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Ius commune and juridical conflicts in the early-modern almotaçaria of Lisbon on construction laws and disputes between neighbours

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Abstract
This article considers the almotaçaria of the properties, a Lisbon municipal institution responsible for the resolution of conflicts between neighbours resulting from activity involving construction. It explains the legal influences left following the reception of the *ius commune* in this institution, both at the level of the customary law of municipalities, and at the level of the general law of the kingdom. It then analyses juridical conflicts, both judicial and regulatory, created through the overlapping elements of the *ius commune* in the almotaçaria of the properties of Lisbon, which took place during the early-modern period.

Keywords
Almotaçaria of the properties, *ius commune*, juridical conflicts, early-modern period, Lisbon-Portugal

1. Concerning the legal nature of the almotaçaria

For some mediaeval law historians it is no coincidence that the first written signs of local *ius consuetudinarium* or customary law for municipalities and the development of *ius proprium regni* or the law of the kingdom, were coeval with the advent of *ius commune* which, starting from Bologna, spread throughout Europe[1]. It was, moreover,

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[1] On the reception of the *ius commune* in Portugal, see above all the major summaries of the history of law: Cruz, G. B., "O direito subsidiário na história do direito português", *Revista Portuguesa de História* 14 (1975), pp. 177-213; Caetano, M., *História do Direito Português: Fontes – Direito Público (1140-1495)*, Lisboa, Editorial Verbo, 1985, pp. 333-343; Hespanha, A. M., *História das Instituições, Épocas medieval e moderna*, Coimbra, Almedina, 1982, pp. 53-55, 439-503; Silva, N. E. G., *História do Direito Português, Fontes de Direito*, Lisboa, Fundação Calouste Gulbenkian, 2011, pp. 211-270; Costa, M. J. A., *História do Direito Português*, Coimbra, Almedina, 2009, pp. 229-299; Albuquerque, R. e Albuquerque, M., *História do Direito Português, 1140-1415, I Volume*, Sintra, Pedro Ferreira, 2005, pp. 261-388; Hespanha, A. M., *Cultura jurídica europeia, síntese de um milénio*,

the imposition of a new legal order which, among other factors, led to the compilation of municipal customs, spontaneously formed and developed by the communities themselves throughout time, with the aim of preserving their own legal tradition[2].

From that initial compilation movement which took place in Portugal in the thirteenth and fourteenth centuries, of the customs – also known as "usos" or "foros" – only those from twenty-five villages have come down to the present day[3]. In five documents one can find a record of part of the legal tradition used in the resolution of conflicts between neighbours resulting from activity involving construction. Indeed, the customs of Évora communicated to Terrena (1280)[4], the customs of Santarém communicated to Borba (c. 1331-1347)[5], the customs of Beja (c. 1254-1335)[6], the customs of Torres Novas (c. 1275-1325)[7], and the customs of Porto known through a royal inquiry ordered by King Afonso IV (r. 1325-1357) in 1339[8], enable us to extract the information that whoever arbitrated and judged those conflicts was a municipal official called "almotacé".

It is true that it is not possible to prove the use of such a medieval custom for the rest of Portugal, due to the lack of written documents, since in many cases local customary law was not even registered since its transmission was oral[9]. However, if since the middle of the thirteenth century the almotacé seems to have been present in most Portuguese municipalities[10], it seems possible to conjecture that, at least in the more populated cities and towns in the kingdom, this officer was tasked with resolving conflicts between neighbours resulting from activity involving construction. There is no doubt that this custom was based on ancient practices, since it was inherited from the Islamic world, from where, furthermore, the name and duties of this officer originated[11].

The alluded custom also existed in Lisbon, the city which, because of King Afonso III (r. 1248-1279), became the seat of the Royal Court and as a result came to be

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Coimbra: Almedina, 2012, pp. 114-148; Marques, M. R., *História do Direito Português Medieval e Moderno*, Coimbra, Almedina, 2002, pp. 21-67.

[2] Cintra, L. F. L., *A linguagem dos Foros de Castelo Rodrigo*, Lisboa, Centro de Estudos Filológicos, 1959, p. LXXVII; Domingues, J. and Pinto, P., "Os foros extensos na Idade Média em Portugal", *Revista de Estudios Histórico-Jurídicos* 37 (2015), p. 162.

[3] This calculation includes the villages which received "foros" from other locations. See the ordered list in Domingues and Pinto, "Os foros extensos na Idade Média em Portugal", pp. 155-160.

[4] *Portugaliae Monumenta Historica, a saeculo octavo post christum ad quintumdecimum, Leges et Consuetudines*, 2 vols., Lisboa, Olisipone Typis Academicis, 1856-1868, II: p. 85.

[5] *Ibid.*, II: pp. 29 e 34; Brandão, Z., *Monumentos e lendas de Santarém*, Lisboa, David Corazzi, 1883, pp. 390, 400-401.

[6] *Portugaliae Monumenta Historica*, II: pp. 69 e 70.

[7] *Ibid.*, II: p. 92.

[8] *Corpvs Codicvm Latinorvm et Portugalensivm eorvm qui in Archivo Mvnicipali Portvcalensi asservantvr Antiqvissimorvm*, 6 vols., Porto, Câmara Municipal, 1891-1974, I: p. 41 or II: p. 205.

[9] Caetano, *História do Direito*, pp. 231-235, 352-354; Silva, *História do Direito*, pp. 169-172, 272-275; Costa, *História do Direito*, pp. 208-209, 290-292; Albuquerque e Albuquerque, *História do Direito*, pp. 234-248; Hespanha, *Cultura jurídica*, pp. 181-182.

[10] It seems that the generalization of use of this official took place in the first half of the thirteenth century, as evidenced by a royal law, issued in 1253, specifically for settlements in the north of Portugal, despite its application throughout the territory. *Portugaliae Monumenta Historica*, I: pp. 191-196; *Lei de Almotaçaria 26 de Dezembro de 1253*, Lisboa, Banco Pinto & Sotto Mayor, 1988.

[11] Pinto, S. M. G., "Regulation of private building activity in medieval Lisbon", *Building Regulations and Urban Form, 1200-1900* (Slater, T. and Pinto, S. M. G., eds.), Oxon, Routledge, 2018, pp. 40-43.

considered as the capital of the kingdom. This is confirmed by the volume containing the oldest known "posturas" (municipal by-laws) of the city[12] – collected in the fourteenth century but containing regulations from the end of the thirteenth century –, as well as from the "Cortes" (assembly of representatives summoned by the king) of Santarém from 1331[13]. The resolution of conflicts between neighbours resulting from activity involving construction in Lisbon took place, then, within the "almotaçaria" institution, which also dealt with issues relating to the market and urban cleaning.

Being both an administrative and judicial institution, the almotaçaria was a special type of court/tribunal. Its jurisdiction involved local power exclusively, that is, the municipal councils, thus it was stipulated in various "forais" (borough charters)[14], such as was the case with that of Lisbon of 1179, ordered by the first king of Portugal, Afonso Henriques (r. 1139-1185). The importance of this privilege was so great that almost all subsequent kings confirmed it, as was the case for Lisbon with the following king, Sancho I (r. 1185-1211)[15].

2. Influences of the *ius commune* in the almotaçaria of Lisbon

The municipal autonomy over the institution of the almotaçaria extended to all the judicial stages in its proceedings, including the appeals procedure. In fact, it was King Afonso III who introduced the "apelação" (appeal, from the Latin *appellatio*) system into the kingdom, as a reflection of the reception of *ius commune*. The appeal had, above all, the aim of providing a means of defence for the unsuccessful party that did not agree with the court decision. At the same time, this procedure also worked as a way of consolidating the king's jurisdictional power, and consequently limiting the powers of the nobles, since it was for him or whoever was delegated such a function – initially the "sobrejuizes" (superjudges) – to consider the appeals[16].

However, to keep the royal privilege given to municipalities intact regarding the almotaçaria, the appeals of the judgments of the almotacés did not rise to the Royal Court but rather to the "alvazis" or municipal judges, who issued the final judgment. The customs of Évora[17], the customs of Santarém communicated to Oriola (1294) [18], the

[12] *Posturas do Concelho de Lisboa (século XIV)*, Lisboa, Sociedade de Língua Portuguesa, 1974, p. 45, § 3.

[13] *Cortes Portuguesas, Reinado de D. Afonso IV (1325-1357)*, Lisboa, INIC, 1982, p. 69.

[14] The "foral" of Tomar of 1174 and its derivatives – Castelo do Zêzere of 1174, Pombal of 1176, Ourém of 1180, Torres Novas of 1190 (Latin version) – contain the expression: "almotace sit de concilio" [almotacé is of the council]. The "forais" of Santarém, of Lisbon and of Coimbra of 1179 and their derivatives – Povos of 1195, Leiria of 1195, Alcobaça of 1210, Montemor-o-Velho of 1212, Alenquer of 1212, Vila Franca de Xira of 1212, Torres Vedras of 1250, Beja of 1254, Odemira of 1255, Monforte of 1257, Estremoz of 1258, Silves of 1266, Aguiar of 1269, Vila Viçosa of 1270, Evoramonte of 1271, Castro Marim of 1277 – contain the expression: "e a almotaçaria seia do conçelho da uilla" [and the almotaçaria be of the town council]. Respectively: *Portugaliae Monumenta Historica*, I: pp. 399-403, 404-405, 420-421, 477-481; I: pp. 405-418, 491-723. See also Reis, A. M., *Origens dos municípios portugueses*, Lisboa, Livros Horizonte, 2002, pp. 143-152, 172-174.

[15] Royal letters of August 1204 and 7 December 1210, published by Caetano, M., *A administração municipal de Lisboa durante a 1ª dinastia (1179-1383)*, Lisboa, Academia Portuguesa da História, 1981, pp. 124-126, 127-129.

[16] Caetano, *História do Direito*, pp. 400-410; Azevedo, L. C. e Costa, M. L., *Estudos de história do processo, Recursos*, São Paulo, FIEO – Joen Editora, 1996, pp. 71-87.

[17] *Portugaliae Monumenta Historica*, II: p. 85.

customs of Torres Novas[19], the municipal by-laws and the various royal confirmations for Lisbon[20], are in this respect unmistakable. In fact, the document from Torres Novas even states "per ElRey assy esta mandado" [by the King it is so ordered]. In addition, also by royal initiative of King Afonso IV, and in order to prevent the many obstacles that were made during the appeal phase, the Lisbon "alvazis" could only receive appeals from cases involving more than five pounds[21].

