Decolonizing Law: Language and anthropology in the Lusosphere

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In the Lusophere, under the appearance of homogeneity of law, due to the influence of Portuguese law, are hidden linguistic and anthropological aspects that are still untied from the State institutions and formal law of the new independent Countries. Thus, this paper, after an overview of the historical events of Portuguese law — from the presence of *ius commune* in Portugal, to the colonial era, to the post-independence legal systems — focuses on the linguistic and anthropological aspects of millions of people, only conventionally of Portuguese mother tongue and who regulate their lives according to spontaneous unwritten rules. Comparing within the Lusophere, this paper carries out its observation from three different perspectives: law, language, and anthropology. Portuguese now ranks sixth in terms of the number of native speakers and is spread across at least four continents; therefore, it is surprising to observe the scant consideration within the comparative studies for the law and language of Lusophone areas, with few exceptions and mostly confined to native authors. Even more unexplored is the field of comparative law among Portuguese-speaking countries, and except for a few contributions between Portuguese and Brazilian law, attention to Angola, Mozambique, Guinea Bissau, Cape Verde, São Tomé e Princípe, Equatorial Guinea and East Timor is sporadic, rare or nonexistent. This scenario appears to be due to a kind of self-referentiality of the Lusophone legal systems, mainly due to a strong academic dependence on Portuguese universities, a common erudite and administrative language, and a low diffusion of foreign language study. A decolonization of law is for these reasons desirable and, instead of being perceived an intimidating path, should be seen as a chance for new development opportunities.

Keywords: Lusophony, Lusosphere, language, anthropology, traditional law, costume, decolonization, comparative law.

Introduction — In loving memory of a dear Friend

It is a great privilege and a source of sincere emotion to participate in this initiative in memory of Gabriele Crespi Reghizzi (hereafter, simply *Gabriele*, out of affection and not for brevity). Gabriele was an enlightened, charismatic lecturer, capable of winning over numerous young students — including my self — from the very first lessons thanks to curiosity, biting irony, provocation, open-mindedness and an extraordinary lucidity that he would never lose even in the worst moments of his illness.

So many friends, colleagues and former students (of whom, he was very fond) have already written beautiful words to honor the man and the scholar. Therefore, I will not engage in the art of remembrance, an exercise that is emotionally too arduous and would certainly prove trivial and lacking for me who had the pleasure of spending time with Gabriele, his family, frequenting his home, and benefiting from the helpful, affectionate, benevolent friendship.

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His erudite passion for foreign languages (Gabriele impeccably spoke seven and perhaps even more), his extraordinary semantic research, and his deep belief in the mutual benefits of the interrelation of comparative law, linguistics, and anthropology have always been the driving force behind the sharing and exchange of ideas in our numerous encounters and days of working *elbow to elbow.*

Gabriele's high attention for and refinement in the use of the language, written and spoken, are very hard to explain: simply sending an e-mail could take up to several hours of heated discussion for the careful lexical selection.

A more suitable way to, at least, attempt to explain Gabriele's meticulousness, is to compare him to Irnerio who *as the magister in artibus that he was, originally was driven to the study of legal texts by the need to satisfy a curiosity of a modestly lexical nature and when he found no relief with an innovative gesture, sought an answer in the direct examination of the Justinian sources; and took up the Digests again, and shook off the dust that had piled up there for five centuries*[1].

Portuguese was not among the languages spoken by Gabriele, although he knew quite a few expressions and was often naturally able to understand some snippets. Still, he loved Lisbon's Fado, the Brazilian musician Heitor Villa Lobos, knew some bizarre proverbs (he always reminded me, a person who comes from Pavia, that "*Roma e Pavia não se fizeram num dia*") and, as a good glutton, he waited impatiently for me to bring him generous quantities of Brazilian nuts on my many trips to the South American giant.

1. Comparative law and the functional relationship between law, language, and anthropology

The historical heritage of a community, its trade and cultural exchanges, migration and legal history, its religious and moral codes, are a genetic component of that community's *legal discourse.*

Legal discourse, in this context, refers to a community's legal system, an extremely dynamic phenomenon by its nature; and all legal systems constantly undergo changes.

Lawmakers, but also courts and legal scholars intervene daily, sometimes wisely, sometimes in a short-sighted manner, modifying legal rules and models.

In this constantly evolving process, Law is expressed through language: the legislature approves a text, the Law is enacted in a text, case law is expressed in words; even law, written or oral (thus also custom), is influenced by the language[2]. And language is affected by the evolution and constantly changing historical heritage.

The relationship between language and law can be considered congenital. Therefore, the study of (legal) language is essential for the interpretation of rules, as well as for the understanding of the theoretical-analytical aspects of normative provisions and for the study of metalanguage, i. e., legal science.

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[1] *Fiorelli P.* Storia giuridica e storia linguistica // Annali di Storia del Diritto. 1957. Vol. I. P. 261. — Since it is a translation by this Author, the original extract is given: [Irnerio] "da magister in artibus qual era, in origine [fu] spinto allo studio dei testi giuridici dal bisogno d'appagare una curiosità di carattere modestamente lessicale [e quando non trovava sollievo] con gesto innovatore cercò una risposta nell'esame diretto delle fonti giustinianee; e riprese in mano i Digesti, e ne scosse la polvere che vi s'era ammucchiata per cinque secoli". Telling about this episode, Fiorelli reminds us that "l'elementare verità che l'indagine giuridica e l'indagine linguistica, intese nella loro essenza più generale e nel loro insieme, procedono fatalmente e procederanno di pari passo, frutti come sono d'un comune bisogno dello spirito umano".

[2] This concept is expressed well by Endicott: "…legislation using languages is, as far as I know, a universal feature of legal systems. So law is typically made by linguistic utterances" (*Endicott T.* Law and Language // The Oxford Handbook of Jurisprudence and Philosophy of Law / eds J. Coleman, S. Shapiro. Oxford, 2010. P. 935).

Thus, the connection between language and law is a tool of exceptional practical relevance, since the legislature manipulates and innovates the law through language, legal scholars use language, lawyers, judges and arbitrators counsel parties and decide their fate through the use of *legal discourse* in a given place and historical moment. Some examples, *inter alia*, can be contracts and their interpretation, the grounds of a judgment or arbitration award and their possible appeal, minutes of negotiation meeting, corporate bylaws, and so on.

Within the legal context, individual words — but also concepts composed of two or more words — are created and defined by the legislature and legal practitioners, and, over the years, as society changes, they can take on new and different meanings, and be interpreted differently. Indeed, legal concepts are not naturally occurring elements, and they can only be communicated through the accurate selection of the specific words and expressions that can convey their precise meaning. It follows that any legal concept is an ontologically linguistic expression to be articulated as simply as possible, this should be the goal.

Research on legal language (meaning the perceivable intersection between language and law) also often focused — and sometimes still does — on the phenomenon at the national level, i. e., the use of language within a specific legal system[3].

Indeed, in the past, the study of legal phenomena only took account of individual national contexts. Linguistic dynamism, while relevant to lawmakers, tasked with passing binding rules at any given historical moment and to legal practitioners called upon to interpret them, was not included in the legal curriculum, because it was considered unrelated to legal knowledge.

Beginning in the latter part of the last century and even more so with the advent of globalization, the increased contamination between legal models, the increasing number of international and supranational organizations, and the increased need for businesses to understand the language of their trading partners have pushed the frontier of comparative law to embrace the study of legal language and translation studies with greater intensity.

Nowadays comparativists play a central role for they study the interpretation, development and structure of different legal systems in order to understand the differences and similarities in the vocabulary of legal linguistics of different legal systems and the interactions between different legal languages.

For these reasons, comparative legal linguistics constitutes an important asset for comparative law, because by clarifying the boundaries of legal models and systems — through the analysis of the meaning attributed to certain words or expressions within a given legal language — it allows comparativists to more easily determine the legal family[4] and legal culture[5] a legal system belongs to.

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[3] In any case, it should not be forgotten that some states have more than one official languages (not to be confused with the recognition and/or protection of linguistic minorities). In such a scenario, bilingualism entails that two or more legal languages coexist in the legal field as well, which means that *legal discourse* too is plurilingual. Such a phenomenon can be included in the comparative study of language and law on which this essay will focus and may even expand its boundaries, since comparativists will be able to notice that, for example, there may be multiple versions of legal language in Dutch, German, English, French, or Italian. The terms "*possession*" in France and "*possesso*" in Italy refer to a *de facto* power over a thing with *animus domini*; while for French speakers and Italian speakers of Switzerland, these terms refer to a de facto power over the thing but do not imply *animus domini*. For an in-depth comparative linguistic analysis in this sense, see: *Sacco R., Rossi P.* Introduzione al Diritto Comparato // Trattato di Diritto Comparato. 7th ed. Milan: Utet Giuridica, 2019. P. 43.

[4] *Mattila H. E. S.* Comparative Legal Linguistics — Language of law, latin and modern lingua francas. Farnham: Ashgate Publishing, 2013. P. 138.

[5] *Sacco R.* La circulation des modèles juridiques, rapport général // Académie international de droit comparé. Rapports généraux au XIII° Congrés. Montréal, 1990. P. 1.

Therefore, the multitude of approaches to the study of "language and law" ought not to surprise. From this perspective, it is possible to distinguish, for example (*i)* studies on "legal language" that focus on language as a tool used by law; (*ii*) translation studies; (*iii*) studies on linguistic rights, primarily belonging to the field of constitutional law; (*iv) the* studies on administrative legal language; (*v) the* studies on the legal language of family or business law; (*vi) the* studies on the language of trials; (*vii*) the linguistic studies in the field of legal knowledge and development.

In their work, the comparativists know that knowledge of language can play a key role in understanding foreign law and its specificities. As Prof. Mario Rotondi, Gabriele Crespi Reghizzi's mentor, explained a century ago, for comparative law to be successful, it requires the best knowledge of patterns[6].

For these reasons, legal and linguistic comparison can be key tools for legal innovation, for understanding foreign interlocutors, for doing business, for facilitating the circulation of judgments and arbitral awards, etc.

In order to make an effective contribution to the legal sciences, the comparison must be neutral and impartial, these being its essential characters for Crespi Reghizzi and Rodolfo Sacco, friends and masters of comparison that, for an entire life, mutually stimulated each other[7].

This neutral and impartial approach is even more necessary for the comparativists who want to go beyond legal formalism and the study of mere legal norms, wishing instead to focusing on the so-called *ethno-law* and its customary sources, without preconceived notions of superiority for the more advanced models.

In this context, anthropology as well — that is to say the science that studies man, from *ànthropos* and *logos* — can provide useful tools for comparative law, especially those branches of comparative law focusing on the more foreign and unusual aspects of legal comparison, to which Gabriele Crespi Reghizzi devoted his entire life.

In most of the countries examined in this paper, native peoples still base their community life on models that are extremely distant from those with which we are familiar: ethno-law often disregards even the existence of a formal lawmaker, the community is regulated by rules that dispense with the State, reduced to an *artificial entity* with which individuals do not identify.

In order to better understand the unwritten rules of *ethno-law*, legal anthropology[8] uses its own words, its own concepts, its own categories, tools that are unknown and alien to the populations who, quite spontaneously, adapt to rules that may never even be expressed with words.

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[6] *Rotondi M.* Il diritto come oggetto di conoscenza // Studi sulle scienze giuridiche e sociali della Facoltà di Giurisprudenza di Pavia. Vol. I. Pavia: Università di Pavia, 1927.

[7] "La comparazione presuppone la conoscenza della regola giuridica straniera. Questa conoscenza in astratto può suscitare simpatia, oppure può portare altrettanto bene a reazioni polemiche. In ogni modo, la comparazione non comporta necessariamente una valutazione, positiva o negativa, favorevole o critica delle istituzioni altrui. La comparazione è potenzialmente imparziale ed ha il diritto di esserlo. Le scienze che si occupano dell'uomo non debbono in quanto scienze, interrogarsi per valutare gli atteggiamenti degli uomini — la lingua, la religione, l'ideologia, il diritto-, assegnando loro certificati di buona condotta, nonché di conformità alla ragione e alla logica. Le scienze umane hanno per scopo di conoscere i comportamenti degli uomini, e di ricercare in seguito quale sia la logica propria e specifica, quali siano le ragioni proprie e specifiche, di tali comportamenti. Se le scienze umane non trovano questa logica e queste ragioni, è perché esse non hanno fatto una buona ricerca" (*Sacco R., Rossi P.* Introduzione al Diritto Comparato).

[8] That is, that branch of anthropology that studies law as a manifestation of human culture. On the subject, see, *inter alia*: *Sacco R.* Antropologia giuridica. Bologna: Il Mulino, 2007; *Rouland N.* Anthropologie juridique // Revue Internationale de droit comparé. 1991. Vol. 43, no. 2, April — June. P. 510; and in Portuguese: *Marques Guedes A.* Entre factos e razões — Contextos e enquadramentos da antopologia jurídica. Coimbra: Almedina, 2005.

In these contexts, as Rodolfo Sacco wisely intuited, equal facts do not produce equal effects, yet there is no concern for legal certainty, since for these populations other elements (e. g., the sphere of magic, social position, ancestor benevolence, religion) enjoy greater weight[9].

Anthropology helps comparative law to identify the difference between custom and *ethno-law*. In fact, when dealing with custom, lawyers refer to *quasi-formal* assumptions, such as repeated observation and conviction of its compulsory nature; whereas, on the contrary, adaptation to traditional law is merely spontaneous[10].

2. Legal models in the Lusosphere

The Lusophone[11] area is one of the most relevant case studies for comparative law, thanks to the influence of different legal systems, cultures and languages. The aim of this paper is to analyze the relevant aspects of the evolution of the legal systems in the Lusophone area. Starting with the *ius commune*, discussing the transposition of the law of the Portuguese kingdom into the overseas territories, leading to the ultimate era of codifica-

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[9] In this regard, for example, see a 2008 judgment by the Angolan Supreme Court that defines traditional authorities as "as entidades que integram e dirigem nas respectivas comunidades, sendo respeitadas, por entre outras virtudes e poderes serem pessoas com autoridade para decidirem sobre a questão de natureza feiticista", Supremo Tribunal de Justiça de Angola, no. 79/2008.

[10] *Sacco R., Rossi P.* Introduzione al Diritto Comparato.

[11] Given its wide use in this paper, it should be clarified that the word *Lusophony is a* neologism that originated in the mid-1980s as a replica of the term *Francophonie.* However, it should be used as a conventional license since this word is not accepted in any dictionary, not even in Portuguese-language dictionaries, although there are numerous "luso-" headwords, but see the end of this note for its presence in a *thematic dictionary*.

On the point, "[o] neologismo português 'lusofonia' nasceu há uns vinte anos, réplica do conceito, da palavra francesa francophonie. Na França foi o geógrafo Onésime Reclus que, em 1880, criou as palavras francophonie e francophone. Ele definia os falantes, os cultores da língua francesa. Até aos anos 30, o termo é raro. Valéry Larbaud, grande escritor francês, com visões internacionais, o democratiza. Mais perto de nós, Raymond Queneau e Léopold Sedar Senghor o internacionalizam. Hoje a francophonie, recuperada pelos políticos, define um espaço mais político, o de países, o de nações, que têm o francês como língua oficial ou utilizada no país. [...] Em Portugal, a lusofonia é uma réplica recente da francophonie, aliás pouco fiel à realidade. Com efeito, nem todos os lusófonos falam português. As estatísticas incluem toda a população dos países que têm o português como língua oficial. [...] No dicionário clássico de José Pedro Machado (10 volumes, 1964) encontramos, além dos clássicos vocábulos: luso-africano, luso-brasileiro, luso-ibérico, geograficamente corretos, lusófilo, lusófobo e um curioso lusitanófilo. Lusófono e lusofonia estão ausentes. A palavra lusofonia não entra tampouco no Novo Dicionário da Língua Portuguesa [see: Buarque de Holanda Ferreira A. Novo Dicionário Aurélio da Língua Portuguesa. Rio de Janeiro. 1976], em 1976, o famoso Aurélio. Mas no Dicionário da Língua Portuguesa Contemporânea [see: Dicionário da Língua Portuguesa Contemporânea / coord. Malaca Casteleiro J. In 2 vols. Lisboa: Academia das Ciências de Lisboa e Editorial Verbo, 2001] da Academia das Ciências de Lisboa, em 2001, entram lusofonia, lusófono (adjetivo e substantivo) e dezanove palavras compostas com luso- como nome de uma terra ou país, além dos lusófilos e lusófobos e o clássico luso-descendente e para não esquecer o Brasil e Gilberto Freire, o luso-tropicalismo. [...] Mas falta ainda o luso-falante, presente aliás no dicionário do meu falecido amigo Antônio Houaiss5 onde estão presentes lusófono, lusofonia mas não luso-descendente. Em nenhum dos dicionários consultados se registra lusógrafo ou lusografia. Há uns vinte anos, depois da independência nos anos 1975 das ex-colônias portuguesas, comecei a utilizar este neologismo e a defini-lo" (*Massa J. M.* 2006. A Lusografia africana // Lusotopie. Vol. XIII, no. 2. P. 175–180).

