THE ROYAL JUSTICE AND THE COMMON LAW IN THE PORTUGUESE MEDIEVAL LEGISLATION

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Abstract

The dynamics between correlation and cooperation of several sources of Law configures the so called juridical medieval pluralism. The jurists formed at the Universities would take us to the realms the debates concerning the renovation of the studies of Roman Law to its private political realities contributing to the construction of a juridical culture substantiated by the *Ius Commune*. On this process, the valid private Law (*Iura propria*), would be an object of gradual hierarchization regarding to the principles of validity generally stated by the Royal Court generating pressure and resistance. However, the concept of a genuine landlord would be affirmed as priority entailing the monarchy to the natives of its land and kingdom. An analysis in the line of the History of Law, applied in the mid thirteenth century, in the Portuguese kingdom, through the documentation collated in the *Livro das Leis e Posturas* in the *Siete Partidas* and in the historiographic- theorical and juridical outline related to the proposed subject.

Keywords

Common Law, Kingdom's private Law, Iberian Medieval Justice.

Capitalia Verba

Ius commune, Ius proprium regni, Iustitia mediaevalis Iberica.

1. Introduction[1]

This work has the purpose to present the conceptions and generalships that sustain the process of definition and affirmation of the Royal Power in the medieval diachrony, between the 13th and 15th Centuries, before the other competitive socio-political forces. This approach will focus on the juridical and legislative strategies promoted by the Royal courts connecting its governance to wider movements propelled by the Universities. Longer processes and completed with preserved tradition and the mores of the people and with its own Law towards the ascension of the Common Law defended by the kings, whom we will describe right now.

Needless to say that the kings do not dispose of an automatic preeminence, even in the cases of the hereditarian dynastic succession, exacerbated, sometimes, by biological difficulties of succession by absence of legitimate and male heirs. The raciness of the blood would aggregate diplomatic and political strategies that involved marriages, negotiations of alliances and pontifical external recognition, besides war. However, none of these initiatives would excuse the allegation of principles of legitimacy and superiority that for many centuries were experienced, with little success, towards the praxis of ruling. Therefore, the 13th and 14th Centuries demanded more of a king and its "staff" of workers and advisers that tried to elaborate a connection among the legal and juridical normative and the theorical values of royal supremacy, through theorical debates that championed with less speed, but, with the same intensity of the military battles.

The ideal and ideological models of precepts of the forms of organization of the ruling medieval society in great part of the latinity intended to build collective plans, defenders of the attribution of private functions to each order or a set "status" of the community integrated by Christians. The formulations such as the trifunctionality are a good example of it, gathering conceptions of the Classic Antiquity and heathen translated by the feather of the authors of the Patristics in the Late Antiquity that defended Unity, the One, lined with a Christian dimension through the cohesion of parts of this human set. The hierarchy and mutuality on a distinct and complemented function, previously defined would promote, in theory, the neutrality of this reality filled with private interests, autophagic that prevented the complete human realization of the common welfare and the maintenance of peace[2]. A model that would cross the entire medievality conserving its validity because of an answer to a royal demand of ordering and stability fostering, on an argumentative point of view, secular models of ruling, especially the model of kings. In the Origin of these episcopal formulations the king had already shown its function of arbitrating this set composed of ideal categories of *oratores, bellatores* and *laboratores* and such principle

1. The author wishes to thanks Rodrigo Fernandes Frighetto for his translation of this study.

2. Brandão, Bernardo. "Pseudo-Dionísio Areopagita, sobre a Teologia Mística para Timóteo". *Kléos*, 5/6 (2001-2002): 146-167; Duby, Georges. *As três Ordens ou o imaginário do Feudalismo*. Lisboa: Estampa, 1982; Fernandes, Fátima Regina; Frighetto, Renan. "Crise e Hierarquias: as interações entre o sagrado e o profano na Antiguidade e na Idade Média". *História Revista*, 24 (2019): 5-19.

would legitimate several royal propositions of supremacy of the *potestas* in the field of the *temporalia* or secular powers.

The Medieval Scholasticism, Aristotelian-Thomist, defended this universal order on which each part specifically should contribute to the common welfare and the harmonic performance of its singular parts, hierarchical in its competences and functions, for the sake of the community. Thus, the head, of this body should not act isolated because it would promote an instability of the social amount[3], in accordance with the metaphor of the political body that John of Salisbury would enhance in his work *Policraticus* attributing its potential problems of action to the interruption of the flows amongst the parts that composed this organic amount[4].

The social proportion of several aspects of the medieval institutions claimed in law, doctrinal treaties, amongst other sorting implements, have consolidated the idea that most of the set of Christians would be conceived as eclectic, but ideally organized in interactive and mutually indispensable categories. A social prevalent proportion over the individual would be observed in several aspects of life, amongst which the social extent of the juridical and legal regulations elaborated and presented.

The Universal value recognized in this ambience of macro conceptions such as the concept of Christianity would find in its complete validity sustaining formulations of imperial and pontifical authorities without sparing the same dynamics of a complemented background. It gathered debates and allegations claimed in a Natural Law[5], an intrinsic tidier of the reality, conception supported only in a reality that conceived as valid the transcendent intervention, divine, even if not determinist, because in its full application would be limited by the liberty of human choices.

Besides, the theory of a Natural Law would assume its definition, *um modelo universal de ação, aplicável a todos os homens em toda parte, requerido pela própria natureza humana para seu aperfeiçoamento (completion)*[6]. An embedded definition of a moral connotation that conceived the formulation of rules with universal validity. In an application of this concept in the Medieval period, Bobbio gives an example with Saint Thomas Aquinas defending common principles that constituted the system of the Natural Law, whose capital rule would be the accomplishment of doing the right

3. Hespanha, António Manuel. *História das Instituições; épocas medieval e moderna*. Coimbra: Livraria Almedina, 1982: 206-207.

4. Berman, Harold. *La formación de la tradición jurídica de Occidente*. Mexico: Fondo de Cultura Economica, 1996: 300-301.

5. The Law and the Natural Law were an object of discussion in the works of Aristotle, Saint Augustine, Gratian, and Saint Thomas Aquinas that defends the premise of a Natural Law, from a divine hand, that would be reached, at least partially, by the human mind, thus, the validity of a positive law could not be sustained if contradicted the principles of the Natural Law. Subjects that were intensely discussed posteriorly in Hank, Kant, Hobbes, Locke, and the contrapositions of the Natural Law to the juridical positivism over which we exempt for not being discussed in the context analyzed by us.

6. "A Universal model of action, applied to every man everywhere, required by the human nature itself to its enhancing (completion)": Bobbio, Norberto. *Jusnaturalismo e Positivismo jurídico*. São Paulo: Editora Uiversidade Estadual Paulista - Instituto Norberto Bobbio, 2016: 254.

thing and the Natural Scholasticism would converge [7], disposing, thus, the nature, of an equal, innate, and permanent order [8].

But, even in medievality it would not be directly associated objects that were essentially meritorious to nature[9], thus, the human intimacy demanded a specific rule, the positive law. Saint Thomas Aquinas defended that *se fundamenta el bien humano en la consideración de una naturaleza normativa, que determina, por medio de las inclinaciones básicas del hombre, los criterios teórico-prácticos de la perfección humana*[10]. Reminding that the complexion of power and ruling, after the triumph of the *Policraticus*[11] of John of Salisbury, the treaty *De Regimine Principum* of the Aquinate, gazed upon that text and in the *Política* of Aristotle would bring more organized reflections about the theory of a closest power of the secular sphere, where the political community would be something natural and, therefore, would be subjected to the Natural Law. And that the desirable common welfare of this community that disposed of a territorial and concrete basis would depend on the good use of the rulers both in justice as well as equity[12]. According to Bobbio, *A função do direito natural é pura e simplesmente a de dar um fundamento de legitimidade ao poder do legislador humano*[13], thus, the ambience of a medieval application of the concept of justice and Natural Law would sustain the supremacy of the kings whose function is to dictate the law.

