# *DURA LEX SED LEX*: Traces of Latin proverbs in the Portuguese contemporary Law

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Recibido: 24-03-2012 | Aceptado: 20-04-212

**Título: «*DURA LEX SED LEX*: Reminiscencias proverbiales latinas en el Derecho portugués contemporáneo».**

**Resumen**

La estrecha relación entre los muy numerosos proverbios latinos y el Derecho portugués contemporáneo representa una prueba clara de la intemporalidad y de la exactitud de algunas unidades paremiológicas.

Los juristas del Imperio Romano fueron responsables por argumentos y locuciones que hoy en día se siguen utilizando como base para muchos principios y artículos de la Ley portuguesa. En las calles o en los tribunales, su uso refleja y asegura la aplicación de máximas universales que garantizan la aceptación, así como la ejecución de normas y reglas fundamentales para una organización comunitaria eficiente y estable.

A través de este trabajo interdisciplinario, y gracias a ejemplos del Derecho portugués, pretendemos así discutir y confrontar cuidadosamente la actual realidad paremiológica y jurídica portuguesa.

**Palabras clave**
Paremiología. Proverbios latinos. Derecho portugués.

**Titre : « *DURA LEX SED LEX*: Réminiscences proverbiales latines dans le Droit portugais contemporain ».**

**Résumé**

L'étroite relation entre nombreux proverbes latins et le Droit portugais contemporain montre une preuve manifeste de l'intemporalité et de la précision des parémies.

Les juristes de l'Empire romain furent responsables des arguments et des proverbes qui sont aujourd'hui encore utilisés comme base pour de nombreux principes et articles de la loi portugaise. Dans les rues ou dans les tribunaux, leur utilisation reflète et assure la mise en œuvre de maximes universelles qui garantissent l'acceptation et l'exécution des normes et des règles de base pour une organisation communautaire efficace et stable.

Grâce à ce travail interdisciplinaire, et en nus basant sur des exemples de la législation portugaise, nou snous proposons de discuter et de confronter de manière exhaustive l'actuelle réalité parémiologique et juridique portugaise.

**Mots-clés**
Parémiologie. Proverbe latin. Droit portugais.

**Title: «*DURA LEX SED LEX*: Traces of Latin proverbs in the Portuguese contemporary Law».**

**Abstract**

Today's close relation between outnumbered Latin proverbs and the Portuguese contemporary Law represents a living proof of the timelessness and accuracy of some paremiologic units.

Roman Empire jurists were responsible for arguments and locutions which nowadays are still used as basis for many principles and articles of the Portuguese Law. Whether in the streets or in the courts, their use reflects and assures the application of universal maxims. The acceptance as well as the execution of fundamental norms and rules contributes therefore towards an efficient and stable communitarian organization.

Through this interdisciplinary paper and thanks to examples from the Portuguese Law it is thus our goal to carefully discuss and compare today's Portuguese paremiologic and juridical reality.

**Keywords**
Paremiology. Latin proverbs. Portuguese Law.

## 1. PAREMIOLOGY, LAW AND SOCIETY

The association of Paremiology with the Law or, if one prefers, of the Law with Paremiology could easily become an impossible task, especially if we were to consider not only the incalculable number of subjects likely to be covered, but also the enormous extent that each of them could take. Therefore, we will circumscribe this paper to some common points to both sciences and, in particular, to the proverbial Latin reminiscences still present in the Portuguese Civil Law.

As early stated in the summary of this article, Roman Empire jurists were responsible for arguments and locutions which nowadays are still used as basis for many Portuguese legal principles and articles; their wisdom was thus immortalized on principles and values that still govern much of the current Portuguese Law.

Whether in the streets or in the courts, the use of proverbs reflects and enforces the application of precepts universally accepted as fair and agreeable to reason, thus ensuring the feasibility and acceptance of rules and regulations essential to a good and efficient organization of society.

There is no better starting point to our essay than the very definition of Justice and Law as provided in the largest compilation of laws of the Roman world - the Justinian Code.[1] Throughout this text, we encounter various allusions to written concepts dating back to Roman orator Marcus Tullius Cicero (106 BC - 43 BC), but it was Ulpian (170 AD - 223 AD), notorious Roman jurist, the head of its explanation: *Ius est constans et perpetua voluntas suum cuique tribuendi*.[2] This crystal clear description of law and justice is within Portuguese Paremiology easily recognizable in the sentence "Dar o seu a seu dono".[3] It is thanks to this first example we may well already see the richness and versatility of Paremiology. As a matter of fact this linguistic unit alone allows us to understand the direct convergence of the apparently inaccessible legal science with the civil society as well as with its members.

Paremiology and Law are indeed indivisible either from the single human being either from the communitarian organizations to which he naturally belongs.