Still on the word *lusoponia*, we recommend consulting its definition in: Dicionário Temático da Lusofonia / ed. by F. Cristóvão. Lisboa: Texto Editores, 2005. P. 652: the Author describes this concept as "o conjunto de três círculos concêntricos de valores, reunidos pela língua comum", by which he means that *lusofonia* is the intersection between, on the one hand, the Portuguese language and, on the other hand, the Portuguese culture, the Brazilian culture and the cultures proper to the other former colonies.

tions overlapping the success of their fights for independence, including the characters of *ethno-law*.

What is now Lusophone civil law (to be understood, as we shall see, as that which was exported from Portugal and transposed first by the colonies and then by the newly independent States) has gone through different eras, events, and experiences such as: the Greek civilization, the founding of Rome, the appearance of the scientific study of law, the *Romanization* of the Iberian Peninsula, the Arab conquest, the Christian reconquest, the formation of kingdoms in northern Spain, the birth of nationalities, and the founding of universities[12].

The legal tradition of the *Liber Iudiciorum*, dating back to the Visigothic kingdom, reached to the dawn of the presence of *Ius commune* in Portugal and, for a time, coexisted with the laws of Alfonso V of Leon from the early 11th century.

By the end of the 12th century, the Portuguese legal tradition had become based on the common law of the *Corpus iuris civilis* and Roman-Canonical doctrine[13].

In 1446, began the season of great Portuguese legislative compilations[14] with King Alfonso V's *Ordenações Afonsinas,* which, however, failed to gain widespread application in the kingdom because they were not printed while in force[15].

In 1521, King Manuel I promulgated the *Ordenações Manuelinas*[16] which followed the same structure as the *Afonsinas* compilation — five books, divided into titles and para-

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[12] *Menezes Cordeiro A.* Tratado de Direito Civil. Vol. I. 4th ed. Lisboa, 2012. P. 84.

[13] Within the Brazilian legal doctrine, it is worth recalling the words of Prof. Orlando Gomes: "…do século XII ao século XVI, o Corpus Juris Civilis foi objeto de intensa exegese, sem cunho sistemático; por parte de juristas, conhecidos pelo nome de glosadores, porque redigiam breves anotações entre as linhas (glossae interlineares) ou à margem (glossae marginales) dos textos justinianeus. Dentre eles, gozam de maior fama Irnério e Acúrsio, este o autor da glosa ordinária. Seguem-se os pós-glosadores, cuja atividade se caracterizou pelo esforço para adaptar a doutrina dos glosadores às necessidades da época e aos costumes vigentes. Os principais representantes dessa escola sao Bártolo e Baldo. No século XVI, a investigação do Direito Romano adquire colorido mais brilhante, devido ao empenho no melhor conhecimento das suas fontes e pela nove orientação, de caráter sistemático, que se procura seguir. As figuras marcantes desse movimento são Cujácio e Doneau. Desde então até nossos dias, o estudo das fontes romanas, principalmente na Alemanha e na Itália, se vem fazendo para melhor fixação de um momento alto de evolução jurídica. Esses estudos têm concorrido decisivamente não só para o esclarecimento das manifestações do gênio jurídico dos romanos, mas também para o aperfeiçoamento da técnica jurídica, em cujo manejo foram insuperáveis" (*Gomes O.* Introdução ao Direito Civil. 13th ed. Rio de Janeiro: Forense, 2001. P. 54).

[14] These compilations, in Portuguese, included civil law, criminal law, public law and procedural law.

[15] "[a] demora na produção de cópias manuscritas parece ter sido um dos problemas para a sua aplicação em todo o Reino. Em Portugal a imprensa apareceu por volta de 1487 e logo foi utilizada para editar a legislação eclesiástica e monárquica, pois, como afirmou o próprio D. Manuel 'necessária é a nobre arte da impressão […] para o bom governo, porque com mais facilidade e menos despesa os ministros da Justiça possam usar de nossas leis e ordenações e os sacerdotes possam administrar os sacramentos da madre santa Igreja'" (*Espinosa Gomes Da Silva N. J.* História do Direito Português. 2nd ed. Lisboa: Fundacao Calouste Gulbenkian, 1992. P. 266).

[16] The first version of the Ordenações Manuelinas is dated 1512/13 and was followed by two reforms in 1516/20 and 1521: "[s]ão conhecidos com o nome de Ordenações Manuelinas os três sistemas de preceitos jurídicos impressos, em cinco livros: o primeiro, de 1512-13 (teve uma reedição com correções pontuais, em 1514); o segundo sistema, posterior a 1516 e anterior a 1520 (de que apenas se conhecem fragmentos recentemente descobertos); e o terceiro sistema, de 1521 (com quatro edições e diferentes reimpressões de cada uma delas, entre 1521 e 1603). Constituem o primeiro grande conjunto legislativo e normativo do Portugal Quinhentista. Ao mesmo tempo que compilavam, reduziram a um único corpo o direito medieval português. Durante o período que estiveram em vigor, 1512–1513 a 1603, as três sistematizações tiveram diferentes edições que até hoje não se encontram cabalmente conhecidas nem estudadas" (*Alves Dias J. J.* Ordenações Manuelinas 500 anos depois: os dois primeiros sistemas (1512–1519). Lisboa, 2012). Indeed, although the 1512/13 version was published in 1514, only in 1521 the final and official edition of the *Ordenações Manuelinas* was published. For further information: *de Almeida Costa M. J.* História do direito português. 2nd ed. Coimbra: Almedina, 1992. P. 278.

graphs — and remained in force until 1603, when they were replaced by the *Ordenações Filipinas* of King Philip II of Spain.

The latter compilation contained a detailed regulation of obligations[17] and some procedural rules that emphasized the now decidedly jurisprudential character of the *ius commune* at that time, although, when the law and the Accursius Glossa were silent, the *opinio Bartoli* was to be considered binding[18].

The *Ordenações Filipinas* dominated Portuguese and overseas territories' legal life for more than two centuries until 1867, the year that marked the twilight of the *ius commune* and the beginning of the season of codifications.

3. The era of codifications in the Lusophone area

Portuguese codification began as early as 1833 with the Commercial Code and continued with the Administrative Code in 1836 and the Criminal Code in 1852, culminating in the promulgation of the first Civil Code, in 1867[19].

The *Código Seabra* incorporated some ideas borrowed from the Enlightenment (in particular, from the Prussian General Code of 1784 and the Austrian Civil Code of 1811), but it was also strongly influenced by the ideology of moderate liberalism of the French Napoleonic Code of 1804[20], although, there were some important differences[21]. These included the structure, tripartite in the *Code civil* and quadripartite in the Portuguese Code; moreover, to the typical secularism of marriage in the French Code, the Portuguese Code preferred Catholic and civil dualism[22].

The new Portuguese Civil Code of 1966, still in force today, is influenced by the conceptual rigor typical of the German *Bürgerliches Gesetzbuch* (hereafter, BGB) of 1900[23] and, in some respects, by the Italian Code (e. g., the discipline of *culpa in contrahendo*) and the Swiss Civil Code. In fact, while family law — in spite of the 1977 major reform — and of property rights have not changed, for the most part, since the 1867 Code, the influence of the BGB in the Portuguese Civil Code is evident in the structure and in the rules concerning obligations[24].

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[17] Book IV contained, *inter alia*, the regulation of contracts of sale and purchase, lease, *mutuo*, *comodato*, emphyteusis, gift, and pledge.

[18] Thus, the excerpt in the *Ordenações Filipinas*: "…se guarde a opinião de Bartolo, porque sua opinião comumente he mais conforme á razão" (*Cavanna A.* Storia del diritto moderno in Europa — Le fonti e il pensiero giuridico. Vol. I. Milan: Giuffrè, 1982. P. 427).

[19] Also known as *Código Seabra*, since it originated from the work of a commission charged with the project in 1850 and chaired by António Luís de Seabra e Sousa, Viscount of Seabra.

[20] "Não se tira mérito a Seabra; mas o Código Napoleão serviu de modelo, em vários pontos, à codificação portuguesa de oitocentos, em termos que chegaram a incluir a tradução literal de artigos. O Código de Seabra filiou-se, assim, na família napoleônica, adoptando-lhe o estilo; traduzia-se, com isso, a Universalidade da Ciência do Direito e, ainda, um contínuo fluxo cultural vindo de França, que tanto marcou a cultura portuguesa do dezenove" (*Menezes Cordeiro A.* 2004. Da modernização do direito civil: aspectos gerais. Braga: Almedina, 2004. P. 33).

[21] Moreover, it should be noted that even some philosophical premises distinguished the *Código Seabra* from the French *Code civil.* On this point, see: *Velozo F. J.* Orientações Filosóficas do Código de 1867 e do futuro Código. Braga: Scientia Iuridica, 1967. P. 155; *Teixeira A. B.* Sobre os pressupostos filosóficos do código civil português de 1867 // Problemas de la Ciencia Juridica. 1991. Estudios en homenaje al Profesor Francisco Puy Muñoz. Vol. I. Santiago de Compostela, 1991. P. 57.

[22] *Ferreira de Almeida C., Morais Carvalho J.* Introdução ao Direito Comparado. 3rd ed. Lisboa: Almedina, 2017. P. 52.

[23] For more information: *Monteiro A. P.* La codification en Europe: le Code Civil portugais // Boletim da Faculdade de Direito da Universidade de Coimbra. 1992. Vol. 1. P. 1.

[24] *Ferreira de Almeida C., Morais Carvalho J.* Introdução ao Direito Comparado. P. 52.

And more specifically, the aspects that, most denote the BGB influence on the Portuguese Code of 1966 are: the systematics typical of the German system, the detailed regulation of the phenomenon of legal transaction and that of contract formation, the centrality of the institution of good faith, the distinction between representation and mandate contracts, and the concept of unjust enrichment; in addition to the regulation of general contract clauses (*Regime jurídico das cláusulas contratuais gerais*[25]) and the Commercial Companies Code (*Código das sociedades comerciais*[26]).

During the colonial period, the legislation of the Portuguese kingdom and the *Ordenações were in* force in Brazil. After gaining independence in 1822, by Law of October 20, 1823, it was established that the *Ordenações Filipinas* would continue to be in force[27] until Brazilian legislation was promulgated. In addition, the first Constitution of 1824, committed the state to implementing a civil code (and a criminal code) based on justice and equity[28].

Brazil's path of civil codification was long and troubled — despite such programmatic declarations — and after the promulgation of the Criminal Code in 1830 and the Commercial Code in 1850, it was not until 1855 that they finally began to work on the Brazilian Civil Code, thanks to a committee presided by Augusto Teixeira de Freitas[29].

Many scholars toiled on the road of codification, until Clóvis Beviláqua in 1899 presented the draft bill to Parliament, which finally gave its approval in December 1915. The act was then promulgated as Law No. 3,071 of January 1, 1916.

The Brazilian case turned out to be an *unicum* in the Latin American landscape, since, while the legislatures of the other newly independent States were strongly inspired by French codification, the Brazilian *Código civil of* 1916 reflected the influence of German Pandectists in its structure, based on a general part (on general principles, persons, goods and legal facts) and a special part (containing the regulation of obligations, property rights, succession and family law).

Other aspects that lead back to the German model are the presence of introductory rules relating to Brazilian law in general (*Lei de Introdução às Normas do Direito Brasileiro*), later replaced by D. L. No. 4,657 of September 4, 2010, "Introductory Law to the Civil Code" (*Lei de introdução ao Código Civil*), again amended and restored to its previous name — *Lei de Introdução às Normas do Direito Brasileiro* — by Law No. 12,376 of December 30, 2010. Articles 7–19 of this statute contain provisions concerning international private law[30].

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[25] Approved by Decree-Law No. 446 of October 25, 1985.

[26] Approved by Decree Law No. 262 of September 2, 1986.

[27] Art. 1, Law of October 20th, 1823: "[a]s Ordenações¸ Leis, Regimentos, Alvarás, Decretos e Resoluções promulgadas pelos Reis de Portugal, e pelas quais o Brazil se governava até o dia 25 de Abril de 1821, em que Sua Magestade Fidelissima, actual Rei de Portugal, e Algarves, se ausentou desta Corte; e todas as que foram promulgadas daquela data em diante pelo Senhor D. Pedro de Alcántara, como regente do Brazil, em quanto Reino, e como Imperador Constitucional delle, desde que se erigiu em Império, ficam em inteiro vigor na parte em que não tiverem sido revogadas, para por ellas se regularem os negócios do interior deste Império, em quanto se não organizar um novo Código, ou não forem especialmente alteradas".

[28] Art. 179, no. XVIII, Const. BR 1824: "[a] inviolabilidade dos Direitos Civis, e Politicos dos Cidadãos Brazileiros, que tem por base a liberdade, a segurança individual, e a propriedade, é garantida pela Constituição do Imperio, pela maneira seguinte. XVIII. Organizar-se-á quanto antes um Codigo Civil, e Criminal, fundado nas solidas bases da Justiça, e Equidade".

[29] Truthfully, Teixeira de Freitas initially worked on the *Consolidação das Leis Civis*, published in 1857, and it was not until Decree No. 2,318 of 1858 that he was tasked with drafting a full-fledged civil code.

[30] The structure of the Brazilian Code differs from that of the Portuguese Code, since the latter includes the rules on international private law in its law enforcement provisions (Articles 14–65), and from those of the other former colonies, which, as will be discussed below, imported the Portuguese Code.

Again, the German influence can be observed as well in the choice not to regulate commercial matters in the civil code and leave it to the *Código comercial* of 1850, thus conforming to the principle of the dualism of private law.

Moreover, while retaining some Romanistic features typical of the previous era[31], as well as Portuguese law and canon law, the Brazilian regulation of obligations[32] is decidedly inspired by the German model[33].

Later, and again after a troubled path, Law No. 10,406 of January 10, 2002, was introduced: the new Brazilian *Código civil.* The new codification is still strongly inspired by the German model; it is enough to examine its structure with the division into a general part (and books on persons, goods, and legal facts) and a special part (containing the discipline on obligations, enterprise, possession, family law).

The presence of elements strongly influenced by the Italian Civil Code should also be emphasized, such as, for example, the return to the monism of private law, meaning that commercial law is dealt with within the civil code, and the introduction of certain key institutions, such as the concept of "enterprise", with a clear adoption of the Italian concept of the "entrepreneur"[34] in Article 966 of the *Código civil*[35].

In the other CPLP Countries, the *Ordenações Filipinas* remained in force until 1867 when the *Código Seabra* was adopted and later replaced by the new Code of 1966[36].

After independence, due to the absence of a local ruling class and of a modern state system, the former colonies adopted (*rectius*, maintained) the Portuguese legislation on a transitional basis[37].

In the field of private law, the old *Código Seabra* was thus later replaced by the *Código Vaz Serra*, literally imported from Portugal, with the result that codification in all these Countries has always been overwhelmingly tied to the Portuguese model.

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[31] About the influence of Roman law in the Brazilian codification of 1916: "…são produtos da cultura romana, ou direitamente apreendidos nas fontes da organização justinianeia, ou indiretamente das legislações que aí foram nutrir-se largamente, como aconteceu a Portugal, à Alemanha, à França, e à Itália, que fizeram do Direito Romano o manancial mais largo e mais profundo para mitigar sua sede de saber" (*Saraiva Da Cunha Lobo A.* Curso de Direito Romano. Vol. I. Rio de Janeiro: Tipografia de Alvaro Pinto 1, 1931. P. 51).

[32] Some examples are Art. 1080 "[a] proposta do contrato obriga o proponente, se o contrario não resultar dos termos dela, da natureza do negócio, ou das circunstancias do caso", Art. 1098 "[o] que estipula em favor de terceiro pode exigir o cumprimento da obrigação", Art. 1332 "[s]e a gestão for iniciada contra a vontade manifesta ou presumível do interessado, responderá o gestor até pelos casos fortuitos, não provando que teriam sobrevindo, ainda quando se houvesse abstido".

[33] Among the main jurists advocating the dissemination of German influence in Brazil, see: *Pontes Da Miranda F. C.* Tratado de direito Privado. Rio de Janeiro: Borsoi, 1972; *Couto E Silva C. V.* A obrigação como processo. São Paulo: Bushastky, 1976; *AA. VV.* O Direito Privado Brasileiro na Visão de Clóvis do Couto e Silva / ed. by V. M. Jacob de Fradera. 2nd ed. Porto Alegre: Livraria do Advogado, 2014.