With the progressive creation of new royal magistrates, responsible for the supervision of the administration and justice of the municipalities, various royal officers tried to meddle in the proceedings of the almotaçarias, especially in their appeals, leading the peoples to complain about this abuse. The matter was systematically brought to the "Cortes", being discussed in those of Santarém of 1331[22], of Elvas of 1361[23], of Lisbon of 1371[24], of Coimbra of 1394-1395[25], of Leiria/Santarém of 1433[26], of Coimbra of 1439[27], of Lisbon of 1459, of Guarda of 1465, of Coimbra/Évora of 1472-1473[28], and of Lisbon of 1498[29]. However, the kings always corroborated the ancient privilege of municipalities, which was followed by the express prohibition of royal officials – especially "sobrejuízes" (superjudges), "ouvidores" (literally hearers, crown judges/magistrates who oversaw justice in the manorial lands), "corregedores" (royal magistrates who corrected acts in local justice and administration), and "desembargadores" (high court judges) – from meddling in these matters.

The new legal order of the *ius commune* began to gradually be mixed in within the customary tradition of the Portuguese almotaçaria, first at the procedural level, but then certainly afterwards at the level of legal rules. Naturally, this influence must have been felt with greater intensity in the Lisbon institution as it was the closest to the Royal Court[30]. As such, the presence of officers trained or qualified in civil law in the structure of that municipal council – with greater incidence from the 1370s onwards[31] – must also have contributed, but as well the volumes of the *ius commune*, which in Portugal included doctrinal and legislative works from the neighbouring kingdom of Castile[32].

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[18] *Ibid.*, II, p. 40 (see also Brandão, *Monumentos e lendas*, pp. 421).

[19] *Ibid.*, II, p. 92.

[20] *Posturas do Concelho de Lisboa*, p. 47: § 15; *Cortes Portuguesas, Reinado de D. Afonso IV (1325-1357)*, p. 69; AML-AH, Chancelaria da Cidade – *Livro I de Sentenças*, doc. 7 (Royal charter of 23 February 1355, copied in 9 May 1357).

[21] Royal charter of 26 October 1330. *Livro dos Pregos*, Lisboa, Câmara Municipal de Lisboa, 2016, pp. 95-97. This precept had already been instituted by King Dinis (r. 1279-1325) for the whole kingdom, on 4 August 1322. *Livro das Leis e Posturas*, Lisboa, Faculdade de Direito da Universidade de Lisboa, 1971, p. 215.

[22] *Cortes Portuguesas, Reinado de D. Afonso IV (1325-1357)*, p. 38.

[23] *Cortes Portuguesas, Reinado de D. Pedro I (1357-1367)*, Lisboa, INIC, 1986, pp. 33-34.

[24] *Cortes Portuguesas, Reinado de D. Fernando I (1367-1383), Volume I (1367-1380)*, Lisboa, INIC, 1990, p. 29.

[25] *Documentos do Arquivo Histórico da Câmara Municipal de Lisboa – Livros de Reis*, 8 vols. Lisboa, Câmara Municipal, 1957-1964, I: p. 194.

[26] Sousa, A., *As cortes medievais portuguesas (1385-1490)*, 2 vols. Porto, INIC, 1990, II: p. 303.

[27] *Cortes Portuguesas, Reinado de D. Afonso V (1439)*, Lisboa, CEH-UNL, 2016, p. 109.

[28] Sousa, *As cortes medievais*, II: pp. 362, 374, 409.

[29] *Cortes Portuguesas, Reinado de D. Manuel I (Cortes de 1498)*, Lisboa, CEH-UNL, 2002, p. 196.

[30] Costa, *História do Direito*, p. 251.

[31] Farelo, M., *A oligarquia camarária de Lisboa (1325-1433)*, PhD Thesis, Universidade de Lisboa, 2008, pp. 197-206.

[32] Domingues, J., "Recepção do *Ius Commune* medieval em Portugal até às *Ordenações*

It is not, therefore, inappropriate to think that the gradual imposition of the *ius commune* on the legal structure of the Lisbon almotaçaria may have been the engine driving the written registration of the rules of this institution, as seems to have happened with the written record of the municipal customs. In this sense, and in addition to the aforementioned volume containing the oldest municipal by-laws for Lisbon, the heading of which expressly stating that "estas son as pusturas que se husarom no feyto daalmotacaria de Lixbõa e ussam oie dia" [these are the by-laws which are used in the jurisdiction of the almotaçaria of Lisbon and are currently used][33], there was another codex on this matter, nowadays called the *Livro das Posturas Antigas* (Book of Ancient Municipal By-Laws)[34]. This factitious codex includes, among many by-laws related to the market and urban cleaning areas, the copy of the *Forall da muy nobre e sempre leall çidade de Lixboa que mandou fazer. Joham estevez correa escudeiro almotaçee moor da çidade era de mjll iiijº Riiijº anos* (Legal Rules of the Very Noble and Always Loyal City of Lisbon, Made by João Esteves Correia, Squire and Senior Almotacé of the City, year of 1444)[35], which contains a set of specific rules for the resolution of conflicts between neighbours resulting from activity involving construction[36].

Compiled at a time when the *ius commune* was already seen as subsidiary to the law of the kingdom, the rules of this regulation show, however, their customary nature, which included other legal influences. From the outset, Islamic law, clearly perceptible in the rules that promoted the protection of the privacy and intimacy of the house or yard – a fundamental principle of Islamic building culture[37] –, prohibiting actions which would lead to the visual invasion of neighbouring properties[38]. However, Frankish law is also present, visible through the procedural figure of possession of an "ano e dia" (year and day)[39], which is referred to when it applied[40], or did not apply[41]. Nevertheless,

Afonsinas", *Initium, Revista Catalana d'História del Dret* 17 (2012), pp. 123-126; Domingues, J., "O elemento castelhano-leonês na formação do Direito Medieval português", *Cuadernos de Historia del Derecho* 21 (2014), pp. 218-224. See also Pinto, S. M. G., "A influência do *Fuero Real* na almotaçaria de Lisboa", *Cuadernos de Historia del Derecho* 15 (2018), pp. 27-44; Pinto, S. M. G., "*Ius commune* e *ius consuetudinarium* no direito de edificar junto ao muro urbano na Lisboa medieval", *Glossae. European Journal of Legal History* 16 (2019), pp. 271-300.

[33] *Posturas do Concelho de Lisboa*, p. 45, § 1.

[34] *Livro das Posturas Antigas*, Lisboa, Câmara Municipal, 1974.

[35] *Livro das Posturas Antigas*, pp. 98-113. Pinto, S. M. G., "Em torno do *Foral* medieval da almotaçaria de Lisboa", *Fragmenta Historica – História, Paleografia e Diplomática* 4 (2016), pp. 47-110.

[36] Pinto, "Regulation of private building activity", pp. 39-57.

[37] Brunschvig, R. "*Urbanisme médiéval et droit musulman*", *Revue des Études Islamiques* 15 (1947), pp. 127-155; Hakim, B. S., *Arabic-Islamic cities, Building and planning principles*, Oxon, Routledge, 2010, pp. 15-54; Akbar, J., *Crisis in the built environment, the case of the Muslim city*, Singapore, A Minar Book, 1988, pp. 93-106.

[38] *Livro das Posturas Antigas*, pp. 105, 108, 111, 113.

[39] Cruz, G. B., "A posse de ano e dia no direito hispânico medieval", *Boletim da Faculdade de Direito da Universidade de Coimbra*, 25 (1949), pp. 1-28. Introduced in peninsular law in the second half of the eleventh century, the possession of a year and day functioned as follows. If someone violated a certain rule, such as opening a window onto the adjoining building or onto a neighbour's yard, peacefully and in plain sight, especially of the injured person, for a year and a day, they would gain rights over that window, a circumstance which was not possible until the period ended. After that time and the lack of a complaint was proven, the injured neighbour could no longer claim against the neighbour who acquired possession of the window through this process, as his/her ability to act had expired. If the injured neighbour lost the ability to complain, the offending neighbour would simultaneously relieve himself of the liability to repair the transgression, that is, to close the window. The window was then legally

a single rule – the penultimate one – clearly declares the inclusion of a precept which stemmed from *ius commune*[42].

The rule stated that if someone had opened a window onto the neighbour's field or yard and if that window had been legally consolidated (by possession of a year and day), then the injured neighbour could no longer have it closed. In addition, when building in that field or yard, the new wall had to be at a distance from that window leaving "aazinhagua tamanha ou espaço em que aJa çinquo pees segumdo direito comuum" [a such narrow private street or a five feet space according to the *ius commune*]. If the presence of the conjunction "or" made it possible to distinguish concretely which part of the rule derived from external elements – that is, the second phrase – this condition is further corroborated when it is verified that the referred measure, the five feet, is the single absolute size present in the regulation – emerging as alternative to the relational view of "aazinhagua tamanha" [a such narrow private street] – and that the actual prescribed dimensional unit, the "pé" (foot), was not commonly used in Portuguese building culture, unlike "braça" (fathom), "vara" (yard), "palmo" (palm, or span of a hand), or even "côvado" (cubit)[43].

Much more difficult to ascertain is the Roman source from which the Lisbon compiler took this precept. It is true that the five-foot measure associated with the interstices between neighbouring buildings refers almost immediately to the knowledge that we now have of the total dimension of the *ambitus* (literally, going about), defined in one of the rules of the *Lex Duodecim Tabularum*, the Law of the Twelve Tables of pre-classical Roman law[44]. However, it is important to clarify that what is known about this *Lex* are fragments and indirect quotations, given that its content was lost at the end of the fourth century BC. Furthermore, the literary or etymological sources of classical culture when dealing with the *ambitus* do not refer to its total dimension – the five feet – , but only half, reporting that each neighbour had only to leave two and a half feet free, between the limit of the property and the wall of the building[45]. The total dimension

consolidated.

[40] *Livro das Posturas Antigas*, pp. 105, 113.

[41] *Livro das Posturas Antigas*, p. 107.

[42] *Livro das Posturas Antigas*, p. 113.

[43] Barros, H. G., *História da Administração Pública em Portugal nos séculos XII a XV*, 4 vols. Lisboa, Typographia da Academia Real das Sciencias, 1885-1922, IV: pp. 302-311; Barroca, M. J., "Medidas-Padrão medievais portuguesas", *Revista da Faculdade de Letras. História* 9-2.ªs. (1992), pp. 53-85; Viana, M., "Algumas medidas lineares medievais portuguesas, o astil e as varas", *Arquipélago. História* 3-2.ªs. (1999), pp. 487-493.

[44] According to the current organization of the fragments, this law appears in the seventh table on land rights. "XII Tabulae sive Lex XII Tabularum / The Twelve Tables or the Law of the Twelve Tables", *Remains of old Latin, newly edited and translated*, London/Harvard, William Heinemann/Harvard University Press, 1938, pp. 466-473. See also Patault, A.-M., "Réflexions sur les limitations au droit de propriété à Rome jusqu'à la fin de la République", *Revue Historique de Droit Français et Étranger* 55 (1977), pp. 242-250.

