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NEW APPROACHES TO LATE MEDIEVAL COURT RECORDS

Bad Cases and Worse Lawyers: Patterns of Legal Expertise in Medieval Portuguese Court Records, c. 1200–1400

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Fragmentary, complex and in short supply, medieval Portuguese court records have been largely overlooked by historians, with the result that the judicial and intellectual workings as well as the social dynamics of legal practice in medieval Portugal remain, for the most part, unknown. Drawing on various examples from several cathedral archives in Portugal and interweaving them with royal legislation and *ius commune* sources, this article contends that, far from merely conveying a disparate array of impressionistic and disconnected glimpses into legal practice, these records are evidence of patterns of legal expertise that can be reconstructed and analysed. It focuses on three such patterns in particular: the exploitation of Romano-canonical procedural law and its flaws; the appeal to the papal curia; and the recourse to authoritative legal counsel abroad. These constants of legal practice not only shaped the experience of the law and litigants' awareness of legal mechanisms in a fundamental way, but also sparked serious social tensions and provided a rationale for the attempts of Portuguese kings, from the 1280s onwards, to exert a tighter control over the legal process.

turpes lites turpiores habent advocatus

William Durand, *Speculum iuris*, 1.4

(after Seneca's *De ira*)

1. Introduction

On the subject of primary sources, Portuguese medievalists are apt to be an embittered, jealous sort, for they know practically for a fact that the grass on the other side of the Pyrenean fence is not only unfairly greener but also indecently abundant. I shall argue in this article that too much coveting of their neighbours' manuscripts and bemoaning of the country's historical calamities—the 1755 Lisbon earthquake, the Peninsular War of 1807–1814, the negligent record-keeping of successive generations—have distracted Portuguese medievalists from the need to look more closely and imaginatively at materials whose indigence they have taken for granted. This is especially true, it seems to me, of ecclesiastical court records and their contribution to legal history, which will be the main focus of this article.

Medieval court registers such as those of Canterbury or York have not survived in Portugal, possibly because the drafting of episcopal court proceedings was not the responsibility of the audience courts but of the notaries public who registered those proceedings in notarial books kept in their custody and supplied the parties with original copies (on notarial practice in medieval Portugal, see Nogueira, 1996). Since ecclesiastical justice (and lower secular justice, for that matter) depended on the services of notaries public for the production and registration of legal documents, the fact that no medieval notarial archives have reached us should mean that the history of legal practice outside the king's court—whose records were kept in chancery since the beginning of the 13th century—is virtually impossible to write.¹ This assumption, however, is only partly correct. Medieval ecclesiastical court records can indeed be found in Portuguese archives, tucked away between the title deeds and royal and papal privileges and confirmations that make up the bulk of cathedral and monastic

¹ Early evidence of the archival carelessness of notaries can be found in a royal decree from January 1305 (the so-called 'Regimento dos tabeliães'), which, among other criticisms, censures notaries for using rolls instead of books for their registers, which they then ostensibly mislaid: *LLP*, 63, no. 1.

collections. These court records were preserved for the same reason that property records and privileges were preserved, that is to say, as muniments (the written proofs of the title of a church or monastery to its land and rights, the guarantees of its wealth and liberties). They were kept, therefore, not by the court that provided justice, as a register, but by one of the litigants seeking it, as an insurance.

What we are left with, then, is a documentary flotsam comprised of notarial copies of court proceedings, legal memoranda (that is, summaries of facts and legal arguments presumably drafted in the context of, or in preparation to, a legal action), inquiries, royal sentences, papal rescripts appointing judges delegate, legal consultations and so on. To these should be added the documents inserted in the



Figure 1: Legal *consilium* procured by the church of Braga in the first half of the 14th century. Source: Braga, Arquivo Distrital de Braga, Gaveta de Braga, no. 21.