[34] Art. 2082 c.c. IT: "[è] imprenditore chi esercita professionalmente un'attività economica al fine della produzione o dello scambio di beni o di servizi".

[35] Art. 966 c.c. BR: "[c]onsidera-se empresário quem exerce profissionalmente atividade econômica organizada para a produção ou a circulação de bens ou de serviços".

[36] The official act for the enforceability in overseas territories of the new Civil Code was the *Portaria* No. 22,869 of September 4, 1967.

[37] See, for example, (i) in Angola, Art. 58 of the 1975 Constitutional Law: "[a]s leis e regulamentos actualmente em vigor serão aplicáveis enquanto não forem revogados ou alterados e desde que não contrariem o espírito da presente Lei e o processo revolucionário angolano"; (ii) in Mozambique, Art. 71 of the 1975 Constitution: "[t]oda a legislação no que for contrário à Constituição fica automaticamente revogada. A legislação anterior no que não for contrário a Constituição mantém-se em vigor até que não seja modificada ou revogada"; (iii) in Guinea-Bissau, Art. 1 of Law No. 1 of September 24, 1973: "[a] legislação portuguesa em vigor à data da proclamação do Estado soberano da Guiné-Bissau mantém a sua vigência em tudo o que não for contrário à soberania nacional, à Constituição da República, às suas leis ordinárias e os princípios e objetivos do Partido Africano da Independência da Guiné e Cabo Verde (PAIGC)"; (iv) in

The legal systems of Angola, Mozambique, Guinea-Bissau, Cape Verde and São Tomé e Princípe belong to the Romano-Germanic system on which Portuguese civil law is based.

However, what was supposed to be transitional is still in force, and there has been no local codification of their respective private law rules, but rather the Portuguese Civil Code of 1966 and the Civil Procedure Code of 1961 are still in force, even though the latter is no longer in force in Portugal, where civil proceedings are now regulated by the new Code of civil procedure of 2013.

However, some amendments to the Portuguese Civil Code have been made and some acts that innovated specific areas of private law have been passed[38], although these Countries have not yet developed a civil legal system independent of the Portuguese.

East Timor is a special case because of the effect of the Indonesian occupation, between 1975 and 1999, during which the Portuguese colonial legislation was no longer in effect. However, the 2002 Constitution and Civil Code definitely reflect the influence of the Lusophone *ancien régime.*

4. Spontaneous traditional law

Custom is *unwritten law*, that is, law that is not expressed through words or other signs. *Unwritten law is* synonymous with "law that has no recourse to language", without verbalization being a condition of validity, nor of effectiveness[39].

In modern systems, the relevance of customary rule is gradually degrading due to the prevalence of formal law among the sources of law[40], whose tradition and value is now ingrained in society.

Cape Verde, Art. 99 of the 1980 Constitution: "[a] legislação em vigor na data da independência nacional, mantém transitoriamente a sua vigência em tudo o que não for contrário à presente Constituição, às restantes leis da Republica o aos princípios e objectivos do PAIGC"; (v) in São Tomé e Princípe, Art. 158 of the 1990 Constitution, which amended that of July 12, 1975: "[a] legislação em vigor à data da Independência Nacional mantém transitoriamente a sua vigência em tudo o que não for contrário à presente Constituição e às restantes leis da República".

[38] For illustrative purposes only, (*i*) in Angola, Law No. 10 of May 5, 1977, on civil status registry, filiation and declaration of death, Law No. 9 of July 29, 1978, on divorce, Law No. 4 of February 18, 2002, on general terms of contract, Law No. 3 of February 14, 2003, on interest regulation, Law No. 18 of August 12, 2003, on distribution, agency, *franchise* and commercial concession contracts, Law No. 19 of August 12, 2003, on consortia and group of companies, the Law on Commercial Enterprises of 2004, Law No. 9 of February 16, 2011, on mortgage, *mutuo* and real estate, Law No. 10 of June 26, 2018, on private investment (*Lei do Investimento Privado*), and, in the procedural field, Law No. 16 of July 25, 2003, on voluntary arbitration; (*ii*) in Mozambique, Decree-Law No. 2 of December 27, 2005, which approved the new Commercial Code, later amended by Decree-Law No. 2 of April 24, 2009, and more recently by Decree-Law No. 1 of May 4, 2018, Law No. 10 of August 25, 2004, on family law, later reformed by Law No. 22 of December 11, 2019; (*iii*) in Guinea-Bissau, Law No. 6/1976 on divorce, Decree No. 13-A of June 9, 1989 on leases, and, in the procedural field, the Voluntary Arbitration Law of 2000; (*iv*) in Cape Verde, Decree-Law No. 58 of June 20, 1981, on family law, replaced entirely the fourth book of the Colonial Civil Code, Decree-Law No. 138 of December 6, 1985, on inheritance, and a massive reform of commercial law introduced by Decree-Law No. 3 of March 29, 1999; (*v*) in São Tomé e Princípe, Law No. 2 of December 28, 1977, introduced the new Family Code, thus replacing entirely the fourth book of the Colonial Civil Code; for more information about some reforms of the commercial discipline of São Tomé e Princípe, see: *Tiny K., Martins Santos R., Tiny N.* Investimentos em São Tomé e Príncipe — Legislação Básica. Lisboa: Almedina, 2006.

[39] *Sacco R.* Langue et droit. Langue et Droit — Collection des Rapports du XV° Congrès International de Droit Comparé / ed. by E. Jayme. Brussels: Bruylant, 1999. P. 227.

[40] In this sense, Art. 4 of Lei de Introdução às normas do Direito Brasileiro considers the customs as a supplementary element in case of deficient law, albeit with lower rank than analogy: "[q]uando a lei for omissa, o juiz decidirá o caso de acordo com a analogia, os costumes e os princípios gerais de direito". With a different choice, the Portuguese Civil Code counts include the law and the corporate norms among the sources of law (Art. 1), but not custom, and gives legal value to custom when permitted by law (Art. 3).

In the Lusophone world, while this is certainly the scenario in Portugal and almost in the whole of Brazil, the reality is radically different in African countries and East Timor.

Colonization was (also) a means of transporting European and modern law into the colonized territories, and, as noted above, after the period of domination, the newly independent States *sic et simpliciter* adopted that law as their own legislation.

In Brazil, factors such as longer-standing independence, a better and more widespread education system, the establishment of sufficiently well-organized universities, and the emergence and growth of a local doctrine and jurisprudence have been the driving force behind the development of a legal thought of its own, understandable and accepted by the society to which it is applied.

On the contrary, the automatic adoption of a Western-style legal system that is reluctant to make allowances for custom[41] (*costume*) took away any space for the local uses of the various ethnic groups that populated the former colonies in Africa and Asia.

For the people inhabiting Angola, Mozambique, Guinea-Bissau, Equatorial Guinea, Cape Verde, São Tomé e Princípe, and East-Timor, the main source of law was and is custom, and the rules governing the lives of these societies are not written[42].

Individuals spontaneously recognize and conform to custom, perceived as a due and proper behavior — sometimes of a spiritual nature — founded on a line of continuity with their ancestors, more than as an actual legal obligation.

The spontaneous traditional legal systems of these populations are not concerned with the attribution or recognition of subjective rights held by individuals, nor with their protection, but rather with the unity and harmony of the group[43] — understood as internal solidarity within it — and the rules have the primary objective of safeguarding these elements[44].

Bearing this in mind, it is not surprising that marriages involve the entire families of both spouses, including in the management of possible disagreements that may arise during this union. Succession *mortis causa* frequently is governed in the collective interest of the family that survives the deceased, meaning that the institution of division of inheritance is often a nonexistent concept in traditional communities[45].

Also absent from traditional spontaneous laws is the concept of equality among community members: power is attributed to elders, whether by divine will, by the special social position of ancestors or for other reasons. The *status of* the individuals who hold these apex

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Vaz Serra's words are significant: "[a]dmitir o costume como fonte do direito seria introduzir um elemento de indecisão acerca do direito em vigor. E, ainda que se não equiparasse à lei e só se lhe reconhecesse valor brigatório na falta dela, é, na ausência da lei que preveja a espécie vertente, mais consentânea com a necessidade de certeza e com a justiça relativa, mandar observar a analogia… […] O favor de que ainda hoje goza o costume vem-lhe do prestígio da escola histórica, contrária à legislação, e para a qual o espírito do povo é a fonte última de todo o direito. Mas esta concepção é puramente dogmática e indemonstrável" (*Vaz Serra A.* A revisão geral do codigo civil: alguns factos e comentarios // Separata do Boletim da Faculdade de Direito. 1946. Vol. 22. P. 16).

[41] In fact, as pointed out before in the text, "custom" is here not to be understood in the erudite sense of modern legal systems, but as spontaneous adherence to a traditional and handed-down behavior.

[42] In this perspective, Oliveira Ascensão's words are useful: "…*a admissão do costume traduz uma concepção não niveladora da existência social, em que haja respeito pela diferença*" (*Ascensão O.* O costume como fonte do direito. Revista Trimestral de Direito Civil. Vol. 39. Rio de Janeiro, 2000).

[43] The *Zulu* proverb "*umuntu ngumuntu ngabantu*", meaning "I am what I am because of what we all are", applies. For a thorough discussion of the superior value of the group over the individual in African communities, consult: *Ayttey G.* Indigenous African Institutions. 2nd ed. New York, 2006. P. 41; *De Asua Altuna R.* Cultura tradicional bantu. Luanda, 2014. P. 211.

[44] *Moura Vicente D.* Direito comparado. Vol. I. Coimbra: Almedina, 2021. P. 394.

[45] *Loureiro Bastos F.* A recolha e a codificação do direito costumeiro vigente na República da Guiné-Bissau // Estudos em Homenagem ao Professor Doutor Jorge Miranda. Vol. I: Direito Constitucional e Justiça Constitucional. Coimbra: Coimbra Editora, 2012. P. 697.

roles in the group is normally unquestionable and often there are no checks or balances as there would be in modern states following the doctrine of the separation of powers.

In the former African colonies — but the scenario is the same in East Timor as well[46] — the informal practice of conciliation is widespread, especially in the context of family disputes. This preliminary attempt to reconcile disagreements takes on high significance, and its failure to do so, resulting in immediate activation of traditional proceedings (or, even "worse", going before State courts), or failure to comply with any agreement reached in that context can be interpreted as behavior that is highly detrimental to honor[47].

Therefore, people do not resort to formal court systems, but rather prefer to turn to traditional authorities because this model of spontaneous justice (or, better said, coexistence) is faster, closer to the communities they belong to, and, above all, capable of working out understandable and acceptable forms and solutions.

Disputes, therefore, tend to be resolved by agreement, not by applying rigid rules of law. Proceedings conducted by the traditional authorities do not follow precise patterns (there is no concatenation of acts and facts typical of Western trials), there are no special rules on jurisdiction, and they are characterized by considerable flexibility to encourage conciliation between the parties.

The leaders of the newly independent countries were convinced of the inferiority of the customary and traditional legal systems of the locals and believed in the importance of adopting a Western legal system (as well as political and economic systems), perceived as the only path to progress and economic development.

The unquestioning importation of European-style legal solutions — often unsuited to African realities — and the resulting establishment of "modern" courts, at the expense of the recognized role of traditional authorities, have led to the development of hybrid systems[48], carrying legal solutions that are often unrecognizable to the populations for which they are intended.

In recent times, the constitutional charters of Angola[49], Mozambique[50] and Timor-Leste[51] have recognized legal pluralism (*pluralismo jurídico*) and a formal role for traditional law. As a result of these provisions, for the first time these new independent States recognize the existence of the principle of legal pluralism, accepting that the rules of spontaneous law practiced within traditional communities can be applied[52].

Thus, by virtue of the principle *iura novit curia*, state judges may be called upon to apply traditional principles or rules without the possibility of requiring parties to prove that those traditional principles or rules are in force.

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[46] *Viana Da Costa I.* As práticas tradicionais timorenses em matéria de direito dos contratos: estudo de caso nos distritos de Díli e Bobonaro // Revista da Faculdade de Direito. Universidade Nacional Timor Lorosa'e. 2019. No. 2. P. 187.

[47] *Moura Vicente D.* Direito comparado. P. 408.

[48] Once again, anthropology is useful for legal comparison, as it "mette lo studioso a contatto con paesi ex-coloniali in cui un modello giuridico europeo è stato introdotto, e ora viene gestito dagli autoctoni con evidente reazione del precedente substrato giuridico, che incide in modo acuto sull'applicazione della norma. Ciò consente di individuare l'apporto del substrato (autoctono) e l'apporto del superstrato (di origine europea), e mostra come il ruolo degli strati incida sulla fisionomia di ogni sistema" (*Sacco R., Rossi P.* Introduzione al Diritto Comparato).

[49] Art. 7 Const. AO: "[é] reconhecida a validade e a força jurídica do costume que não seja contrário à Constituição nem atente contra a dignidade da pessoa humana".

[50] Art. 4 Const. MZ: "[o] Estado reconhece os vários sistemas normativos e de resolução de conflitos que coexistem na sociedade moçambicana, na medida em que não contrariem os valores e os princípios fundamentais da Constituição".

[51] Art. 2(4) Const. T-E: "[o] Estado reconhece o direito consuetudinário de Timor-Leste, sujeito à Constituição e a qualquer legislação que trate especificamente do direito consuetudinário".

[52] *Burity Da Silva C. A. B.* Teoria geral do direito civil. 2nd ed. Luanda: Edicao da Faculdade de Direito da UAN, 2014. P. 50.

It is, however, still a complex matter to determine the actual scope of application of this recognition of traditional law. In Angola, Mozambique and East Timor, arguably, pursuant to Article 239 of the Civil Code[53], traditional rules can supplement the parties' negotiating statements. Instead, it is decidedly more difficult to know whether these rules of a customary nature can lead to the disapplication of statutory provisions, when the two are incompatible; a constitutionally oriented solution should suggest the prevalence of traditional law within the limits of constitutional values and principles[54].

In this regard, it is interesting to examine the provisions of Angola and Mozambique relating to ways of preserving traditional marriages even when they are somehow invalid and how these rules have replaced the regulations found in the *Código civil*.

In Angola, Article 20[55] of Law No. 1 of February 20, 1988, defines marriage as the monogamous union between a man and a woman, which means that no polygamous marriages can ever be preserved, not even through a constitutionally oriented reading of the law, even though such marriages are common especially in the more rural areas of the country.

However, under article 73, lett. *d*), marriages solemnized according to custom are valid and effective, unless they have been declared invalid by a court[56].

In Mozambique, Article 17 of Law No. 22 of December 11, 2019, recognizes traditional marriages as long as they meet the same requirements as civil marriages[57].

Then on the subject of decisions of traditional authorities, the question arises as to their effectiveness against state bodies (judicial and administrative).

In Angola[58], Article 223 of the Constitution recognizes the role and functions of traditional authorities so long as they do not operate contrary to the constitutional spirit, and Articles 224 and 225 regulate the function and purpose of these traditional authorities[59].

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[53] Art. 239 c. c.: "[n]*a falta de disposição especial, a declaração negocial deve ser integrada de harmonia com a vontade que as partes teriam tido se houvessem previsto o ponto omisso, ou de acordo com os ditames da boa fé, quando outra seja a solução por eles imposta*".

[54] To confirm this interpretation, see: *Moura Vicente D.* Tendências da codificação do direito civil no século XXI: algumas reflexões // Estudos comemorativos do vinte anos da faculdade de direito de Bissau / ed. by F. Loureiro Bastos. Vol. I. Lisboa, 2010. P. 381; *Machado J. E. M., Nogueira Da Costa P., Hilario E. C.* Direito constitucional angolano. 2nd ed. Coimbra: Coimbra Editora, 2013. P. 328.

[55] Art. 20, Law No. 1 of February 20, 1988: "[o] casamento é a união voluntária entre um homem e uma mulher, formalizada nos termos da lei, com o objetivo de estabelecer uma plena comunhão de vida".

[56] Art. 73, lett. d), Law No. 1 of February 20, 1988: "[c]onsidera-se sanada a anulabilidade e válido o casamento desde o momento da celebração se, antes de transitar em julgado a sentença de anulação, ocorrer algum dos seguintes factos: [...] d) ser a falta de requisitos formais devida a circunstâncias atendíveis, como tais reconhecidas pelo Ministro da Justiça, desde que não haja dúvida sobre a celebração do acto".

[57] Art. 17, Law No. 22 of December 11, 2019: "1. O casamento é civil, religioso ou tradicional. Ao casamento monogâmico, religioso e tradicional é reconhecido valor e eficácia igual à do casamento civil, quando tenham sido observados os requisitos que a lei estabelece para o casamento civil".

[58] About the relationship between the State and traditional authorities in Angola, see: *Feijó C.* A Coexistência Normativa entre o Estado e as Autoridades Tradicionais na Ordem Jurídica Plural Angolana. Coimbra: Almedina, 2012.