[45] For instance: Sextus Pompeius Festus (Festo) in *De verborum significatu*: "*Ambitus proprie dicitur circuitus aedificiorum patens in latitudinem pedes duos et semissem, in longitudinem idem quod aedificium. Ambitus proprie dicitur inter vicinorum aedificia locus duorum pedum et semipedis ad circumeundi facultatem relictus. Ex quo etiam honoris ambitus dici coeptus est a circumeundo supplicandoque*"; Marcus Terentius Varro (Varrão) in *De lingua latina*: "*XII tabularum interpretes ambitum parietis circuitum esse describunt*" (both cited in Patault, "Réflexions sur les limitations", p. 243); Hispalensis, I., *Opera Omnia, Tomus IV. Etymologiarvm, Libri X. Posteriores*, Roma, Apud Antonium Fulgonium, 1801, p. 244 (15.16.12): "*Ambitus inter vicinorum aedificia locus, duorum pedum, et semipedis ad circumeundi facultatem relictos, eta b ambulando dictus*".

appears only described in the work of Marcus Tullius Cicero, *De Legibus* (On the Laws), when explaining that, according to the Twelve Tables, the free space of five feet could not be acquired by *usucapio* (acquisitive prescription)[46]. In the volumes of the compilation of Justinian, the intersection between buildings is addressed in a law contained in *Digest* (10.1.13), taken from a comment by Gaius, which also refers to the Twelve Tables, although it records other dimensions that varied according to the future use of the land. Thus, according to Gaius, the distance to be left from the boundary of the land was: one foot for the construction of a masonry wall; two feet for building a house; the measure equal to the depth of the dig or ditch to be opened; a fathom in the construction of wells; nine feet for planting olive and fig trees; and five feet for planting other tree species[47]. From the available data, then, it is possible to question: would the Lisbon compiler have opted for the intermediate dimension of those referred to in the *Digest* – either directly or through the gloss from Accursius[48] – or the precise indication given by Cicero – an author who had been read, copied and translated in Portugal since the end of the fourteenth century[49] – or, furthermore, another Roman source not considered taken as a reference? Logically, the lack of better clues does not enable the resolution of this issue for now.

In any event, the express reference to the *ius commune* in only one rule and the absence of specific Roman concepts – such as servitude (or easement), from the Latin *servitus*, through which *iura in re aliena* (rights in another's properties) were established –, for the specific terminology of this institute, of its modes of constitution and extinction, or of equivalent words which suggest dominant properties and/or servient properties, in the regulation of the almotaçaria of Lisbon, leads to the consideration that no more rules or precepts had derived from the *ius commune*.

What is certain is that the rules of the *ius commune* began, little by little, to meddle in the Lisbon almotaçaria[50], with a particularly revealing record of a sentence handed down in 1499[51]. The dispute was complex due to the many damages involved, but the parties used the rules of the said almotaçaria regulation to justify their position. The plaintiff evoked the technical rules, while the defendant, in an attempt to annul the action, invoked the procedural rules, as well as the "dereyto comuum" [*ius commune*]. The almotacés, considering all the arguments and carrying out an inspection of the problem, ended up judging in favour of the former. Nevertheless, the fact that private individuals themselves invoked legal rules, whether under customary or *ius commune*, is important.

[46] Cícero, *De Legibus* (1.21.55): "[…] *usus capionem XII Tabulae intra quinque pedes esse noluerunt* […]". "XII Tabulae sive Lex XII Tabularum", pp. 466, 468.

[47] *Corpus Iuris Civilis*, 3 vols. Berolini, Apud Weidmannos, 1889-1895, I: pp. 137-138.

[48] *Corpus Iuris Civilis Iustinianei, cum commentariis Accursii…, Tomus hic primus Digestum Vetus continet*, Lyon, Franc. Nauarr. Regis, 1627, p. 1085. This law was not subject to commentary by Bartolus.

[49] Pereira, M. H. R., "Nas origens do Humanismo ocidental: os tratados filosóficos ciceronianos", *Revista da Faculdade de Letras da Universidade do Porto – Línguas e Literaturas* 2-2ªs. (1985), pp. 25-28; Matos, M. C., "A presença de Cícero na obra de pensadores portugueses nos séculos XV e XVI (1436-1543)", *Hvmanitas* 46 (1994), p. 268.

[50] See also Pinto, "*Ius commune* e *ius consuetudinarium* no direito de edificar", pp. 281-284.

[51] Document published by Pinto, S. M. G., "Em torno do *Foral* medieval", pp. 79-82.

3. Influences of the *ius commune* in construction laws of the kingdom

A similar conceptual and terminological absence related to building servitudes, as well as the thematic omission related to the area of activity involving construction, can also be seen in the coeval compilation of the law of the kingdom, the *Ordenações Afonsinas* (Alphonsine Ordinances), concluded in 1446, despite the *ius commune* being widely referred to as one of its external sources[52] and the latter containing various rules and principles for the regulation of activity involving construction[53]. There were two rules which formed an exception, which, through having different purposes, appeared in titles and in books different from the Alphonsine compilation.

The first rule was to be found in Title XXIV of Book 2, about royal rights, forming part of a set of rules compiled by order of King Duarte (r. 1433-1438). Paragraph 35 there established a prohibition on buying houses if the objective was to demolish them and sell their building materials[54]. For offenders, the penalty to be applied was the loss of the value of the sale, imposed on both the seller and the buyer in equal amounts; a value which, when reverting to the tax authorities, thus became a royal right[55]. Leaving aside the problems related to the sources of this title from the Alphonsine Ordinances[56], the truth is that this paragraph is very close to a law from *Las Siete Partidas* (The Seven Headings) (V.5.16), compiled in the reign of King Alfonso X of Castile (r. 1252-1284)[57], suggesting, perhaps, that it was this Castilian legal document – which, in turn, was also rooted in *ius commune*[58] – which gave rise to the possible Roman contribution to the Portuguese rule. It should be noted that, in fact, the *Partidas* were part of the Portuguese legal system, either as a subsidiary right, or as a direct source in the constitution from various titles of the Alphonsine Ordinances, "metamorphosing" into Portuguese law[59].

The second rule in Title LXXX of Book 3, regarding appeals of extrajudicial proceedings, had the aim of correcting divergences between sources from canon law and sources from Roman law. Paragraph 5 regulated, indeed, the only case "achado em Direito" [found in Law] of proceedings started and not finished, determining not the appeal – which did not apply in this specific case –, but the "denúncia" (claim), which,

[52] Domingues, J., "Direito Romano na sistemática compilatória das Ordenações Afonsinas", *Direito Romano Poder e Direito (Actas do XV Congresso Internacional e XVIII Congresso Ibero-Americano de Direito Romano)*, Coimbra: Coimbra Editora – Faculdade de Direito da Universidade de Lisboa, 2013, pp. 547-576.

[53] See for instance Saliou, C., *Les lois des bâtiments, Voisinage et habitat urbain dans l'Empire romain. Recherches sur les rapports entre le droit et la construction privée du siècle d'Auguste au siècle de Justinien*. Beyrouth: Presses de L'IFOP, 1994.

[54] King Afonso IV had already banned the sale of tiles which were utilised in houses, as they were considered to be real estate, requiring that these be sold only in conjunction with the building. *Livro das Leis e Posturas*, p. 434.

[55] *Ordenações Afonsinas*, 5 vols. Lisboa, Fundação Calouste Gulbenkian, 1984, II: p. 218.

[56] Domingues, "Direito Romano na sistemática compilatória", pp. 553-555.

[57] *Las Siete Partidas del Rey Don Alfonso El Sabio*, 3 vols., Madrid, Real Academia de la Historia, 1807, III: p. 183.

[58] In Roman law there was a law of the Emperor Alexander in 222 (*Codex* 8.10.2), which cited an edict by Vespasian and a decree from the Senate, which prohibited the demolition of buildings in order to remove and/or sell the marble that had been utilised in that building. *Corpus Iuris Civilis*, II: p. 334.

[59] Domingues, J., "As Partidas de Castela e o processo medieval português", *Initium, Revista Catalana d'Història del Dret* 18 (2013), p. 247; Domingues, "O elemento castelhano-leonês", pp. 213-227.

however, had the same effect and force as of an appeal. The case concerned the covering of the views of the house or any servitude caused by new works. The claim, by the injured neighbour, was made by throwing stones at the new works, with it then being up to the judge, required for that purpose, to suspend the works and order that everything that had been added in the meantime should be demolished. Only after the work had returned to its initial state did the dispute follow the normal procedure[60]. The precept of throwing stones (*jactus lapilli*) as an action of making a claim against a new work (*de operis novi nuntiatione*) was undoubtedly derived from Roman law (*Digest* 39.1.5.10)[61], which was also described in the *Partidas* (III.32.1)[62], and which, with its inclusion in the Alphonsine Ordinances, became part of the law of the kingdom of Portugal. But it is quite interesting to verify, through the text of the rule itself, that this action of claim also applied "segundo usança de cada huum Luguar" [according to the use of each place] or "segundo Direito, e usança da terra" [according to Law and land use], leading to the supposition that the practice of throwing stones may have already existed in certain Portuguese villages. Although no other documentary evidence on this practice has yet been found, it should be noted, however, that it was from the second half of the thirteenth century that *traditio corporalis* (physical delivery) began to emerge in the transfer of real estate properties, as a legal practice of a symbolic nature[63] – as was the action of throwing stones – which was also derived from Roman law, but to which popular, unwritten habits and customs of Germanic origin had contributed[64].

Important is also the fact that the aforementioned thematic omission in the Alphonsine Ordinances extends to Title XXVIII of Book 1, entitled *Dos Almotacees, e cousas, que a seus Ofiicios pertencem* (Of the Almotacés, and things that belong to his Office)[65] with there being no express reference to conflicts between neighbours derived from activity involving construction[66]. Rather, it contains precepts for the good resolution of judicial proceedings, including a new formality regarding the appeal procedure (1.XXVI.26; 1.XXVII.13; 1.XXVIII.19)[67]. Thus, the court which received an appeal from the almotaçaria started to be decided by the value of the cases: until the amount of ten thousand pounds the cases went up to be considered by municipal judges; above that amount, cases were to be resolved by municipal judges in conjunction with the "vereadores" (councilors) at municipal council meetings. Since the appeal sentences were final, there was no further appeal. There were, however, two caveats to this general rule, which are also defined in the Alphonsine Ordinances.

[60] *Ordenações Afonsinas*, III: pp. 310-311.

[61] *Corpus Iuris Civilis*, I: p. 592.

[62] *Las Siete Partidas del Rey Don Alfonso*, II: p. 770.

[63] In the case of urban buildings, this symbolic practice was carried out by the delivery of elements of the building by the seller to the buyer, such as the key, a door, or a tile. In turn, buyers touched the material elements that made up the built structures (stone, wood, tiles) with their hands, in addition to opening and closing doors and windows.