Figure 2: Parchment roll containing the preliminary phase of proceedings in the dispute between the abess and convent of Lorvão and the cathedral chapter of Coimbra (1304–1306). Source: Lisbon, Arquivo Nacional da Torre do Tombo, Cabido da Sé de Coimbra, mç. 102, 2.^a incorporação, no. 1.

court proceedings themselves, which include procurations, court inquiries and witness depositions. From a material point of view, these records consist, as a rule, of individual folded-up parchment skins (**Figure 1**) or parchment membranes stitched together and rolled up (**Figure 2**), but they can also be found in miscellaneous cartularies, such as Braga cathedral's 16th-century *Rerum Memorabilium* (**Figure 3**), or as part of *ad hoc* dossiers compiled with the purpose of documenting a specific legal dispute, such as the one that opposed, in the first half of the 14th century, the bishops of Porto and the kings of Portugal over the former's temporal jurisdiction over the city of Porto (**Figure 4**).

Like solitary pieces of an irretrievably lost jigsaw, these records do not lend themselves easily to interpretation. Court proceedings are very often incomplete and it is sometimes quite difficult to guess the purpose and procedural role of certain documents—for instance, those records which I have called, for lack of a better term, legal memoranda. Moreover, when one is fortunate enough to establish a convincing relationship between several records, as being the product of a single lawsuit or a series of connected legal actions, the precise nature of that relationship and the

