AN EXAMINATION OF PORTUGAL'S ANNOUNCED REFORMS
FOR AFRICAN TERRITORIES

by
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Within recent months Portugal has called attention to its introductions of reforms in its African Territories of Angola, Mozambique and Guinea. These measures, no doubt, represent Portuguese reaction to the increasing criticism of her African policies, particularly by neighboring African countries. The reforms include the repeal of the Estatuto dos Indigenas (Native Statutes), passed by decree in May 1954, and the introduction of political, administrative, legal and modified agricultural reforms. A detailed examination of the decrees containing the reforms will be made below. This analysis, however, must rest against the background under which the reforms were promulgated.

The language of the decree repealing the Estatuto dos Indigenas, recalling Portugal's laudatory historical policy of permitting local law to co-exist with Portuguese law in colonized regions, reminds one of a similar statement made by the Portuguese Colonial Minister in 1926 when discussing the then recently enacted Estatuto Politico Civil e Criminal dos Indigenas das Colonias de Angola e Mozambique. At that time, the Minister said:

"One of these (dominant ideas) is to guarantee the natural and unconditional rights of the native whose tutelage is confided to us.... The natives are not granted, because of the lack of practical application, the rights associated with our own constitutional institutions. We do not impose on their individual, domestic, and public life, if it may be called that, our political laws, our administrative, civil, commercial and penal codes, our judicial system. We maintain for them a judicial system consistent with the state of their facilities, their primitive mentality, their feelings, their way of life, but at the same time we continue to encourage them constantly by all appropriate means to raise their level of existence." (Excerpted from Duffy Portuguese Africa)

This statement stood as an expression of the policy Portugal followed in Mozambique and Angola until the 1950's. This policy envisioned the integration of the local inhabitant into the Portuguese nation, ever mindful, however, of his own peculiar social organization, which was to be protected and maintained. The State was charged with the African's protection, including both his person and property, and the supervision of his labor contracts. This policy of integration
into the Portuguese nation seemed, according to 1950 census figures, illusory, since there were only 30,889 assimilated Africans in Angola and 4,353 in Mozambique.

It is interesting to note that the Portuguese defined an indígena as a member of the Negro race, who could not be governed by the law applicable to Portuguese citizens, since he was still ruled by tribal or societal custom and had not yet progressed to a cultural level.

THE 1954 DECREES

The Estatuto dos Indigenas of 1954, which did not go into effect until 1956, accounted for an increase in the nominal powers of the village chiefs. It developed a definition of indígena, which was not as precise as the one given above. It, further, admonished the Portuguese administrators to develop a rapport between Portuguese law and native custom.

Territorial Divisions: The Estatuto created districts out of what had formerly been called provinces. This change was accomplished by an attempt to introduce metropolitan administrative organization to the African territories. This meant that each district was divided in concelhos and "circumscriptions." In a concelho lived what might be termed a "civilized" majority. The "circumscription" was used mostly in areas composed largely of Africans. The concelhos were sometimes redivided into freguesias, which might be called parishes, or non-urban administrative centers. To speed up African development, the intendencia was introduced in some areas. This was composed of a number of circumscriptions and African areas within neighboring concelhos. The aim of this Portuguese policy was to have African units become concelhos as the African became "civilized." These civilized concelhos would then have limited powers of local government.

Line of Authority: To administer the new system, a line of authority was created, at the apex of which stood the Governor-General of the territory. Under him were the district governors, administrators, and chiefs of post, in descending order. The administrators and chiefs of posts continued to be white men, so that every aspect of native activity was either supervised or watched by a white man. This system also included an official, if he can be so called, titled regalo. The regalo was beneath the administrator and the chief of post in the chain of administrative command. He attained his position either by succession, tribal election, having served the Portuguese well, or having had prior military service with them. His duties included the maintenance of public order, assistance to tax collectors, informing the Portuguese on local activities and seeing to it that the Africans fulfilled their labor obligations. In every village the regalo was assisted by a headman to collect taxes and to carry out the road building programs.