[59] Art. 223 Const. AO: "1. O Estado reconhece o estatuto, o papel e as funções das instituições do poder tradicional constituídas de acordo com o direito consuetudinário e que não contrariam a Constituição. O reconhecimento das instituições do poder tradicional obriga as entidades públicas e privadas a respeitarem, nas suas relações com aquelas instituições, os valores e normas consuetudinários observados no seio das organizações político-comunitárias tradicionais e que não sejam conflituantes com a Constituição nem com a dignidade da pessoa humana"; Art. 224 Const. AO: "[a]s autoridades tradicionais são entidades que personificam e exercem o poder no seio da respectiva organização político-comunitária tradicional, de acordo com os valores e normas consuetudinários e no respeito pela Constituição e pela lei"; Art. 225 Const. AO: "[a]s atribuições, competência, organização, regime de controlo, da responsabilidade e do património das instituições do poder tradicional, as relações institucionais destas com os

A more formal role for this form of customary justice is provided for under the Land Law (*Lei de Terras*) for the resolution of certain disputes within local communities[60].

In Mozambique, Article 118 recognizes traditional forms of dispute resolution[61] and Decree No. 15 of June 20, 2000, introduces a system of administrative decentralization for the enhancement of the organization of local communities and their participation in the public administration. The latter expresses State recognition of certain traditional authorities that are assigned, *inter alia,* specific functions to ensure peace, justice and social harmony in their communities[62].

However, a framework for the concrete and uniform implementation of these constitutional principles is lacking, and, within the context of the African and Asian CPLP, all legal systems can be classified as hybrid systems in which formally prevailing State justice is juxtaposed with traditional justice, which continues to be the primary form of justice recognized by millions of people, especially in matters relating to family relations, succession and land tenure[63].

There is reason to believe that greater consideration for traditional justice and initiatives for better coordination between it and national justice would bring benefits for all components of society.

Since the peacemaking action of traditional justice within communities is incontrovertible, it could serve a twofold fundamental function: on the one hand, it could ease the burden on formal courts, and, on the other, it might also prove to the litigants the usefulness of also having recourse to a state court to resolve disputes. This effort aimed at making the hybrid system fruitful, requires reforms to clarify the relationship between the two spheres of justice. It should, for example, make provisions regarding the effectiveness, appealability, recognition and enforcement of the decisions of traditional authorities by the state apparatus. Hence the need for lawmakers to be able to implement a courageous and forward-looking customary policy capable of resisting the impulse to reduce custom to statutory law (*direito legislado*) and distort the functioning of traditional authorities[64].

5. Lusophony, Portuguese language and variants

In Portugal, the linguistic context is decidedly homogeneous, although there are some minorities, such as *Mirandés* in the northeast[65], *Minderico* in the center, *Barran-*

órgãos da administração local do Estado e da administração autárquica, bem como a tipologia das autoridades tradicionais, são regulados por lei".

[60] Art. 82 (1), Law No. 9 of November 9, 2004: "[o]s litígios relativos aos direitos colectivos de posse, de gestão, de uso e 5-uição e dodomínio útil consuetudinário dos terrenos rurais comunitários serão decididos no interior dascomunidades rurais, de harmonia com o costume vigente na comunidade respectiva".

[61] Art. 118 (1), Const. MZ: "1. O Estado reconhece e valoriza a autoridade tradicional legitimada pelas populações e segundo o direito consuetudinário".

[62] Art. 4, lett. a), Decree No. 15 of June 20, 2000: "[s]ão áreas de articulação entre os órgãos locais do Estado e as autoridades comunitárias, aquelas em que se realizam actividades que concorram para a consolidação da unidade nacional, produção de bens materiais e de serviços com vista à satisfação das necessidades básicas de vida e de desenvolvimento local, tais como: a) Paz, justiça e harmonia social".

[63] The concept of hybrid system can also apply to other and different scenarios. Hybrids are (*i*) systems that are based on elements of the Romano-Germanic family and Common Law (e. g., Scotland, Louisiana, and Quebec) or religious law (e. g., Israel and most Maghreb countries); (*ii*) systems that combine Common Law and religious elements (e. g., Pakistan and Malaysia); and (*iii*) systems that, while belonging to the Romano-Germanic family, also have their own characters (e. g., China, Japan, and South Korea).

[64] Interesting on the topic of traditional law is the contribution: *Jerónimo P.* Os direitos tradicionais africanus // Lições de Direito Comparado. Braga: Elsa Uminho, 2015. P. 155.

[65] It is worth mentioning the curious case of Picuote, *freguesia* of the Miranda do Douro municipality, a small village of a few hundred inhabitants, where people regularly speak this language, and all public postings are in dual *Mirandés* and Portuguese.

quenho in the southeast, Hebrew spoken by the Israelites, *Caló* by the gypsies, and Cape Verdean *Crioulo* used by a significant immigrant community, and numerous dialects.

In the other CPLP countries, the language system is decidedly more varied and complex, and although today, thanks to *lusitanização*[66], Portuguese is the official language, it is not the language spoken daily by most of its members, especially in African countries and East Timor[67].

The scenario is even more complex, considering the existence of numerous unofficial languages (which are today sometimes recognized and even protected, but which were referred to disparagingly as *dialects* and strongly opposed or forbidden during the colonial period) spoken by millions of individuals in their daily lives. In most cases, these languages seem doomed to extinction as they are excluded from curricular courses at school from political and economic power.

Indeed, in these countries, Portuguese came in as an oppressive language, made forcibly compulsory as one of the many means of securing cultural as well as political conquest and subordination.

Therefore, it is not surprising that, for example, according to a recent census, in Mozambique native Portuguese speakers make up for barely 2 percent of the population. And the scenario is similar in all former colonies, whose populations, as a general rule, only come into contact with the Portuguese language upon starting their education.

In other words, except for Portugal and much of Brazil, for all the rest of the Lusophone world being native Portuguese speakers is more a question of constitutional convention than endo-family linguistic transition.

To understand the linguistic conquest of *lusitanização*, it is necessary to start from the royal decree of Don José I that reaped the greatest fortunes in the South American colonies belonging to present-day Brazil, through the *Lei do Diretório* of May 3, 1757, considered the first act of the so-called *legislação pombalina*[68].

Indeed, while the Portuguese kingdom in Africa was still relegated to coastal areas and was not interested in investing into expanding into territories that were deemed poor in wealth and infrastructure and inhabited by wild and conflicting tribes, the Latin American colonies were richer and more developed thanks to the, by then, established presence of Jesuit missions.

Thus, from the northeastern colonies of Grão-Pará and Maranhão began the effective linguistic (and, in general, cultural) conquest operated by *Marquês de Pombal*[69] with the

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[66] This word refers to the phenomenon of colonial penetration aimed at dominating peoples and territories through the imposition of culture, worldview, religion, and language. On this point, see: *Severo C. G., Makoni S.* Políticas linguísticas Brasil-África: por uma perspectiva crítica // Coleção Linguística. Vol. 5. Florianopolis: Editoria Insular, 2015.

[67] In this scenario, it seems fitting to consider the linguistic tool as a set of shared and necessary conventions adopted by a social body to enable communication between individuals (*Saussure F.* Curso de linguística geral. São Paulo: Cultrix, 2006. P. 17).

[68] This expression identifies the set of laws that arose during the government of Sebastião José de Carvalho e Melo, *Marquês de Pombal* and *Conde de Oeiras*, Secretary of State of the kingdom of Don José I between 1750 and 1777. The *legislação Pombalina* ruled over all the territories of the kingdom; as for the territories in South America, they extended as established by the 1750 Treaty of Madrid, which ended the conflicts between the Spanish and Portuguese crowns and redefined the borders, surpassing the 1494 Treaty of Tordesillas.

With the Treaty of Madrid, by applying for the first time the usucaption (*uti possidetis*), according to which land belongs to those who occupy it, Spain retained most of the lower La Plata basin and Portugal secured most of the Amazon basin, thus laying the groundwork for the future geopolitical demarcation of today's Brazil. For further infomation, see: *de Almeida L. F.* Alexandre de Gusmão, o Brasil e o Tratado de Madrid: 1735–1750. Lisboa, 1990.

[69] Brazilian historian Francisco José Calazans Falcon classifies *Marquês de Pombal*'s works into seven thematic groups: the first group concerns writings on Anglo-Portuguese economic relations, the

Lei do Diretório[70] a few months later extended by José I to all the colonies of the continent with the *Alvará* of August 27, 1758.

This piece of legislation is one of the most important language policy documents of the 18th century because of the pioneering spirit that distinguished its main salient features: the notion of a polished and civilized Europe contrasted with the supposed backwardness of Jesuit administration; the modern pedagogy contrasted with the punishments and rigors of traditional teaching; and the historical self-awareness based on the invention of a tradition of the Lusitanian people, thus going back to the time of the great navigations of the 16th century[71].

With the *Lei do Diretório* of May 3, 1757, the Jesuits were expelled[72] and Portuguese was established as the sole language of the Grão-Pará and Maranhão colonies with a ban on the use and teaching of the indigenous native languages[73] , namely the *Tupi* and *Guaraní* languages[74].

The *Alvará* of August 27, 1758, extended the legislation to all South American colonies, mandating the use and teaching of the Prince's language (*língua do Príncipe*) and prohib-

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second are the "*instruções*" produced during the first years of his government and addressed to various authorities, the third refers to his polemical works, such as the *Compêndio histórico da Universidade de Coimbra* of 1771, the fourth consists of legislation, the fifth of his diplomatic correspondence, the sixth of his secret analysis, and the seventh is devoted to his self-celebratory speeches of his government (see: *Falcon F. J. C.* A época pombalina: (política econômica e monarquia ilustrada). 2nd ed. São Paulo: Atica, 1993).

[70] Although part of the *legislação Pombalina*, it was drafted by Maranhão Governor Francisco Xavier de Mendonça Furtado, brother of Marquês de Pombal.

[71] *Oliveira L. E., Simões Borges Fonseca A. L.* Obra completa pombalina: os escritos sobre instrução pública // Educar em Revista. Setor de Educação da Universidade Federal do Paraná. Curitiba. 2019. No. 75. P. 219.

[72] In the opinion of the monarchy, in fact, the Jesuit "*methodo*" was leading the Portuguese dominions to the collapse "not only of the arts and sciences, but also of the monarchy itself and of religion". However, see: *Favero L. L.* A política linguística do Marquês de Pombal para o Brasil // Século das Luzes. Vol. 1 / ed. by W. Thielemann. Frankfurt am Main: TFM, 2006. P. 518: the expulsion of the Jesuits did not mean the secularization of teaching, which remained within the Catholic sphere of influence. In this sense, see the *Brief Instrução* of the Governor of Pernambuco, transcribed in: *de Andrade A. A. B.* A Reforma Pombalina dos Estudos Secundários no Brasil. São Paulo: Saraiva, 1978. P. 123: "[e] como o princípio da ciência é o temor de Deus, devem os Mestres colocar nas escolas uma imagem de um santo crucifixo em vulto ou em pintura, e obrigar os meninos quando entram na escola, que de joelhos devotamente a reverenciem, se persignem e se benzam, e ensiná-los a persignar e a benzer, fazendo-lhes certo que o sinal da Santa Cruz é a arma mais forte para destruir as tentações do inimigo comum".

[73] In particular, see Art. 6 of the Lei do Diretório: "[s]empre foi maxima inalteravelmente praticada em todas as Nações, que conquistárão novos Dominios, introduzir logo nos Póvos conquistados o seu proprio idiôma, por ser indisputavel, que este he hum dos meios mais efficazes para desterrar dos Póvos rusticos a barbaridade dos seus antigos costumes; e ter mostrado a experiencia, que ao mesmo passo, que se introduz nelles o uso da Lingua do Principe, que os conquistou, se lhes radica tambem o affecto, a veneração, e a obediencia ao mesmo Principe. Observando pois todas as Nações polidas do Mundo este prudente e sólido systema, nesta Conquista se praticou tanto pelo contrario, que só cuidárão os primeiros Conquistadores estabelecer nella o uso da Lingua, que chamarão geral; invenção verdadeiramente abominavel, e diabolica, para que privados os Indios de todos aquelles meios, que os podião civilizar, permanecessem na rustica, e barbara sujeição, em que até agora se conservárão. Para desterrar este perniciosissimo abuso, será hum dos principaes cuidados dos Directores, estabelecer nas suas respectivas Povoações o uso da Lingua Portugueza, não consentindo por modo algum, que os Meninos, e Meninas, que pertencerem ás Escolas, e todos aquelles Indios, que forem capazes de instrucção nesta materia, usem da Lingua propria das suas Nações, ou da chamada geral; mas unicamente da Portugueza, na fórma, que Sua Magestade tem recomendado em repetidas Ordens, que até agora se não observárão com total ruina Espiritual, e Temporal do Estado" (*da Silva A. D.* Coleção de Legislação Portuguesa (1750–1820). Lisboa: Mercado de Letras, 1830).

[74] On this topic, see: *Oliveira L. E.* A legislação pombalina sobre o ensino de línguas: suas implicações na educação brasileira (1757–1827). Maceió: Edufal, 2010.

iting the use of indigenous languages and so-called general languages (*linguas gerais*) considered a "truly abominable invention" (*invenção verdadeiramente abominável*)[75].

However, there were mixed results in terms of the effective implementation of the *legislação Pombalina*, particularly owing to the monarchy's financial difficulties in meeting the costs for teachers and school supplies[76], but there are official sources of its actual implementation in the colony of Pernambuco[77].

In São Paulo, which at the time was under the *Capitania* of Rio de Janeiro, due to the great distance between the two cities, the entry into force of the new legislation was delayed until 1768, when the colony was made autonomous and Portuguese-language reading and writing schools were finally opened[78]. The governor's new statute stipulated that no pupil could continue his or her studies unless he or she presented a certificate in reading and writing[79].

Despite the difficulties initially faced by the *Lei do Diretório* of May 3, 1757, the *legislação Pombalina* and more than two centuries of monolingual teaching have allowed today's Brazil to have a distinctly unified linguistic framework. In other words, for all intents and purposes, the *South American giant* today is a native Portuguese-speaking country.

However, in addition to the dominant Portuguese, a number of indigenous idioms are still widespread in Brazil, although they are mostly confined to the more rural States such as Amazonas, Pará, Acre, Roraima, Amapá, Rondônia, and narrow areas of Maranhão, Mato Grosso, Mato Grosso do Sul, Bahia, Tocantis, Pernambuco and Minas Gerais.

It is difficult to know the exact number of indigenous languages currently still alive in Brazil, since some of them are only spoken by a very small number of individuals[80]. In any case, UNESCO's *World Atlas of* Languages counts 190 languages, while there are 154 according to a study by the Department of Linguistics of the Faculty of Philosophy, Humanities and Humanities at the Universidade de São Paulo[81].

Thus, while today's Brazil can certainly be considered monolingual and native Portuguese-speaking, this condition stems overwhelmingly from the *legislação Pombalina*, regardless of any moral judgment on the anthropological and cultural consequences of one of the great imperialist aggressions of the 18th century.

In the other colonies, the crown's impulse towards the use and teaching of the Portuguese language had to contend with logistical and acclimatization difficulties in highly hostile and logistically complex lands.

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[75] These the words of the Alvará: "…não consentindo por modo algum, que Meninos, e Meninas, que pertencerem às Escolas, e todos aqueles índios, que forem capazes de instrução nesta matéria, usem da Língua própria de suas nações, outra chamada geral".

[76] *de Andrade A. A. B.* A Reforma Pombalina dos Estudos Secundários no Brasil; *Favero L. L.* A política linguística do Marquês de Pombal para o Brasil. P. 521.

[77] *Favero L. L.* A política linguística do Marquês de Pombal para o Brasil. P. 515.

[78] *de Andrade A. A. B.* A Reforma Pombalina dos Estudos Secundários no Brasil.

[79] In particular, see the third and seventh paragraphs: "3) Que nenhum menino se possa passar ao estudo da língua latina, sem preceder a mesma licença, a qual se dará com informação do Mestre, sobre a sua capacidade, para se saber se acham bem instruídos no ler, escrever e contar, e bons costumes, para que não suceda passarem a outros estudos maiores, sem estes primeiros e mais necessários fundamentos, da Religião Cristã e obrigações civis. … 7) Que todos os Mestres sejam obrigados a ensinar pelo livro de Andrade,1 e a seguir em tudo aquelas regras que no princípio do dito livro se prescrevem para a boa direção das Escolas, e será bom que tenha outros livros, como a Educação de um menino nobre (da autoria de Martinho de Mendonça de Pina e Proença Homem), a tradução das Obrigações Civis de Cícero e, para que possam inspirar aos meninos, as boas inclinações e o verdadeiro merecimento do homem".