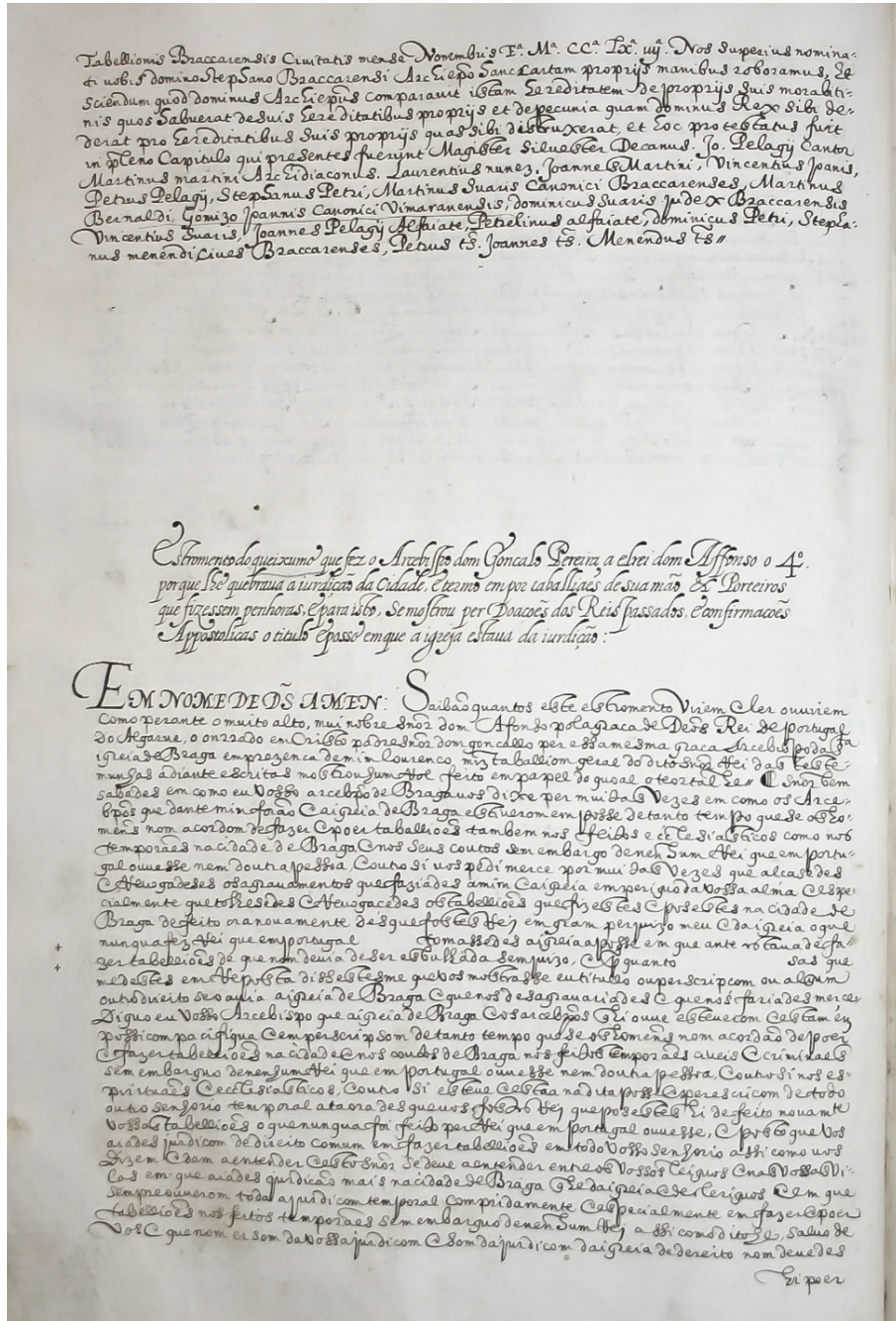


Figure 3: Folio from the 16th-century Braga cartulary known as *Rerum Memorabilium*. Source: Braga, Arquivo Distrital de Braga, *Rerum Memorabilium*, Vol. II, fol. 19v.