[64] Moncada, L. C., "A «traditio» e a transferência da propriedade imobiliária no direito português (séculos XII-XV)", *Boletim da Faculdade de Direito da Universidade de Coimbra* 6 (1920-21), pp. 472-496; Sánchez Domingo, R., "*Traditio*: Rito, símbolo y título en la transmisión de la tierra", *Glossae, European Journal of Legal History* 12 (2015), pp. 757-781.

[65] *Ordenações Afonsinas*, I: pp. 179-187.

[66] This title contains organizational aspects of the almotaçaria institution, focusing mainly on the market and urban cleaning. However, in the first half of the fourteenth century, King Afonso IV had already established, as a general law, new rules for the almotacé official – the way of acting, the mode of selection, the number of officers, and the length of service –, so as to mitigate possible regional differences. *Livro das Leis e Posturas*, pp. 259-261; 275-277; 278-280.

[67] *Ordenações Afonsinas*, I: pp. 168, 176, 185-186.

The first caveat (3.IV.5)[68] – the origin of which dates back to the time of King João I (r. 1385-1433) – allowed the royal "corregedor" to have knowledge of the judicial records of the almotaçaria whenever the king was in that place, confirming the "idea that the king's jurisdiction should prevail over all the lower jurisdictions, at least in the territory where the king resided"[69].

The second caveat (3.IV.6)[70] – also based on use by previous monarchs – established that whenever the decisions of almotacés or appeals considered by municipal judges and councillors, led to high penalties being issued – whether corporal, such as death, cutting off members, lashings; or material such as the loss of all goods – one could appeal to the king through a simple "querela" (complaint). It was the case that royal power not only conveyed the right to impose these types of penalties and to apply them to carry out justice, but also had the power to dispense with them through granting grace or mercy[71].

Despite the fact that these laws had been copied into the book of the city's by-laws[72], the truth is that the municipality of Lisbon has always managed to maintain the privilege of exclusive jurisdiction in the judicial proceedings of the almotaçaria, also regarding royal mercy. King João I granted it – still as Governor and Defender of the kingdom (1383-1385) – as well as King Afonso V (r. 1477-1481)[73].

Moreover, the Alphonsine Ordinances (3.LXXX.1)[74] further established, in cases where the municipalities had complete jurisdiction – as was the case with the almotaçaria –, that anyone who was harmed by any decision could not appeal, but could, rather, aggravate this ("agravar", literally making it more serious; a type of appeal[75]) to the king, by a simple complaint ("querela"), accompanied by a testimonial letter or public instrument with the reason for the aggravation, then requiring that the proceedings be corrected and amended with law and justice. However, for Lisbon, King

[68] *Ordenações Afonsinas*, III: pp. 17-18.

[69] Hespanha, *História das instituições*, p. 338 (translation by the author).

[70] *Ordenações Afonsinas*, III: pp. 18-19.

[71] Hespanha, *História das instituições*, pp. 336-337; Garcia, M. G., *Da justiça administrativa em Portugal, Sua origem e evolução*, Lisboa, Universidade Católica Editora, 1994, pp. 107-109.

[72] *Livro das Posturas Antigas*, pp. 132-133.

[73] Royal charters of 11 May 1384, 2 April 1478 and 29 January 1479. *Livro dos Pregos*, pp. 239, 549-550, 561.

[74] *Ordenações Afonsinas*, p. 307.

[75] According to António Manuel Hespanha, there were "two types of recourse to the crown – the recourse of "aggravation", founded on a clear and direct violation of the law by the judge appealed; and recourse to "appeal", based on a deficient appreciation of the case, both in terms of law and in terms of factual aspects. The recourse to *aggravation* [was] more easily decided, given the gross character and more serious nature of the judge's error, in view of the disrespect for the law that this implied […] on the other hand, recourse to an *appeal* [was] more technical and politically less important". Hespanha, *História das instituições*, p. 337 (translation by the author). See also Caetano, *História do Direito*, pp. 400-410, 585-591. However, the matter was far from clear or even obvious in the daily practice of the courts, as can be seen from the coeval treatises on the subject. Leitão, M. H., *Do Direito Lusitano dividido em três tratados, Agravos, Cartas de Seguro, Inquirições* (Vaz, F. L. e Hespanha, A. M., trad., 1ª ed. 1645 – *De jure lusitano in tres tractatus divisus*), Lisboa, Fundação Calouste Gulbenkian, 2009, pp. 5-211; Pinto, A. J. G., *Manual de appellações, e aggravos, ou deducção systematica dos principios mais solidos, e necessarios, relativos á sua matéria, fundamentada nas leis deste Reino, para uso, e utilidade da magistratura, e advocacia*, Lisboa, Of. de Simão Thadeo Ferreira, 1813.

Afonso V even forbade the royal high judges of the "Casa do Cível" (Court of the Civil House) from meddling in the aggravations of the affairs of the city, confirming that only the king had the knowledge to resolve the aggravations submitted[76].

It was, therefore, due to this exclusively regal power and authority that King João II (r. 1481-1495), in 1486, instructed the royal high court judges ("desembargadores") of the newly created "Desembargo do Paço" (Royal Supreme Court) to check, by petition of the parties, that the sentences of the proceedings of the Lisbon almotaçaria were in accordance with the law. Although the municipal officials refused to deliver the testimonial letters to those royal high judges, claiming that, according to that general law, in cases pertaining to the almotaçaria there was no appeal or aggravation, the King, assisted by the royal officials, certified that the same law gave him the power to call upon the proceedings of the parties that aggravated through simple petition, then delegating the task to these high judges, because these "em aas coussas que aa sopricaçam perteençem, rrepresentam nossa pessoa" [in the things that belong to the supplication, represent our person]. In any event, it was not yet a usurpation of the powers of the municipality of Lisbon or a breach of its municipal privilege, as the high judges did not produce new judicial decisions, making a determination only in cases where the law had not been complied with such that other people, such as almotacés, councillors and other city officials, would hear the parties again and determine the cases by law without any further appeal or aggravation. In this way, the city maintained its privileges and the aggravating party was "servido com direito" [served with the Law][77].

Despite the ability of King João II to conjugate disagreeing interests, it is certain that, shortly afterwards, the high judges of the Royal Supreme Court were already aware of the aggravations of the proceedings of the almotaçaria, with the city council complaining not only about the breach of privilege, but also of delays in the building works and the great expense of the parties caused by such practice. In order to resolve the issue, King João II established the requirement that in order for the high judges to be able to verify the aggravations of the almotaçaria, they would need to obtain a royal pass in advance and, before having the decision reviewed, they had to ask the plaintiff for a security deposit of thirty *espadins* – a Portuguese gold coin –, returnable if the new decision were favourable, otherwise this would revert to the works of the city[78].

If the changes attempted by King João II were fundamentally aimed at the appeals procedure of the almotaçaria institution, it was, however, King Manuel I (r. 1495-1521) who ended up causing the greatest transformations, both in the Lisbon institution and in the general law of the kingdom.

4. Creating the almotaçaria of the properties of Lisbon

Due to the demographic and urban explosion that was felt in the capital at the beginning of the sixteenth century, Lisbon almotacés were no longer able to cope with the work they oversaw. Therefore, the king ordered, with the agreement of the councillors and other officers of the city council, a new regulation for those officers.

[76] Royal charter of 4 September 1465. *Livro dos Pregos*, p. 524.
[77] Royal charter of 31 May 1486, copied in 27 June 1486. *Ibid.*, pp. 567-568.
[78] Royal charter of 18 September 1489, copied in 23 November 1491. *Ibid.*, pp. 582-583.

The main change was based on doubling their time of service, which also made it possible to double the number of officers in service, without however increasing the number of people – twenty-four – who, according to the general law of the kingdom, were annually elected to the position – one pair for each month –. The service therefore became bimonthly, with the two pairs of almotacés being distributed according to their remits. One pair oversaw dealing with the proceedings and hearings and the other oversaw implementing the city's by-laws and cleaning[79].

The *Regimento de Vereadores e Officiais da Câmara de Lisboa* (Regulation for Councillors and Officers of Lisbon City Hall) of 1502 clearly explains the different functions of each pair: the first was responsible for the "feitos d'amtres partes E contemdas das casas E eramcas E cousas depemdemtes dellas" [proceedings between parties and disputes regarding houses and inheritances and things dependent on them] or "almotaçaria de casas E obras" [almotaçaria for houses and works], that is, control of activity involving construction while the second was in charge of "de todallas cousas do bem da ree pruvica" [all things for the good of *res publica* (public affairs)], i.e., areas of the market and urban cleaning[80].

Shortly afterwards the three remits of the Lisbon almotaçaria were definitively separated. In 1508 there were already six almotacés divided into pairs in terms of the three types of almotaçaria[81] – that of "execuções" (actions) to operate in the market, that of "limpeza" (cleaning) to promote urban cleaning and that of "propriedades" (properties) to resolve conflicts between neighbours resulting from activity involving construction – which ended up taking on distinct characteristics in the following years[82]. In the specific case of the almotacés of the properties, in 1509 King Manuel I determined that they should have an annual mandate and be elected at the same time that the municipality chose its councillors, municipal judges and other officers[83]. In the following year, and responding to the municipal council's request for two judges to occupy the position, the king appointed two superjudges from the Court of the Civil House[84], establishing later that, in the future, one of the almotacés of the properties had to be a learned judge and the other a squire[85]. Due to the requirement of having learned people, the almotacés of the properties became known as "juízes das propriedades" (judges of the properties)[86], also including in the remit of the almotaçaria of the

[79] Royal charter of 3 January 1500. *Ibid.*, pp. 602-603.

[80] Published in Santos, M. R.; Viegas, I. M. (eds.) *A evolução municipal de Lisboa, Pelouros e Vereações*, Lisboa, Pelouro da Cultura, Divisão de Arquivos, Câmara Municipal, 1996, pp. 147-170.

[81] This information is taken from a royal order of 4 September 1508, to increase to two the registers of the almotaçaria precisely due to the existence of three "modos" (types) of almotacés. AML-AH, Chancelaria da Cidade – Livro I dos Provimentos, doc. 104.

[82] Pinto, S. M. G., "A instituição da almotaçaria, o controlo da atividade construtiva e as singularidades de Lisboa em finais da Idade Média", *Lisboa Medieval: Gentes, Espaços e Poderes* (Fontes, J. L. I., *et al*., ed.), Lisboa, Instituto de Estudos Medievais, 2016, pp. 309-311.

[83] *Documentos do Arquivo*, VI: p. 36.

[84] Royal charter of 8 April 1510. AML-AH, Chancelaria da Cidade – Livro I dos Provimentos, doc. 120.

[85] Royal chater of 20 April 1512. AML-AH, Chancelaria da Cidade – Livro I dos Provimentos, doc. 132.