Territorial Legislation: On the political and legislative side, each overseas territory had a Legislative Council. These councils were granted larger powers in the early part of the last decade. But these grants did not greatly
enhance their decision-making power. The councils merely discussed and made suggestions about local policy which might be the subject of local legislation. They could express an opinion only when the Governor-General or the Overseas Minister in Lisbon had given permission. When the Governor-General would not accept the advice of the Council such differences as existed were required to be called to the attention of the Overseas Minister.

James Duffy concluded that such Councils acted as "a safety valve for local resentments," in addition to giving local Portuguese residents a feeling that they were participating in the enactment of the laws which governed them. These Councils met for one month a year. The number of Council members varied from territory to territory. In Angola there were eighteen members of which eight were appointed. The eleven, elected directly, included two representatives from municipal bodies; two from cultural and moral organizations; one from labor; one from employer's associations; and one from taxpayers of Portuguese nationality. Astonishingly enough, there was no single member for the African population.

The situation was no different in Mozambique. There, two out of the twenty-four members of the Legislative Council were Africans. They were nominated, rather than elected, since indigenous representatives cannot be elected in any of the Portuguese African territories.

Judicial System: The dominating characteristics of the Portuguese legal system in her overseas provinces were:

(1) Lack of clear-cut delineation between Portuguese law and native custom;

(2) Lack of any legal codes or compilation of customary law;

(3) The only laws, which might be called official, were the civil and criminal codes of metropolitan Portugal;

(4) Statutes contained provisions which made customary law applicable only when the statute so indicated. To rectify the problem created by such statutes (i.e., failing to apply local customary law, except when so expressly provided in the statute), the Portuguese developed a workable ad hoc system. This permitted the administrator or chief of posts to hear civil cases in which indigenas were solely involved. He functioned as a Justice of the Peace and was assisted by two African advisors. These latter officials were usually chiefs or other people familiar with the area's customs. The administrator guided by these two officials was then capable of deciding the case in accordance with customary law and Portuguese interests.

(5) In circumstances involving proceedings between a Portuguese citizen and an African, the Portuguese common law (civil code) was applicable, unless there were some peculiar circumstances which made some other law applicable. Such proceedings were probably brought before
a special colonial court over which a Portuguese judge presided. Final appeal lay with the High Court in Lisbon, though there is no information available indicating whether the right of appeal included cases where only indigenas were involved.

One feature of the Portuguese colonial legal system, which may appear strange to many besides lawyers, is that in all criminal cases the law to be applied was Portuguese criminal law. The only mitigating factor was that, when the judge was sentencing the offender, he supposedly took into account the influence tribal customs may have had on his act.

Land Policy: Portuguese land policy relating to Africans, at the time of enactment of the 1961 "reforms," was governed for the most part by Article 38 of the Native Statute for Angola and Mozambique. This statute guaranteed to Africans collectively living in tribal areas the use and development of land, as prescribed by tradition, for pasture, crops and villages. The notion of individual landholdings seems to be a strange one, though an African who decided to be governed by Portuguese law might have exercised rights of ownership over land, including its sale and its disposal at death. In addition to tribal areas, the Portuguese reserved large tracts as native reserves (Duffy remarked that native rights are as unclear as is the extent and the actual location of these reserve areas).

In concluding the discussion of background material, one other item seems worthy of mention: the Portuguese attempt through the education of the African to wean him away from his traditions and institutions. How successful this has been can be gauged by the literacy figures of 1950, which listed only 1% of the African population as literate. There has been no effort on Portugal's part to create a native administrative corps to aid it in its rule. This parallels Belgian policy in the Congo and Ruanda-Urundi. Whatever schooling is available has Portuguese as the language of instruction.

THE 1961 DECREES

Turning to an examination of the reform decrees, one notes initially that there is little that can be said about the decree which rescinds the Estatuto dos Indigenas. It constitutes a panegyra of Portuguese colonialism which is deemed to have been almost divinely inspired. The decree recalls, in glowing terms, Portugal's ability to live side by side with different cultures and societies and to assimilate their peoples into the Portuguese body politic, while still respecting their individual and local differences, through the maintenance of local institutions and customs. According to the Portuguese, this maintenance of local institutions and customs does not mean that the people in Portuguese territories are subject to two political laws, as has been alleged by many of the Government's critics. It rather, they say, represents a respect for different traditions. Critics, the decree points out, ignore that "in contemporary Portuguese law a connection between private law statutes and political status is no longer even a general rule." And then: "The definite trend of our legislation has accordingly been to place the entire population under the same political status, in keeping with an evolution only conditioned by the duties of our mission."
However, the Portuguese decision to recognize African traditions and customs at such a late date in its control of these territories represents the adoption of a policy which should, according to Portugal's view of its colonial policy, have taken place shortly after its first arrival or effective occupation of these territories some 400 years ago.

