pertence ao direito público e não è um negócio jurídico que deva regular-se com as normas do direito privado"*, *"a sanção reparatória (ressarcimento do dano) tem carácter público e è função do Estado como as outras formas de prevenção e repressão do delito"*.

<sup>41</sup> Mário Ferreira Monte, *Da reparação como consequência jurídica autónoma do crime*, in Jorge de Figueiredo Dias, *Liber discipulorum*, Coimbra Editora, Coimbra, 2003, p. 139: *"a proposal based on the idea of volunteer aim, in which the author and the victim voluntarily come to an agreement and, for this conception, the reparation acts as an authentic penalty, insofar as the judge sentences the author to repair"*. Original: *"uma proposta que assenta na idea de voluntariedade, em que infractor e vítima se entendem voluntariamente, agora, para esta concepção, a reparação funciona como autêntica pena, na medida em que o juiz condena o agente a reparar."*

The first article<sup>42</sup> defines the fundamental features of the model. So the reparation is set as a consequence of the crime which has the objective to restore peace; so it is necessary for the offender to become conscious of the disvalue of his conduct and its effects and to carry out a volunteer action which, first of all, brings benefit to the victim. This becomes possible only if the latter is able to evaluate the purpose of the offender and accepts it, which is why a communicative relationship has to be built between the two of them.

If the one that we have just quoted can be understood as the statement of principle of the reparative model, the proposal about its legislative translation was twofold, both substantive and procedural. From the first point of view, reparation will aim towards: substituting the penalty, becoming a cause of non-punishability, or mitigating the penalty, becoming a mitigating circumstance. From the second point of view, the institute can acquire the status of a cause of preliminary dismissal of the hearing or of a cause of conditionally suspended judgement<sup>43</sup>.

## **6. Penalties for theft and violence in the following ethnic groups: Mancanha, Bijagó, Felupe, Balanta.**

The plurality of ethnic groups of Guinea-Bissau and the impossibility to study all of them imposed to limit the present research to four of them only, selected for personal affective and friendship reasons (Mancanha and Felupe), for power peculiarity (Bijagó,

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<sup>42</sup> “*Reparation is the compensation of the consequences of the crime through a voluntary performance of the author. It serves the restoration of juridical peace. Reparation has to work first of all in the victim’s favour; if it is not possible, or there are no perspectives of a positive result, or it is not sufficient per se, then the reparation is considered an answer over the collectivity (symbolic reparation). There is a voluntary performance also when the offender fulfils an obligation which himself undertook in a process of judicial or extra-judicial reparation.*”. Original: “*Wiedergutmachung ist der Ausgleich der Folgen der Tat durch eine freiwillige Leistung des Täters. Sie dient der Wiederherstellung des Rechtsfriedens. Die Wiedergutmachung soll in erster Linie zugunsten des Verletzten erfolgen; wenn dies nicht ausreicht, so kommt Wiedergutmachung auch gegenüber der Allgemeinheit in Betracht (symbolische Wiedergutmachung). Eine freiwillige Leistung liegt auch dann vor, wenn der Täter einer Verpflichtung nachkommt, die er in einem gerichtlichen oder außergerichtlichen Wiedergutmachungsverfahren übernommen hat.*”. Jürgen Baumann, Anne-Eva Brauneck, Manfred Burgstaller, Albin Eser, Barbara Huber, Heike Jung, Ulrich Klug, Horst Luther, Werner Maihofer, Bernd-Dieter Meier, Peter Rieß, Franz Riklin, Dieter Rössner, Klaus Rolinski, Claus Roxin, Heinz Schöch, Horst Schüler-Springorum und Thomas Weigend, *Alternativ-Entwurf Wiedergutmachung (AE-WGM)*, C. H. Beck, München, 1992.

<sup>43</sup> The conditionally suspended judgement is a criminal institute, typical of the romanist systems, on the basis of which the trial judge, under certain conditions related to the criminal record of the defendant and the applicable penalty, has the ability to suspend for a defined time the execution of the penalty pronounced in the sentence of the convicted person. The suspension can be subordinated to the fulfilment of specific obligations. Once the period passes without incident, the penalty is discharged. If, however, the defendant commits another crime, the judge is entitled to revoke the suspension.

where also women hold power), for the particular social organization (Balanta, a horizontal hierarchy without a rank of power figures).