[80] In the BBC Brasil *reportagem by* Leticia Mori of March 4, 2018, they show the story of a couple living in an area near the border with *Bolivia* — Känätsɨ and Híwa, ages 78 and 76 — who represent the last two individuals speaking the *Warázu* language of the indigenous tribe *Warazúkwe*.

[81] *Storto L.* Linguas Indigenas — Tradicao, Universais e Diversidade. São Paulo: Mercado de Letras, 2019.

The reach of the Portuguese language, therefore, remained limited both in the number of speakers and in their location, for they were mostly confined to coastal areas and to the few major centers. It is not surprising, therefore, that even with the organization of the General Agency for the Colonies (*Agência Geral das Colônias*) during Salazar's government, which provided for the creation of schools, high schools and universities, the percentage of Portuguese speakers remained well below fifty percent[82].

Consider, for example, that still in 1980, five years after Mozambique's independence, the general population census placed Portuguese sixteenth among the Country's languages, with only twenty-five percent of speakers, of whom just over one percent used it as their mother tongue[83].

As for today's scenario, in Angola there are about twenty national languages including *Umbundu*, *Kikongo*, *Cokwe*, *Nhaneka*, *Ngangela*, *Fiote*, *Kwanhama*, *Muhumbi*, and *Luvale*; in Mozambique more than twenty *Bantu moçambicanas* languages; in Cape Verde the *Krioulo Caboverdian*; in São Tomé e Princípe *Santomense*, *Principeense*, *Angolar*, and *Anobonense*; in Guinea Bissau *Crioulo* and about fifteen other languages; in Equatorial Guinea Portuguese has been the third official language since July 20, 2010, in addition to Spanish and French, and some native languages are spoken including *Fangue*, *Bubi*, *Pichi*, *Balengue*.

In spite of the limited territorial extension of East Timor, its historical evolution and the period of Indonesian occupation make it particularly interesting, because, in many respects, the penetration of the Portuguese language has peculiar connotations compared to the rest of the Lusophere.

Driven by the search for new and distant trade routes and by ambitions of evangelism, the Portuguese arrived in East Timor in the 16th century, and the missionaries started to spread the Portuguese language[84], even authoring an early bilingual manual[85].

From a more political point of view, the Portuguese presence became more formal starting in 1702 when the first governor was appointed, the first central administration was established, and, consequently, the Portuguese language became the language of administration[86].

At the turn of the nineteenth and twentieth centuries, greater and more widespread colonial administration and the opening of Catholic mission schools, and thus language instruction, even for girls, made it possible for the Portuguese language to spread further.

But it was with a Colonial Decree (*Ato Colonial*) of 1930 that the administration implemented a real watershed through the introduction of the "assimilate" (*assimilado*) that made knowledge of the Portuguese language mandatory for the acquisition of citizenship by natives and mestizos[87].

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[82] *Oliveira L. E., Simões Borges Fonseca A. L.* Obra completa pombalina… P. 219.

[83] *Pereira D.* O português e os crioulos: políticas de língua [sécs. XIX e XX] // Nação e identidades: Portugal, os portugueses e os outros / eds H. Fernandes, H. Henriques, I. Castro Horta, J. da Silva e Matos, S. Campos. Lisboa: Centro de Historia da Universidade de Lisboa — Caleidoscopio, 2009. P. 278.

[84] "[…] já que, cerca de 1560, chegaram os primeiros missionários portugueses que, a custo de muito sacrifício, conseguiram expandir a língua portuguesa através da alfabetização nas escolas e das preces expressas nas capelas e igrejas católicas" (*Ruak T. M.* A importância da língua portuguesa na resistência contra a ocupação indonésia // Camões — Revista de Letras e Culturas Lusófonas. 2001. No. 14. P. 40).

[85] "A principal via de difusão do português em Timor-Leste foi a da missionação. Durante os primeiros cento e cinquenta anos foram os missionários que se ocuparam do ensino, desenvolveram o primeiro manual bilingue (Cartilha Tetum, P. e Laranjeira, 1916) para ensinar Português. Foram ainda os missionários que implementaram as escolas primárias, fundaram a Escola de Professores Catequistas, a Escola de Artes e Ofícios e o Seminário Menor (primeiro em Soiaba, em 1898, e depois em Dare, em 1951)" (*Costa L.* Línguas de Timor // Dicionário Temático da Lusofonia. Lisboa: Texto Editores, 2005. P. 614).

[86] *Thomas L. F. F. R.* Babel Loro Sa'e: O problema linguístico de Timor Leste. Lisboa: Instituto Camoes, 2002. P. 137.

[87] *Taylor J. G.* Timor, a história oculta. Lisboa: Bertrand Editora, 1993. P. 41.

In the second half of the 20th century, after decolonization, East Timor was invaded by Indonesian troops in 1975 and annexed (without UN recognition) as Indonesia's 27th province until 1999 and, after a period of administration, it became independent in 2002.

A further aspect of Timorese distinctiveness in the *Lusophone* landscape is related to the fact that the Portuguese language has romantic connotations and functions as an identity marker, because the criminalization of the Portuguese language during the years of Indonesian occupation turned it into some kind of a language of resistance[88]. It is not surprising, therefore, that today it is still widely spoken throughout the Country, as are the *Tetum* language and a dozen *Austronésicas* and four *Papuásicas* languages.

After this overview and in the face of such an extremely varied scenario[89], one may wonder whether the *Lusophere* is an environment characterized by a shared language or whether there are several Portuguese languages, "Brazilian Portuguese", "Angolan Portuguese", "East Timorese Portuguese", and, again, whether an Angolan or Guinean understands the speech of a Mozambican or Cape Verdean[90].

The answer to such questions is twofold: while there is certainly one and only one Portuguese language buttressed by intense pan-Lusophone institutional efforts directed at creating orthographic homogeneity, that language is enriched by numerous variants typical of Lusophone peoples. Unsurprisingly, the literatures of Brazil, Angola, Mozambique and so on are rich in indigenous *linguistic imprints*[91].

The cultural-historical heritages of the CPLP peoples have contributed and contribute daily to the semantic and lexical dynamism of the *Portuguese spoken by the non-Portuguese*.

Some examples are explanatory and curious to both the scholars of Portuguese and to many native speakers. Thus, if "bathrom" is *banheiro* in Brazil and *casa de banho* in Portugal, *banheiro* means "lifeguard" in Portugal, the equivalent of *salva-vidas* in Brazil. Again, *comboio* means a row of vehicles in Brazil and "train" in Portugal; *propina* means "bribe" in Brazil and "tuition" in Portugal; if *moleque* is child in much of Brazil (but in southern States it is more common *gurí*), it means "slave" in Mozambique; "girl" is *moça* in Brazil, *rapariga* in Portugal, *mboa* in Angola; even *arroz*, a very common word considering how common this food is, can be cited as an example, because while this term has a triple meaning throughout the Lusophone world — "rice plant", "rice grain" and "rice as food preparation" — in East Timor there are three words, one for each meaning, namely *hare* for the plant, *fos* for the grain, and *etu* for the prepared food.

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[88] "[…] uma língua que foi banida ostensivamente durante mais de 20 anos, proibida nas escolas e que se apresenta viçosa logo a seguir à libertação, mostra que estava mesmo com profundas raízes nos valores culturais mais sagrados deste povo. […] A experiência de ensinar a Língua Portuguesa, mais abertamente, mas ainda discreta, anos antes do referendo, veio a demonstrar vigorosamente que a 'semente' da Língua Portuguesa esperava no coração do povo, das crianças e dos jovens o momento para germinar" (*Felgueiras P. J.* As Raízes da Resistência // Camões — Revista de Letras e Culturas Lusófonas. No. 14. Lisboa: Instituto Camoes, 2001. P. 49).

[89] And it is also necessary to mention the recognition and use in each country of its respective sign language.

[90] *Timbane A. A., Sozinho Quiraque Z. A.* Língua ou línguas portuguesas? A variaçao linguística e ensino nos países lusófonos // Filosofia, Política, Educação, Direito e Sociedade. Vol. 6 / ed. by S. A. de Souza Monteiro Belo Horizonte: Atena Editora, 2019. P. 233.

[91] To understand the profound lack of homogeneity of the Portuguese language within the overall framework of the *Lusofonia*, consider that there are even variants of Portuguese within single states. See in this regard, with reference to Brazil: *Bagno M.* Gramática pedagógica do português brasileiro. São Paulo: Parabola Editorial, 2012; *de Castilho A. T.* Nova gramática do português brasileiro. São Paulo: Contexto, 2012; with reference to Angola: *Bernardo E. P. J.* Norma e variação linguística: implicações no ensino da língua português em Angola // Revista Internacional em Língua Portuguesa. 2017. No. 32. P. 39–54; with reference to Mozambique: *Dias H. N.* Minidicionário de moçambicanismos. Maputo: Imprensa Universitária, 2002.

Moreover, with the exception of Portugal[92] and to a large extent Brazil[93], in all other CPLP Countries a person's Portuguese proficiency can be affected by socio-economic factors, among them: (*i)* the fact that, especially in rural areas, preschool children are rarely taught Portuguese; (*ii*) the fact that the language spoken at home is not the language taught in school; (*iii*) teachers are often unprepared and have limited school materials; (*iv)* non-existence or scarcity of Portuguese/native language dictionaries; and (*v*) inadequate school policies and investments.

6. The contribution of linguistics and translation studies in monolingual legal systems

The significant contribution that legal scholars have made to the development of language is well known. The imprint offered by legal scholars to the elaboration of language is due, essentially, to their attempts at adapting it to better suit the needs of law. This phenomenon that led to the emergence of *legal language* — thus a technical idiom as opposed to both the literary and the vernacular versions of the same language — dates back to Roman times and the birth of jurisprudence[94].

Over time, the development of legal linguistics has helped to improve the quality of legal drafting. In this sense, the era of the great codifications meant an important stage of refinement and standardization of legal terminology, wherever it occurred, particularly in the German experience.

Within the *common law* family, the same phenomenon has occurred, albeit because of the doctrine of *binding precedent*.

However, within the same monolingual system — i. e., the vast majority — the in-depth study of legal linguistics and interest in its study may be, today, less interesting and thus somewhat stale for the jurist and language scholar. This can be explained by the absence of the need for coordination among multiple legal languages, a condition that makes the distances that are created over time between the norm and its practical application scarcely perceptible.

The Lusophone context mirrors this scenario and, once again, it is the comparativist, supported by the translator, who makes a valuable scientific contribution. Indeed, through observation of what is happening elsewhere and through translanguaging, it is possible to stimulate Portuguese-speaking lawmakers through the solutions accepted and undertaken in other legal systems.

Moreover, from this perspective, linguistics and translanguaging can be an evaluative impetus for jurisprudential *humus* and doctrinal style.

Then, there are further relevant practical perspectives of the application of translanguaging to law, albeit of a monolingual system.

It is a widespread and growing phenomenon in recent decades that of the proliferation of special laws that remove entire disciplines from private and commercial codification, and in this regard, there are numerous examples in Lusophere as well.

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[92] However, it is worth mentioning the curious and nice so-called Portuguese. Algarian dictionary by Madeira V. — Dicionário algarvio de termos e dizeres do Algarve — published in 2011 online. Available at: https://www.vitormadeira.wordpress.com/2011/09/30/dicionario-algarvio-de-termos-e-dizeres-do-algarve-ja-com-o-nove-acorde-ortugrafique/ (accessed: 08.12.2023).

[93] An erudite variant of Brazilian Portuguese can be found in the poetic licenses of the Brazilian composer and singer João Rubinato, better known as Adoniran Barbosa (Valinhos, Aug. 6, 1910-São Paulo, Nov. 23, 1982): in the 1951 song "*Saudosa mimosa*" we find some examples: "Mais, um dia nós nem pode se alembrar", "Peguemo todas nossas coisa e fumos pro meio da rua", "E hoje nóis pega a páia nas grama do jardim".

[94] *Sacco R.* Mute Law // American Journal of Comparative Law. 1995. Vol. 43, iss. 3. P. 455.

These new special disciplines concern technical and economic fields, which are often regulated by their own logic due to their high degree of specificity and which require the use of niche slang terminology. One thinks of consumer disciplines, those regulating certain aspects of health, finance, science, sports, and so on.

As Rodolfo Sacco rightly observed, in all (or almost all) fields of life it is possible to find at least one word that expresses exactly a given concept, so it is not in law[95].

Thus, the irruption of special disciplines to regulate certain scientific and economic fields brings with it, on the one hand, norms enriched with extremely technical terminology, and, on the other hand, the obvious need for coordination with respect to the general principles of the system concerned.

At every latitude, the significant criticalities of the fundamental goal of legal certainty due to this tendency toward legislative fragmentation that undermines the interpretive coherence of norms are well known.

From this perspective, translanguaging does not aim at observing external experiences, but rather at providing support for interdisciplinary linguistics and, more specifically, in the activity of transposition and the use of different specialized lexicons within a given legal regulatory framework that must operate harmoniously and fruitfully within the framework of a complex legal system.

7. The sources of language law within the Lusosphere

The analysis of sources on language policy can only start from constitutional principles and, secondarily, some other lower-ranking sources, assuming that all modern states give themselves regulations about the *status* and use of one or more languages within their political context[96].

7.1. Portugal (PT)

The Portuguese Constitution of 1976, following the fifth constitutional revision (Law No. 1 of December 12, 2001), establishes in Article 11(3) that Portuguese is the official language in the Country.

Driven by the liberal wind of the Council of Europe, with *Resolução da Assembleia da República* No. 42 of April 5, 2001, Portugal transposed the Framework Convention for the Protection of National Minorities (Strasbourg, February 1, 1995). Specifically, Article 10(1) states that "[t]*he Parties undertake to recognise that every person belonging to a national minority has the right to use freely and without interference his or her minority language, in private and in public, orally and in writing*". Also Article 10, in its second paragraph, requires "to the extent possible" and in cases of "real necessity" the use of the minority language in dealings with the public administration.

However, several ordinary laws express privileges for the Portuguese language: first, Article 133(1)[97], of the *Código de processo civil* (hereafter, also with reference to other

[95] "Si un biologiste, pour parler des ganglions lymphatiques, utilise quatre langues différentes, il trouve dansa toutes les langues un mot qui correspond assez exactement au concept qu il doit exprimer. La meme chose ne se produit pas toujours pour le droit. Les concepts créés, élaborés, définis par le législateur ou les juristes d'un système donné ne correspondent pas nécessairement aux concepts élaborés pour un autre système. Il est ainsi difficile de trouver le mot français permettant d'exprimer agent, estoppel, executor, etc." (*Sacco R.* Langue et droit // Langue et Droit — Collection des Rapports du XV° Congrès International de Droit Comparé, Bristol 1998. P. 230).

[96] *Turi J. G.* Introduction au droit linguistique // Langue et Droit — Actes du Premier Congrès de l'Institut international de droit comparé, 27–29 avril 1988, Université du Québec, ed. by Pupier P., Woehrling J. Montréal: Wilson & Lafleur Itee, 1988. P. 56.

[97] Art. 133 (1) c.p.c. PT: "[n]os atos judiciais usa-se a língua portuguesa".

countries, c.p.c.), and Article 92(1)[98], of the *Código de processo penal* (hereafter, also with reference to other countries, c.p.p.) provides for the use of Portuguese in civil and criminal proceedings.

There are also rules that favor Portuguese as the language of the contract: for example, for the consumer-facing professional: Article 1 of Decree-Law (D.L.) No. 238 of August 8, 1986, (as amended by D.L. No. 42 of February 6, 1988) establishes that all information must be provided in Portuguese[99] and Article 2 specifies that if it is in a foreign language, there must be a Portuguese translation[100].

7.2. Brazil (BR)

In Brazil, the first constitutional text that contained some reference to the issue of language was that of 1934, which, in Article 150, established the use of the idiom of the homeland for teaching in private institutions, while safeguarding the teaching of foreign languages[101].

Later, the 1946 constitutional amendment included knowledge of the national language among the requirements for voter status (Article 132[102]) and established that compulsory elementary education be in the national language (Article 168[103]).

Subsequently, the 1967 Constitution, regarding the national language, reiterated the same precepts (Articles 142[104] and 168[105]).

However, the constituents of 1946 and 1967 did not express any specific reference to the Portuguese language, and, therefore, the identification of that idiom as the national language had to be presumed, first, from the fact that both constitutional texts were written in Portuguese and, second, from the centuries-long custom of Portuguese's dominance as a compulsory language.

It was not until the 1988 Constitution, which is still in force today, that a precise constitutionalization of the official language took place, and so in Title II, about fundamental

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[98] Art. 92 (1) c.p.p. PT: "[n]os actos processuais, tanto escritos como orais, utiliza-se a língua portuguesa, sob pena de nulidade".