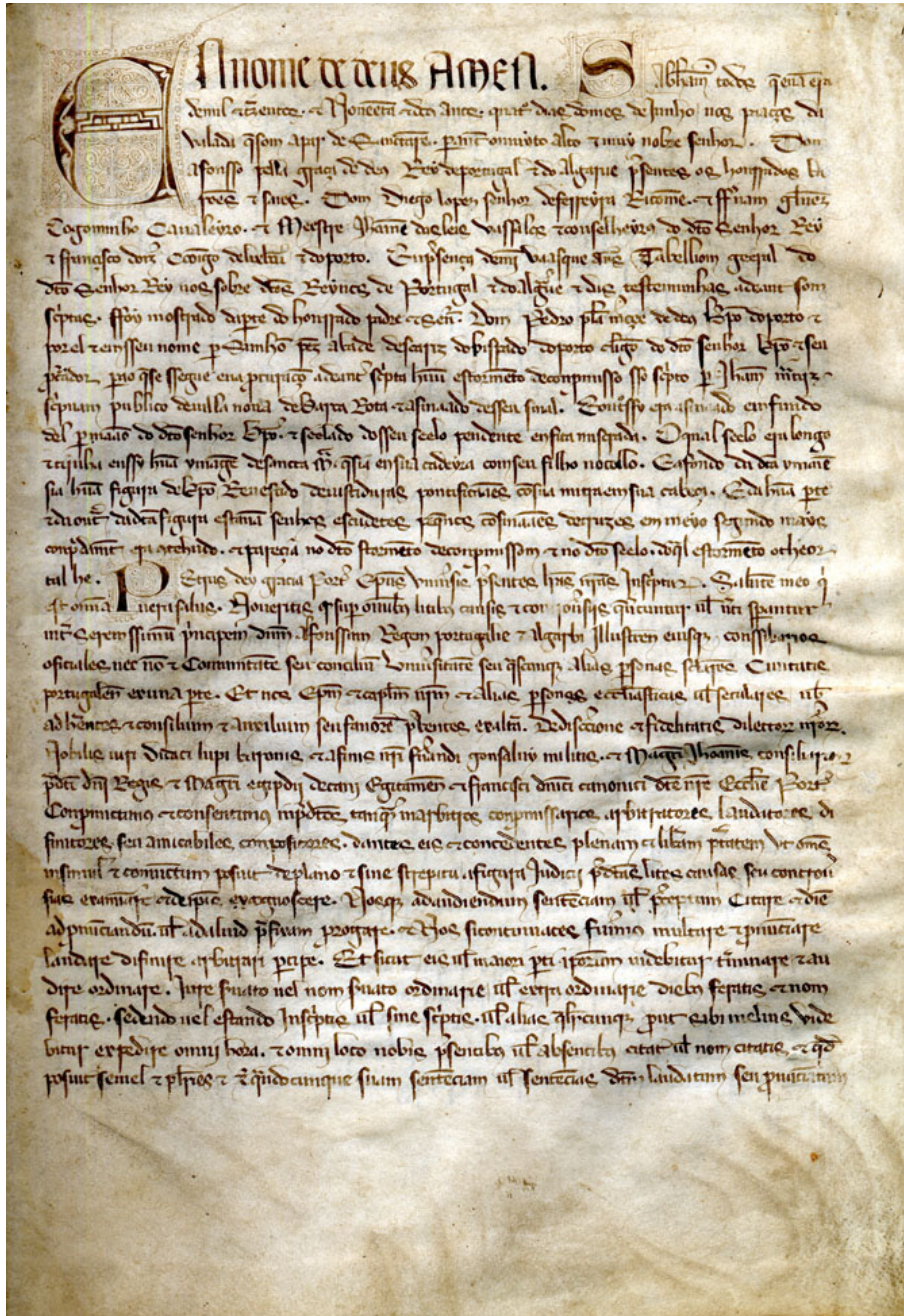


Figure 4: Folio from a dossier containing the court proceedings, allegations and legal evidence concerning a dispute between the bishops of Porto and the kings of Porto in the first half of the 14th century. Source: Porto, Arquivo Histórico Municipal do Porto/Casa do Infante, A-PUB 5514, fol. 1.

chronology of its production are frequently unclear. This and the fact that some of these records are written to a formula, in a highly technical juristic language, rich in abbreviated references to *ius commune* texts and their glosses, go some way towards explaining why Portuguese legal historians have chosen to turn a blind eye on ecclesiastical case material and on legal practice more broadly. Possibly they saw in the Romano-canonical reality that emerges from those records something separate from (perhaps even extraneous to) what appears to be their main concern, namely the genesis and development of a Portuguese *ius proprium*. The result of that indifference is as formal, top-down and lifeless as one would expect of a history of medieval law written almost exclusively from normative sources: an imposing courtroom, as it were, lined with tomes containing the laws of the kingdom but otherwise empty of the social dynamics and intellectual operations that were an integral part of the law as it was experienced by litigants (for the classic approach, see for instance Caetano, 2000; Costa, 2012; and, to a lesser degree, Silva, 2006).

Part of that experience can be recovered from the records of legal practice, such as they have reached us. Their fragmentary nature makes it impossible to describe in any great length the functioning and social profile of a particular court, let alone reconstitute trends of legal consumption, but *some* aspects of the latter can none the less be gleaned from them. Furthermore, even a truncated court record can tell us a great deal about the social dynamics of litigation and especially about the practicalities of procedure, the mastery of which is a primary marker of what historians of the *ius commune* usually refer to as the professionalisation of legal practice: that is to say, the increasing centrality to a legal system of the specialist services of a class of court- or university-trained lawyers and proctors (on this topic in general, see Brundage, 2008). These services, and how they shaped legal practice in ecclesiastical courts, will be the subject of the remainder of this article. I shall concentrate my attention on three points in particular: the exploitation of Romano-canonical procedural law and its shortcomings (section two), the possibility open to litigants of appealing to the papal curia and the recourse to prestigious legal counsel abroad (section three). I propose to treat them not as incidental aspects of legal practice but as basic patterns of legal expertise that considerably affect not

only the course of judicial proceedings and the behaviour of litigants, but also the very materiality of litigation. The concept of pattern that I will be using throughout is especially helpful to convey two distinctive features of legal expertise, insofar as it can be documented by medieval Portuguese court records. Firstly, that the judicial conduct of lawyers and proctors depended on a measure of repetition and formalism implicit in a procedural framework. Secondly, that some of the things that can be known with a fair degree of certainty about legal expertise in a legal action are not necessarily found in the documents that record it, but can be plausibly inferred from them (see Smail, 2017).

2. Looking inwards: procedural minutiae and legal practice

Writing about Evesham Abbey in the early 1200s, Alain Boureau has shown how recourse to the papal court forced religious institutions to confront the brave new world of the *ius commune*, where the expertise of university-trained lawyers was essential if one were to avoid the shoals of procedure and steer a clear course through the deep waters of Justinianic and canon law (Boureau, 2000). The rapid spreading of the *ius commune* across Europe between the second half of the 12th century and the first half of the 13th is inseparable from the success of papal justice, whose unsurpassable authority and bureaucratic efficiency made it highly attractive to litigants, both ecclesiastical and lay (the most limpid description of this process remains Southern, 1990: 115–21). In Portugal, the first appointments of papal judges delegate date back to the 1180s, becoming steadily more abundant during the pontificates of Innocent III and Honorius III (Feige, 1978: 313–56; Branco, 2011: 47–61, and 2018; Linehan, 2006). This upward trajectory and its chronology are neatly matched by the growing number of Portuguese clergymen in the law schools of Bologna from about 1180 (Fleisch, 2006: 120–52), arguably as a consequence of mounting judicial business and a deeper interest in the law, practical as much as intellectual, which the habit of 13th- and 14th-century Portuguese prelates of bequeathing their Roman and canon law books to their relatives and fellow churchmen would seem to confirm (Pereira, 1964–6 and 1967–9).