The investigation focused on two types of offence, theft and violence. The choice was oriented, on the one hand, by the fact that these are unlawful conducts with a low or medium seriousness, coming under the category of crimes that nowadays are undoubtedly attributed by traditional laws to the competence of ethnic authorities (contrary to homicide, to which over recent years a wider scope is acknowledged to State jurisdiction); and, on the other hand, by the fact that their features recall the elements of reparation, as we are going to see.

Theft is one of the most committed crimes and it has as main targets domestic farm animals such as chickens and goats; cattle such as cows and bulls, but also pigs; consumer goods such as rice, fruits, vegetables and fish. Violence is intended as a physical attack, assault, beating or any other action of a violent nature that causes physical injury to a person, or also a sexual assault to which a person did not in fact consent.

### *6.1. Mancanha.*

The sanctions for theft are of different kind depending on what was stolen; if a few foodstuffs were stolen there is a reprimand by the judge, combined with the obligation for the offender to apologise in front of the victim and the social group<sup>44</sup>. If the target was a considerable quantity of foodstuffs, or a domestic animal, the guilty has to return the goods; if the goods are no more claimable, the sanction consists in the payment of an amount of money decreed by the judge (who takes also into account the economic significance of the stolen good for the victim and his family) or in the delivery of another domestic animal which is killed, cooked and eaten by the whole community. The type of theft sanctioned heavily is the one related to livestock, because within the category of private goods cattle and pigs have an extremely important value; in this case the guilty is condemned to give back two or three of the same cattle, apart from the one stolen (so if it is stolen a cow the victim will receive three or four cows, included also the stolen one if possible).

The penalties for the violence change in term of quality on the base of the identity of the victim: if the latter is younger or more or less of the same age as the offender, the delivery of a commercial product considered expensive, such as a bottle of spirits or a domestic animal, is ruled; on the contrary, if the victim is older than the author, this one will be beaten.

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<sup>44</sup> Reference is generally made to the village.

Finally, we want to report the fact according to which reiteration of the crime, if in certain cases operates as a simple aggravating circumstance of the penalty, in other situations entails the application of an autonomous sanction: the banishment from the community.

The community plays an essential role, almost vital, in person's life because in that system the individual finds everything he/she needs for living and interacting; consequently, depriving a person of the right to enjoy the group in which he/she was born and grown constitutes the greater dishonour, but also a great problem related to the necessity to find a new place, a new community where to be willingly accepted and start a new life.

## 6.2. Bijagó.

The sanctions system of Bijagó ethnic group establishes only one penalty for theft, consisting in the payment of a double, triple or quadruple quantity of the stolen goods; the decision on the *quantum* is taken by the judge, who sometimes sentences the author to the payment of “*a quantity very much higher compared to what was stolen, so that the offender desists from repeating the action*”<sup>45</sup>, and this is the demonstration that the authority has the discretion of going over the general limits of the law for deterrent purposes.

Taking into consideration the crime of violence, there is an articulated provision. The general penalty is the payment of a domestic animal or a livestock unit and in addition food or other goods (for instance fabrics or tobacco); everything is then donated to the community which can consume and benefit from all the given afterwards.

If the fact is particularly serious, such as for the violence of a man against a woman, the penalty is the humiliation. “*On educating children and youth it is told them that being humiliated is a dishonour for the whole family, insomuch as some people committed suicide or changed village. If a man rapes a woman, all the people of the village, kids included, meet in a place, sit in a circle and invite the guilty to stand in the middle so that everybody, even the very kids, can reproach and shame him for all the things that they do not like about him. That is the complete humiliation.*”<sup>46</sup>, says Ms. Calmicia Sohres.

On the contrary, if the crime is characterized by an extreme tenuity, or if there are subjective mitigating circumstances, a very particular consequence can occur: the ‘Regulo’ (not other judges because only the highest authority can exercise this power)

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<sup>45</sup> Interview with Mr. Shati Emenuel Banca, eminent man of Bijagó ethnic group and chief of Bijante village, Island of Bubaque, of the 19.03.2012 - Bubaque (Guinea-Bissau), Audio n. 5.