Already in Aristotle's (384 BC - 322 BC) *Politics* was established that man is by nature a social and political animal: unable to be self-sufficient in a situation of total and long lasting isolation, he does (he can) not live outside of society. Society in its turn is the whole group of people living during a time period long enough to organize and identify themselves as a social, economic and political unit with its own well-defined boundries (Ralph Linton, 1971). This common experience, on one hand, requires the fulfillment of duties and obligations and, on the other hand, grants in a correct proportion the enjoyment of rights and freedoms: as a matter of fact only through behaviors and rules created and assimilated towards the development and subsistence either of the individual either of the community itself it is possible to maintain the desired social soundness.

The Law is thus created to and from the individual, to and from society as a result of primordial human needs. It is precisely in this context that the Latin proverb *Necessitas facit Jus*[4] may be referred. As the crutches for the lame, the Law represents an indispensable tool for society.[5]

Within the theoretical frame on the imposition and respectability of the Law, it is then discussed whether it should be classified as coactive or coercive. In the first case, it is argued that the Law is a normative order imposed by force and in the second one it is defended force is not its intrinsic characteristic, but rather a weapon which use is merely a possibility.

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[1] The compilation of the Justinian Code was initiated in 528 and it represents a modified and updated collection of all Imperial Constitutions from the time of Hadrian (76 AD - 138 AD) until the year of 534 and it holds both an injunctive and instructive nature.

[2] English translation: The Law is the constant and perpetual will to give each his own; Portuguese translation: A Lei é a constante e perpétua vontade de dar a cada um o seu.

[3] English translation: To each his own.

[4] English translation: Necessity makes (creates) the Law; Portuguese: A necessidade faz (cria) o Direito.

[5] Cf. Portuguese proverb «A nenhum coxo esquecem as muletas» [English: No lame forgets his crutches].

The Latin proverb *Melior est justitia vere praeveniens quam severe punens*[6] gives us a first response towards a possible theoretical orientation. In fact, although there are some juridical perspectives rather punishing and penalizing, repression should, in our view, be considered not as Law's essence, but as a way for it to be considered. The foreseen penalties surely represent one of its performative means however they are not necessarily implied. Coaction itself is obviously legitimate and even desirable as a consequence for violating behaviors, nevertheless it is coercivity, the threat of an effective sanction for failing to meet the standards and needs of society, its true and characteristic element.

Let us consider the academic example of «Mr. A.» who throughout his life has never violated a legal precept. Has he lived outside the Law? Has he lived in a society without Law? The answer is clearly negative and the only conclusion that one can and must reach is that, despite having lived in a society ruled by the Law, thanks to his exceptional conduct, «Mr. A.» did not have to be targeted by the sanctioning power of the Law. In accordance with our previous view, the Law is thus essentially preventive.

It is actually this observation which eventually justifies today's application of the above-mentioned Latin maxim and at the same time allow us to notice once again Paremiology, Law and Society converge once more in the same sense by speaking up together and without hesitation «Mais vale prevenir do que remediar».[7]

## 2. PAREMIOLOGY AND PORTUGUESE LEGAL PRINCIPLES

The Portuguese Law is founded on the equality of all citizens before the Law, or better yet, the legal equality of human beings.[8] As the scope of the juridical system they are to be ensured a position of parity against the Law. Parity should however not be confused with equality as such, since the latter, when considered only in the abstract, is responsible for many of the situations of injustice prevailing in society.

Equality is above all treat equally what is equal, and differently what is different. Based on this principle and given a real disparity caused, among others, by unequal economic conditions, market dominance by one party, cultural inferiority of one of the litigants, the Law advocates the weakest party through the establishment of special protection rules (for tenants in rental contracts, for workers on employment contracts, for clients in consumer contracts, etc.).

Thus, despite all difficulties in putting this principle into practice, the Latin maxim *Justitia omnibus*[9] not only immediately establishes the possibility all citizens have to go to court to defend their rights but also ensures legal parity to every future party in a legal dispute regardless of its economic position.[10] The Law assumes therefore all are entitled to a court that, on fair terms, yields results individually and socially just. With the appropriate adjustments, we could then affirm that «A Justiça, quando nasce, é para todos».[11]

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[6] English translation: True preventive justice is better than the one that severe punishes; Portuguese translation: É melhor uma justiça que previne eficazmente do que uma que pune severamente.

[7] English translation: Better safe than sorry.

[8] Cf. Portuguese Constitution, Article n. 13/1 «(Princípio da Igualdade): Todos os cidadãos têm a mesma dignidade social e são iguais perante a lei» [English translation: (Principle of Equality): All citizens have equal social dignity and are equal before the law].

[9] English translation: Justice for all; Portuguese translation: Justiça para todos.