Integrated and mutually legitimated conceptions that eluded the indispensability of the function of the human legislator whose enunciations in a conceptual dialogue with the Natural Law would appear in this dialogue, at the same time the validity of its authorship, but also the boundaries of its assumptions. Knowing that a potential division between theory and practice that promoted a Naturalism would be in many contexts a propellent of oppressive methods.

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7. Bobbio, Norberto. *Jusnaturalismo*...: 158; 256.

8. Contreras, Sebastián. "La intelegibilidad de la naturaleza y su vinculación com el conocimiento de los universales". *Anuario de Estudios Medievales,* 41(2011): 385.

9. The aquinate defends in its work the free will of the Christian regarding its connection to its Christian and citizen extent, aware that in this context nature would not be considered essentially positive and the expulsion of Heaven due to a choice considered wrong would bequeath to human beings the capital sin as a mark of an identity of humanity. An original *locus* of sin of which each Christian should seek to conform with the Christian principles.

10. *La mezcla de cualidades empírico-deductivas y ético-normativas constituyó, de hecho, uma terceira innovación de estilo y de método introducida por el Policraticus* ("The human welfare is grounded in the consideration of a normative nature, that determines, through its basic learnings of the man, its theorical-practical canon of human perfection"): Contreras, Sebastián. "La intelegibilidad de la naturaleza..." :383.

11. "The miscellaneous empirical-deductive and ethical-normative qualities constituted, in fact, of a third innovation of style and a method introduced by Policraticus": Berman, Harold. *La formación de la tradición*...: 299).

12. Berman, Harold. *La formación de la tradición*...: 289- 301; Grossi, Paolo. *A ordem jurídica medieval*. São Paulo: Martins Fontes, 2014: 216-224.

13. "The function of the Natural Law is purely and simply to give a ground of legitimacy to the power of the human legislator": Bobbio, Norberto. *Jusnaturalismo*...: 159.

Considering the Christian Latin Medieval application of these conceptions, the bond between general and wider concepts applicated in administrative implements towards a broken and divided reality created a constant labor of modernization and revision that, largely would be conducted by qualified representatives. These representatives, trained at the Universities, would foster the scholar cadre that translated, in an official language, formally, current concepts originated from the social basis, whether in secular or clerical plain.

The Medieval Universities with the formative Scholasticism method promoted the production of recognized and valid lore, tested by the exercises that involved this process, as well as the exposition of the knowledge produced by a scientific community to obtain a degree would generate some shaped arguments, both in the Christian orthodoxy in the theological sphere as well as Law in the juridical sphere. By way of the construction of filters of validity of principles and rules that, however, could not escape of the connection with the reality where it aspired the questions to be settled, just like which reality it would be applied safeguarding the social extent, including, the medieval knowledge.

Berman analyzes epistemologically the tasks developed by the jurists in medievality, highlighting the conscience of the involved in a task of juridical systematization and the larger skeleton of theorical learning, extracted from that skeleton, authorizing us to assign to these developed activities some scientific qualities. Gathered insights and reflections recognized in works concerning specific subjects classified by its quality, debated, and exposed to a verification through logic and experience, are assignments that reflects the application of the Scholastic method of analysis and synthesis, whose contradictions created the dialectic effort, in medieval terms, of reconciliation of the stated principles. Not exactly a forced reconciliation, arbitrary, but the result of a *interpretación de princípios generales que fueran congruentes con la evidencia,y en su uso de esos principios para explicar la evidencia y extrapolar a partir de ella*[14]. With these rules, it would be offered empirical evidence of validity of the general principles and at the same time, proper empirical utilities to these rules. Therefore, logic, experience and application to factual cases would be equivalent practices to a *dogmática jurídica*[15].

By referring us to a more centered focus on the plan of juridical and governmental application of the realms, we will try to expose the medieval juridical pluralism which observed the coexistence of several sources of the Law without having a mandatory resistance or ineffectiveness of the process.

14. "An Interpretation of general principles that were equivalent with the evidence, and in the use of these principles to explain the palpability and to surpass the evidence through these foundations": Berman, Harold. *La formación de la tradición*...: 162-163.

15. Berman, Harold. *La formación de la tradición*...:131-165; Gouron, André. *Etudes sur la diffusion des doctrines juridiques médiévales*. Variorum Reprints, 1987.

2. Juridical Pluralism and the formulation of the Common Law

It is explained, repeatedly, the action of renovation concerning the studies of Roman Law that started at the University of Bologna spreading across the other general studies of Latinity from the 12th and 13th Centuries, merely by the necessity of uniformization of the existing rules. However, as we shall see, it is about a complex process and with nuances and variations that deserve a prelusive look at this work.

The preparations realized by the jurists was detained in a collection of juridical texts promoted by Justinian I (482-565) before the Eastern Roman Empire divide in four parts, the *Codex*, twelve books containing orders of Roman Emperors, the *Novellae*, promoted laws by Justinian I himself, the *Institutiones*, an introduction to the studies of Law and the *Digesto*, fifty books containing opinions of Roman jurisconsults concerning the most diverse juridical subjects related to properties, contracts, related to the civil and criminal spheres of the Law. The troubles of this nature would arrive at the kings in late medievality focusing discussions about Justice and Law in continuity to the Justinian experiences as far as the capacities of these available implements in the German-barbaric monarchies[16].

To Berman, the source of the demand by systematization of the Law comes from the *Querela das Investiduras* between papacy in a process of centralization from Rome and the Holy Roman Empire, in the 11th Century, demonstrated in the normalizing efforts of synthesis and legislative collections that were not mutually opposite. *Fue este total transtorno el que hizo nacer la tradición jurídica occidental* [17] and an effect of this moment would be the rediscovery of the *Digesto* in 1080 by Henry IV and in 1087 the foundation, in Bologna, of the General Study with papal endorsement, which, according to Berman, it justified to think that the demand by the Canon Law catapulted the demand of the Roman Law[18].

A process executed by glossers and scholiasts that promoted a filtering of principles whose tradition preserved as classics, universals and valid, especially the *Digesto* or *Pandectas* and only when all this knowledge was transferred to the University it received the title of *Corpus Iuris Civilis*. A propellent of promoting the knowledge that would make famous the beneficiations that supported the function of the ruler by providing elaborated conceptions and implements, from the juridical and legislative perspective. A task that involved the systematization of the rules, converting them as a total instate, *no sólo definir los elementos comunes a espécies particulares de casos, sino también sintetizar las reglas em princípios, y los princípios mismos en todo un sistema, en un*

16. Frighetto, Renan. "O Direito entre a justiça e a piedade: sobre a infidelidade e o desterro de aristocratas e nobres no reino hispano-visigodo de Toledo (636-654)". *Romanitas - Revista de Estudos Grecolatinos*, 14 (2019): 100-119.

17. "It was this complete nuisance that created the Western juridical tradition": Berman, Harold. *La formación de la tradición...*: 545.

18. Berman, Harold. *La formación de la tradición...*:130- 547. Some examples would be: Burchard, Bishop of Wörms, in its *Decretum* (c.1012), Ivo, bishop of Chartres, in its *Decretum* (c.1095) and in the 12th Century, Gratian, a Bolognese monk, in the work *Concordância de cânones discordantes* (1140) supported in Ivo of Chartres and Irnerius (c.1060-1125) in the early systematization of the Canon legislation.

cuerpo de derecho, o, corpus iuris que se converteria no *Ius Comunne* [19]. A total, resulted from the interacting quotas, an organic definition, aggregated from the reality in a general way, that prevailed in this academical theoretical context both in juridical and theological, debating the Nominalism and the Universal Concepts.

However, the Scholastic Dialectic was not restrained to a mere method of reason, because it discussed more than true or false, private, and general, object and subject and of course, justice contained in the actions and decisive options that would be beyond the text of the Law providing to the conducting institutions, an epistemological dynamic that would be far beyond the juridical action. The concrete, the specific and the nuances potentially contained there fostered the jurisprudence and the exceptions of the Law.

The interdisciplinary debates between jurists from the University of Bologna and theologists from the University of Paris had gone deep in those discussions by propitiating reflections concerning the concept of justice[20] and the *interpretatio* of the law and the current juridical order. After all, in a pluralistic juridical system, king, municipal local mores and nobility would defend its own rights and would be, therefore, everyone, originated from the ordination, would give the task to the most qualified enunciated organs whose function was to refine the current and valid mores, hierarchizing, throughout the following two centuries these sources[21].