<sup>46</sup> Interview with Ms. Calmicia Sohres of the 17.03.2012 - Canhabaque (Guinea-Bissau), Audio n. 4.

declares to personally undertake the responsibility for the unlawful act; later, he goes to the place where the 'Irã'<sup>47</sup> icon is guarded and he pours water<sup>48</sup> communicating to the spirit that he personally takes on himself the responsibility for the fact and promising that the offender will never commits the crime again.

### 6.3. Felupe.

The penalties system of Felupes wants the author of a theft to return the stolen goods and sometimes the double of what was stolen. If the illegal appropriation concerns a low value good, the guilty suffers a simple verbal admonishment.

The crime of violence is sanctioned with the obligation to prepare a ceremony that, on the base of the seriousness of the inflicted damage (the main valuation parameter being bloodshed), entails one or more specific fulfilments, which can start from the sacrifice of a domestic animal and attain *“the sacrifice of two cows, one to be killed in the forest, where the rite of circumcision takes place, and the other one to be killed in the presence of the ‘Regulo’ of the village. Furthermore, a very fat pig has to be sacrificed for the women of the village and finally another pig has to be immolated in local spirit’s name.”*<sup>49</sup>.

Within the category of violence, the offence committed on a woman is punished more severely because the penalty associated is the expulsion from the community.

Banishment is also the typical sanction for recidivism, both for theft and violence. Mr. Luis Sunca Bé and Mr. Pedro Buirà specify that this last penalty is temporary and the guilty has to leave the village for six years; this non-permanent exile has an inflicative purpose, represented exactly by the period of estrangement which impose on the subject to reflect on his conducts, but at the same time it gives a chance to socialize again with the group once back.

### 6.4. Balanta.

The traditional law of Balanta ethnic group has a remarkable characterization within the regulation of theft penalties: *“for the Balantas, the theft is not a profession, but it is considered as a sport in which the most valuable challenge themselves. In this particular playful activity only cows, which are the most precious good (after the*

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<sup>47</sup> Creole name of the supreme and guardian spirit of the community.

<sup>48</sup> In creole this action is called “darma iagu”; in general terms, it is the ritual for everyone to invoke a spirit for a ceremony, for a prayer, for a wish, but also for a curse. Beyond water, every kind of alcoholic drinks can be poured, especially spirits.

<sup>49</sup> Interview with Mr. Luis Sunca Bé and Mr. Pedro Buirà, eminent men of Felupe ethnic group in Suzana, of the 22.03.2012 - Suzana (Guinea-Bissau), Audio n. 6.



*paddy) in the socio-economic context but at the same time the most difficult to steal because of the dimensions of the animals, are stolen (not chickens, pigs or rice); so that on the occasion of a great ceremony like a funeral the author is celebrated for his talent. This is the meaning of theft in Balanta society, but only until the moment the subject receives his initiation. The acquisition of adult status makes the person feel responsible and these liberty and impunity end.”<sup>50</sup>.*

The confirmation comes from Mr. Benedito Antonio Clussé, who explains that if the young thief is caught in the act and it is discovered that he comes from a village far from the one where he was committing the fact, “*people consider him a macho, a talented and daring boy, and even a personal fame starts being created in the community where he sneaked in for his illicit purpose*”<sup>51</sup>.

Excluding the exceptional case outlined above, a selection of different penalties is combined to the judgement for theft and the judge has to evaluate the one to inflict on the base of concrete circumstances; in the category there are included: the return of the stolen good; the restitution of the double, triple or quadruple of the stolen good, and sometimes in addition the payment of something else like foodstuffs; the option, for the community, to come into the abode of the guilty and take some of his goods with the approval of the judge, and give them back to the victim and the population so that everybody can benefit; the seizure of the paddy property in case of impossibility for the guilty to fulfil the imposed obligation.

By taking into account the crime of violence, if the fact is particularly slight it is sanctioned with a verbal admonishment, or with the obligation to serve the victim for a specific job or activity. The other cases are punished with strokes.

#### *6.5. Connection between traditional sanctions and reparation.*

At the end of the account, once excluded strokes and banishment, we can highlight some common and fundamental elements of the listed sanctions: the fact of requiring the apologies by the offender and the public humiliation, understood as the way of emphasising the perception of the unlawful nature of the action by the guilty and of making him aware of it; the fact of paying back an established quantity of goods, determined on the subjective importance and value (which means for the victim’s economic perspective), and the assignment of a job or activity on victim’s behalf; the fact that some payments are allocated to the whole community or that the same community plays an active role in the execution of the penalty. They all represent the

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<sup>50</sup> Interview with Father Armando Cossa, Catholic parish priest of Nhoma, of the 24.04.2012 - Nhoma (Guinea-Bissau), Audio n. 11.