[86] Royal chater of 25 August 1516. *Documentos do Arquivo*, V: p. 81. This is also clarified by a consultation of the municipal council to the king, on 6 August1665: "dos juizes das propriedades, que são propriamente almotacés, no corpo da Ord., tit.º 68, d'onde se derivaram para serem juízes lettrados, pela importancia das materias e causas das propriedades e edificios; ficando tambem distinctos entre si os almotacés das execuções da cidade e os almotacés das execuções da limpeza" [of the judges of the

properties which would be called "Juízo das Propriedades" (Court of Properties).

5. Breaking the municipal privileges of the almotaçaria

Other amendments were established in the new compilation of general law for the kingdom, the *Ordenações Manuelinas* (Manueline Ordinances), completed in 1521. Firstly, the ancient municipal privileges of exclusivity in the jurisdiction of the almotaçaria were finally broken through the implementation of an appeal body outside the municipal structure (1.XLIV.43; 1.XLVI.16; 1.XLIX.19)[87]. Thus, cases up to the amount of six hundred *reais* were dealt with by the municipal judges and from that amount up to six thousand *reais* were heard by municipal judges and councillors, adding, however, that these were "sem mais apellaçam, nem agrauo pera minhuũ Senhor de Terra, nem pera Nós" [without further appeal, no aggravation for no lord of the land, nor for us [the king]]. However, if the sentences were corporal or if they went over six thousand *reais* the cases would go directly to "Nossos Desembarguadores, a quem dereitamente pertencerem, sem irem aos Juizes nem Officiaes da Camara" [our [royal] high judges, to whom they directly belong, without going to the judges or officials of the municipal councils].

Furthermore, specific rules for resolving conflicts between neighbours resulting from activity involving construction were finally included as general law (1.XLIX, 24-44)[88]. The inclusion of the specific rules for the only domain of the almotaçaria – activity involving construction – which had not yet been regulated in the general law of the kingdom was naturally inserted within a broader movement "to respond to the requests of the people, to put traditional customary law in writing in authoritative texts, making this more certain and more controllable"[89]. But these rules were of interest not only to private individuals, but also to almotacés or judges of the properties (in Lisbon) and other municipal council officials who had to arbitrate and resolve conflicts between neighbours. They were of particular interest to royal high court judges, who, being outside the municipal structure, could not rely on the knowledge and opinion of the most experienced municipal officials. Furthermore, it was only through standardising these rules for all Portuguese municipalities that the royal high court judges could remotely competently assess appeals involving conflicts between neighbours, otherwise there would always have been the issue of incurring the problem of not knowing local customs and/or imposing strange uses on them.

For the inclusion of these rules in the general law the royal legislators used the rules of the almotaçaria of Lisbon. The royal letter of 3 November 1519 proves this, through which the king asked the Lisbon municipal council to send a copy of this regulation to be handed over to the scholar Cristóvão Esteves[90]. Indeed, Cristóvão

properties, who are actually almotacés, in the body of the Ordinances, Title 68, which they were apart being learned judges, due to the importance of the materials and cases of properties and buildings; also distinct among them were the almotacés for actions and the almotacés for the cleaning]. *Elementos para a historia do Municipio de Lisboa*, 17 vols. Lisboa, Typographia Universal, 1882-1911, VI: p. 559.

[87] *Ordenações Manuelinas*, 5 vols. Lisboa, Fundação Calouste Gulbenkian, 1984, I: pp. 300, 328, 347-348.

[88] *Ibid.*, I: pp. 349-356.

[89] Hespanha, *Cultura jurídica europeia*, pp. 234 (translation by the author).

[90] *Documentos do Arquivo*, V: p. 114.

Esteves and doctors João Faria and Pedro Jorge had been tasked with continuing the work of revising the general law of the kingdom[91]. Hence the affinities between the items in the Lisbon almotaçaria regulation with paragraphs 24 to 44 of Title XLIX, of Book 1, of the Manueline Ordinances, notwithstanding – and as was the case throughout the entire legal compilation[92] – that the rules had been linguistically remodelled and thematically reorganized[93].

Now, despite the *ius commune* being subsidiary law in the kingdom and, incidentally, for the Lisbon almotaçaria, the truth is that, again, no influence is to be found in those specific rules of the new general law. On the contrary, the only reference to the *ius commune* that was present in the Lisbon rules was suppressed, with "azinhaga" (narrow private street), which before was defined as a five feet space according to the *ius commune*[94], being now expressed by "hũa vara e quarta de medir pano, em larguo" [a yard and a fourth for measuring cloth, in width][95].

However, the actual metrological conversion itself does not offer an easy solution. If the old standard Portuguese measurements are used, based on the palm (22 centimetres)[96], where the yard corresponded to five palms (1.1 metres) and the foot a palm and a half (33 centimetres), then there seems to have been no conversion, as the five feet were equivalent to 1.65 metres while the yard and the fourth were 1.375 metres. If this is the case, what is strange is not only the decrease in the width of the "azinhaga", but also the actual choice of the Manueline compilers in choosing a fractional unit, easily solved by prescribing six complete palms (1.32 metres) given the irrelevance, in urban terms, of the difference between them (i.e. 5.5 centimetres)[97]. This leads us to suppose that, most probably, at this time the foot – which, as stated above, was not a dimensional unit at that time –, may not have equalled one palm and a half, but one palm and a quarter (27.5 centimetres, and therefore closer to the true science of this part of the human body), and then there would have been a simple transformation of the Roman measurement to Portuguese units. If so, in this case as well, as in all the new rules for the title of the almotacés, the legislators of the Manueline Ordinances gave – as they had determined in Title V of Book 2[98] – priority to the law and the customs of the kingdom in the creation of the general law to the detriment of all other legal systems, although, by definition, in the absence of those, the latter continue to be subsidiary sources of law[99].

[91] Cruz, "O direito subsidiário na história", pp. 223-231.

[92] Domingues, J., "A última reforma do direito medieval português", *Lusíada. Direito* 1-2 (2010), pp. 376-377.

[93] Pinto, "Em torno do *foral*", pp. 73-74, 84-105.

[94] *Livro das Posturas Antigas*, p. 113.

[95] *Ordenações Manuelinas*, I: pp. 352-353.

[96] Silveira, J. H. F., *Mappas das medidas do novo systema legal comparadas com as antigas nos diversos conselhos do Reino e Ilhas*, Lisboa, Imprensa Nacional, 1868.

[97] Pascoal José de Melo Freire, in the same sense, stated: "One can also build in his own yard or field and offend the neighbour's light, as long as he leaves a gap of about six common palms, that is, a yard and a fourth". Freire, P. J. M., "Instituições de Direito Civil Português tanto Público como Particular", (Menezes, M. P., trad., 1ª ed. 1789-1795 – *Institutionum juris civilis lusitani cum publici, tum privati*), *Boletim do Ministério da Justiça* 162 (1967), p. 105 (Book 1, Title 10, § 7) (translation by the author).

[98] *Ordenações Manuelinas*, II: pp. 21-22.

[99] Cruz, "O direito subsidiário na história", pp. 222-250.

The same absence referred to remained in the following compilation, the *Ordenações Filipinas* (Philippine Ordinations), commonly known as *Ordenações do Reino* (Ordinances of the Kingdom) – completed in 1603 and in force until the mid-nineteenth century –, which kept the same number and the same organization of specific rules in the title for the almotacés (1.LXVIII. 22-42)[100], with only the inclusion of the heading "Edifícios e servidões" [Buildings and Servitudes][101].

In relation to the courts of appeals, the Ordinances of the Kingdom similarly kept the previous provisions (1.LXV.23; 1.LXVI.5; 1.LXVIII.2)[102], although the reform of the higher courts, promoted by King Filipe I of Portugal, II of Spain (r. 1581-1598) in 1582, led to cases for the almotaçaria above six thousand *réis* being sent to two different courts, according to their geographical location (1.VI.12; 1.XXXVII,0-2)[103]. Thus, the cases coming from the regions of Trás-os-Montes, Entre Douro and Minho, Beira (except Castelo Branco), Coimbra and Esgueira went up to the Court of the Civil House – also called the "Tribunal da Relação do Porto" (Court of Appeal of Porto), through having been transferred to the city of Porto –; the cases coming from the regions of Extremadura (except Coimbra and Esgueira), Entre Tejo e Guadiana, Castelo Branco, the Algarve, Islands and overseas, as well as the cases from the Court of the Civil House involving more than eighty thousand *réis* in real estate, were moved up to the "Casa da Suplicação" (Court of Supplication House) – or the "Tribunal da Relação de Lisboa" (Court of Appeal of Lisbon).

This was, therefore, the judicial hierarchy of appeal of the institution of the almotaçaria which was defined to be used by all municipal councils in the kingdom; but not for Lisbon. Indeed, the privileges which, in this domain, the municipality of Lisbon had enjoyed for such a long time, were kept throughout the sixteenth century and the beginning of the seventeenth century. It was also at this time that the Lisbon municipal council changed its name to "Tribunal do Senado" (Senate Court) or "Senado da Câmara" (Senate Chamber), by equivalencing this with the higher courts[104], not only because its organizational structure had been different from other municipal councils for a long time[105], but mainly because, by royal demand, some of the Lisbon councillors had to be noblemen and others had already been royal high judges in one of the higher courts[106], therefore, equivalencing their status among the members of these institutions.

[100] *Ordenações e Leis do Reino de Portugal, publicadas em 1603, Collecçaõ da Legislaçaõ Antiga e Moderna do Reino de Portugal, Parte II – da Legislação Moderna*, 3 vols., Coimbra, Na Real Imprensa da Universidade, 1790, I: pp. 327-332.

[101] Something which indicated the subsequent movement of Portuguese legal culture in linking these rules of the almotaçaria to the Roman building servitudes. Monteiro, C., *O domínio da cidade, A propriedade à prova no direito do urbanismo*, PhD Thesis, Universidade de Lisboa, 2010, pp. 101-104.

[102] *Ordenações e Leis do Reino de Portugal*, I: pp. 288-289, 298, 322.

[103] *Ibid.*, I: pp. 47, 170.

[104] Ferro, J. P., *Para a História da administração pública na Lisboa seiscentista. O senado da Câmara (1671-1716)*, Lisboa, Planeta Editora, 1996, p. 21.

[105] By royal letter of 1 February 1509, King Manuel I arranged the Lisbon councillors into three areas – dealing with meats; dealing with sanctions and deeds to be dispatched at the Council table; works and cleaning – , "pera fiquar a carrego de cada huum sua parte, e cada huum dar razam daquello que lhe couber, e nom fiquarem a carrego de todos três" [for each to stay with the duties of their part, and each one deciding what he has to do, and not be in charge of all three]. *Documentos do Arquivo*, VI, p. 9.

[106] Royal charters of 12 December 1572 and of 22 June 1591. *Ibid.*, VIII, pp. 69-70; VI: p. 82.