According to Genicot, initially the main interest is to overcome the simplistic dichotomies of opposition between acts and morals, according to which, the act was always written, *consuetudo scripta*, something new, while the moral would be unwritten, *lex non scripta*, referring to a determined customary practice, without having an interaction between both. In fact, the institution would be generally, more enunciated globally by an authority of public ethos *pour ordonner les rapports entre tous les membres d'une collectivité publique*[22], but that withdraw its foundation of the morals. The competence of the authorities in a more focused standard would be to preserve the peace, what would have been done, according to the belgian historian, through the assumptions of the Aristotelian-Thomist philosophy and the Roman Law, essentially by two ways, the exercise of justice and the forumlation of the institutions that inhibited the private vengeances[23].

All this process would end by highlighting the image of the ruler, in fact, the legislator, but, after all, the real enunciator and normative ruler, summoner of the validity of the rules would be other, the people or *populus*. *O populus, compreendido na*

19. "Not just defining the common elements to private descriptions of cases, but also to synthesize the rules in foundations and the foundations in a system, in a Common Law, or *Corpus Iuris*": Berman, Harold. *La formación de la tradición*...:150.

20. Ullmann, Walter. *Princípios de gobierno y politica en la Edad Media*. Madrid: Alianza Editorial, 1985: 290-1; Fernandes, Fátima Regina. *Portugal 1385, quando um reino fez seu rei.* Jundiaí: Paco Editorial, 2018: 40-44.

21.Berman, Harold. *La formación de la tradición*...:133-88; Hespanha, António Manuel. *História das Instituições*...: 214-215.

22. "To settle the relations between all the members of a public society": Genicot, Léopold. *La loi*. Brepols Publishers: Turnhout, 1977: 13.

23. Genicot, Léopold. *La loi*...: 24.

sua dimensão jurídica de comunidade organizada e que, graças ao seu ordenamento interior, realizava a própria unidade a modo de universitas[24]. Thus, the function of legislator that was fit to the prince, Emperor in the Justinian Code, whose interpretation of the medieval jurists, among them, Azo (1150-1230), roman, reinforced the jurisdiction of the law in this function, to exercise justice through the emission of a wisdom, only granted by the organized community, by the *populus*. This community, an organic organism, plural, with several functions and autonomies[25] represented by its *valentior pars*, or those who effectively interfered in such rule[26] and the identification of the foundation of the law presents the discussion to the complexion of power in these medieval centuries[27].

The acceptance of the Common Law, *Utrumque Ius*, either law, in the realms was gradual and always followed, the path of the graduates of the Universities in the administrative offices. And despite some suspensions of the historians of the Institution in recognizing the acceptance of Common Law in the legislation of the medieval kingdoms, the historiography in general conceives this phenomenon as a process that culminated in the 18th Century, however it already manifested itself in statutes that recommended the due respect to the Common Law, at least since D. Afonso III in Portugal, on the second half of the 13th Century[28].

These jurists sought, with this application, the construction of the possible oneness of the juridical order, however, it still preserved, the validity of the important parts of the very royalty[29]. The written decisions of this juridical scenery imposed, therefore, one more dialectical approach concerning the current values over the examined quarrels than the imposition of unique and dogmatic principles[30]. Such deliberative dynamics demanded the application of an appeal to the voices of the authority of this juridical truth and affirmed itself as the validity of the concept of *communis opinio doctorum*, or the general opinion of the doctors [31].

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24. "The *populus*, understood on its juridical extent of organized community and that, thanks to the interior ordering, made its own unity on the way of the *universitas*": Grossi, Paolo. "A ordem jurídica...": 243-244.

25. Grossi, Paolo. "A ordem jurídica...": 245; Berman, Harold. *La formación de la tradición*...: 304-306.

26. Padua, Marsílio de. *O Defensor da Paz*, ed. José António Camargo de Souza. Petrópolis: Vozes, 1997: 144; Miehtke, Jürgen, *Las ideas políticas de la Edad Media.* Buenos Aires: Editorial Biblos, 1993: 149-152; Fernandes, Fátima Regina. "O conceito de Império no pensamento político tardo-medieval", *Facetas do Império na História. Conceitos e métodos*, Andrea Doré, Luís Filipe Silvério Lima, Luís Geraldo Silva, eds. São Paulo: Editora Hucitec, 2008: 185-198.

27. Genicot, Léopold. *La loi*...: 45.

28. Domingues, José. "Sinopse da receção do Direito Romano em Portugal", *A Locatio-Conductio – influência dos direitos atuais: atas do XX Congresso Internacional e do XXIII Congresso Ibero-Americano de Direito Romano*, António dos Santos Justo, ed. Lisboa: Editora Universidade Lusíada,2018: 478.

29. Hespanha, António Manuel. *História das Instituições*...: 471-480, note 1029.

30. Concerning the Scholasticism dialectic in the juridical studies see: Berman, Harold. *La formación de la tradición*...: 143-154.

31. Chronological references of some of the most important romans-medieval canonists Doctors: Irnerius (1050-1125), Accursius (1182-1263, Magna Glosa), Dino del Mugello (1253-1303), Cino de Pistoia (1270-1336, friend of Dante), Bartolus de Sassoferrato (+1357) and Baldus de Ubaldis (1327-1400):

> *(...) Assim, enquanto não intervieram factores de decadência, a invocação do argumento da autoridade e da opinio communis doctorum não significa, como muitos pensam,um dogmatismo estiolante para a ciência jurídica, antes sugerindo uma atitude mental aberta em que, por não se reconhecerem verdades definitivas, importava, a todo momento, confrontar os pontos de vista dos vários autores*[32].

In the first step of this process, between the 12th and 13th Centuries, the actual theoretical predominance of the Common Law, from a universal extent, an imperial extent concerning the other concurrent sources. Which leads us to the issue of how and why the Justinian-Roman Law, imperial served to the kings? Why the kings applied it? The Church would also apply it when it did not dispose of any support of alternative authority and since it did not contradict the Canon Law itself. It is observed, therefore, an interaction of complementarity, just like in theory of two swords, forming the *Utrumque Ius*. The Roman Institution recognized by the church *in temporalibus* should be used by the rulers, which according to Nuno Espinosa Gomes da Silva conditioned the reception of the Roman Institution by the Canon. Thus, the Sanctuary disseminated the Common Law and would place it in the shoulders of rulers the power and the responsibilities *in temporalibus* of an Emperor, each one from its realms turning monarchs into *Principes*[33]. Thence the interest of monarchs in using a legislation that granted them equivalent authority to a power of an Emperor by exceeding the partial feudalistic extension of divine and social support of elect[34]. The intensification of this royal function towards the entire organic social organism is well expressed in this extract from the Second Passing,

> *(...) E estos, seyendo muchos, non podria ser que algunas vegadas non se desacordassen, porque naturalmente las voluntades de los omes son departidas, los unos quieren mas valer, que los otros. E porende fue menester por derecha fuerça que ouiesse uno que fuesse cabeça dellos, por cuyo seso se acordassen, e se guisassen, assi como todos los miembros del cuerpo se guian, e se mandan por la cabeça. E por esta razon conuino que fuessen los Reyes, e los tomassen los omes por Señores (...) E tiene el rey lugar de Dios, para fazer justicia, e derecho, en el Reyno en que es Señor, bien assi como de suso diximos, que lo tiene el Emperador en el Imperio. E aun demas, que el Rey lo tiene por heredamiento, e el Emperador por elecion*[35].

Silva, Nuno Espinosa Gomes da. *História do Direito português*. Lisboa: Fundação Calouste Gulbenkian, 1985:149.

32. "(...) Therefore, while it did not intervene facts of decay, the summon of the argument of the authority and the *opinio communis doctorum* does not mean, like some thought, an exhilarating dogmatism for the juridical science, suggesting before an open-minded attitude wherein, was not recognized defining truths, it mattered, always, to confront the aspect of several authors": Hespanha, António Manuel. *História das Instituições*...: 475.