<sup>51</sup> Interview with Benedito Antonio Clussé, eminent man of Nhoma, of the 30.03.2012 - Nhoma (Guinea-Bissau), Audio n. 10.



fundamental and innovative features of the reparation, as we have seen in the preceding section.

The confirmation of what was stated above comes directly from the authors of the ‘AE-WGM’ project. In fact, the traditional penalties mentioned above constitute exactly what was intended to be the catalogue of reparative obligations in the theoretical idea of the 1992 European academics, as evidenced by the text of Article 2 of the ‘AE-WGM’ *corpus legis*, that reads: “*Are considered reparative performances mainly: 1. indemnity in victim’s favour; 2. indemnity in third parties’ favour, especially insurance companies, to which was transferred the victim’s pretension; 3. other material performances, as the payment of an amount of money to institutions of public utility; 4. gifts to the victim, or immaterial performances as apologies or conciliatory conversations; 5. labour performances, in particular of public utility. Different reparative performances can be fulfilled together. Reparative performances should not burden disproportionately or unreasonably neither the victim nor the author of the crime*”<sup>52</sup>.

## **7. Integrative proposal for State law and traditional law.**

Once analysed both the foundations of reparation and the traditional penalties in the selected ethnic groups, it is now time to consider the Bissau-Guinean legislation in order to see if the studied institute has found place inside, generating a synergic link between State law and juridical customs.

But before that, a brief account of the influence of Portuguese laws on Bissau-Guinean legislation is necessary.

The first Constitution of the newborn State of Guinea-Bissau, approved on the 24<sup>th</sup> of September 1973, was a short compendium of fundamental principles and organization of political and legislative power, strongly marked by the anti-colonialist and

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<sup>52</sup> Jürgen Baumann, Anne-Eva Brauneck, Manfred Burgstaller, Albin Eser, Barbara Huber, Heike Jung, Ulrich Klug, Horst Luther, Werner Maihofer, Bernd-Dieter Meier, Peter Rieß, Franz Riklin, Dieter Rössner, Klaus Rolinski, Claus Roxin, Heinz Schöch, Horst Schüler-Springorum und Thomas Weigend, *Alternativ-Entwurf Wiedergutmachung (AE-WGM)*, C. H. Beck, München, 1992. Original: “*Als Wiedergutmachungsleistungen kommen namentlich in Betracht*

1. *Schadensersatz gegenüber dem Verletzten,*
2. *Schadensersatz gegenüber Dritten, insbesondere Versicherungen, auf die der Anspruch des Verletzten übergegangen ist,*
3. *Andere materielle Leistungen wie Geldzahlungen an geme innützige Einrichtungen,*
4. *Geschenke an den Verletzten oder immaterielle Leistungen wie Entschuldigung oder Versöhnungsgespräch,*
5. *Arbeitsleistungen, insbesondere gemeinnützige Arbeiten.*

*Verchiedene Wiedergutmachungsleistungen können nebenainander erbracht werden.*

*Wiedergutmachungsleistungen sollen weder den Verletzten noch den Täter unverhältnismäßig oder unzumutbar belasten”.*

revolutionary spirit, inspired by European liberal and socialist models in general and by the soviet constitutionalism as far as some principles were concerned, such as, specifically, the principle of hegemony of the unique party, the “Partido Africano Da Independência Da Guiné e Cabo Verde” (PAIGC), over the State and the principle of national revolutionary democracy.

The constitutional revision of 1984 also took inspiration from external sources. If the first Constitution remained the milestone, the Cuban Constitution of 1976 and the Portuguese Constitution of 1976 were the references<sup>53</sup>. In particular the second one, drafted after the ‘Revolution of the 25<sup>th</sup> of April 1974’ and the downfall of the dictatorship regime of the ‘Estado Novo’.