[99] Art. 1, D.L. No. 238/86 PT: "[a]s informações sobre a natureza, características e garantias de bens ou serviços oferecidos ao público no mercado nacional, quer as constantes de rótulos, embalagens, prospectos, catálogos, livros de instruções para utilização ou outros meios informativos, quer as facultadas nos locais de venda ou divulgadas por qualquer meio publicitário, deverão ser prestadas em língua portuesa".

[100] Art. 2, D.L. No. 238/86 PT: "[n]o caso de as informações escritas se encontrarem redigidas em língua ou línguas estrangeiras aquando da venda de bens ou serviços no mercado nacional é obrigatória a sua tradução intregal em língua portuguesa [...]".

[101] Art. 150 (2), lett. d), Const. BR 1934: "[o] plano nacional de educação constante de lei federal, nos termos dos arts. 5º, nº XIV, e 39, nº 8, letras a e e , só se poderá renovar em prazos determinados, e obedecerá às seguintes normas: [...] d) ensino, nos estabelecimentos particulares, ministrado no idioma pátrio, salvo o de línguas estrangeiras".

[102] Art. 132, No. 2, Const. BR 1946: "[n]ão podem alistar-se eleitores: [...] 2) os que não saibam exprimir-se na língua nacional".

[103] Art. 168, No. 1, Const. BR 1946: "[a] legislação do ensino adotará os seguintes princípios: 1) o ensino primário é obrigatório e só será dado na língua nacional".

[104] Art. 142 (3), lett. B), Const. BR 1967: "[s]ão eleitores os brasileiros maiores de dezoito anos, alistados na forma da lei. [...] § 3º — Não podem alistar-se eleitores: [...] b) os que não saibam exprimir-se na língua nacional".

[105] Art. 168 (3), No. 1, Const. BR 1967: "[a] educação é direito de todos e será dada no lar e na escola; assegurada a igualdade de oportunidade, deve inspirar-se no princípio da unidade nacional e nos ideais de liberdade e de solidariedade humana. [...] § 3º — A legislação do ensino adotará os seguintes princípios e normas: I — o ensino primário somente será ministrado na língua nacional".

rights and guarantees, Chapter III, about nationality, Article 13 elevates the Portuguese language to the official idiom of the Republic[106].

In addition, in Title VIII, Chapter III, Section I "Education", Article 210(2) secures the right to the use of one's own language in elementary education for indigenous communities[107].

Again, in Title VIII, Chapter VIII, about indigenous people, Article 231 recognizes, *inter alia,* the language of indigenous communities[108].

As for ordinary legislation, consider, for example, Article 192[109] Brazilian c.p.c., which mandates the use of the Portuguese language in civil proceedings[110].

It is necessary, however, to note an interesting element of Brazilian language legislation, namely the use of the locution national language (língua *nacional*) before and after the introduction of the constitutional precept that elevated Portuguese to the official language.

For example, a reference to the national language can be found in the 1943 labor legislation[111], just as the 1941 Code of criminal procedure[112] refers to the mandatory use of the national language for interrogation[113] and testimony[114] as well as a formal requirement for letters rogatory[115].

However, even after the 1988 constitutional amendment introducing the official language, for example, still the Civil Code of 2002 requires the use of the national language for public writing[116] and wills[117].

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[106] Art. 13, Const. BR 1988: "[a] língua portuguesa é o idioma oficial da República Federativa do Brasil".

[107] Art. 210 (2), Const. BR 1988: "[s]erão fixados conteúdos mínimos para o ensino fundamental, de maneira a assegurar formação básica comum e respeito aos valores culturais e artísticos, nacionais e regionais. § 2º O ensino fundamental regular será ministrado em língua portuguesa, assegurada às comunidades indígenas também a utilização de suas línguas maternas e processos próprios de aprendizagem".

[108] Art. 231 Const. BR 1988: "[s]ão reconhecidos aos índios sua organização social, costumes, línguas, crenças e tradições, e os direitos originários sobre as terras que tradicionalmente ocupam, competindo à União demarcá-las, proteger e fazer respeitar todos os seus bens".

[109] Art. 192 c.p.c. BR: "[e]m todos os atos e termos do processo é obrigatório o uso da língua portuguesa".

[110] Case law has also intervened on the point: "[a] imprescindibilidade do uso do idioma nacional nos atos processuais, além de corresponder a uma exigência que decorre de razões vinculadas à própria soberania nacional, constitui projeção concretizadora da norma inscrita no art. 13, caput, da Carta Federal, que proclama ser a língua portuguesa o idioma oficial da República Federativa do Brasil", RTJ No. 164/193), cited in: *de Moraes A.* Constituição do Brasil interpretada e legislação constitucional. 2nd ed. São Paulo: Atlas S. A., 2013. P. 533.

[111] See Consolidação das Leis do Trabalho (Law-Decree No. 5.452 of May 1, 1943), in particular, concerning evidences, Art. 819: " [o] depoimento das partes e testemunhas que não souberem falar a língua nacional será feito por meio de intérprete nomeado pelo juiz ou presidente".

[112] D. L. No. 3,689 of October 3, 1941, as later amended.

[113] Art. 193 c.p.p. BR, as amended by Law No. 10,792 of December 1, 2003: "[q]uando o interrogando não falar a língua nacional, o interrogatório será feito por meio de intérprete".

[114] Art. 223 c.p.p. BR: "[q]uando a testemunha não conhecer a língua nacional, será nomeado intérprete para traduzir as perguntas e respostas".

[115] Art. 784 (2), c.p.p. BR: "[a]s rogatórias, acompanhadas de tradução em língua nacional, feita por tradutor oficial ou juramentado, serão, após exequatur do presidente do Supremo Tribunal Federal, cumpridas pelo juiz criminal do lugar onde as diligências tenham de efetuar-se, observadas as formalidades prescritas neste Código".

[116] Art. 215 (3) and (4), c.c. BR: "3. A escritura será redigida na língua nacional; 4. Se qualquer dos comparecentes não souber a língua nacional e o tabelião não entender o idioma em que se expressa, deverá comparecer tradutor público para servir de intérprete [...]".

[117] Art. 1871 c.c. BR: "[o] testamento pode ser escrito em língua nacional ou estrangeira, pelo próprio testador, ou por outrem, a seu rogo".

As illustrated by the Minister Emeritus of the Supreme Federal Court, Luís Barroso, it is necessary to *read* the pre-1988 norms through the lens of constitutionally oriented interpretation: therefore, where the legislature of the time used the locution "national language" because of the 1988 reform, must be understood "official language", with the consequent exclusion from the administrative life of the so-called *línguas nacionais.*

7.3. Angola (AO)

After the silence of the Angolan constitutional charters of 1975 and 1992, the 2010 reform legislature included in Title I, fundamental principles, the new Article 19, "[l]ínguas", which, in its first paragraph, elevates Portuguese to the "official language" of the Republic, and, in its second paragraph, establishes that the State shall value and promote the study, teaching and use of other Angolan languages[118].

Still in Title I, Article 21 mentions the "Angolan languages of African origin" among the cultural heritage of the State and encourages their development and protection among the fundamental tasks of the Republic[119].

The Angolan Civil procedure code is still that of the colonial era, as there has been no reforming process and, therefore, no constitutionally inspired reference to the official language can be found, but rather the obligation to use the Portuguese language in court documents can be found[120].

The mandatory use of the Portuguese language in court is also provided for in the Angolan Code of criminal procedure[121], which was fully reformed and approved by Law No. 39 of November 11, 2020.

7.4. Mozambique (MZ)

The Mozambican Constitution in Title I (fundamental principles) identifies Portuguese as the official language of the Republic (Art. 10[122]), while valuing national languages by promoting their use and development such as cultural heritage (Art. 9[123]).

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[118] Art. 19 Const. AO 2010: "1. A língua oficial da República de Angola é o português. O Estado valoriza e promove o estudo, o ensino e a utilização das demais línguas de Angola, bem como das principais línguas de comunicação internacional".

[119] Art. 21, lett. n), Const. AO 2010: "[c]onstituem tarefas fundamentais do Estado angolano: [...] n) Proteger, valorizar e dignificar as línguas angolanas de origem africana, como património cultural, e promover o seu desenvolvimento, como línguas de identidade nacional e de comunicação".

[120] Art. 139 c.p.c. AO: "1. Nos actos judiciais usar-se-á a língua portuguesa. Quando hajam de ser ouvidos, os estrangeiros podem, no entanto, exprimir-se em língua diferente, se não conhecerem a portuguesa, devendo nomear-se um intérprete quando seja necessário, para, sob juramento de fidelidade, estabelecer a comunicação. A intervenção do intérprete è limitada ao que for estritamente indispensável".

[121] Art. 105 (1–4), c.p.p. AO: "1. A língua utilizada nos actos processuais é o português. 2. As pessoas que intervêm no processo e não falam ou não compreendem bem o português podem, porém, exprimir-se na respectiva língua materna ou em outra que falem ou compreendem. 3. No caso previsto no número anterior, é nomeado, sem encargos para a pessoa que não falar a língua portuguesa ou não a compreender bem, um intérprete idóneo. 4. É, do mesmo modo, nomeado intérprete para traduzir documentos exarados em língua que não seja a portuguesa, desacompanhados de tradução autenticada". It seems useful to point out that Article 187, paragraph 1, c.p.p., on the translation of documents, uses the expression "official language" (in line with Article 19 of the Constitution) in place of "Portuguese language": "1. Se o documento estiver escrito em língua estrangeira ou em uma das línguas nacionais, ordena-se a sua tradução para a língua oficial, nomeando-se intérprete nos termos do artigo 105".

[122] Art. 10 Const. MZ 2004: "[n]a República de Moçambique a língua portuguesa é a língua oficial".

[123] Art. 9 Const. MZ 2004: "[o] Estado valoriza as línguas nacionais como património cultural e educacional e promove o seu desenvolvimento e utilização crescente como línguas veiculares da nossa identidade".

Article 27 provides for the use of at least one national language, even alternatively to Portuguese, among the criteria for obtaining Mozambican citizenship[124].

The use of the official language, Portuguese, is also mandated by ordinary legislation and, therefore, it is mandatory in the drafting of criminal trial documents, and when people who do not know Portuguese participate or in the presence of documents that lack a legalized Portuguese translation, the intervention of an interpreter is required[125].

7.5. Cape Verde (CV)

In Cape Verde, the Constitution includes among its fundamental principles a specific article about language aspect that is decidedly peculiar precisely because of a marked lack of linguistic accuracy.

First, in fact, Article 9 titled "official languages" — in the plural — identifies in the first paragraph only the Portuguese language as the "official language" — in the singular. However, in the third paragraph, it enunciates for all citizens the duty to know and the right to use the "official languages", in plural, thus not only Portuguese. Again, in the second paragraph, there is a curious declaration of intent under which the State will promote the officialization of the Cape Verdean mother tongue on an equal footing with Portuguese[126].

In addition, Article 78, "right to culture", enunciates the task for the State to defend, enhance and encourage the use of the Cape Verdean mother tongue[127].

7.6. Guinea-Bissau (G-B)

While the Constitution of Guinea-Bissau is written in Portuguese, it does not address the issue of language, so while there are countless native languages (i. e., so-called *linguas nacionais*) in the Country, there is no official idiom.

However, some privileges for the Portuguese language emerge in ordinary legislation, such as the mandatory use of it in civil trial acts[128] and criminal trial acts[129]; in which, at any rate, in certain oral trial acts it allows the use of *Crioulo* or other native languages[130].

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[124] Art. 27 (1), lett. c), Const. MZ 2004: "[p]ode ser concedida a nacionalidade moçambicana por naturalização aos estrangeiros que, à data da apresentação do pedido, reunam cumulativamente as seguintes condições: [...] c) conheçam o português ou uma língua moçambicana".

[125] Art. 102 (1–3) c.p.p. MZ: "1. Nos actos processuais, tanto escritos como orais, utiliza-se a língua oficial portuguesa, sob pena de nulidade. 2. Quando houver de intervir no processo pessoa que não conhecer ou não dominar a língua de comunicação, é nomeado, sem encargo para ela, intérprete idóneo, ainda que a entidade que preside ao acto ou qualquer dos participantes processuais conheçam a língua por aquela utilizada. 3. É igualmente nomeado intérprete quando se tornar necessário traduzir documentos em língua não oficial e desacompanhados de tradução autenticada [...]".

[126] Art. 9 Const. CV: "1. É língua oficial o Português. 2. O Estado promove as condições para a oficialização da língua materna cabo-verdiana, em paridade com a língua portuguesa. 3. Todos os cidadãos nacionais têm o dever de conhecer as línguas oficiais e o direito de usá-las".

[127] Art. 78 (3), lett. f), Const. CV: "[p]ara garantir o direito à cultura, incumbe especialmente ao Estado: f) Promover a defesa, a valorização e o desenvolvimento da língua materna cabo-verdiana e incentivar o seu uso na comunicação escrita".

[128] Art. 139 c.p.c. G-B: "[n]os actos judiciais usar-se-á a língua portuguesa".

[129] Art. 86 (1) c.p.p. G-B: "[s]ob pena de nulidade insanável, nos actos processuais escritos utiliza-se a língua portuguesa".

[130] Art. 86 (2) c.p.p. G-B: "[n]os actos processuais orais, oficiosamente ou a requerimento, poder-se-á determinar o uso do crioulo, dalgum dialecto usado pelas diversas etnias da Guiné-Bissau ou de língua estrangeira". However, please, note that the third paragraph of Art. 86 c.p.p. G-B provides for the intervention of the interpreter in such cases precisely for the purpose of reducing the acts in which the Portuguese language is not used: "[p]ara a redução a escrito das declarações em que não tenha sido usada a língua portuguesa, é obrigatório nomear interprete".

In addition, again on the subject of criminal trial legislation, it is stated the mandatory intervention of an interpreter for the translation of unauthenticated documents that are not written in Portuguese[131]. Again, legislation on stamp duty on public and notarial acts provides for a higher cost in the case of documents that are not written in Portuguese.[132] On the contrary, in the so-called *Tribunais Judiciais de Sector* (a kind of justice of the peace, established as part of the reorganization of justice following the abolition of the *Tribunais Populares de Base*), while the use of the Portuguese language is mandatory[133], the use of *Crioulo* and other native languages in conciliation hearings and in the reading of judgments is also permitted[134].

7.7. East Timor (ET)

East Timor's legislature has opted for bilingualism and, therefore, the two official languages are *Tetum* and Portuguese[135], still commit the State to the enhancement and development of national languages[136].

East Timor's ordinary laws safeguard bilingualism. Thus, for example, civil[137] and criminal[138] trial documents must be written in one of the Country's official languages, and likewise, consumer protection legislation safeguards bilingualism[139].

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[131] Art. 87 (1), lett. a), c.p.p. G-B: "[p]ara além da situação referida no artigo anterior é obrigatório nomear intérprete: a) Se for necessário traduzir documento que não esteja redigido em língua portuguesa e não venha acompanhado detradução autenticada".

[132] Art. 34, lett. a), Decree No. 18 of May 23, 1988, G-B: "[o] emolumento do artigo 29 será aumentado: a) Para o dobro, nas certidões e públicas-formas de documentos da primeira metade do século XIX, de escritos em cifras ou em língua que não seja portuguesa e de mapas ou contas dos actos notariados".

[133] Art. 10 (1), D.L. No. 6 of October 13, 1993, G-B: "[n]os processos instaurados no Tribunal de Sector utilizar-se-á na escrita apenas a língua portuguesa".

[134] Art. 10 (2)(3), D.L. No. 6 of October 13, 1993, G-B: "2. [n]as audiências conciliatórias e de julgamento utilizar-se-á a língua nacional (crioulo). 3. O tribunal, oficiosamente ou a requerimento, poderá determinar o uso de outro dialecto, da língua oficial ou de línguas estrangeiras, durante a conciliação ou julgamento".

[135] Art. 13 (1), Const. ET: "[o] tétum e o português serão as línguas oficiais da República Democrática de Timor-Leste".

[136] Art. 13 (2), Const. ET: "[o] tétum e as demais línguas nacionais serão valorizados e desenvolvidos pelo Estado".

[137] Art. 104 (1), c.p.c. ET: "[n]os actos judiciais usar-se-ão as línguas oficiais da República Democrática de Timor-Leste: o tétum e o português".

[138] However, it should be noted that Article 82 c.p.p. ET presents ambiguous wording by establishing that the national language is used in the procedural acts, that is, in the singular, although there are two national languages: "[s]ob pena de nulidade, nos actos processuais é utilizada língua oficial de Timor Leste".