33. *Las Siete Partidas del muy noble Rey Don Alfonso el Sabio*, ed. Gregorio Lopez. Madrid: Compañía General de Impresores y Libreros del Reino, 1843: I, 376-378 (*Partida* II, title I, law VIII).

34. Silva, Nuno Espinosa Gomes da. *História do Direito*...: 155-158.

35. "And these, being many, sometimes they reach a disagreement, naturally because the wills of men are divided, some want to be more important than others. Therefore, it was a legitimate attribution that there was a chosen one that was their leader, from which they reached an accord and guided themselves, just like the members of a body would be guided by their head. Hence it was suited that the recognized kings by the men as Lords (…) And the king has a role of being a God, to make justice and

In this job, the jurists assisted the kings, recognized adjudicators by the Natural Law and the representative voices of the community, whose function was to ordain and codify principles that are oftentimes oral crystallizing by writing the principles that the other two sources enunciated as valid. At this point, Grossi highlighted the importance of the concept of *aequitas*, in the sense of the operational proportion of the Natural Law in its medieval uniform connotation.

> *(...) Deus é a garantia desta ordem harmônica, e a equidade é a dimensão de organização. Dimensão e instrumento da ação benéfica divina que desce gradualmente do metafísico (a divindade) para o físico (as coisas, a natureza das coisas), para o humano (a vontade dos homens), tornando-se justiça e manifestando-se, por fim, num sistema de normas escritas ou consuetudinárias fundado e edificado nela*[36].

By progressing in these conceptions, it is realized that the *aequitas*, on its human extent was supported in the community, in its diversity, plural, corporative, as a voice of authority, before the Common Law. The universal served as a filter to reach the comprehension of the individual. The universal was also an instrument of mediation and in the juridical field the universal would be represented by the civic community.

By these assumptions, the General Court of the Councils would be compasses of indirect formulation of legislations partially by the Royal Court safeguarding the corporative aspects of legitimacy of its content. At the same time, it reinforced the royal instance as a recognized adjudicator of the dispute between so many valid principles, customary that were confronted with the Common Law that resulted in general statutes. Or even between the Canon Law and the Roman Law, in the laic issues, therefore, in the same Courts of Elvas the royal consent would be a good example of these issues, *(...) poder invocado, pelo rei, de aprovar as letras pontifícias a fim de se poderem tornar obrigatórias em Portugal* [37]. The filtering of the preserved customary mores would be equally applied to other commissions, such as the noble commission, always in a declared benefaction of the common welfare, in other words, the highest set, of the community.

Therefore, the mores and the Feudal Law, customary, of the nobles, would be understood as a private law, *Iura propria* and not, Common, specific of a part of the community, just like the Merchant and Urban Law and, therefore, it should,

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Law in the kingdom on which he is the Lord, just like we said above, such as the Emperor in the Empire. Furthermore, the ruler has this right to inherit while the emperor has this right by election": *Las Siete Partidas*...: I, 376 (*Partida* II, title I, law VII).

36. "God is the guarantee of this harmonic order, and equity is the extent of the organization. An extent and instrument of the divine beneficial action that gradually comes down from the metaphysics (divinity) to the physical (the objects, the nature of objects), to the human (the will of men), becoming justice and manifesting itself, eventually, in a system of customary or written rules founded and built upon a system": Grossi, Paolo."A ordem jurídica...": 217.

37. "A summoned power, by the king, that approves the pontifical writing to make them necessary in Portugal": Silva, Nuno Espinosa Gomes da. *História do Direito*...:164-167; Grossi, Paolo. "A ordem jurídica...": 241

partially, be hierarchically submitted to the common and general legislation, without losing the completeness of its validity, since it does not contradict the *Ius Commune*. On this account, the tendentious pleasures would be impediments, naturally, in this system, of the realization of the common welfare, which potentially nullified them when opposed to the Common legislation, thought as a whole[38].

We will see, in the sequence, the challenges of application of these principles in the political reality of the medieval Iberian kingdoms on the west of the Iberian Peninsula.

3. The reception of the Common Law in the Circles of Castile and Portugal

When a second angle of the reception of the *Ius Commune* uncoiled in the Hispanic West, in the 14th Century, this process followed important phenomenon of the impoverishment of the methods and patterns of current official values. A manifested transformation in the crisis of the Latin unitary Christianity with the exile of Avignon (1305-77) and the Western Schism (1378-1422) and the Hundred Years' War, movements that would lead the highest nobiliary echelons to resist to the ethical and valorous inflexions proposed by the lower and medial categories mostly receptive to follow illegitimate kings situated in almost all the Royal Circles simultaneously, in the way of a renovation of an entire group[39]. The revision of the concepts of legitimacy, fidelity and treason were imposed before these new contextual and dynastical extents in general and everything that served before or in what it was believed, at least officially, had to be readjusted.

Therefore, at a juridical angle, in Portugal, that suffered with all the aspects of this crisis, it was observed the competition between two versions of the Common Law, the Hispanic and the Italian Trans Pyrenean. It is also assembled the job of the jurists in promoting the integration of the *iura própria* to the Common Law in an equilibrium baseline, preserving the prerogative of the validity of this baseline concerning the mores and private rights considered harmful to set of the realm by the Royal Court[40].

An important aspect to be highlighted in this context is the conservation of the extent of the dialogue and potential partial validation of the local law by the central ascendancy, which, however, would not avoid the escalation of tensions of

38. Grossi, Paolo. "A ordem jurídica...": 241.

39. Quintanilla Raso, María Concepción. "La renovación nobiliária en la Castilla bajomedieval: entre el debate y la propuesta", *La Nobleza Peninsular en la Edad Media. Actas del VI Congreso de Estudios Medievales*, Leon: Fundación Sánchez-Albornoz, 1999: 255-96; Moxó Ortiz de Villajos, Salvador de. "De la nobleza vieja a la nobleza nueva". *Cuadernos de História*, 3(1969): 1-210.

40. Portuguese Jurists of the Royal Courts, Master Goncalo of the Laws (1343), Master Goncalo of the Decrees (1357), João Afonso "scholar in lex" (1387), Rui Lourenco "discharged in exiles" (1391), Doctor John of the Rules (1357-1404).

resistance in the order of the conservation of the customary principles, generally, towards the dynamics of a royal modernization.

In this matter, it is highlighted the initiative of the king D. Afonso IV to promote the insertion of the royal official scholars in the municipal circumscriptions whatever inspectors and judges are brought from the outside, replacing in some cases, the local judges in the Councils, at their expenses. The application of external rules to the written postures of municipal assemblies that manifested the recognized tradition by this autonomous universe, aggravated by the forwardness in the defense of the privileged premises of the neighbors of the Council or of external factors such as noble lords and religious orders, oftentimes in dispute, made this job of the central ascendancy, a herculean work[41].

The mutuality between these multiple manifestations of juridical pluralism and the common legislation expressed the vantage of the royal organs in disposing of academic formation while the local adjudicators reproduced oral or written principles, almost constantly very ancient, without disposing of a qualification to formalize them and even not considering discussing them. As alerted by António Manuel Hespanha, the adjudicators from outside, very often translated the local elements into Latin imposing a technical vocabulary imbued with important alterations in the conception and complexion of the Private rights of the localities[42]. It was being promoted, slowly, a masked integration reserved only to its application to the most important localities of the kingdom, from which it spread as model to the minors.

> *(...) e esta transplantação bastava para imediatamente integrar a realidade local portuguesa num contexto institucional que lhe era estranho; a partir daqui esta realidade recebia novas conotações, tornava-se passível de novas referências, recebia um novo enquadramento dogmático e normativo; tornava-se, enfim, familiar à literatura jurídica e, com isto, a realidade incômoda de um mundo jurídico alternativo podia ser comodamente absorvida (...).*[43]

In this miscellaneous period, the rules would not be, thus, neither a spontaneous creation of the community, nor arbitrarily due to the Royal Court, but it was approved by the jurists and its ability to adequate the two steps of reception and enunciation, interpreting the texts of an external origin to the realm to create statutes that would not oppose the recognized principles by the *populus* creating a juridical culture of its own[44].