Going back to the independence and considering statute law, the same National Popular Assembly which wrote the constitutional Charter ratified a series of complementary legislative regulations, including the Law n. 1/1973, which declared that the “*Portuguese legislation in force at the date of Proclamation of the sovereign State maintains its effectiveness for all that will not be contrary to the nation sovereignty, to the Constitution of the Republic, to the ordinary laws and to the principles and purposes of PAIGC*”<sup>54</sup>. It is the clear demonstration of the fact that, even if belonging to the colonialist<sup>55</sup>, Portuguese legislation not colliding with the general principles of the independent new Republic still is the cardinal reference.

Taking into consideration criminal law, on 1966 PAIGC adopted what became its first legislative text, the so-called ‘Law of Military Justice’. Even if it served as an orientation for the army’s judicial power, lacking a specific regulation it was applied also to the cases involving civilian people<sup>56</sup>; that created a conflict between the very law and Portuguese legislation applicable on the base of Law n. 1/1973. The problem was immediately solved by the principle of legality in criminal matter, declared in Article 18 of the Constitution of 1973, because the ‘Law of Military Justice’ had never been formally published, being then devoid of the minimum standard of certainty. So, the

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<sup>53</sup> Fernando Augusto Albuquerque Mourão, Walter Costa Porto, Thelmer Mário Mantovanini, *As Constituições dos Países da Comunidade de Língua Portuguesa comentadas*, Edições Do Senado Federal, Brasília, 2008, p. 481.

<sup>54</sup> Original: “*legislação portuguesa em vigor à data da Proclamação do Estado soberano mantém a sua vigência em tudo o que não for contrário à soberania nacional, à Constituição da República, às suas leis ordinárias e aos princípios e objectivos do PAIGC*”.

<sup>55</sup> Sousa Santos declared: “*not everything in colonial law is inherently colonialist or anyway colonialist*”. Original: “*nem tudo no direito colonial é intrinsecamente colonialista ou igualmente colonialista*”. In Frederico De Lacerda Da Costa Pinto, *O desenvolvimento do direito penal guineense após a independência: das rupturas à definição político criminal*, Paper corresponding to an extendend version of a speech presented during the ‘*I Jornadas Jurídicas Luso-Guineenses*’, Bissau, February 1991, p. 27.

<sup>56</sup> Frederico De Lacerda Da Costa Pinto, *O desenvolvimento do direito penal guineense após a independência: das rupturas à definição político criminal*, Paper corresponding to an extendend version of a speech presented during the ‘*I Jornadas Jurídicas Luso-Guineenses*’, Bissau, February 1991, p. 12.

Portuguese Penal Code of 1886 became the applicable penal law at the moment of the independence.

The situation did not change until 1993, year of the approval of the new Penal Code, which was certainly elaborated drawing inspiration from the Portuguese Penal Code of 1982, but also taking into consideration the most modern euro-continental codifications and the peculiarities of Guinea-Bissau reality above all<sup>57</sup>.

In concluding the normative description, it is possible to say that along the forty years of independence the legislation has grown and structured itself starting from the Portuguese model, of course, but shaping according to the internal necessities on the one side and on the requirements and conditions descending from the participation to supranational and international systems on the other side.

The reference to the Penal Code of Portugal turns out to be fundamental for showing how the corresponding Bissau-Guinean legislation took example from the first in adopting the institute of reparation.

If we read the Penal Code of Guinea-Bissau, we can find three relevant provisions. The first one is Article 72, according to which reparation can be a special mitigating circumstance of the penalty: *“Besides the cases expressly set by the law, the judge can mitigate the penalty in a particular manner when circumstances prior or posterior or contemporaneous to the crime diminish in an relevant manner the unlawfulness of the fact or the culpability of the offender.*

*The following circumstances, among others, have to be considered for this reason: [...] c) facts which demonstrate sincere repentance of the offender, namely the reparation, to the possible extent, of the damages produced; [...].”*<sup>58</sup>; in its literal expression it is almost identical to Article 72 of the Portuguese Penal Code.

The second and the third, which have to be considered together because of their complementarity, are Articles 57 and 58 that regulate reparation as one of the causes of suspended judgement; they respectively declare, in the parts we are interested in: *“When the jail penalty applied is not higher than three years the judge can suspend its execution for a period to be determined between one and five years, starting from the*

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<sup>57</sup> João Pedro C. Alves de Campos, *Guiné-Bissau - Colectânea de legislação fundamental de direito penal*, Faculdade de Direito de Bissau - Centro de Estudo e Apoio às Reformas Legislativas, Lisboa, 2007, p. 13.