6. Jurisdictional conflict in the almotaçaria of the properties of Lisbon

Despite the Lisbon privileges, the provisions contained in the Ordinances of the Kingdom would give rise to various jurisdictional conflicts regarding the dispatching of the appeals of the Lisbon almotaçaria. During the government of King Filipe III of Portugal, IV of Spain (r. 1621-1640), the high judges of the Royal Supreme Court intervened in these matters. However, the Spanish monarch maintained the previous practice, ordering that there was only recourse to him, by petition, which after being assessed regarding its legitimacy, would be sent to the Royal Supreme Court, from which an opinion for the king would be issued and not any sentence or decision on the matter[107]. At the time of King João IV (r. 1640-1656), a similar problem arose with the "corregedores" of the Royal Court[108].

However, it was during the reign of King Afonso VI (r. 1656-1683) that the situation worsened, when the judges of the Court of Supplication House systematically began to become aware of the more valuable resources of the Court of Properties, contrary to their previous practice of refusing these because they were not considered as belonging to this jurisdiction. Several requests came from the Lisbon Senate Chamber for the monarch to intervene and to prohibit the breaking of "sua jurisdicção e posse immemorial, privativa e inhibitiva a todos os mais tribunais" [its immemorial, private and inhibitory jurisdiction and possession over all other courts]. Against the Lisbon Senate Chamber there were also some learned individuals from the Royal Supreme Court – the court which would resolve conflicts between the Lisbon Senate Chamber and the Court of Supplication House – as well as from the "Juízo da Coroa" (Court of the Crown), by invoking only the rules of the Ordinances of the Kingdom without taking into account the privileges of the city, which had been confirmed by King João IV at the start of his reign. In addition, the lawyers of the parties, in order to be able to send appeals to the judges of the Court of Supplication House, inflated the value of the cases, assessing them "ainda que de pouca importancia a muita quantia" [albeit of a small importance, as a large amount][109].

The successive lack of royal response led the Lisbon Senate Chamber to reiterate its request in the "Cortes" of Lisbon of 1668, organized by the regent of the kingdom, the future King Pedro II (r. 1683-1706)[110]. There had been thirteen years of waiting for a royal resolution, which came out in 1670, which, however, proved to be contrary to that expected, as it was justified with the abrogation of part of the ancient privileges established in the prologue of the Ordinances of the Kingdom[111]. Therefore, in this period there were various dispatches from the high judges of the Court of Supplication House to the appeals of the decisions of the judges of the properties of Lisbon. And it is at this same time that the existing documentation began to register with greater

[107] Royal charter of 25 April 1624; consultations to the king of 16 September and 10 December 1624; royal charters of 23 November 1624 and of 27 July 1627. *Elementos para a historia*, III: pp. 87-88, 110-111, 127-128, 263.

[108] Consultation to the king of 27 March 1651. *Ibid.*, V: pp. 274-276.

[109] Consultations to the king de of 20 June1657, of 13 February 1658, of 8 May 1663, of 21 April and 6 August 1665. *Ibid.*, VI: pp. 27-29; VII: pp. LXXXVI-LXXXIX; VI: pp. 425-426, 547, 553-567.

[110] *Ibid.*, VIII: p. 14.

[111] Royal resolution of 23 July 1670 to the consultation to the king of 6 August 1665. *Ibid.*, VI: pp. 566-567. This order was also proclaimed the following day by decree. *Collecção Chronologica da Legislação Portugueza, 1657-1674*, Lisboa, Imprensa de J. J. A. Silva, 1856, p. 183.

incidence the use of a specific law for activity involving construction taken from the *ius commune*, especially on the *maris prospectum* (sea view).

7. Regulatory conflict in the almotaçaria of the properties of Lisbon

It was the case that the law of the sea view was instituted, among other laws, by the emperor Zeno (r. 474-491) for the city of Constantinople in the fifth century, and was then generalised for the whole Roman Empire of the East by the emperor Justinian (r. 527-565), which appeared in his legislative compilation (*Codex* 8.10.12.4a-4b)[112]. In addition, this latter emperor added two new constitutions – now present in the volume *Novellae* (63 and 165)[113] – in order to clarify the meaning of that law. However, during the medieval period, glossers and commentators were unaware of either the original text of the set of laws granted by Zeno – later called the Zenonian Constitution –, or either one of the constitutions, as they were written in Greek, thus not forming part of the medieval books of Justinian-Roman law. Only the text of the constitution entitled *De novi operis nuntiatione maritimi aspectus* (On notice of a new work which obstructs the sea view) was known in the volume designated by the glossers of *Authenticum* – later dubbed the *versio vulgata* (vulgar version) – which consisted of 134 constitutions, with this then corresponding to the sixty-sixth. In order to reconcile these regulations with those of the *Codex*, the glossers divided the *Novellae* into nine books called *Collationes* and each constitution formed a different title[114], with *Novella* 66 corresponding to title 15 of the *Collatio* 5[115]. This *Novella* then established an addendum to a law of the Zenonian Constitution, which prohibited, in the royal city – Constantinople – the obstruction of the sea view of an existing building by the elevation of a new higher building, if there was a distance of less than hundred feet between them. The addendum aimed to inhibit the fraudulent acts of certain individuals who raised walls or false buildings outside the hundred feet with the purpose of removing the sea view from the existing building, and then being able to build within that range, as the sea view had already been obstructed.

Although this *Novella* about the law of the sea view is included in the medieval volumes of the Justinian-Roman law, making it part of the *ius commune*, it does not seem to have given rise to any legal influence in Portugal during the medieval period, with only a scant number of references appearing in the later documentation, although almost always related to royal interests or initiatives. In fact, the first news that was found about this perspective view was not related to the domain of construction, but to cleaning, when, in 1495, King João II ordered the municipality of Lisbon to ban the throwing of dirt from the outside of the wall, close to the Porta da Oura and the royal shipyards "porque faz aly gramde alevanto De terra e que se cobria a vista Do maar" [because it considerably raises the land there which hides the sea view][116]. At the

[112] *Corpus Iuris Civilis*, II: p. 336.

[113] *Ibid.*, III: pp. 334-335.

[114] Graves, J. T., "Roman Law", *Encyclopeadia Metropolitana, or Universal Dictionary of Knowledge, Volume II*, London, Willian Clowes ans Sons, 1845, pp. 776-779.

[115] *Argumentum Instituitionum Imperialium* [*Corpus Iuris Civilis cum Accursii Commentariis, Institutiones I-IV, Liber Autenticorum Collatio, Codex X-XII, Feudorum liber, Extravagantes*], Lyon, Francisci Fradin, 1521, fl. LIIv; *Bartoli Commentaria super Authenticis*, Lyon, Claudius Seruanius, 1555, fl. 32v.

[116] Royal charter of 4 May 1495. *Documentos do Arquivo*, vol. III, p. 356.

beginning of the early-modern period that law was also not included into the body of law of the kingdom, nor does it appear to have been used, as subsidiary law, in cases between individuals. Hence its absence in the first works of Portuguese casuists[117], although it is significant that some of these volumes mention cases, albeit rare, regarding conflicts arising from activity involving construction[118].

In fact, as was previously stated, it was during the mid-seventeenth century that the first references to the judicial application of the law of the sea view can be discerned in the Portuguese context; at a time when translations and publications of the complete set of the laws of the Zenonian Constitution, included in the *Codex* within the title *De aedificis privatis* (On private buildings) started to circulate, as much as the complete 168 constitutions, including those which had been written in Greek. This led to a new reorganization of the volume *Novellae*, with the appearance of sequentially numbered constitutions, but remaining divided into the nine *Collationes*. Thus, the known *novella* – previously, the 66 in *collatio* 5 – was then in position 63 within the *collatio* 5, with another on the same subject also present, called *Generalis forma de prospectu maris* (General form of the sea view) – the *novella* 165 in *collatio* 9[119]. The latter clarified that the sea view was considered not only as being front on, but also transversal.

Thus, and in addition to the brief mention made by António Cardoso do Amaral, to the analysis of the term *servitus* (servitude) – corroborating that the elevation of a building was limited by the existence of the neighbours' rights, such as the non-obstruction of light from existing windows or the non-impediment of the view of the sea and/or the Tagus river[120] – it was the work of another legal practitioner who unequivocally certified the judicial application of the law of the sea view in Portugal, as a limitation on the freedom to build among private individuals.

Manuel Mendes de Castro refers, therefore, to a case which took place in 1637, between the Count of Sabugal with António Vieira and decided by Bernardo Gomes Barona, whose decision had been based on "*collatione 5, nouella 66*" and "*collatione 9,*

[117] Gama, A., *Decisiones Supremi Senatus invictissimi Lusitaniae Regis*, Lisboa, Emmanuel Ioannes Typographus, 1578; Valasco, Á., *Consultationum ac rerum judicatarum in Regno Lusitaniæ*, Lisboa, Emmanuel de Lyra, 1588; Costa, J. M., *Domus Supplicationis Curiae Lusitanae Ulyssiponensis Magistratus, styli, supremique senatus consulta*, Lisboa, ex Officina Gerardi de Vinea, 1622; Reinoso, M., *Observationes practicae in quibus multa, quae in controversiam in forensibus Judiciis adducuntur, felici stylo pertractantur*, Lisboa, Petri Craesbeeck Regii Typographi, 1625. According to Mário Júlio de Almeida Costa *casuistry* constituted of a type of legal literature, which collected "concrete cases extracted from embargoes of the higher courts, from consultations with famous lawyers or only imagined by their authors, with conclusive indication of the solutions considered preferable". Costa, *História do Direito*, p. 364 (translation by the author). See also Hespanha, *História das Instituições*, pp. 520-521.

[118] Cabedo, J., *Praticarum observationum sive decisionum Supremi Senatus Regni Lusitaniae*, 2 vols. Lisboa, Georgii Rodriguez, 1602-1604, I: p. 265 (decision 119 – on the servitude regarding plumbing for water), p. 321 (decision 152 – on the servitude of light); Febo, B., *Decisiones supremi eminentissimique Senatus Portugalliae, in quibus multa quae in controversiam quotidie vocantur gravissimo illustrium senatorum judicio deciduntur*, 2 vols. Lisboa, Officina Petri Crasbeeck, 1619-1625, vol. 1, pp. 275-277 (decision 73 – on opening windows); Castro, G. P., *Decisiones Supremi Eminentissimique Senatus Portugalliae ex gravissimorum patrum responsis collectae*, Lisboa, Petrum Craesbeeck Regii Typographi, 1621, pp. 424-425 (decision 87 – on the servitude regarding dripping water).

[119] *Corpus Iuris Civilis*, III: pp. 334-335.