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41. Hespanha, António Manuel. *História das Instituições*...: 253-272.

42. Hespanha, António Manuel. *História das Instituições*...: 274-278.

43. "(…) and this transplantation was enough to immediately integrate the local Portuguese reality in an institutional context that was unfamiliar; from that point this reality received new connotations, made it believable for new references, it received a new dogmatic and normative constitution; it was made, ultimately, familiar to the juridical literature and, with this, the bothered verity of an alternative juridical world could be comfortably absorbed (…)": Hespanha, António Manuel. *História das Instituições*...: 278-279.

44. Hespanha, António Manuel. *História das Instituições*...: 440-469; Grossi, Paolo. "A ordem jurídica...": 37-44; Fernandes, Fátima Regina. *Portugal 1385*...: 25-32.

We will see, in continuity, how it was manifested the application of these principles in the royal legislation of the Portuguese kingdom. Afonso III (1248-1279), king of Portugal that was raised in the French Court, cousin of Louis IX and married with the Countess of Bologna, since its ascension to the Portuguese throne promoted a huge legislative effort and a definition of judicial procedures, later collected in the *Livro das Leis e Posturas*[45] in the same line of his cousin, Alfonso X of Castile (1252-84). In its reign, it was observed the reception of the Common Law in Portugal and it is perceived in the written legislation of its Court the influence of the Bolognese thought, but also the Castilian thought, in particular the doctrinal works of Jacome Ruiz or Jacob of the Laws, written in Castilian, that constituted explanations of proposed solutions by the Justinian *Corpus Iuris Civilis*, some of them translated into Portuguese in the *Venues of the Guard*[46]. Master Jacob, a jurist that was not Castilian, disposed of a trajectory that commonly represents, the circularity of those men of knowledge and the medieval scholastic debates in the roominess of latinity[47]. In its works, specially, *Flores del Derecho*, Paulo Mêrea highlights the Castilian acceptance of the Justinian Law, by having the glossers gathered in the work of Justinian, especially *Digesto*, principles that were accepted in fragments of the *Fuero Real* and the *Siete Partidas*[48] of Alfonso X that surrounded Portugal in Castilian and with parts translated to Portuguese[49] composing in its set an almost infinite source of valid juridical arguments. Right in the opening of the book *Flores del Derecho* highlights the desirable benign posture, although unbiased posture of the judge, to which is confused with the king.

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45. *Livro das Leis e Posturas*, ed. Maria Teresa Campos Rodrigues. Lisboa: Universidade de Lisboa Faculdade de Direito, 1971; Homem, A. Luís de Carvalho. "Estado Moderno e Legislação Régia: Produção e Compilação Legislativa em Portugal (séculos XIII-XV)", *A Génese do Estado Moderno no Portugal tardo-medievo*, Maria Helena da Cruz Coelho, Armando Luís de Carvalho Homem, eds. Lisboa: Universidade Autônoma Editores,1999: 111-130.

46. The first and thir work of the *Flores del Derecho (Flores de las Leyes), Doctrinal de los pleytos e os Nueve tiempos del juicio* are translated into Portuguese on the note 1 of the *Foros da Guarda*, as well as the work of: Merêa, Paulo. "A versão portuguesa das 'Flores de las leyes' de Jácome Ruiz". *Revista da Universidade de Coimbra*, 5 (1916): 444; Merêa, Paulo. "A versão portuguesa das 'Flores de las leyes' de Jácome Ruiz". Revista da Universidade de Coimbra, 6 (1917): 343. The *Nueve tempos del Juicio* os published in the *Portugaliae Monumenta Historica*, Leges, I: 330-332 referred by Silva, Nuno Espinosa Gomes da. "História do Direito...": 159-160.

47. He acted on behalf of the Holy Roman Emperor Frederick II and its son Manfred, just like James I of Aragon, before joining the attendance of the Castilian Court, where according to Paulo Merêa, was a maid of the Infant Alfonso, vidimus *Flores del Derecho*, dedicated to the same Infant, and future Alfonso X: Merêa, Paulo. "A versão portuguesa das "Flores de las Leyes"de Jácome Ruiz". *Revista da Universidade de Coimbra*, 5/6 (1916-1917) : 444-457. But this is not a consensual opinion, because, Pérez Martin defends that the work would be dedicated to Alfonso, *el Niño*, an illegitimate son of Alfonso X: Pérez Martin. António. "La obra jurídica de Jacobo de las Leyes: las Flores del Derecho". *Cahiers de linguistique hispanique médiévale*, 22 (1998): 249-251 <https://www.persee.fr/doc/cehm_0396-9045_1998_num_22_1_896>.

48. Pérez Martin articulates, including, the hypothesis of the work *Flores del Derecho* to be integrated to a set of alphonsins' works, *Fuero Real* and *Siete Partidas*, being the last of these works to be redacted containing a description of an administrative synthesis of its content.

49. Pérez Martin, António. "La obra jurídica...", 249-251 ; Merêa, Paulo. "A versão portuguesa das "Flores de las Leyes"...": 445-448; and Silva, Nuno Espinosa Gomes da. *História do Direito...*: 1985.

> *En el primer libro tracta como guardedes vuesta dignidat, et vuestro sennorio, que es dicho en latín officio et iurisdiccion. Et otrossi, de las personas por que passan los pleytos et de las naturas délias, et de todas las cosas que se fazen o se deven fazer ante que el pleyto sea começado*[50]

It is adopted relative subjects to the harassment with the counselors, the prosecutors and those who had to be involved in the litigations, adjudicators, culprits and defendants, as well as the definition of the cases of trials by default after informing the accused and the procedures of how functions the trial, such as, who can be the witness, even the emission and execution of a written sentence and the possible appeals to the same witnesses[51]. This work, still disposes, of an applicative and objective nature, Pérez Martin recognizes it as the feature of a treaty of the *Ius Commune*, of a pedagogical nature, whose language would specify the Latin terms referring to the addressed practices in its content and whose internal unit was testified by the internal forgiveness to the jurisprudence contained in him, inherent of the Scholasticism method. The reference or mention to the sources that Jacome Ruiz utilizes it would be of a higher complexion, such as the Justinian *Digesto* and *Códex* that contributed to the influence of the Roman Law, but also, the Glosses of Azo and aspects of the Canon Law[52].

Many of the subjects that the book, *Flores del Derecho*, deals with are objects of definition of the legislations of Afonso III that are equally contained in the *Livro das Leis e Posturas* which confirms the reception in Portugal of the same principles of how the tribunals function and the action of the judges that the Common Law validated[53].

In this context, in the Portuguese kingdom the monarchic issue focused in containing the promoted *assuadas* by an alleged entitlement of the nobles, a customary more established by practice[54]. A constant issue that Afonso III manifested

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50. In the first book it is managed how to preserve your dignity, and your landlord, whom in Latin is called *métier* and authority. And even the nature of people who passed the litigation and all the things that are done or should be done after starting the plea, referred by: Pérez Martin, António. "La obra jurídica...": 251, note17).

51. Parents and their sons, brothers in demand, dates that could not be accomplished alongside holidays, the day of the birth of a king, of great battles or days of harvesting bread and wine: Pérez Martin, António. "La obra jurídica...": 256-258).

52. Pérez Martin, António. "La obra jurídica...": 251-269; Ladero Quesada, Miguel-Ángel. "La Corona de Castilla: transformaciones y crisis políticas (1250-1350)", *Poder político y sociedad en Castilla siglos XIII al XV*, José Manuel Nieto Soria, ed. Madrid: Editorial Dykinson, 2014: 139-162.

53. Fernandes, Fátima Regina. *Comentários à legislação medieval portuguesa de Afonso III*. Curitiba: Juruá, 2003: 136-165.