[10] Cf. Portuguese Constitution, Article n. 20/1 «(Acesso ao direito e tutela jurisdicional efectiva): A todos é assegurado o acesso ao direito e aos tribunais para defesa dos seus direitos e interesses legalmente protegidos, não podendo a justiça ser denegada por insuficiência de meios económicos» [English translation: (Access to law and effective judicial protection): Everyone is guaranteed access to the law and to the courts to defend their rights as well as interests protected by law and justice may not be denied for insufficient economic means].

[11] English translation: Justice shines upon all alike. Cf. Portuguese proverb «O Sol quando nasce é para todos» [English translation: The Sun shines upon all alike].

Under the administration of justice, we may subsequently find another maxim *Nemo judex in re propria*[12] which in turn leads to an important principle of the Portuguese legal system - Independence and legality of the courts.[13] The courts as sovereign bodies specifically tasked and empowered to exercise judicial functions, that is, to resolve disputes through the protection of rights and legally protected interests, shall also ensure its independence through i) a private agency responsible for management and discipline of the judiciary bodies - The Supreme Judicial Council (Conselho Superior da Magistratura); ii) the principle of tenure of its judges, and iii) the principle of judges non subjection to any orders or instructions relating to their activity. It is the very Law of Civil Procedure that expresses these orientations in many of its precepts: Book II of the Code of Civil Procedure devotes its entire Chapter VI to guarantees and impartiality of those who are involved in the exercise of judicial functions. Thus, based on its Articles n. 122, 124, 126 and 127 we may verify, for example, that no judge can perform his functions either when he may intervene with another title in the process, either when he or, in special cases, a relative or his spouse has an interest in the dispute, either when he may have received donations because of the process, or finally when there is a strong intimacy between the judge and any of the parties, in other words, *Nemo judex in re propria*.

All these situations envisaged in the Law but also recalled on the form of a proverb by the Portuguese civil society once again distinctly demonstrate the close relationship that can be observed between Paremiology and the Law.

## 3. CASE STUDIES

From a practical standpoint, it is to find several and clear examples of paremiologic latin reminiscences in the Portuguese Civil Law. Let us then focus our attention in the following case studies:

*Silentium non est consensus (nisi lex loqui iubeat)*[14]
*Vs*
«Quem cala consente»[15]

As we know, the Law bases its action on the manifestation or expression of wishes, intentions and qualities. Those can then take an express or tacit form, that is, express before a behavior directed to the expression or communication of something, and tacit when from a behavior it can be inferred in all probability the expression or communication of something.

Let us take the example of «Mr. B.». When he declares he wants to sell the building X, he a) explicitly externalizes his willingness to sell the building X and b) he tacitly externalizes he is the rightful owner of the building X. And what if «Mr. C.» asks «Mr. B.» if he wants to sell his building X and «Mr. B.» does not react? What happens when nothing is said? What is the value of silence before the Portuguese Law? Unlike the Portuguese proverb «Quem cala consente», the Portuguese Civil Law interprets the silence as an omission, as a lack of action. Therefore he who keeps silent does not consent or agree (or disagree). Since he says nothing, there is simply no representation or manifestation of any will, intention or quality.

Let us consider the following situation: «Mr. D.» is sitting in a café attentively listening to the speech of an encyclopedia salesman who not only praises the product he is selling, but also informs «Mr. D.» that he will leave a copy of the announced publication in his mailbox. «Mr. D.» does not react to it and quietly continues having his coffee. The next day «Mr. D.» finds in

[12] English translation: No one should be judge in his own cause; Portuguese translation: Não se pode ser (bom) juiz em causa própria.
[13] Cf. Portuguese Constitution, Article 203 «(Independência): Os tribunais são independentes e apenas estão sujeitos à lei» [English translation: (Independence): The courts are independent and subject only to the law].
[14] English translation: Silence is no consent (unless otherwise is stated by the Law); Portuguese translation: O silêncio não é consenso (excepto quando assim determinado pela Lei).
[15] English translation: Silence is the door of consent.

his mailbox the volume the seller was advertising the day before as well as a note with the amount due. May the seller require the payment of the encyclopedia from «Mr. D.»? The answer is a resounding no. For all practical purposes, «Mr. D.» had showed no express or tacit manifestation of his intention or desire to purchase the referred copy - There was only silence. In this way, this attitude could legally never give rise to the seller's claim. Despite «Mr. D's» affable and condescending behavior, there was no sign of an express or tacit will to negotiate and therefore the Portuguese Civil Law would never penalize him for his silence. As stated above *Silentium non est consensus*.