[120] Amaral, A. C., *Liber utilissimus judicibus, et advocatis*, Lisboa, Antonio Alvarez, 1610, fl. 381 (n. 35).

nouella 165" of the Justinian-Roman law, given that as the provisions of paragraph 33 of Title LXVIII of Book 1, of the Ordinances of the Kingdom was omissive in relation to the sea view, then it was possible to apply the imperial laws as provided for in Title LXIV of Book 3 of the same Ordinances[121]. Note, however, that the first mentioned *novela* corresponds to the previous organization of the *Authenticum*, which allows one to suppose the cross-checking (or certification) of the available Roman sources. However, more important is the fact that the dogmatic construction used in this case established itself as a paradigm for subsequent cases. In effect, paragraph 33 of the Title for the almotacés (LXVIII), which was the only rule to determine the distance that had to be left between buildings – that is, the already mentioned dimension of a yard and a fourth –, in order to preserve the light and air of the legally consolidated windows, even causing damage to the neighbour, – that is, the already mentioned possession of a year and day –, as it appeared described in the previous paragraph 24 of the same title, was now – like paragraph 24 itself – limited by the law of the sea view from Roman law.

However, the judges of the Court of Properties and the high judges of the Court of Supplication House had different interpretations regarding the specific application of this limitation, as can be seen in the judgments and the sentences of appeals, mostly from the 1660s and 1670s, included in the commentaries of Manuel Alvares Pegas to the title of the almotacés[122].

For the judges of the Court of Properties, the law of the sea view was strictly applied, being used when the views of the affected buildings were royal or noble and when they obstructed all the building's windows or the main ones, because if the perspective view was in regard to the windows of lesser buildings or roof windows, then the limitation of the law of the sea view was no longer used. Thus, when managing the use of this law on a case-by-case basis, the judges of the Court of Properties sought not to undermine the freedom to build by the private sector when repairing and improving buildings, as "nam era visto carecerem huns de aposentos, por ficarem outros olhando para o rio" [it was not right for some to be lacking rooms, while others were looking at the river] [123]. Basically, what these magistrates did was to apply to an external law the same communitarian logic as they did to the rules of the almotaçaria.

Indeed, more than respond to individual interests, the rules of the almotaçaria sought to maintain balance in the built environment of the community, in terms of its universal order (*cosmos*)[124]. For this reason, restrictions on the freedom to build did not apply equally and reciprocally to all buildings, but stemmed from the position taken by each building within the urban structure. In turn, the prescriptions, which explained how one could resolve or circumvent some of the prohibitions, aimed at restoring that balance. All of this resulted in the fact that new constructions were physically and visually dependent on the existing buildings, such that the entire built urban structure

[121] Castro, M. M., *Secunda pars Practicae lusitanae cum plurimis amplissimi senatus decisionibus, & aliis novissimis declarationbus ad Leges Regias*, Lisboa, Typographi Antonii Alvarez, 1639, fl. 23 (book 1, chapter 2, n. 139).

[122] Pegas, M. A., *Commentaria ad ordinationes Regni Portugalliae, Tractacio scientifica, utrique foro perutilis, ac necessaria, ex Iure natural, Ecclesiastico, Civili, Romano, Hispano, & Lusitano, Tomus Sextus*, Lisboa, Antonii Leite Pereyra, 1681, pp. 1-149.

[123] *Ibid.*, p. 98.

[124] On the collective conception of society see, above all, Hespanha, *Cultura jurídica europeia*, pp. 98-111.

interconnected in a complex and organized manner.

Now, along with the existing hierarchy, from older buildings to new ones, added to this was the law of the sea view, with the hierarchy of noble buildings (or buildings belonging to privileged groups) prevailing over current buildings. However, as in other domains "the subordination of some over others did not represent the lesser dignity of the former but rather merely the recognition that each had a specific place in the order of the world"[125].

On the contrary, for the high judges of the Court of Supplication House, more compelled to apply the *ratio scripta* (written reason) of the *ius commune*, the law of the sea view was to be applied in all cases, regardless of the quality of the buildings, or regarding who was demanding this, whether in full or partial view, or involving any window in the building or from the roof (roof window) or from the position – standing or sitting – of the person who possessed this. The reasoning was based on the understanding that the law of the sea view was a general and abstract right, granted "pelas leys do direito commum dos Romanos, que a Ordenaçam do Reyno manda guardar, quando falte alguma, no caso sobre que se contender, & nam se mostrar costume em contrario introduzido legitimamente, & com os requisitos de direito" [by the laws of the *ius commune* of the Romans, which the Ordinances of the Kingdom orders to be kept when something is missing in the case in question, and as long as nothing contrary to it is shown this is introduced legitimately within the requirements of the law][126]. Moreover, this law was in the sense of the individualistic logic of property and recognised freedom to build, not only by Roman servitudes, "in accordance with the *opinio doctorum communis* (general opinion of legal experts) which had been forming in the whole of Europe"[127], but also through the exact purpose of the regulation itself, as it was "graue prejuizo que se considera na privaçam da dita vista … [pela] diminuiçam no rendimento" [considered serious harm to be deprived of the said view… [through] the decrease in real estate income][128].

High judges of the Court of Supplication House and judges of the Court of Properties only agreed not to apply this limitation to the views arising from interstices or windows located on the sides[129].

Whenever the judges of the Court of Properties resolved cases differently from the extensive view of this law taken by the high judges of the Court of Supplication House, they, in the appeal phase, revoked their sentences, which, in addition to other reasons, helps to understand the jurisdictional interference of the higher court so frequently alleged by the Lisbon Senate Chamber. The widespread application of the law of the sea view led, then, to the creation of yet another cause of conflict in neighbourly relations between private individuals, becoming, in this period "the most important limitation to the freedom to build in Lisbon"[130], because the topography of the city provided that perspective view towards the Tagus and any change in the existing built structure would certainly cause damage to someone.

[125] *Ibid.*, p. 104 (translation by the author).
[126] Pegas, *Commentaria ad ordinationes*, p. 95.
[127] Monteiro, *O domínio da cidade*, p. 102 (translation by the author).
[128] Pegas, *Commentaria ad* ordinationes, p. 99.
[129] *Ibid.*, pp. 101-102.
[130] Monteiro, *O domínio da cidade*, p. 105 (translation by the author).

8. Fixing the conflicts

In the meantime, the Lisbon Senate Chamber did not give up on defending its jurisdictional privileges, managing that in the new Rules of the Chamber, ordered by the regent of the kingdom in 1671, it was clearly stated that the sentences and orders of the almotaçaria decided in the Chamber could not be appealed more, nor an aggravation made, because "tem mostrado a experiencia que da dilação do recurso resulta irreparavel damno, e que muitas vezes depois delle padecido se manda aplicar o remedio" [experience has shown that extending an appeal results in irreparable damage, and that many times, after suffering it, the medicine is ordered to be administered]. To this was added the confidence that the king placed in the councillors of the chamber, who were not only of royal appointment, but also in order to achieve that position they previously had to have served as high court judges. From then on, only cases involving possessions, property (i.e. domain), pensions and appointment to officers were brought up to higher courts, where the extension of the appeal did not cause irreparable damage, nor was it an impediment to the city's current governance[131].

However, the clash of arms between the judicial bodies did not end immediately, with the Lisbon Senate Chamber having to make a new complaint to the king, because the Royal Supreme Court, which had meanwhile transferred to it the aggravations belonging to the Court of Supplication House, claimed a lack of knowledge of the previous regulatory amendment, as the new Rules of the Chamber had not been published as a law, nor had this been sent to them[132].

In 1745, the problem of jurisdictional interference still remained, and a new complaint was brought up to the king, this time, from the registers of the Court of Properties. King João V (r. 1706-1750), to solve the problem once and for all, ordered by law, that no one should have "conhecimento em Juizo algum das causas sobre edifícios, e servidoẽs, por serem pertencentes ao das Propriedades, de baixo da pena de nullidade do processo, custas, perdas, e damnos contra os Escrivaẽs, que nellas escreverem; e que o Juiz das Propriedades possa por seu precatorio chamar ao seu Juizo os processos desta qualidade" [knowledge in any court of the cases concerning buildings and servitudes, through belonging to the Court of the Properties under penalty of annulling the case, costs, losses and damages against the registers who write in them, and that the judge of the Properties can, at its request, call to its Court, cases of this kind]. In this law the king also ordered the express compliance of the high judges of all superior courts, royal officials, and all other judges, courts, persons and lords of the Kingdom. And so that no one could invoke ignorance, the king also ordered that this law be published in the royal chancellery, that copies be sent to the judicial districts, that it be registered in the books of all higher courts, with a copy further being deposited in the archive of the kingdom, at the Torre do Tombo[133]. It therefore appears that it was

[131] *Systema ou Collecção dos Regimentos Reais, Tomo Quarto*, Lisboa, Officina de Simão Thaddeo Ferreira, 1785, pp. 140-154.

[132] Consultation to the king of 17 February 1673. *Elementos para a historia*, VII: pp. 433-435.

[133] Law of 26 October 1745. *Ordenaçoẽs e Leys do Reyno e Portugal, confirmadas e estabelecidas pelo Senhor Rey D. Joaõ IV. Novamente impressas, e accrescentadas com tres Collecçoẽs… por mandado do muito alto e poderoso Rey D. Joaõ V – Livro Terceiro*, Lisboa, Mosteiro de São Vicente de Fora, 1747, pp. 133-134.

only in the mid-eighteenth century that the jurisdictional conflict which existed between the Lisbon Senate Chamber and the higher courts was definitively resolved.

Nevertheless, the general application of the law of the sea view to all cases, driven by the decisions of the high court judges and the rule of precedent, was already, by this time, a reality, with the Lisbon Senate Chamber dealing with this legal constraint in the development of public works[134], in the day-to-day management of licensing requests for private works[135] and, of course, in the resolution of conflicts between neighbours resulting from the activity of construction[136].

Its application became sufficiently popularized to become part of the list of legal rules for the construction of Lisbon, as evidenced by the only written work of corporate construction manuals in Portugal, written in 1739, by a master stonemason from Lisbon, called Valério Martins de Oliveira[137]. It should be mentioned, however, as regards indicating the origin of this legal precept, that the mention of this rule did not arise from direct reference to Roman law, but rather stemmed from the citation of the judicial practice, included in the works of the aforementioned Manuel Mendes de Castro, Manuel Álvares Pegas and António Cardoso do Amaral[138].

The law of the sea view was used in Lisbon until the earthquake of 1755, or more specifically until 12 June 1758, the date on which this limitation was declared extinct, because the particular interest of its use was deprecated to the interest of the "utilidade pública da regularidade, e formosura da Capital destes Reinos em todas as Ruas, cujos edificios forão arruinados …; e naquellas, que se reduzirem a huma regular simetria" [public utility of the regularity and beauty of the Capital of this Kingdom in all the streets the buildings of which have been ruined,… and in those that are reduced to a regular symmetry][139].