It may be that the present reforms are envisioned as advancing the day when the African's political status will be similar to the Portuguese citizen's, but such advance is almost imperceptible. The history of Portuguese activities in Africa and the thrust of the new reforms offer little evidence to suggest that a change is due. James Duffy's observation that the Portuguese envision an equal status for the African in 200 or 300 years continues to hold. Certainly these reforms are hardly worthy of the name, for they propose no significant changes.

Administrative Units: The more comprehensive of the decrees is the one creating the Regedorias. These administrative divisions aim "to give expression to other forms of local institutionalism which may profitably be integrated in the general framework of the administration, with due respect for the traditions and habits of the peoples."

Areas of concelhos, not including freguesias, and circumscriptions are divided into Regedorias. These administrative units may in turn be divided into single or groups of villages. The Regedorias are grouped according to administrative units. A Regedoria shall be composed of all people whom customary law regards as neighbors. The local officials in the regedoria are: regedor, group village headman and village headman. They are charged with carrying out functions prescribed by Portuguese law, local custom not contrary to Portuguese law, and their immediate administrative superiors.

The appointment to the office of regedor shall be made by the district Governor, after the traditional consultation of the neighbors. A similar procedure is to be followed for the investment of group village and village headmen. The determination of compensation of these local leaders shall fall to the district governors. In addition, the local officials can be relieved of their duties by the governor of the district.

These local officials are also heads of what is called the regedorias traditional militia, and, are responsible for the observation, inculcation of respect for and provisions of military discipline. The regedor may also select a council of his choice. However, the appointment of men to this council, as well as their replacement, must be approved by the regedor's immediate superior, in this case a Portuguese. These advisors may be entrusted with the direction of certain affairs.

The relation between the local officials in the regedoria is that the group village and village headmen are subordinate directly to the regedor. These local officials receive orders and instructions from the administrator or chief of post. The decree also provides for representation of the regedorias in the legislative or government council of each province.
One final provision provides that where a large population, which cannot be considered a traditional regedoria or a freguesia, comes into existence, the administration may appoint from among the local inhabitants regedores and cabos de ordens, charged with police and auxiliary functions.

Failures of Administrative Reform: It is felt that this reform has brought about change in name only and has not effectively advanced the participation of local interests and institutions of government. This is found to be the case for the following reasons:

1. There is no indication from the decrees that the functions to be given local officials, whether granted by Portuguese law, traditional custom or administrative superiors, represents a significant expansion of the functions of the units of local government existing prior to the reform when local functions were of a limited nature.

2. There is no requirement that the Governor of a district or administrative officials, who invest the local officials, are bound by the decision of the neighbors. There is no provision for any election, but merely for a consultation with no indication how wide the consultation should be and whether the neighbors' choice is binding.

3. The retention of the Governor's power of removal of local officials, his power to fix compensation, plus the approval of the administrative authority for the appointment or replacement of advisors prevent the local officials from carrying out their functions without close Portuguese scrutiny and pressure.

4. There is no provision that regedoria representation in the legislative council is to be by election of the regedorias themselves, which would seem to prevent the selection of people truly representative of these local institutions. Even if such representatives were elected by the regedorias themselves the other safeguards built into the system, particularly the matters discussed in 2 and 3 (above), would probably assure the election of representatives who support the Portuguese.

In conclusion, then, it is felt that while the Portuguese emphasize the greater participation of the African in the role of government, the African local leader, in effect, will be chosen, watched and supervised as much as he has been in the past by the Portuguese Administration. It is illusory to style these reforms. They represent no reforms at all, but merely the retention of the status quo.