54. *Assuadas*, murder or combat, a private war summoned by the landlords to avenge familiar offenses or "a gathering of armed people to make war, assault a castle or village": Viterbo, Fr. Joaquim de Santa Rosa de. *Elucidário das palavras, termos e frases que em Portugal antigamente se usaram e que hoje regularmente se ignoram*, Mário Fiúza ed. Barcelos: Companhia Editora do Minho, 1993: I, 627. An action that involved the summoning, partially made of nobles, kins, vassals and relatives to promote private vengeances: Caetano, Marcello. *História do Direito Português (1140-1495)*. Lisboa - São Paulo: Verbo,1985: 361 (2nd edition) demonstrating its military and socio-political potential towards the other nobles and the

in January of 1264, was by referring to a previous legislation over the same topic whose sentences under a Royal Council would have to be aggravated in benefit of its fulfillment. To the wealthy men it was maintained the prohibition to promote or participate of a dauntless under a pecuniary sentence of a thousand pounds besides some patrimonial impacts such as the loss of benefits, as well as the loss of the lands that you received from the king, besides the obligation of leaving the kingdom. By the look of it, the culprit would lose, by its partial initiative of disrespect to royal prohibition of private vengeance, the bond with the land and its landlord, the king, hence the accumulation of sanctions that involved the exclusion of the royal protection and the patrimonial benefits to the vassal way. The inferior categories of armed knights and squires, as well as men on foot and by horse, contingent villains that followed these movements was fixed the lowest pecuniary sentence, not only by its minor socioeconomical capacity, but also by its advisable extent and not a promoting extent of the dauntless, as stated by the law. Ultimately, it is fixed that the vassal of a wealthy man that was responsible for helping others in these initiatives had a similar punishment to the one of the rich men, in the monetary part it would pay to the Royal Court the thousand pounds and the land bestowed upon a benefaction should be removed by its landlord, the rich man.[55] At this moment, the Royal Court shared the responsibility of applying the justice with its closest liegemen, the wealthy men, making them the executors of the Royal Justice. It is their job the judicial functions, while, as we have seen, in the first part of the law it limited potential promoting initiatives of the same crimes partially by these elevated stratums. In February of 1272, the same monarch would still male a new version of this same legislation recovering the original content and including punishments to those who promoted undue prejudices and thefts in the monasteries through the promotion of undue retirements[56].

Its successor, the ruler Denis of Portugal (1279-1325) in a recovered legislation on the *Livro das Leis e Posturas* demonstrates quite well this principle establishing, including the mandatory peace of the ruler, that was imposed by the royal presence, just like the previous definitions of the institutes of peace and truce of God. Thus, where were the monarch in a scope of a league of distance was forbidden to raise a cleaver or a sword against others, under the penalty of a corporeal punishment or even death, besides the penalty of being exiled of its land[57]. A decree that would be

monarchy itself appealing, thus its right of *revindicta*, "revenge to a public and recognized offense": Torres, Ruy d'Abreu. "Revindicta", *Dicionário de História de Portugal*, Joel Serrão, ed. Porto: Livraria Figueirinhas, 1992: VI, 338-339.

55. *Livro das Leis e Posturas*...: 362.

56. *Livro das Leis e Posturas*...: 154-155. Another law of the same king, dated from 1261 specifically restrained the knights while on this law of 1272 the reference spread to the potential promotors of the dauntless and thefts to the ecclesiastical institutes, the rich men: Fernandes, Fátima Regina. "Comentários à legislação medieval portuguesa...": 115-118.

57. In the case of a threat with the referred weapons, even without promoting the injury in others, would suffer the penalty of losing a thumb, if other got injured he would lose the hand and ultimately if he killed them, he died. In the three cases, besides the corporeal punishments he would be exiled from its land, as penalty from violating the peace: *Livro das Leis e Posturas*...: 81).

amplified specifying even better the crime of aggression or promoted violence in the special proximity of the king, would be written by the Royal Court in Lisbon, on July 1st of 1318. The roominess of royal immunity would be expanded to two leagues of distance of the place where the king was found adopting the royal insistency on the affirmation of its law towards the resistance of the rich men that ignored the previous royal legislative precepts.

> *(...) E porque as desfiações lhi som começo e Razom per que esto pode uijr E eu ueendo como alguus filhos dalgo nom entendiam como sse este dereyto entendia e filhauam atreujmento e desfiauam sse huus outros e mandauam sse desfiar perdante mjm em nos lugares hu eu era e a duas legoas a Redor de mjm. E porque por estas desfiações se ssegujam mujtas mortes e omezios e outros mujtos maaes.(sic) e querendo eu esquiuar e estranhar esto que sse nom faça daqui adeante auendo consselho com o Jfante Dom affonsso meu filho mayor e herdeiro. E com os Ricos homeens e com os filhos dalgo do meu ssenhorio e auendo consselho com mha corte declarando este dereyto que alguus nom entendiam. Stabelezco e ponho por ley que daqui adeante nenhuu filho dalgo nom desafij nem mande desfiar outro nem per ssy nem per outrem perdante mjm nem nos logares hu eu for nem a duas legoas a Redor de mjm E aquel que contra esto ueer moyra porem assy como sse o matasse hu eu for ou a duas legoas a Redor de mjm e a desfiaçom nom ualha a qual ley logo fiz pobricar (...)*[58].

In the same *Livro das Leis e Posturas* is still retracted another law of the king that once was, Afonso IV (1325- 57), quoted in the previous law as an heir and part of the Royal Council, in an immediate previous context to the rise, under his leadership, against his father, the King Denis of Portugal[59]. A legislation whose prologue manifests the importance of virtue in the justice of the stability of the sociability of the kingdom as a whole and each of the parts of the political organism according to its *status* and honor, a competent assignment of kings. This assignment would depend on the concord and peace through the application of the royal justice, detrimental to mores and common rights. *(...) Porem porque nos nosos Reynos era hua maneyra husada que cada huu querya acoomar a morte e a desonrra de seus parentes segundo*

58. "(...) And because the provocations are the beginning and reason for this to come. And I see as some nobles had a different understanding of this law and mutually challenged themselves, including before me in the places that I were and two leagues around me. And for that matter it professed many deaths and crimes and many other evils and I wanting to avoid all of this so to not happen again, made a conclave with my heir and eldest son, the Infant Afonso and with the rich men and the nobles of my landlord and with my Court declaring this law that some did not understand. I establish and revere by decree that from now on no noble challenges or dare to challenge personally or by others before me or in the places where I will be or around two leagues of distance. And the one that is against this decree, may he die as if he made it so in the perimeter of two leagues around the king and that the provocation has no value, to which I made this decree published immediately": *Livro das Leis e Posturas*...: 190-191.

59. Mattoso, José. "A guerra civil de 1319-1324", *Estudos de história de Portugal. Séculos X – XV*. Lisboa: Estampa, 1982: 161-176; Mocelim, Adriana. *'segundo conta a estória...'* A Crónica Geral de Espanha de 1344 como um retrato modelar da sociedade hispânica tardo medieval. Curitiba: Programa de Pós-Graduação em História da UFPR, 2013: 265-279 <https://1library.org/document/zx0ervvz-universidade-federal-do-parana-adriana-mocelim.html>.

lhys pertiçya em diuydo[60] generating criminals, violence and damages to the realm. Thence the king argued its legitimacy of applying a practiced righteousness in other spaces with success and vantage, giving the way to *(...) dereyto comum pera sse fazer per el justiça*[61]. The ruler, then, responded to the damages caused by this practice of the rich men, when *(...) os omyzyos conteçiam antre os milhores das terras porque porem uijnha mayor desassesego e moor dano e estremadamente se esto contecya antre os filhos dalgo*.[62]

In continuity, it elapses to the text of the law itself, entitled *Ley en que elRey manda que nenhuu ffilho dalgo nem outro nenhuu nom mate nem ffeyra sobre rreuendyta*[63]. The declared alternative would be to seek righteousness in the Royal Court or in the judges of the lands to achieve the fulfillment of the law, restraining, thus, the old more to punish man or woman privately by death or dishonor of a parent, being promoted by father, son or relative, what should be replaced by judicial sentences. Ultimately, the emission of this law would be justified because in the previous one on the same subject, which we commented above, would not be specified its application to the rich men, which excused through its privileges, what this new legislative redaction corrected.