[139] Unlike the procedural codes, the most recent Law No. 8 of July 8, 2016, about the "Law for the Protection of the Consumer", is written in dual languages and, for example, establishes that guarantees from suppliers of goods and services must be given in one of the official languages (Art. 7(4), lett. a): "[...] as garantiam devem: a) Ser prestadas por escrito, numa das duas línguas oficiais [...] / [...] garantia sira tenke: a) Fó liuhosi eskritu iha dalen ofisiál rua ne'e ida ka iha lia traballu sira ida"); and that the public broadcasting service must offer periodic consumer information in one of the official languages (Art. 8(3): "[a] rádio e a televisão de Timor-Leste, em cumprimento das suas obrigações de serviço público nos termos da lei, devem integrar na sua programação espaços semanais, nas duas línguas oficiais, com a duração de quinze minutos, destinados à educação e formação dos consumidores. / Rádiu no televizaun Timor-Leste nian, tenke hatama iha ninia programasun espasu semanál, iha dalen ofisiál rua ho durasaun minutu sanulu-resin-lima foka liu ba edukasaun no formasaun konsumidór sira, hodi halo-tuir sirania obrigasaun nu'udar servisu públiku tuir saida maka lei hateten").

7.8. Equatorial Guinea (E-G)

The Constitution of Equatorial Guinea does not mention Portuguese among the country's official languages[140]. However, by Decree of July 20, 2010, Portuguese was declared the third official language[141]. In addition, native languages are recognized as national heritage.

8. Language and law in Lusosphere

Although there is one and only one Portuguese language, there are numerous dyscrasias in literary and vernacular Portuguese, and even more considering the profound contaminations due to the countless national languages, often true mother tongues for millions of people only conventionally classified as native Portuguese speakers.

It is now time to analyze the concrete relationship between language and law in Lusosphere and, specifically, to understand whether there are differences between the legal Portuguese of the Portuguese, Brazilians and that used in the other former colonies now part of the CPLP.

The law in force today in the Lusosphere is the result of contamination through inspiration from foreign legal models developed elsewhere. As mentioned, Portuguese law is descended from Roman law and, more recently, has been influenced by French and German law as well.

It is therefore easy to understand that the law of Portugal, Brazil, Angola, Mozambique and other former colonies is formulated through heterogeneous linguistic elements and includes multiple legal languages.

Bearing in mind this evolutionary process, legal translation, the reception of alien concepts and doctrinal elaboration are all useful tools in comparative studies, both legal and linguistic.

Difficulties related to translation and the dissimilarity of legal meanings are common to all systems. Thus, the *contract* of the English implies a *consideration*, an element unknown to the French and Italians, with the consequence that *contract*, *contrat* and *contratto* are not the same thing.

The German concept of *Rechtsgeschäft* can be explained to the French, the English, and the Italians, yet while Paris and London they do not use this concept and do not need a word to translate it, the Italian jurists frequently use the expression *negozio giuridico* despite not finding its discipline in their civil code.

The Código Seabra, a product of French influence, preferred the dogmatic category of the legal act (*ato jurídico*). Indeed, the concept of legal transaction — unknown in Roman times, when, instead, it was used to refer to specific legal acts — was first coined by 18th-century German doctrine, particularly in the studies of Harpprecht and Nettelblandt.

At first, Brazilian law also embraced the French model and thus the notion of the *ato jurídico*. Later, after the publication of the Civil Code in 1916, legal scholars and jurisprudence supported the introduction of several German concepts that were more adherent to the discipline of obligations, including the legal transaction (*negócio jurídico*), today regulated by the *Código civil of* 2002 (Articles 104–184) although there is no specific definition of it.

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[140] Art. 4 Const. E-G: "[a]s línguas oficiais da República da Guiné Equatorial são o espanhol, o francês e as determinadas pela Lei. As línguas autóctones são reconhecidas como parte da cultura nacional".

[141] Given the difficulty in finding official legislative texts of Equatorial Guinea, a link to a press report is provided for completeness: Available at: https://www.tsf.pt/internacional/africa/portugues-tornou-se-3-lingua-oficial-da-guine-equatorial-1622709.html (accessed: 08.12.2023).

The current Portuguese Civil Code — still in force also in Angola, Mozambique, and other former colonies — includes the same discipline of legal transaction (Articles 217–294).

Portuguese and Brazilian doctrine seem to adhere to the formal dogmatism of German Pandectists, fully embraced by Italian jurists as well. *Fato jurídico* thus has the same meaning as *fatto giuridico* and must be understood as any event that has legal consequences in itself; *ato jurídico*, like *atto giuridico,* on the other hand, implies human intervention in the event that causes legal consequences; finally, the *negócio jurídico,* like the *negozio giuridico*, consists of a declaration of will by which the person expressing it enunciates the effects pursued and to which the legal system — if these objectives are lawful and if the act meets the formal requirements that may be imposed — recognizes the legal effects conform to the intended purpose.

It appears interesting to examine the Portuguese idea of possession (*posse*), which is different from that adopted in Brazil.

The Portuguese Code defines possession[142] and adopts the traditional conception (previously supported also by the Italian doctrine) that lumps possession and detention together on the level of the objective element — *corpus*, that is, the physical availability of the good — and distinguishes them on the level of the subjective element — *animus possidendi* and *animus detinendi*.

Instead, Article 1196 of the Brazilian Civil Code defines the possessor (*possuidor*)[143] and introduces a discipline of possession that adheres to the solution prevalent today in Italy and Germany. Brazilian law, therefore, while giving different relevance to factual situations involving the exercise of power over a thing, qualifies full possession, detention and mediated possession as possession indiscriminately.

In other words, one can possess a thing regardless of internally psychological state — whether *animus detinendi* or possidendi — while it is the *animus* manifested externally, i. e., the title by virtue of which he acquires a factual power over the thing, to be relevant.

These examples are common and typical in *modern law* and, in our perspective, issues related to legal language suggest precise roles. Translation is, on the one hand, the search for the proper meaning within the language of the concept to be translated and, on the other hand, the search for the appropriate phrase to express that meaning in the target language. Legal practitioners shall deal with these operations, while, instead, the combination of these two operations, that is, analysis of similarities and differences of concepts from different legal systems, is a task for the comparativists.

Even more complex is the interpretation of rules observed in the contexts of traditional law and coexistence and dialogue between spontaneous law and formal law.

In this sense, the comparatist should observe a certain rule — unwritten but spontaneously fulfilled — and attempt to give it a formulation using legal concepts known to him and expressed in a given language.

The Angolan lawmaker considers marriage (*casamento*) to be a legal transaction and prizes the nuclear family, which arises through the voluntary union of a man and a woman and is founded in the equality of rights and duties.

Despite some differences that may be found, within the traditional law marriage is considered a sort of contract between two families and the idea of the enlarged family to relatives (*parentesco*) is widespread and indeed it is not uncommon for marriage to sur-

[142] Art. 1251 c.c. PT: "[p]osse é o poder que se manifesta quando alguém actua por forma correspondente ao exercício do direito de propriedade ou de outro direito real".

[143] Art. 1196 c.c. BR: "[c]onsidera-se possuidor todo aquele que tem de fato o exercício, pleno ou não, de algum dos poderes inerentes à propriedade".

vive a physical separation (quite different from divorce) and even the death of one of the spouses.

Again, through the succession, the State shows its positive attitude for the nuclear family, thus favoring the patrimonial succession in the direct line. Within the spontaneous law, however, there are rules that can be extremely different, ranging from hypotheses of only patriarchal or only matriarchal lineal succession[144], to second-degree collateral line successions and still other hypotheses. In some traditional contexts in Mozambique and Guinea-Bissau, *levirate* is applied, and the widow must marry a brother of her deceased husband to regain protection[145].

Words such as prescription (*prescrição*) and cosa giudicata (*força obrigatória do caso julgado*), corresponding to concepts well known in formal law, are unknown and alien in many traditional laws and cultures of these communities. Thus, a property cannot be subject to the statute of limitations, since, belonging to the family, which tends to be eternal, it cannot be lost. In same way often a traditional lawsuit can always be reopened until a final agreement is reached between the parties[146].

9. The contract and the language of the contract

While the Italian Civil Code contains the express definition of the contract[147], the civil codification of the Portuguese-speaking countries — in line with the German BGB[148] — deduces the notion of the contract from the general scheme of the legal transaction and the general discipline of obligations[149].

This paper is not the venue for typical treatment of private law manuals, but it is useful to point out that *contrato*, according to the positive law of all the lusophone Countries, means the common will of two or more parties to implement, modify or extinguish a specific legal obligation susceptible to economic evaluation.

However, because of the legal pluralism, due to spontaneous traditional law, large portions of the population of former colonies (except Brazil) do not (fully) recognize themselves in State law.

Therefore, for millions of individuals, *contrato* as a concept of positive law, is something alien and nonexistent in their daily practice linked to their traditional and cultural values.

In the absence of written law, doctrine and jurisprudential compilations, the comparatist shall try to formulate the rules of spontaneous law through vocabulary foreign to this reality and typical of modern law experiences.

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[144] Matriarchal lineal succession is practiced at least among some communities in Guinea-Bissau; on this point, see: *Cardoso L.* Sistemas de herança entre os Papéis, Manjacos e Mancanhas // Soronda — Revista de Estudos Guineenses. No. 6 / Instituto Nacional de Estudos e Pesquisa (INEP). Bissau, 2003. P. 147.

[145] *Moura Vicente D.* Direito comparado. P. 397; *Augusto Da Silva A.* Usos e costumes jurídicos dos Mandingas. Bissau: Centro de Estudos da Guine Portuguesa, 1969; *AA. VV.* Direito costumeiro vigente na República da Guiné-Bissau / ed. by F. Loureiro Bastos. Bissau: Papeis, 2011. P. 425.

[146] *Moura Vicente D.* Direito comparado. P. 397.

[147] Art. 1321 c.c. IT: "[i]l contratto è l'accordo di due o più parti per costituire, regolare o estinguere tra loro un rapporto giuridico patrimoniale".

[148] Section 311 BGB says that a contract (Vertrag) is the way to constitute or modify the content of an obligation.

[149] Among the many definitions that can be found, contrato "é o negócio jurídico bilateral ou plurilateral, isto é, integrado pela manifestação de duas ou mais vontades diversas que se conjugam para a realização de um objetivo comum. É, pois, a convenção pela qual duas ou mais pessoas constituem, regulam, modificam ou extinguem relações jurídicas, regulando, assim, juridicamente os seus interesses", headword "contrato", in: *Prata A.* Dicionario Juridico. 3rd ed. Coimbra: Almedina, 1978. P. 272.

For these populations, the *contrato* represents an agreement (and thus a commitment), but not necessarily of patrimonial nature. Moreover, it should be considered that often essential elements of this agreement are reliance between the parties, reputation and social interest as a driving force for the achievement of personal and community goals.

Furthermore, while positive law sometimes imposes form requirements on the contractual declaration (*ad substantiam* and *ad probationem*), spontaneous law do not seem to be familiar with such requirements or, at any rate, there is little certainty around them.

In all the legal systems here considered, i. e., in their formal legislation, the contract is formed upon the occurrence of a meeting of two or more wills.

This means that the proposal to the other party is a unilateral *pre-negotiation* statement that, if accepted, will constitute the content of the agreement[150].

By virtue of the general principle of party autonomy recognized by formal law in relationships between private individuals[151], contractual declarations may be expressed in any language[152], with the only limitation being that the other party is (or can be presumed) to understand the content.

The *ratio* is inherent in the very nature of any contractual declaration, since it is not only the manifestation of the internal will of its author, but is an expression of will that becomes perfect in the sphere of its recipient.

As it is well known, except for the specific limitations sometimes imposed by law, the parties can freely choose the language of the contract through an express choice. In most cases, contracts are written in the official language of the country where they are signed or in the official language of the country of nationality of the parties, since under these circumstances it is assumed that the contracting parties know that idiom.

It is understood, however, that the imposition or choice of language, as well as the presumption of knowledge of it, must be counterbalanced by an examination of the reasons for and the goodness of the language monopoly (or at least privilege) affecting that contractual settlement.

10. Elaboration of the concept of *Sprachrisiko* and its perspectives

The growing phenomenon of migration to Germany in the 1960s ripened the conditions for the development of the concept of language risk (*Sprachrisiko*) by German doctrine.

The term first appeared in an essay of Hannsjosef Hohn, a German lawyer) with reference to the linguistic risk if a foreign worker signed an employment contract in German, despite not knowing it. In Hohn's view, the *Sprachrisiko* burdened workers who, by signing what they did not fully understand and without using an interpreter, implicitly expressed their willingness to accept the content of the contract[153].

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[150] Art. 232 c.c. PT: "[o] contrato não fica concluído enquanto as partes não houverem acordado em todas as cláusulas sobre as quais qualquer delas tenha julgado necessário o acordo".

[151] Art. 405 c.c. PT: "1. Dentro dos limites da lei, as partes têm a faculdade de fixar livremente o conteúdo dos contratos, celebrar contratos diferentes dos previstos neste código ou incluir nestes as cláusulas que lhes aprouver. As partes podem ainda reunir no mesmo contrato regras de dois ou mais negócios, total ou parcialmente regulados na lei"; Art. 421 c.c. BR: "[a] liberdade contratual será exercida nos limites da função social do contrato". The limits imposed by law can be of different kinds, think of the use of the official language in public acts.

[152] As legal practitioners familiar with international business are aware.

[153] "Das Sprachrisiko muss von einem Gestarbeiter, der die deutsche Sprache nicht beherrscht, getragen werden [...] Erklärt er sich [...] mit der ihm nicht verständlichen Vertragsfassung einverstanden bzw. unterschreibt er einen entsprechenden Vertrag, findet darin konkludenterweise sein Wille hinreichend Ausdruck, in jedem Fall mit dem deutschen Vertragsinhalt einverstanden zu sein. Gegebenenfalls muss

Later, an intense doctrinal debate around the concept of *Sprachrisiko*, as originally conceived by Hohn, involved *inter alia* the allocation of risk and the option of a different language used during negotiations[154].

Case-law has always applied *Sprachrisiko* with some rigidity according to the concepts of declaration of intent (*Willenserklärung*) and its understanding (*Zugang*) under Article 130(1) BGB[155].

More recent case-law, while continuing to allocate *Sprachrisiko to* the party who nonetheless signs a contract, has slightly mitigated its rigidity by virtue of good faith under Article 157 BGB[156] which must also apply to the declaration of intent *under* Article 133 BGB[157].

This more recent (and always concerning labor law cases) and still prevailing orientation is based on essentially two strands.

First, a declaration is deemed to be known with the delivery to the addressee; the actual understanding (perception) of the meaning of the words pertains to the linguistic knowledge of the individual concerned, and on him/her (equated with the person who signs without reading) must be allocated the linguistic risk. Given that no one is forced to sign a contract in a foreign language (for such cases, in fact, there are the remedies of violence or malice under Article 123 BGB[158]), the signature must be intended as acceptance. According to German case law, in fact, the employee was fully aware of the obligations he was taking on, and evidence of this is the fact that, after signing, he commenced work performance[159]. The failure to fully and accurately understand each clause of the contract is thus to be attributed solely to the choice of the individual who did not procure a translation of the text written in a foreign language, and, consequently, it is on this party that the linguistic risk must be borne[160].

Therefore, according to the German court's reasoning, the employee did not incur a false perception of the content of the contract, but only an inaccurate perception due to

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der Gestarbeiter seinerseits einen Dolmetscher hinzuziehen" (*Hohn H.* Ausländische Industriearbeiter und deutsches Recht // Betriebs-Berate. 1965. Vol. 10, iss. 34. P. 1).

[154] It is worth mentioning the following contributions: *Jayme E.* Das 'Sprachrisiko' im deutschen und internationalen Privatrecht unter besonderer Berücksichtigung der Rechtsprobleme türkischer Arbeitnehmer in der Bundesrepublik Deutschland // Annales de la Faculte de Droit d'Istanbul. 2011. Vol. 28, no. 44. P. 363–377; *Rieble V.* Sprache und Sprachrisiko im Arbeitsrecht. Available at: https://www.zaar.uni-muenchen.de/pub/vr2007-8.pdf (accessed: 08.12.2023).

[155] Art. 130 (1), BGB (official English translation): "[a] declaration of intent that is to be made to another becomes effective, if made in his absence, at the point of time when this declaration reaches him. It does not become effective if a revocation reaches the other previously or at the same time".

[156] Art. 157 BGB (official English translation): "[c]ontracts are to be interpreted as required by good faith, taking customary practice into consideration".

[157] Art. 133 BGB (official English translation): "[w]hen a declaration of intent is interpreted, it is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration".

[158] Art. 123(1), BGB (official English translation): "[a] person who has been induced to make a declaration of intent by deceit or unlawfully by duress may avoid his declaration".

