

The Drafting of Common Legislative Drafting Rules for Portuguese-speaking Countries and Regions

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Summary

- Legislative certainty, public trust and the adoption of common legislative rules

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- Legislative drafting in Portuguese-speaking Countries and Regions: differences and similarities

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Since 2016 the Lisbon Centre for Research in Public Law has been developing the project ***Legislative drafting rules on the Portuguese-speaking countries and regions*** which aims to promote the definition of common rules on better regulation in the legal systems included in the project:

- **Angola**
- **Brazil**
- **Cape Verde**
- **Guinea-Bissau**
- **Macao**
- **Mozambique**
- **Portugal**
- **São Tomé and Príncipe**
- **Timor-Leste**



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1. Scope of our project
 2. State of the art of the existing rules
 3. Specific legislative drafting differences and similarities
 4. Final remarks on the results
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1. Scope

1. The study of **better regulation** encompasses
 - a) The study of the system of legal sources
 - b) “Material” rules for legislative drafting
 - c) “Formal” rules for legislative drafting and
 - d) Legislative impact assessment
2. Our main objective is related to **formal legislative drafting**, which envisages the definition and implementation of rules and good practices regarding the drafting of legislation and regulation
3. **Finding common standards for legislative drafting**, including its systematization

Legislative certainty, public trust and the adoption — of common legislative rules

The problem

9 countries or regions all-over the world with *i)* a common language, *ii)* varied economic and trading relationships; *iii)* similar constitutional and legal frameworks **but** *iii)* with different legislative drafting rules.

Legislative certainty, public trust and the adoption — of common legislative rules

But there is hope...

These 9 countries or regions with privileged diplomatic and academic relations are available to work on the determination of common rules and standards for legislative drafting in the Portuguese-speaking legal systems.

Legislative certainty, public trust and the adoption — of common legislative rules

Why?!

- 1) Better understanding of law and regulation in the Portuguese-Speaking Countries and Regions;
 - 2) Take advantage of the common language;
 - 3) Take advantage of the similarities of the legal systems;
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Why?!

4) Improve legal certainty within investors and the community in general;

5) Develop cooperation in the legal and administrative spheres to promote economic development and social cohesion;

And... Last but not least 6) *Better regulation increases transparency!*

Building on

1. A common language
2. A specific family of legislation
3. Constitutional and legal frameworks with important similarities

Looking for

1. Simplification of legislation
2. Better understood legislation
3. Cutting red tape

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Our main goal:

An International Convention between
Portuguese-speaking Countries and Regions on
legislative drafting

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Minor goals

- i) To publish the legislative drafting *guidelines* for Portuguese-speaking Countries and Regions (non-mandatory principles);
 - ii) A Declaration / proclamation by the Portuguese-speaking Countries and Regions.
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How?

- An international team with researchers from these 9 Countries and Regions;
 - Definition of common criteria, standards and legislative drafting-rules based on the most relevant similarities of the Portuguese-speaking Countries and Regions legal systems.
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2. State of the art of the existing rules on legislative drafting in Portuguese- speaking Countries and Regions

Existing legislative drafting rules

1. The status of the legislative drafting rules in each of the jurisdictions involved has been studied and common standards, differences and innovations were identified

2. The legislative drafting rules in Portuguese-speaking Countries and Regions are:

- a) Set forth in a collection of laws, guidelines and handbooks
- b) Which vary in its form
- c) On its legal value (hard law, soft law, doctrine)
- d) On its scope
- e) And are very similar in a relevant number of cases, seemingly having evolved from the same shared roots, but there are exceptions

- **Angola: Presidential Decree n. 251/12, of December 27**
 - ✓ Legislative drafting rules for legislation approved by the Executive
 - **Brazil: Supplementary Law Bill n. 95, of February 26 1998, as amended by Decree n. 9.191 of November 1, 2017**
 - ✓ Legislative drafting rules, rules for amendments and legislative consolidation
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- **Cape Verde: Decree-Law n. 6/2005, of January 24**
 - ✓ Legislative drafting rules for legislation approved by the Government
 - **Macao**
 - ✓ The Legislative Assembly has guidelines for legislative drafting: Legislative drafting rules for the approval of legislation of the Legislative Assembly
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Portugal

- ✓ Legislative drafting rules for **legislation approved by the Government** – Council of Ministers Resolution no. 90-B/2015, of November 9 (these rules are not in force but are in use)
 - ✓ Since 2004 new governments have approved a similar act repeatedly, being the last one this act of 2015
 - ✓ The recently elected Government will be preparing its act
 - ✓ The new legislature is also due to approve a “**Code on Legistics**”, approving common legislative drafting rules for the Parliament, the Government and for the Regional Legislative Assemblies of the Autonomous Regions of Azores and Madeira
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Portugal

- ✓ The **Portuguese Parliament** has guidelines: “*Regras de legística a observar na elaboração de actos normativos da Assembleia da República*”
 - ✓ These guidelines follow the standards set by the following **handbook**: “*Legística – Perspectivas sobre a concepção e redacção de actos normativos*” (2002) and
 - In general, Angola, Cape Verde, Guinea-Bissau, Macao, Mozambique, São Tomé and Príncipe as well as Timor-Leste follow these standards, also inspiring their rules
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- **S. Tomé and Príncipe: Law n. 9/2008, of September 24**

- ✓ Legislative drafting rules for texts approved by the National Assembly, the President of the Republic, the Government, the Regional Assembly and the Regional Government