> *E porque na ley que ffezemos ante desta tolhe os homi/zios dantre os que nom son ffilhos dalgo e he contheudo que antre os ffilhos dalgo e antre as outras gentes se guarde o que se sempre guardou antre eles de custume e huso. e huso e custume era que acoomauam os huus aos outros os mays e as desonrras que rreçebyam. Porem teemos por bem e mandamos que esta ley em todo seya guardada antre eles. E qualquer que acoomar ou doutra guysa passar. E nom aguar (sic) esta nosa ley assy come en ela he contheudo mandamos que moyra porem*[64].

In other law of the same Afonso IV, without a precise date, it was referred that in Guimarães, the king has received partially by the nobles, through Martim Eanes Briteiros, a request of revision of the foreseen sentence to the nobles that practiced the revenge as a mitigation. The death of the culprit would be conceived

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60. "(...) However, because in our kingdoms it was a rule that each one wanted to avenge the death and dishonor of its relatives according to the satisfaction": *Livro das Leis e Posturas*...: 284.

61. "(...) Common rights to make righteousness": *Livro das Leis e Posturas*...: 284.

62. "(...) The crimes occurred between the most important of the lands what caused a bigger unrest and damage especially when it occurred between the nobles": *Livro das Leis e Posturas*...: 284. Armindo de Sousa defines the years of 1331, 1334-5, 1341 and 1343 as those where the king lodged upon the repression of the landlord abuses (Sousa, Armindo de. "A monarquia feudal (1096-1480)", *História de Portugal*, José Mattoso ed. Lisboa: Editorial Estampa, 1993: II, 486).

63. Law that the king ordered that no noble son neither other do not kill nor wound on revenge*: Livro das Leis e Posturas*...: 285.

64. "And because in the law that we made prior to this one omits the crimes amongst those who are not noble, and our intention is what is determined to the nobles and to other people that guard what was always valid according to its use and more. And the use and more was that it was avenged the received dishonors and evils. However, we accept well and commit this law in everything that is guarded amongst them. And anyone who avenge or in any event do not obey the law in all its content we will send you to death": *Livro das Leis e Posturas*...: 286. *Acoimar* according to Viterbo, "Make them pay the damage, that the animals made in the other farm, punish, blame and correct them": Viterbo, Fr. Joaquim de Santa Rosa de. Elucidário das palavras, termos e frases...: I, 180.

as overpowering, *Pero em todo caso nom merece morte aquel que vendita faz*[65] in the perspective and argument of the representative of the nobility. The royal voice refers to the realization of the new Royal Council with this subject, reinforcing some justified aspects of the original content of previous legislation:

> *E nos ueendo o que pediam e uisto outrosi essa ley com os da nossa / Corte auudo conselho sobre todo achamos que aquel custume antigo que os filhos dalgo diziam que lhis fora guardado nom podia seer derecto custume, porque nom tam solamente era contra dereito de deus, mays ainda era contra dereyto natural, de si muy danosa aos que na nossa terra viuiam, também a elles meesmos comme aos outros*[66].

As we see, the king accepted to quench the act of the revenge in what it was referred as the sentence of death previously foreseen but preserved the condemnatory perspective of the action of private vendetta before the Natural Law. In a long-written text in Coimbra it is published a revised and more specific content over the conditions of application of the punishments elaborated by doctors in decrees quoted in the eschatocol of the Law, Master Vicente, Master Pero of Sem, Estevan of the Guard amongst others, formed jurists in Common Law[67].

Therefore, should a *don*[68] practiced revenge and provoked it, with this death or mutilation of another noble by vengeance to a previously received humiliation, it was maintained the previous death sentence, because the referring issue, through the *Iura própria*, in detriment to the judicial passage, turned the victim in culprit. However, in the case of a noble, defendant that was summoned by Royal Justice, having, nonetheless, escaped the land to not *seer chamado ou apoderado da Justiça*[69], in case he desired to be present himself to the judges, he would receive a royal reliability letter[70] to therefore, not put in jeopardize its physical integrity towards a possible private vengeance of the offended section.

In other words, the law made exclusive the judicial referee as an answer to the violence between noble, victims or defendants. Besides, it reinforced the vantages of such referee, without, however, depending on an undefined impunity should the accused flee. Thence, it is predicted the law that, sixty days after presenting the complaint, if the accused was not present and after it, it suffered a private revenge of the accuser part, death, or mutilation, should not be applied to the passing sentence

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65. But, in every case, it did not deserve death to the one that was avenged: *Livro das Leis e Posturas*...: 287.

66. "And as we see what they asked and recognizing this law alongside our Court having an admonition about all this we consider that the old more that the nobles said it was kept from them could not be valid, because it was against the law of God, against the natural law, very damaging to those who lived in our land, both themselves and the others": *Livro das Leis e Posturas*...: 287.

67. Homem, Armando Luís de Carvalho. *O Desembargo régio (1320-1433)*. Porto: Instituto Nacional de Investigação Científica - Centro de História da Universidade do Porto, 1990: 213-223.

68. Noble, privileged, rich man, knight, or a young noble: Viterbo, Fr. Joaquim de Santa Rosa de. *Elucidário das palavras, termos e frases*...: I, 372 and II, 269.

69. Be called or taken in the name of Justice: *Livro das Leis e Posturas*...: 288.

70. Gonçalves, Beatris dos Santos. "Em busca do perdão: reflexões sobre a concessão da remissão régia à luz do processo penal português medieval (séc. XV)". *Anos 90*, 38 (2013): 151-179.

of the one that promoted *Ca poys el fugiu ou se asconde, e nom quer fazer dereito razom he que pella dicta lei nom seia defeso*[71]. Therefore, after the determined deadline, the indicted, not presenting himself to the Royal Court, after receiving a complaint from someone else he would be considered reluctant, ceasing to be potentially safeguarded by this law and the previous reliability foreseen by the Royal Justice.

That makes us return to the origin of the referred request by a rich man to the Royal Court, on which defended the application of a gentler sentence to those who practiced its proper entitlement of the nobiliary group, but, as we have seen, the answer of the jurists of the Circle preserved an eventual tolerance to this customary practice, only in the specified cases of default of the indicted to the application of righteousness. In other words, it conceived, exceptionally, the potential application of private vendetta partially by the noble accusers, over its equals, in the condition of indicted that refused to subordinate to the righteous of the Royal Circle, limiting, with it, a potential immunity of the representatives of the nobility that chose, indefinitely to flee. It is pleased, then, partially the rich men that Jackhammers represented without losing the principle of primacy and safety of the Royal Justice as advocated by the Common Law and the previous law[72].

The previous legislation bent over also, the specificity of the application of these safeguards in the case of an outsourced righteousness, when a revenge was promoted by a rich man in the name of someone else who was not noble. It was provided in the case of murder the promotor of the revenge would be subjected to the death sentence and in the case of private vengeance to involve the mutilation of the righteous one, the culprit should be perpetually exiled as in the previous case that involved two nobles[73]. It is deduced precepts over an array of possibilities, like nobles that slayed, by way of avengement, honorable men, but not an aristocrat, if the victim or at least its representative should appeal to Royal Justice, it was applied the primary defined rules concerning private vengeance amongst aristocrats, including the fleers[74].

The conception of crime and sentence would be, thus, in this statute, still bonded to the "status" of the originator of the crime reflecting a rectitude and a monarchic power of a personalist nature[75], but that also sought to stablish to the

71. "Because he run away or has hidden and does not want to subordinate to the law, it is not defended": *Livro das Leis e Posturas*...: 288.

72. Yet the application of justice to those who promoted smaller injuries and exempted of presenting themselves to Justice consisted in its arrest until they were doubly chastened the committed crimes*: Livro das Leis e Posturas*...: 288-289.

73. If the noble by way of other make smaller injuries than the previous ones he will be sentenced to pay twice the victim, the evil caused upon him, besides losing the right to quarrel against the originator of the injury that led him to private vengeance: *Livro das Leis e Posturas*...: 289.

74. An honorable man against a noble or an honorable man against an aristocrat make it by the way of smaller injuries amongst nobles, already defined at the law. Already the regulation of perpetration of the revenge, in that case, of smaller injury, partially by an honorable man against a villein, that honorable man should pay twice the perpetuated violence, besides losing the right to quarrel over the original insult: *Livro das Leis e Posturas*...: 289- 290.