Legal Reforms: The second substantive reform decree pertains to the coordination of written and customary law. The decree contains a number of provisions which are of interest:

1. There is the provision that local usage and customs should be taken into account, whether these have been or will be compiled. The decree charges the Governments of the Overseas Provinces with compiling such usages and customs which had not been compiled.
2. A respect for usages and customs is enjoined, except where such usages and customs are at odds with the "moral principles and fundamental and basic rules of the Portuguese legal system."

3. A simple procedure, free from charge, is provided to enable anyone to choose to be governed by written private law rather than customary law. (It should be noted that customary law is regarded as unwritten private law.)

4. The decree provides that cases involving people having different private laws shall be regulated (1) by any law providing for such an occurrence; (2) in the absence of such a law, the law chosen by the parties, either expressly or in light of the surrounding events; and, (3) in all other situations by the written common law (Portuguese law).

5. Article 5 provides that written private law shall be in effect in areas not comprising regedorias.

6. The act of marriage in the Catholic Church confers with it, upon an appropriate entry being made in public records, the right to be governed by written private law.

7. Article 7 provides that the law governing movable property shall be written private law.

8. Article 10 provides that the penal law shall be the same for everybody. But, in determining penalties, the influence of social conditions and the private law status of the offender should be considered. The carrying out of penalties is also to respect the private law, i.e., an individual's personal law.

Land Use: In addition to these legal aspects of this decree, it also contains provisions relating to land. Article 8 of the decree guarantees to the neighbors of a residencia collectively the use and fruit of land needed for villages, crops and pasture. No occupation of land was, by itself, to confer individual ownership. All occupation was to be regulated by custom and usage, and, in situations not so provided for, by the written private law for common possessions. However, Article 9 did make what appears to be a real concession to the notion of individual ownership. It provided that when the regedores, with the agreement of their advisors, request the governor of either a district or province to permit individual "appropriation" of land subject to the provisions of Article 6, the Governor may so authorize. Such land can only be acquired by the neighbors of the respective regedoria.

The last Article of the decree authorized the Minister of Overseas Territories to have a committee review the legislation in force in the overseas territories to harmonize it with the new decrees.
CONCLUSION

As a whole, the second reform decree is much less objectionable than the first. It is, however, open to the following objections:

1. It continues the application of the Portuguese penal code to all inhabitants of the African territories. Though providing, as previously had been the case, that cognizance of an offender's social background should be taken before sentencing, it still permits the application of a penal code to a local population whose mores, customs and way of life are far different than those of the society for which the penal code was evolved.

2. It continues the system of administrators and chief of posts as Justice of the Peace. Though these two officials have native advisors, the actual decision is made by the Portuguese officials themselves. In cases involving only Africans, unless some paramount recognizable interest requires trial by a European, native justice should devolve, as it has traditionally in certain areas in Africa, on local officials. Perhaps, the regedores, village headmen and headmen should have judicial functions. With a European deciding every case involving Africans, Portuguese influence is ever present.

3. Articles 1 and 2 which require the judge to recognize customary law whether or not codified does no more than state what had been the previous practice. However, the broad provisions of Article 2, as to the considerations of Portuguese law which must be taken into account when applying customary law, leaves too much room for continued suppression of native custom by the Portuguese judges. The provision as to compilations of customary law are all right, provided the provision requiring approval of such compilation by the provincial Governments does not leave the door open for the regulation of the codified customary law: approval of the compilation might be withheld, until certain changes were made in the compilations. Portuguese past activities in Africa make one skeptical about the practical value of a compilation, since where Portuguese interests conflict with native tradition, evidence Article 2, African interests fall by the way.

4. The easy way in which Portuguese pressure can be exercised under the regedoria system, suggested above, makes one ask whether native leaders will ever request the governors to authorize individual land holdings. This seems to be a reform without meaning, since Portuguese control of the new local governmental units is assured.

5. The provisions relating to the Africans' choice to be governed by written law are not meaningful, unless impartiality is assured them in the decision of disputes. As suggested above, the continued presence of Portuguese judges at all levels of the judicial system makes this unlikely, when the interest of the state is uppermost.

In conclusion then, it is felt that the second reform decree also makes no appreciable advance in African rights, though this is not as apparent as in the first decree.

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