- **Timor-Leste: Council of Ministers Resolution n. 21/2019, of June 26, Resolution on legal drafting**

- ✓ Legislative drafting rules for legislation approved by the Government

Some conclusions on the state of the art of these logistics architectures:

- **Angola, Brazil, Cape Verde, São Tomé and Príncipe and Timor-Leste** have **hard law** regarding legislative drafting
 - ✓ Brazil and São-Tomé and Príncipe: hard law for acts of Parliaments, Presidents and Governments
 - ✓ Angola, Cape Verde and Timor-Leste: hard law for acts approved by Governments
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Some conclusions on the state of the art of these logistics architectures:

- **Macao and Portugal:** both have guidelines and handbooks on legislative drafting
- **Guinea-Bissau and Mozambique:** do not have hard or soft law documents, both countries have cirurgical rules in their national Parliaments regulations (in a similar way as the other jurisdictions have)

3. Specific legislative drafting differences and similarities

Similarities

In general, Portuguese-Speaking Countries and Regions address similarly common problems and issues:

- a) How to organize **the systematics** of legislation
 - b) How to **distribute the same categories of provisions** through an act
 - c) How to identify the **type of legislation** (or regulation)
 - d) How to **amend** legislation
 - e) How to **repeal** legislation
 - f) The **clarity and simplification** of legislation
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Similarities

- **Hard and soft law in Angola, Cape Verde, Macao, Portugal, São Tomé and Príncipe and Timor-Leste are very similar, proving to have similar roots**
- The same common patterns and practises are followed in **Guinea-Bissau and Mozambique**
- In some pieces of legislation (as well as in regulations), in all countries and regions, it is possible to identify the use of important lusophone **comparative law exercises**, including the use of jurisprudence

Similarities

- Ex1:** The designation for subparagraphing, paragraphing, numbering and articles is normally the same: “*artigos, números, alíneas e subalíneas*”.
- Ex2:** Similar criteria is used to identify and separate what to include in each of them
- Ex3:** Similar rules for the use of capital letters
- Ex4:** Similar rules for the type of rules to include as “final provisions” / “*disposições finais e transitórias*” chapters

The case of **Brazil** is the one showing more differences, although not prejudicing our efforts to achieve common standards that we are being able to reach

Ex1: There is no “summary”/”*sumário*” of a piece of legislation but an “ementa”, which purpose is also to briefly identify the subject of the legislation

Ex2: In what concerns numbering, the division is also in articles but then these are divided in “*parágrafos, incisos, alíneas e itens*” (not in “*números, alíneas e subalíneas*”)

Ex3: Brazil endorses the use of the future tense

Additional challenges

Additional challenges posed by the clash of different traditions arising, namely, from:

- a) European law – ex.** with the use of definitions in a wide range of directives and regulations
 - b) International law – ex.** technical/scientific concepts deriving from the Cybercrime CoE Convention
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Additional challenges



Additional challenges

The specific cases of **nation building in multilingual contexts** as in the case of Timor-Leste – **ex. the drafting of “the” legislation on lawyers in Timor-Leste (2006):**

- a) Structure and drafting of other Portuguese-speaking Countries and Regions used as a reference by different decision makers (namely from Angola, Australia, Mozambique and Portugal; the *Defensoria Pública* from Brazil)
 - b) Human national capital vs lawyers from abroad (with different legislative mindsets, namely from common law traditions)
 - c) Portuguese and tétum as a constitutional option and the bilingual texts (as in the case of Macao)
 - d) United Nations “nation building” legislative precedents – a mix of different traditions (UNTAETs, *inter alia*)
 - e) Published in July 2008
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4. Final remarks on the results

Our research project is evolving through different phases

- A) A **general approach** where **simplicity and clarity of legislation**, the construction of legal provisions or the use of our common language has been in focus (**1st block**)
- B) A second phase, centered in the **architecture and the systematics** of legislative acts, which we are working on (**2nd block**)
- C) A third phase, regarding **legal reforms, legislative consolidation, simplification programs and other strategies** available (**3rd block**)

General approach

1st block of common legislative rules (already drafted)

- Simplicity and clarity
- Titles of legislation itself and of articles
- Articles
- Marks, including the use of **bold**, *italic*, “quotation marks” and other «quotation marks», CAPITAL and regular letters
- Punctuation, including the use of (), [] and –

General approach

1st block of common legislative rules (already drafted)

- Uniform use of language and concepts, the use of foreign languages and verbal forms
- Technical and scientific concepts and formulas
- Acronyms and abbreviations
- Numerals
- Amendments and the inclusion of new articles
- Repealing legislation, the cases of special legislation
- Preambles, explanatory memoranda and equivalent texts

2nd block

Architecture and systematics of legislative acts (a draft set of rules is due to be agreed this November at the meeting of the team of experts)

- Systematic organization of a legislative act
- Articles, numbering, paragraphing and sub-paragraphing
- Cross-references
- Formulary mentions

2nd block

Architecture and systematics of legislative acts (a draft set of rules is due to be agreed this November at the meeting of the team of experts)

- Subject, scope and definitions
- Specificities of punitive, tax and procedural norms
- Complementary, transitional and final provisions
- Attachments

3rd block

Legislative reforms and legislative restructuring (2020)

- Formulary laws and formulas
- Model laws and framework laws
- Consolidation and compilation
- Simplification
- Republishing legislation which has been amended
- Legislative planning
- Universal and free access to legal and regulatory texts and accessible communication about them

Any questions?



Thank you!

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