[159] "Insbesondere wusste er, dass er ein Arbeitsverhältnis eingeht und hat den Inhalt des Rechtsgeschäfts — jedenfalls in seinen Grundzügen — erkannt", Bundesarbeitsgericht, No. 5 AZR 252/2012 of March 14, 2014 (older, LAG Niedersachsen of 18.03.2005 — Sa 1990/04 — NZA — RR 2005, 401 = LAGE § 307 BGB 2002 Nr. 6, LAG Köln of 02.09.2004 — Sa 274/04 — LAGReport 2005, 94, Hessichles LAG of 01.04.2003 — 13Sa 1240/02).

[160] "Deraufmerksame und sorgfältige Teilnehmer am Wirtschaftsverkehr […], der einen Vertrag in einer ihm unbekannten Sprache schließt, wird das damit übernommene Risiko selbst beseitigen, indem er sich den Inhalt des Vertrags übersetzenlässt", Bundesarbeitsgericht, No. 5 AZR 252/2012, March 14, 2014.

his/her own negligent free choice[161] and cannot benefit from the remedies offered by the discipline about the error under Section 119(1) BGB[162].

Second, this rigidity is mitigated in cases where the employee has signed a contract containing terms that he/she could not reasonably imagined to be present or where the employer has offered guarantees regarding the absence of conditions not previously negotiated[163] under Art. 305(c) BGB, headed "*Surprising and ambiguous clauses*"[164].

Beyond the German experience, within which it originated, *Sprachrisiko* and related issues can naturally extend to areas other than labor law.

In today's world, there might be multiple examples, such as in the context of international business relations, the case where a contract is drafted in a bilingual version and one of them is qualified by the parties as the prevailing language in case of doubts; or, the numerous contractual relationships entered into daily between individuals who move with increasing ease and frequency from one country to another; or, again, legal relationships that are entirely domestic but entered into in multilingual jurisdictions, and more examples could be given.

In each of these hypotheses, there could be specific issues peculiar to the prevailing language or to the only contract language that are not perfectly translatable into the other or, in any case, have a different meaning in the language of the other contracting party.

In such a case, the same problems would arise with respect to the validity of the transaction and the allocation of the *Sprachrisiko* and would have to be resolved on a case-by-case basis according to the provisions of the applicable law.

Lusophone lawmakers do not specifically regulate the *linguistic risk* and they regulate the formation of the contract at the moment of the meeting of two pre-negotiation wills: proposal and acceptance. Thence, on this axis, the risk of abuse of one party over the other must be curbed through the canons of good faith.

The legal system — on the one hand, should offer a usable model, and, on the other, should safeguard the certainty of legal relations — repels the abuse of one party and, also repels the idea that the other party can entirely renounce the protection that the law gives him/her. Under the principles on contract formation, the absolute inability to understand the meaning of a contractual declaration is tantamount to not having received it.

To avert this (and other risks), Lusophone lawmakers impose on contracting parties to behave in accordance with good faith in negotiations (*culpa in contrahendo*)[165] and in the execution of the contract.

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[161] "Irrtum iSv. § 119, Abs. 2 BGB ist nur das unbewusste Auseinanderfallen von Wille und Erklärung und liegt nicht vor, wenn jemand — wieder Kläger — eine Erklärung in dem Bewusstsein abgibt, ihren Inhalt nicht zu kennen", Bundesarbeitsgericht, No. 5 AZR 252/2012, March 14, 2014.

[162] Art. 119(1) BGB (official English translation): "[a] person who, when making a declaration of intent, was mistaken about its contents or had no intention whatsoever of making a declaration with this content, may avoid the declaration if it is to be assumed that he would not have made the declaration with knowledge of the factual position and with a sensible understanding of the case".

[163] "Zur Sprachunkundigkeit des Arbeitnehmers müssen deshalb weitere Umstände hinzukommen, wie etwa das Drängen des Arbeitgebers, den Arbeitsvertrag ohne vorherige Übersetzung zu unterschreiben, oder die Versicherung, der Arbeitsvertrag enthalte keine Regelungsgegenstände, die nicht im Vorfeld erörtert worden seien", Bundesarbeitsgericht, No. 5 AZR 252/2012, March 14, 2014.

[164] Art. 305, lett. c), BGB (official English translation): "1. Provisions in standard business terms which in the circumstances, in particular regarding the outward appearance of the contract, are so unusual that the other party to the contract with the user need not expect to encounter them, do not form part of the contract. Any doubts in the interpretation of standard business terms shall be resolved against the user".

[165] Art. 227(1) c.c. PT: "[q]uem negoceia com outrem para conclusão de um contrato deve, tanto nos preliminares como na formação dele, proceder segundo as regras da boa fé, sob pena de responder pelos danos que culposamente causar à outra parte"; Art. 422 c.c. BR: "[o]s contratantes são obrigados a guardar, assim na conclusão do contrato, como em sua execução, os princípios de probidade e boa-fé".

11. The linguistic error

What happens if the negotiating statement, while formally existing and valid, contains linguistic elements that one of the contracting parties deduces that he/she has not correctly understood?

In the context of negotiations, of course, this affects their continuation and the good faith.

But the linguistic error may even emerge later, during the execution of the contract.

The linguistic error concerns the meaning of words and implies a divergence between the objective meaning of the contract and the meaning the one party ascribes to it.[166]

If, as we have seen, a contract is the union of two pre-negotiated wills, it is intuitable that the error[167] implies that at least one of these two wills no longer meets the typical criteria and assumptions of contract formation.

Although *Sprachrisiko is* a concept of German doctrinal elaboration[168], legal systems link this hypothesis to the discipline of *defects of consent*.

In Italian law, this error (on the contractual declaration, *ex* Art. 1431[169]) can result in the annulment of the contract (*ex* Art. 1433 c.c.[170]) if it was recognizable by the other party.

Brazilian law regulates error or ignorance (*erro ou Ignorância*) in Articles 138–144 of the Civil Code. Specifically, grounds for annulment are the essentiality and recognizability of the error (*ex* Art. 138[171]), and Art. 142 states that the error in the declaration will not lead to annulment of the contract if from the whole context and circumstances it is possible to understand the clause[172].

The Portuguese Civil Code and those of other former colonial African states include among the prerequisites of the error on the declaration its recognizability by the other contracting party, and not only its essentiality[173].

The accuracy of the contractual declaration draws attention, on the one hand, to the need to safeguard the certainty of legal relations, and on the other, to the desirability of averting the linguistic risk[174].

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[166] *Bianca C. M.* Diritto Civile. Vol. 3. Il Contratto. Milan: Giuffré, 1987. P. 607.

[167] Some legal scholas distinguish *error*, as a fact of the declarant, from *misunderstanding*, namely a misperception of the declaration by the addressee. See: *Titze H.* Die Lehre vom Mißverständnis. Berlin: Walter De Gruyter, 1910. P. 3.

[168] We said that this concept was developed by the German doctrine; as for the Anglo-Saxon family, similar concept is known as *unconscionability-doctrine*. On this point, see: *Jayme E.* O Risco da Diversidade Linguística e o Direito Internacional Privado // Boletim da Faculdade de Direito da Universidade de Coimbra. 1978. Vol. 4. P. 5.

[169] Art. 1431 c.c. IT: "[l]'errore si considera riconoscibile quando in relazione al contenuto, alle circostanze del contratto ovvero alla qualità dei contraenti, una persona di normale diligenza avrebbe potuto rilevarlo".

[170] Art. 1433 c.c. IT: "[l]e disposizioni degli articoli precedenti si applicano anche al caso in cui l'errore cade sulla dichiarazione, o in cui la dichiarazione è stata inesattamente trasmessa dalla persona o dall'ufficio che ne era stato incaricato".

[171] Art. 138 c.c. BR: "[s]ão anuláveis os negócios jurídicos, quando as declarações de vontade emanarem de erro substancial que poderia ser percebido por pessoa de diligência normal, em face das circunstâncias do negócio".

[172] Art. 142 c.c. BR: "[o] erro de indicação da pessoa ou da coisa, a que se referir a declaração de vontade, não viciará o negócio quando, por seu contexto e pelas circunstâncias, se puder identificar a coisa ou pessoa cogitada".

[173] Art. 247 c.c. PT: "[q]uando, em virtude de erro, a vontade declarada não corresponda à vontade real do autor, a declaração negocial é anulável, desde que o declaratário conhecesse ou não devesse ignorar a essencialidade, para o declarante, do elemento sobre que incidiu o erro".

[174] There is, in fact, a close interrelationship between language, law, and culture in the sense that language and culture can condition law and, through that conditioning, violate it. For further discussion

In order to assess whether the linguistic error is recognizable and its scope, beforehand it is needed to determine how advanced each of the contracting parties masters the language in-use, and the indications must always be guided by the principle of good faith. Hence, those who are unfamiliar with the contractual language bear the burden of procuring a translation (or other solutions aimed to avoid mistaking) and of declaring the unfamiliarity to the other contracting party; conversely, those who know that the other party is exposed to the linguistic risk must refrain from lobbying for hesitant consent.

The mere fact that a contract was worded in a foreign language for one of the parties will not be sufficient to declare it ineffective, nor will the circumstance of the incomprehensible wording of some elements of it.

What the court will be called upon to do is to make a thorough investigation of the actual will of the contracting parties, and only when the apparent content of the agreement turns out to be different than that intended by one party and recognizable by the other, then it will be possible to annul the contract for lack of the requirement of *in idem placitum consensus*.

Conclusions — toward a perspective of decolonization of law

What is examined here, is an opportunity for a concluding reflection on the relationship between language, anthropology and law as possible distinguishing elements of a Lusophone legal model.

Due to the volume limits, a current overview of global legal systems and their perspectives are not here[175], but it attempts to draw some insights about the systems of the States under consideration.

The CPLP legal systems all belong[176] to the Romano-Germanic family, finding the historical roots of their civil law in the BGB.

Apart from Brazil, which has developed its own legislative, doctrinal, and jurisprudential path, and East Timor, because of its peculiarity partly due to Indonesian occupation, the Portuguese Civil Code (and Civil Process Code) rooted in the colonial era still applies in the former African colonies.

According to renowned legal scholars, the common official language and the common legislative framework, carrying some endemic legal solutions are elements that identify an autonomous legal system, a subgroup of the Romano-Germanic family[177].

Other aspects emphasized with the aim of identifying an autonomous legal model are the proximity of their constitutions[178] and academic teaching based on a constant cooperation between Portuguese universities with those of former colonies that result in a common *mental framework* of legal practitioners[179].

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see: *Fradera V. M. J.* Langue et Droit au MERCOSUR // XV Congrès International de Droit Comparé / ed. by E. Jayme. Brussels: Bruylant, 1999. P. 123.

[175] For an in-depth analysis along these lines, see: *Menezes Cordeiro A.* Tratado de Direito Civil. P. 263.

[176] Some distinction is possible for the case of Equatorial Guinea, even from a linguistic perspective. However, this Author points out the considerable complexity, bordering on absolute impossibility, to find direct sources.

[177] *Jayme E.* Das Recht der lusophonen Länder — Tagungsreferate, Rechtsprechung, Gutachten. Baden-Baden: Nomos, 2000. P. 249; *Marques Dos Santos A.* As relações entre Portugal, a Europa e o mundo lusófono e as suas repercussões no plano jurídico // Lusiada. Direito II serie. 2003. No. 1. P. 73.

[178] In this regard, see the paper: *Malheiros M., Reinert-Schoerer M.* Die Entkolonialisierung und die Verbreitung des portugiesischen Rechtskultur // Deutsch-Lusitanische Rechtstage / ed. by E. Jayme Baden-Baden, 1994.

[179] *Moura Vicente D.* Direito comparado. P. 412.

Menezes Cordeiro emphasizes the so-called *critical mass*, i. e., the number of people affected by a legal model with common lineaments. Hence, language becomes decisive: if ten million Portuguese in a continent of five hundred million individuals is a marginal quantity, approximately two hundred and fifty million Portuguese speakers in the world represent that critical mass that is crucial for identifying an autonomous legal system[180].

Even recognizing a common legal culture and similar (sometimes equal) historical, cultural, social, and emotional roots, Moura Vicente points out at least three circumstances that weaken the recognition of an autonomous legal system from the Romano-Germanic family, among them: the lack of an own conception of law; some *centrifugal forces* such as the membership to different supranational organizations (to the EU Portugal, to Mercosul Brazil, to ECOWAS Cape Verde and Guinea-Bissau, to OHADA Guinea-Bissau, to SADC Angola and Mozambique, and to ASEAN East Timor); the existence of numerous national languages actually spoken by millions of people, and the relevance of traditional law (sometimes recognized by formal law, e. g., family law in Angola and Mozambique)[181].

Moura Vicente's remarks persuade. Political and regulatory integration in supranational organizations will grow in intensity. Thus, the standardization of important legal solutions in different international organizations will contribute to the distancing of legislation in CPLP Countries.

Moreover, CPLP Countries have distinct economic and social needs, production capacities, strategic investment diversification policies, and so on.

Now, it seems appropriate to offer some perspectives to the years ahead and the challenges that, inevitably, will face former African colonies and East Timor in particular.

On a purely domestic level, the linguistic issue cannot be reduced to the conventional (sometimes constitutional) figure of two hundred and fifty million native Portuguese-speaking individuals: the real picture is that of a widespread and intense linguistic pluralism, and Portuguese is not spoken daily by citizens, but is often spoken only in the institutional and administrative context.

In other words, the so-called national languages, endogenous, define the identity of the people; Portuguese is a European, exogenous language used for power-consolidation purposes, but each legislature has to offer its own legal model, capable of guaranteeing equal rights and dignity to all citizens. In this sense, probably, the model of recognition of linguistic minorities adopted by the Italian legal system could offer interesting solutions.

Another crucial aspect appears to be the *decolonization of law*.

Both domestically — given the existing linguistic pluralism, sometimes recognized by the constitutions, as in Angola, Mozambique, and East Timor — and in terms of the international relations of the CPLP Countries, the need for extensive civil law changes will be increasingly demanded over time. First and foremost, a systematic reform of the entire civil legislation should be urged, since it is not capable to be maintained as of the Portuguese Code coming from the colonial era, nor be so extremely fragmented by sectoral reforms that undermine the certainty of legal solutions.

Furthermore, the growing participation to international conventions (e. g., the Angolan ratification of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards) and the increasing relevance of these Countries on the international trade chessboard should suggest a wider (i. e., more international) academic approach aiming to pursue and foster the development of new doctrinal and jurisprudential orientations. In this perspective, creating new collaborative ties with universities and legal scholars from countries also other than Portugal will also play a key role in the educational

[180] *Menezes Cordeiro A.* Tratado de Direito Civil… P. 269.

[181] *Moura Vicente D.* Direito comparado. P. 84.

offerings for students who can and should grapple with concepts and cultures that are today almost entirely absent in the teaching of law in many CPLP Countries.

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Деколонизирующее право: язык и антропология в Лузосфере

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В Лузосфере под видимой однородностью права, обусловленной влиянием португальского законодательства, скрываются лингвистические и антропологические аспекты, которые все еще не связаны с государственными институтами и формальным правом новых независимых стран. В статье дается обзор истории развития и распространения португальского права — от присутствия *ius commune* в Португалии до правовой истории колониальной эпохи и правовых систем бывших португальских колоний после обретения независимости, а основное внимание уделяется лингвистическим и антропологическим аспектам миллионов людей, которые только условно владеют португальским языком как родным и которые регулируют свою жизнь по спонтанно неписаным правилам. Проводя сравнение различных частей Лузосферы как мира, сформированного общими для всех

его составляющих португальским языком и культурой, автор проводит исследование с трех различных точек зрения: юриспруденции, языка и антропологии. Португальский язык в настоящее время занимает шестое место в мире по числу его носителей и распространен на четырех континентах. По этой причине удивительно наблюдать скудное внимание, уделяемое в сравнительных исследованиях праву и языку португалоязычных регионов, за редким исключением ряда работ, в основном вышедших из-под пера авторов — носителей этого языка. Еще менее изученной является область сравнительного правоведения португалоязычных стран, кроме нескольких работ по португальскому и бразильскому праву. Внимание исследователей-компаративистов к Анголе, Мозамбику, Гвинее-Бисау, Кабо-Верде, Сан-Томе и Принсипи, Экваториальной Гвинее и Восточному Тимору является спорадическим, редким или вообще отсутствует. Эта ситуация, по-видимому, обусловлена своего рода самореферентностью португалоязычных правовых систем, главным образом ввиду их сильной академической зависимости от португальских университетов, общего для них научного и административного языка и низкого распространения изучения иностранных языков в ареалах их существования. По этим причинам деколонизация португалоязычного права желательна, и ее надо воспринимать не со страхом, а следует рассматривать как шанс для новых возможностей развития.

Ключевые слова: Лузофония, Лузосфера, язык, антропология, традиционное право, обычай, деколонизация, сравнительное правоведение.

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