It should be noted, however, that the royal power had already recognized the urban inconveniences caused by that law. In 1742, when it was proposed to regularize the western riverside limit through the construction of a new stone pier, with the opening of lined streets and buildings with a uniform structure on the land won back from the river, it was inferred that one of the losses of the work was precisely "que perderão a vista do mar muitas casas das que hoje a logram" [that many houses which nowadays have a sea view will lose this]. Yet, for the government this problem was easily solved simply by invoking the public interest for its non-application, not least because "é certo que a recreação dos particulares não póde pôr-se em balança com a

[134] Legal decision of the town council of 1 April 1678, consultations to the king of 1 July 1678 and 25 August 1745. *Elementos para a historia*, VIII: pp. 265, 291; XIV: pp. 434-446.

[135] Consultation to the king of 9 December 1716. *Ibid.*, XI: pp. 156-158.

[136] Petition by João Afonso do Vale requesting an inspection and license to continue his works embargoed by the judge of the Properties, because they took away the sea view, from June 1701. AML-AH, Administração – Livro de Cordeamentos, 1637-1715, fl. 181-182v.

[137] About this book see: Pinto, S. M. G., "As *Advertencias* de Valério Martins de Oliveira ou o manual dos mestres pedreiros e carpinteiros portugueses no período moderno", História da Construção em Portugal: Consolidação de uma Disciplina (Mateus, J. M., ed.) Lisboa, By the Book, 2018, pp. 77-101.

[138] Martins de Oliveira, V., *Advertencias aos modernos, que aprendem o Officio de pedreiro*, Lisboa, Officina Sylviana da Academia Real, 1739, pp. 187-196, 210-212.

[139] *Collecção da Legislação Portugueza desde a ultima compilação das Ordenações – Legislação de 1750 a 1762*, Lisboa, Typografia Maigrense, 1830, pp. 624-625.

utilidade pública, … [de] uma obra em que são tantas e tão ponderosas as utilidades" [it is certain that the entertainment of private individuals cannot be equated with the public utility,… [of] a work where the advantages are so many and so important][140]. This project did not go ahead, but the legal exception envisaged ended up being applied, although initially limited to the area of the city destroyed by the earthquake, until the decision of the Court of Supplication House of 2 March 1786 extended it to all neighbourhoods in Lisbon and other cities in the kingdom[141].

Another law contributed to this legal extension, known as the "Boa Razão" (Good Reason), which had meanwhile given a more restrictive interpretation to Title LXIV of Book 3 of the Ordinances of the Kingdom – the one that authorized the application of Roman law in omissive cases –, since, despite the fact that it was already clearly established that (Roman) imperial laws were only kept "pela boa razão, em que são fundadas" [for the good reason, on which they are founded], magistrates systematically made use of subsidiary law without taking into account its good reason, superimposing it on the kingdom's own laws and customs[142]. This condition was especially paradoxical in the rules of the almotaçaria for activity involving construction. After all, it had been the same legal precedent to allow the use of the law of the sea view.

Indeed, the fact that the aspect of the sea view was not present in the law of the kingdom, was what appeared to justify the use of subsidiary law. However, the admission of this law ended up creating a contradiction with paragraphs 24 and 33 of the title of the almotacés, which established the freedom to "alçar-se quanto quizer" [raise [the building] as much as you want], as long as this was built in the legitimate way, that is, that the precepts defined in the rules themselves be fulfilled. This regulatory disagreement created various controversies around the validity and legal extension of Roman law, whether because of the authenticity of the Zenonian Constitution, because it was aimed at Constantinople, because it did not include the common texts of Roman law, because it had not been dealt with by older learned doctors, or because it was not included in the Ordinances of the Kingdom[143].

Perhaps for this reason, the Zenonian Constitution was only mentioned by Portuguese legal practitioners and commentators when dealing with the law of the sea view, not considering the other laws contained within it, something that most probably derived from the certification given by *Novella* 66 in the medieval texts. The work of Domingos Antunes Portugal is, in this sense, exemplary. In the eleven limitations on the freedom to build that the author recognizes, it is only the last one, regarding the sea view, where the Zenonian Constitution is mentioned[144]. Therefore, it can be considered that in the Portuguese legal discourse of the early-modern period the Zenonian Constitution was equivalent to the law of the *maris prospectum* (view of the sea).

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[140] Letter from the secretary of state for navy and overseas affairs to the Lisbon council of 9 October 1742. *Elementos* para *a historia*, XIV: pp. 104-108.

[141] *Collecção* Chronologica *dos Assentos das Casas da Supplicação e do Civel*, Coimbra, Real Imprensa da Universidade, 1791, pp. 577-579 (doc. 290).

[142] Law of 18 August 1769. *Collecção da Legislação Portugueza desde a ultima compilação das Ordenações – Legislação de 1763 a 1774*, Lisboa, Typografia Maigrense, 1829, pp. 407-415.

[143] See, for example, the arguments developed by the judge of the Properties, in a case tried in 1673. Pegas, *Commentaria ad* ordinationes, pp. 98-99.

[144] Portugal, D. A., *Tractatus de donationibus jurium et bonorum regiæ coronæ, Tomus secundus…* Lugduni, Anisson & Posuel, 1699, pp. 324-329 (n. 32 a 38).

That is, at least until the Manuel Alvares Ferreira treatise which, due to the excessive esteem and perhaps with some "temerity" in interpreting the Roman element to the detriment of Portuguese regulations[145], ended up relating the paragraphs in the title of the almotacés of the Ordinances of the Kingdom with the laws of the Zenonian Constitution[146]. In the same sense, Pascoal José de Melo Freire also considered that it was the laws of the Zenonian Constitution that had originated those regulations of the almotaçaria included in the Ordinances of the Kingdom, although he admitted that such a Constitution had never been received in Portugal, nor the law of the sea view being able to be adopted as it went against the general tenor of the law of the kingdom[147].

What is certain is that the *ius commune* came to be seen not only as a subsidiary right, but also as a criterion for the interpretation of the kingdom's own rules[148]. Hence the association of the almotacé with the Roman *aedile* and the attempts, sometimes divergent or even contradictory, to see the different types of building servitudes[149] in the rules of the almotaçaria or to establish a direct correspondence between those regulations with the laws contained in the *Codex*, in the *Digest* and in the *Institutiones*, thereby reducing them to a single unit[150].

It is, in fact, strictly the case to state that the law of the sea view was not formally received within the law of the kingdom, because there would have been no diploma that would have instituted this, as was the case, indeed, with all the gaps in the law remedied by subsidiary law. However, it is also true that the law of the sea view was established legally, perhaps first as a royal mercy and then through the widespread use of the jurisprudence of the higher courts. It was enough, therefore, to consider it "good reason" for the jurists to start to interpret in the opposite sense that which had hitherto been a creation of jurisprudence and doctrine. If, in other legal areas, this movement brought about a renewal of the legal order of the Ordinances of the Kingdom[151], in the specific case in question, the revocation of the limitation of the sea view did nothing more than to keep the secular rules of the almotaçaria intact, thereby, in this way, ending the regulatory conflict which existed in this area.

[145] Which is precisely that affirmed by Sousa (de Lobão), M. A., *Tractado historico, encyclopedico, critico, pratico sobre todos os direitos relativos a cazas, quanto às materias civis, e criminais*, Lisboa, Na Impressão Regia, 1817, pp. 71-76.

[146] Ferreira, M. A., *Tractatus de novorum operum aedificationibus*, 2 vols. Porto, Dominicum Serqueyra Costa, 1750.

[147] Freire, "Instituições de Direito Civil", 162 (1967), p. 104 (Book 1, Title 10, § 6), 166 (1967): p. 163 (Book 3, Title 13, § 10).

[148] See what was stated in note 101.

[149] In Roman law, building servitudes were dealt with through the respective legal means of defence, hence they were located throughout the different volumes in different institutes. Amunátegui Perelló, C. F., "Las relaciones de vecindad y la teoría de las inmisiones en el Código Civil", *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso* 38 (2012), p. 92.

[150] A view that was maintained during the first half of the 19th century. See Sousa, *Tractado historico*; Carneiro, M. B., *Direito Civil de Portugal, contendo tres livros: I. das pessoas, II. das cousas, III. das obrigações e acções*, 4 vols. Lisboa, Na Impressão Régia, 1826-1828, IV: pp. 164-225.

[151] Costa, *História do Direito*, pp. 452-453.

9. Closing remarks

In medieval times, the Portuguese almotaçaria was a special type of court, which, by royal privilege, belonged exclusively to the municipal councils. In Lisbon, this institution had the control of the market, urban cleaning and the conflicts between neighbours resulting from activity involving construction. The reception of the *ius commune* in Portugal did not cause major changes to the structure of the medieval almotaçaria institution, although some influences can be noticeable, such as the appeal procedure and a rule for construction inserted in the Lisbon regulation. The same slight influence of the *ius commune* as subsidiary law of the kingdom is also visible in a few general rules on construction laws.

However, the greatest transformations in the almotaçaria institution took place not by an external legal order, but by royal decision. In the beginning of the early-modern period the Lisbon almotaçaria became different from the rest of the kingdom: the three remits were separated, each one with its specialized officers, and the almotacés of the properties in charge of the building disputes were required to be learned judges, hence called judges of the properties.

At the same time, the new compilation of the general law for the kingdom included specific rules for resolving conflicts between neighbours resulting from activity involving construction, but also an appeal body outside the municipal structure to dispatch the appeals of the almotaçaria, something that ended up breaking the ancient municipal privilege. These last changes were responsible for several juridical conflicts: not only the royal high court judges contradicted the judgments of the judges of the properties, but also, by overlapping a particular law of the *ius commune* over the customary rules of the almotaçaria, they created a contradiction to the general law of the kingdom.

Therefore, the foregoing makes it possible to certify that the law for activity involving construction in Lisbon in the early-modern period was perfectly aligned with the legal order of the kingdom, was corporative and "structurally dominated by the principle of particularism […] where multiple sub-orders coexisted […] in conflict with each other"[152]. In particular, these were the rights of the kingdom, the *ius commune*, the customary law of the city and its privileges. Furthermore, the law from *ius commune* which prevented the obstruction of the "vista do mar, do rio, & banda dàlem" [view of the sea, the river and the strip beyond][153] contributed to increasing legal conflicts, not just because it itself was the source of numerous conflicts between neighbours, but because it also generated conflicts between legal regulations, between judges, and between judicial courts. Conflicts that began to be resolved with the jus rationalism of Enlightenment, but which were only resolved with the individualistic current of liberalism, when the administrative and judicial structure of the kingdom was changed through the separation of powers of public bodies and when the rules of the almotaçaria were revoked with the entry into force of the first Portuguese Civil Code, of 1867.

[152] Hespanha, *História das Instituições*, pp. 404-413, 426 (translation by the author). See also, Grossi, P. *A History of European Law*, West Sussex, Wiley-Blackwell.

[153] Expression used by the judge of the Properties, in a case tried in 1664. Pegas, *Commentaria ad* ordinationes, p. 94.

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