<sup>58</sup> Original: *“O tribunal pode atenuar especialmente a pena para além dos casos expressamente previstos na lei, quando existam circunstâncias anteriores ou posteriores ao crime, ou contemporâneas dele que diminuem por forma acentuada a ilicitude do facto ou a culpa do agente. Serão consideradas para este efeito, entre outras, as circunstâncias seguintes: [...] c) Ter avidos actos demonstrativos do arrependimento sincero do agente, nomeadamente a reparação, na medida possível, dos danos causados; [...].”*

achievement of the force of *res judicata* of the decision. [...]”<sup>59</sup> and “The judge has to condition the suspension of the execution of jail penalty to the fulfilment of certain non-humiliating obligations which facilitate or reinforce the detachment of the offender from future crimes.

The suspension can be conditioned by the following obligations: a) the reparation or the guarantee of the reparation of the damages produced by the crime within a certain term; [...]”<sup>60</sup>; and these are the Bissau-Guinean transposition of Articles 50 and 51 of Portuguese Penal Code.

Beyond the references listed above, the keystone rule is incorporated in the Organic Act of District Court. We have already seen that it is one of the State laws which contains a mention (Article 2), even though very general, of traditional uses and customs. The Act, in considering that its provisions related to criminal matter integrate the normative content of the Penal Code, contains the clause which makes of reparation the linking institute between State law and local traditional law in the criminal field; in fact, Article 21 states that: “The Court can suspend the execution of the jail judgement for a period from one to three years. The suspension could be conditioned by the fulfilment of obligations directed to facilitate the rehabilitation of the convicted and the reparation of the negative consequences of the crime, namely: a) any local use or custom which does not offend human dignity; b) the payment within a set date of an arbitrated indemnity or the guarantee of this payment through an adequate instrument; c) the public presentation of apology to the victim; d) the temporary deprivation of exercise of rights whose exercise beyond moderation is at the origin of the illicit conduct.”<sup>61</sup>.

In accordance to this rule, which integrates the provision of Article 58 of the Penal Code, the suspended judgement can be applied by the judge in certain specific instances: among them, the one according to which the effects of the crime can be

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<sup>59</sup> Original: *Sempre que a pena de prisão aplicada não for superior a três anos o tribunal poderá suspender a sua execução por um período a fixar entre um e cinco anos, a contar do trânsito em julgado da decisão. [...]*”.

<sup>60</sup> Original: “O tribunal deverá condicionar a suspensão da execução da pena de prisão ao cumprimento de certos deveres não humilhantes que facilitem ou reforcem o afastamento do agente da prática de futuros crimes.

*Podem condicionar a suspensão, nomeadamente, os seguintes deveres:*

a) *Reparação ou garantia de reparação dos prejuízos causados pelo crime em prazo determinado; [...]*”.

<sup>61</sup> Original: “O Tribunal poderá suspender a execução da pena de prisão pelo período de 1 a 3 anos.

*A suspensão poderá ser condicionada ao cumprimento de deveres que visam facilitar a ressocialização do réu e a reparação do mal do crime, nomeadamente:*

a) *Quaisquer usos e costumes locais que não ofendam a dignidade humana;*

b) *Pagamento dentro de certo prazo da indemnização arbitrada ou a garantia desse pagamento por meio idóneo;*

c) *Apresentação pública de desculpas ao lesado;*

d) *Privação temporária do exercício de direitos cujo uso imoderado esteja na origem da conduta ilícita.”.*

repaired through the fulfilment of an obligation represented by “*any local use or custom which does not offend the human dignity*” (Paragraph 2, Letter a). This is precisely the legislative turning point which allows to associate the two sources of law.

By making the suspended judgement contingent upon the performance of certain activities, the text of Letter a) means that traditional normative solutions are agreed. And the latter are the penalties characterized by the fundamental elements of the reparation. These, which are authentic sanctions for traditional systems, therefore turn themselves into a condition for the suspended judgement, thus shaping, moreover, reparation as third-way in the array of the consequences of the crime, as depicted above in the description of the birth of the institute.

## **8. Conclusions.**

The concrete application of the integrative solution exemplified and proposed above would have the merit of renewing the value of the traditional component in the State's legal context and would also entail strengthening the roots of the synergy between distinct systems of sources of law, with the creation of a legislative model closer and closer to people's awareness.