75. Genicot, Léopold. *La loi*...: 45.

most privileged, patricians, the limits of application of an unauthorized more by the juridical principles written in the Court and the actual discussions in the Common Law. Besides, it is a set of precepts dedicated to regulating the nuances of the crimes of avengement that reached other standards of status of all the socio-political civic community understood as a kingdom. Therefore, it hierarchically spread the complexion of prohibiting a private vendetta to the social livelong, still preserving the privileges that guaranteed smaller punishments when the vendetta involved distinct socio-political categories, but also a gradation of the punishments in a direct relation with the gravity of the committed crimes, identified as of major or minor injury.

In the same *Livro das Leis e Posturas* it is retracted another set of laws concerning the same subject dating from 1336, *publica forma* of the contents of previous laws about private vengeance promoted by nobles and rich dames, against men or women. Therefore, it was included, in this context, the daughters of someone in the fief of potential impersonator or a victim of the revenge, "(...) nenhuu fidalgo nem Dona nom possa acoomhar no noso senhoryo (...) homem como Molher[76], a measure that reflects the demand for a regulation of promoted crimes by and against women, which can be noticed.

On 17 June 1336, an affix to the previous legislations granted them an extent of retroactive validity to this date, once again justifying the prohibition that nobles "nem outras gentes de nosas terras nom acoomhasem per sij nem por outrem em nenhua maneyra Mais demandasse E ouuesse o seu dereyto per nos e por nosas Justiças"[77]. It is sanctioned the attendance of a complaint, including through the solicitors, of some revenge, previously realized to the elaborated statutes by this king over the subject, being referred alongside the Royal Court, in a deadline that expanded until Christmas of that year of 1336[78]. It is observed the meticulosity in the constant instrumentalization of the essential content of the previous statutes manifesting a deliberate purpose of increasing its occupation in detriment to wars and private vengeances.

Until eventually, a legislation of 17 October 1336 written in Coimbra retracted a definitive version of the previous tenors [79] as an ending to a debate. In fact, the emission of this decree emerged in the aftermath of the struggle of the recent risen king, towards its stepbrother, Afonso Sanches, that unraveled between 1326-1329

76. "(...) no noble man, can avenge nobody on our landlord (…) both man and Woman": *Livro das Leis e Posturas*...: 412-413. In the first law it is referred that in Viseu, on 2 March 1330, before the magistrate of the Beira would be presented to the king, a dating law from a month before, accorded in Santarém, on 21 February 1330. To which ultimately it is declared to be accorded in Coimbra on 17 March 1336, a certain misunderstanding of the transcription that must have been misused from the age of Caesar of 1368, year of 1330: *Livro das Leis e Posturas*...: 412-413.

77. Neither other person of our lands should not personally or through somebody else avenge in any event. But demanded and reached its right by us and our righteousness: *Livro das Leis e Posturas*...: 413.

78. *Livro das Leis e Posturas*...: 413-414.

79. Since the request of Martim Eanes of Briteiros, to which, according to this law, would have been brought to the Royal Court, in Guimarães, on 9 July 1270, dated from 1308 years ago, treating of a misunderstanding of the transcription: *Livro das Leis e Posturas*...: 414-417.

promoting a sociopolitical instability inside and outside of the kingdom, especially with the involvement of Castile. And when D. Afonso IV managed the wedding of its heir with the daughter of Don Juan Manuel of Castile, once again hurtled a war against Alfonso XI, that unfolded in 1336 and consumed the three following years of the finances and Royal forces, as it was intensifying the imminent Muslim pressure over Gibraltar. Amidst all this, we encounter the Portuguese king dedicated to stabilizing its internal context of the realm through the appeal to actualized juridical appliances and consonants to the Natural Law, dedicating in the next four years to deal with Christian enemies inside and outside of the realm and the Muslim forces on the Río Salado[80].

But, after all, which general legal principle could sustain these regal initiatives of bearing the resolution of the fief of private vengeance to the fief of Royal Justice? It is about a contained issue, in other terms, already in the Justinian collection and essentially connected to the answer to an outrage by others that implied in the loss of something or a moral offense. And, in what implied that issue? In a conception that what was lost or stolen concerned only to the exclusive and private property of the involved nobles. However, if it were a patrimonial difference, of lands, for example, being the natural landlord of the land, and, therefore, of all the natives and either the dwellers of the kingdom, a defended and educed juridical principle by the royal jurists that enlarged, thus, the theoretical scope of the quarrel of a private scheme to a monarchic scheme. Thus, towards the actual juridical pluralism, emerged a more general rule that the victim that violated some law should claim it by a legal action to Justice and not to *revindicta*, or private vengeance. Besides, from the previous experiences, it was educed the consequences of such private wars like violence, insecurity, injustices, and excesses in general, which, could, eventually become a straightforward confrontation of the regal power. Subjoin this to the confrontation, that in comparison of the results between the application of the private revenge and the practical righteousness, it was evident, by the current logic, the many vantages of the last, what increased its universal validity. The violation of the peace was a practice largely recognized as nefarious and hostile to the ideal balance by the Natural Law and the Scholasticism Aristotelian-Thomist. Thus, the practical legislative actions since, at least Afonso III in Portugal, enlarged in this set of universal fundaments guaranteed by the scholars and the University earned a wider theoretical recognition even that in practice it was objected by the constant defense of the private nobiliary legislation. The best righteousness was, thus, of the king, just like the good war, because it implied in a wider perception of the quarrels that involved these events.

80. D. Pedro, Conde de Barcelos. *Crónica Geral de Espanha de 1344*, ed. Luís Filipe Lindley Cintra. Lisboa: Academia Portuguesa da História, 1990: 261-2; Mocelim, Adriana. *'segundo conta a estória'...* A Crón*ica Geral de Espanha de 1344*...: 281-283; Fernandes, Fátima Regina. "O Poder do Relato na Idade Média Portuguesa: a Batalha do Salado de 1340", *Por São Jorge! Por São Tiago! Batalhas e narrativas ibéricas medievais*, Marcella Lopes Guimarães, ed. Curitiba: Editora da Universidade Federal do Paraná, 2013: 87-120.

4. Final Considerations

The monarchies promoted an integration of the feudalistic law, without nullifying, putting itself as the instance that regulated the cases of disrespect to this statute itself. In normal conditions there would be no misunderstanding, only when the natural landlord of the king became irrelevant by the vassal nobility until the private nobility. Or in the cases on which the vassal fiefs were an object of inadequate violation or questioning to the private customary legislation.

The conception that this royal function and an equivalent status were part of a natural order, of the stability of the political organism disposed of a constituent form in specificities that should function through a dynamic of mutuality and complementarity that legitimated the *iurisdictio* of the rulers and its right to issue some judgements. The justice and the law that would be summoned from the civic community would be obligated to be fulfilled according to the dictates of the Aristotelian-Thomist Justice.

It is even highlighted, the effort to systematize the juridical-legislative in an elaborated Common Law and a constant instrumentalization partially by the *staff* of Romans or Canonists jurists, according to the case. Involved in the elaboration of rules focused on acceptable principles, what constituted a system, whose identity in each political space of application, would be forwarded these juridical truths to the formulation of the proper rights to the realms. The keyword would be transformation and actualization of the norms and juridical-legislative principles in an incessant interaction with the social scope of its application, that were nothing else than to preserve a certain empathy between the public and its norm, just like ensuring a wider recognition of its validity. A dialectic dynamic, more than just dogmatic, built by doctors in institutions, formed by the Medieval Universities, manifesting the potentiality of thought and scientifical action, in medieval terms, on the scope of ruling, generally. The contributions would be, therefore, the result of systematized reflections, even that were passible of accepting some nuances of judicial singularity of its respective political organisms, understood as constituent, hierarchized and plural in its functions, statutes, and *status*, ideally mutual and complementary. Far from idealizing these medieval verities we must understand them in its specificities and its organizing processes, such as human experiences in the past, an object of critical analysis, partially by the researchers of history, on this, just like any other historical diachrony.