The second part of the Latin proverb underlies however some of the exceptions considered by the Law. *Nisi lex loqui iubeat* can, for example, correspond to Article n. 218 of the Portuguese Civil Code.[16] From a technical standpoint, silence is nothing, and only in accordance with the law, usage or agreement, in other words, only on an exceptional basis, it may have legal implications. This is also the case of Article n. 1054/1 of the same Code for which he who does not legally terminate a rental contract, conversely, he who keeps silent consents to its renewal.[17] This exceptional case allows us thus to deduce that sometimes «O silêncio também é resposta»[18], «O silêncio também fala».[19]

In conclusion, civil and legal society should thus affirm «Silent is the door of consent» as long as it does not speak.

*Ad impossibilia nemo tenetur*[20]
*Vs*
«Quem faz o que pode a mais não é obrigado»[21]

Last but not least we may now observe another Latin proverb with direct reflections on today's both Portuguese civil society and Portuguese legal system.

According to the principle of liability, the person who does not fulfill his contractual obligations must compensate the other party for it. As a matter of logic however the obligation will only be provided if it can be done, that is, if there is no objective or subjective impossibility exempting the debtor's compliance. And it is exactly what is respectively stated in Articles n. 790/1 and 791 of the Portuguese Civil Code.[22]

Let us consider the following situation regarding the first article: If «Mr. E.» signs a contract in which he undertakes to deliver the moon to «Mr. F.» he is not compelled to do it since that

[16] Cf. Portuguese Civil Code, Article n. 218 «(O silêncio como meio declarativo): O silêncio vale como declaração negocial, quando esse valor lhe seja atribuído pela lei, uso ou convenção» [English translation: (Silence as a means of declaring): Silence is like to negotiate, when that value is assigned by law, usage or agreement].

[17] Cf. Portuguese Civil Code, Article n. 1054/1 «(Renovação do contrato de arrendamento): Findo o prazo do arrendamento, o contrato renova-se por períodos sucessivos, se nenhuma das partes o tiver denunciado no tempo e pela forma convencionados ou designados na lei» [English translation: (Renewal of the rental contract): Once the term of the rental contract is reached, it is renewed for successive periods if neither party has terminated in the time and manner agreed upon or designated in the law].

[18] English translation: Silence is also an answer.

[19] English translation: Silence also speaks.

[20] English translation: No one is held to do the impossible; Portuguese translation: Ninguém é obrigado ao impossível.

[21] English translation: He who does what he can, cannot be further requested.

[22] Cf. Portuguese Civil Code, Article n. 790/1 «(Impossibilidade objectiva): A obrigação extingue-se quando a prestação se torna impossível por causa não imputável ao devedor» [English translation: (Objective impossibility): The obligation is extinguished when the compensation becomes impossible through no fault of the debtor]. Cf. Portuguese Civil Code, Article n. 791 «(Impossibilidade subjectiva): A impossibilidade relativa à pessoa do devedor importa igualmente a extinção da obrigação, se o devedor, no cumprimento desta, não puder fazer-se substituir por terceiro» [English translation: (Subjective impossibility): The debtor personally related impossibility is also important to the extinction of the obligation, if the debtor cannot be substituted by a third party].

provision is physically impossible and therefore the Portuguese Law itself determines it is automatically extinguished.

As for the second article, if «Mr. G.», who cannot swim, signs a contract in which he is obliged to swim across the Atlantic Ocean there would be a subjective impossibility, since neither «Mr. G.», nor anyone for him (the «third party» provided at the end of Article n. 791) could do it. Also in this case, therefore, the contract incompletion would not rise to any obligation.

All these situations may seem outlandish or exaggerated, but it is exactly these articles which among others protect the citizen who, in jest, ignorance or carelessness commits himself to agreements apparently unthinkable. Let us imagine for a moment what unpredictable consequences would ensue if it were possible to require to «Mr. E.» and/or to «Mr. G.» the completion of those contracts.

For this same reason, in special cases, the Law needs to establish and to set rules independently of the will of its community members - *Dura lex sed lex*.[23] Fortunately however its legitimating force comes often from the civil community itself. Once again thanks to the close connection between Paremiology and the Law we may observe it is the very society that through its proverbs easily and voluntarily accepts some of its legal system prescriptions and commands.

## CONCLUSION

By way of conclusion, and after having examined some of the theoretical and practical aspects of the relation between Paremiology and the Law we may now firmly enhance not only their close relationship, but also the extreme importance and necessity both sciences have for the development and subsistence of worldwide societies. By analyzing today's Portuguese (legal) proverbs after Roman Law features we would like to believe we have also contributed to the understanding of the links between past and future. It is indeed also our opinion we can face our future only if we are aware of our past.

As the Portuguese proverb goes «Lê o passado e ficarás preparado para o futuro».[24]

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[23] English: The Law is harsh but it is the Law; Portuguese translation: A Lei é dura, mas é a Lei.
[24] English translation: Consider the past and you shall know the future.