It is clear that the objective of systematizing traditional law and State law cannot be reached simply working at the interpretative and applicative level of legislation; an articulate and very in-depth activity would be necessary.

First of all, a preliminary study of traditional indigenous realities with the collaboration of experts of ethnology, sociology and anthropology would have the great value of providing the jurists with multiple point of views, which would contribute to compose a much more solid overall picture of the mosaic.

The research behind the present paper, born out of a master degree thesis, could not take advantage of the cooperation of the above-mentioned professionals. But, beyond the impossibility of setting up a research project of greater proportions, two very important aspects were not dealt with: firstly, a direct contact, thus an exchange of information, with the apical traditional authorities such as chiefs of villages or the supreme authorities of the ethnic groups, and, secondly, a proper study of case law.

With regards to the first point, direct approach and conversations with the higher judges of the traditional judiciary would have allowed to discover the foundations of the judicial setting of each ethnic system: the rules of procedures, judicial practices, the ceremonies which could be part of a trial. But the inaccessibility of those figures to provide such information is an insurmountable barrier, due to the will of safeguarding

jealously from the outside, from people who are not members of the ethnic group, the (also judicial) practices more confidential, ancient and authentic<sup>62</sup>.

Considering the second point, case law is intended both as the decisions of traditional authorities (and in this direction the preceding point would have been the instrument for reaching the objective), useful for understanding different items such as the criteria used to analyse the case or the binding power of the precedents, and as the decisions of the District Courts which can apply uses and customs for the resolution of a dispute instituted before them, as we have seen throughout the course of the paper.

Furthermore, also the official recognition of traditional authorities at an institutional level should be encompassed. The recognition by the State should not be achieved by and through a simple formal certification of traditional authorities, which would transform the duality of the legal systems into a cohabitation not producing harmonization; it would instead be concretely implemented through an incessant joint activity between traditional and State judges. In this regard, it has to be said that a legislative handhold on which to develop the matter is already present and represented by Articles 5 and 6 of the Organic Law of District Courts; Article 5 declares that the Presiding Judge of a District Court is assisted by two advisors (“Assessores”), and the following Article 6, proclaiming that “*the Advisors who constitute the Court are selected for each hearing among citizens older than 30 years of age and residing for more than 3 years in the territorial area of Court’s jurisdiction*”<sup>63</sup>, is telling us that the people who can cooperate with the State judge are exactly traditional authorities, persons who know better than everybody else the socio-juridical context which the case refers to.

The realization of this enterprise, along with all consequent positive effects at legislative, institutional and social levels, especially with the momentum of traditional culture and deep pride as experiences by the population, could be considered also matter of democracy. As reported by Professor Frederico de Lacerda da Costa Pinto in relation to the development of criminal law, in a democratic society the areas of consent have to be maximized and the areas of conflict or divergence have to be limited<sup>64</sup>; the matter can be transferred to the relationship between the sources of law, so the objective has to be the effective acknowledgment of traditional laws and institutions as integrative values (which have thus to be protected) of the juridical system of Guinea-Bissau.

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<sup>62</sup> See Samory Badona Monteiro, *L’equità e la riparazione nel diritto penale della Guinea-Bissau*, University of Trento, Academic year 2011/2012, p. 46.

<sup>63</sup> Original: “*Os Assessores que constituem o Tribunal são seleccionados em cada audiência entre os cidadãos maiores de 30 anos e residentes há mais de 3 anos na área territorial de jurisdição do Tribunal.*”.

<sup>64</sup> Frederico De Lacerda Da Costa Pinto, *O desenvolvimento do direito penal guineense após a independência: das rupturas à definição político criminal*, Paper corresponding to an extended version of a speech presented during the ‘*I Jornadas Jurídicas Luso-Guineenses*’, Bissau, February 1991, p. 32.

Otherwise democracy would be frustrated in favour of the short-sighted power of imposition of State law under the banner of the consolidation of the so-called 'modern State'.

We conclude saying that all the considerations exposed above might be made subject to one question, formulated by Sousa Santos in 1983<sup>65</sup> but extraordinarily current: what is the degree of legal pluralism that the new legality is willing to account?

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<sup>65</sup> Ibidem, p. 17.