In keeping with a paradigm of state formation common to other 13th-century monarchies, it was from this legally minded ecclesiastical elite that royal power in Portugal drew the cadres that allowed it to develop its own judicial and administrative structures and to consolidate its legitimacy as the principal source of public authority in the kingdom, particularly during the reigns of Afonso III (1245–1279) and Dinis (1279–1325) (Mattoso, 1995: 97–117, especially 104–7; Branco, 2001). This was achieved, in large measure, by the establishment of a secular legislative framework, which, among other things, laid out the rules by which litigants could appeal to the king's court and defined the judicial procedure by which the latter must abide. The nexus between procedure and judicial primacy was well understood by 13th-century monarchs seeking to extend their authority over territories that they did not entirely control (on this point, see Hilaire, 2011: 37–65). From this perspective, the foundational legislation of Afonso III and Dinis on procedure, and specifically on the appeal, is of a piece with the judicial reforms of Louis IX, which expanded the jurisdiction of the Paris *Parlement* and transformed it into the sovereign court of France (Hilaire, 2011: 37–92; for its later development, see Cheyette, 1962), or with Edward I's ground-breaking statutes and judicial experimentation (such as the favouring of petitioning or the multiplication of commissions of *oyer and terminer*), which left a deep mark on the institutional structure and the judicial dynamics of English royal justice (Maddicott, 1986: 29–30; Prestwich, 1997: 267–97; Burt, 2013: 83–176).

Such efforts from royal power to organise the channels through which a masterful justice could be easily sought and swiftly delivered were no doubt a response to a rising social demand for exactly that kind of justice, just as papal justice had grown and asserted its primacy largely in response to wide demand from the lower strata of the ecclesiastical hierarchy. The specificity of the Portuguese case in this respect has to do with how greatly the organisation of those channels relied on the adoption of Romano-canonical procedural law, the basic elements of which may be found in Afonso III's decrees and chancery formularies (see Domingues, 2013: 206–17). For this reason, by 1300 the experience of the law for a layman at the king's court must

have been similar in many respects to that of a clergyman at his ordinary's audience, as they were equally structured by Romano-canonical procedure (for an outline of the latter, see Fowler-Magerl, 1994: 36–59). Both would have expected a lawsuit to start with a summons and to be roughly divided into two halves: a preliminary phase *in ius* and the judicial phase proper (*in iudicio*), separated by a specific procedural moment, the *litis contestatio*, in which the defendant was expected to confess to or to deny the plaintiff's accusation. They would probably appoint a proctor and maybe hire the services of a lawyer. The former would read the articles of the accusation or raise objections to them, depending on whether his client was the plaintiff or the defendant. The judge would then rule on those objections and chivy the defendant into formally contesting the accusations. Enquiries would then be carried out, based on articles put forward by the parties; written evidence might be adduced and allegations might be made in court. Procedures would eventually culminate in the judge's definitive sentence, which either party could appeal to a higher jurisdiction, to the king himself or to the papal court, as the case might be.

The legal pattern by which litigants employed court proctors and lawyers to exploit the shortcomings of procedural law constitutes an essential aspect of legal practice in later medieval Portugal, one which bestrides secular and ecclesiastical jurisdictions and to which extant court records, sparse and fragmentary as they are, and royal legislation on judicial matters bear ample witness. But before looking more closely at the latter, a few general remarks are necessary regarding the use and abuse of expert legal counsel and representation in the context of Romano-canonical litigation. Defendants had arguably more to gain than plaintiffs from the complexity of Romano-canonical procedure and from the ability of sharp-witted legal professionals to find procedural grounds to invalidate a suit (excommunication or double jeopardy, for instance) or at least to drag it out (insufficient procuration, badly drafted *libellus*, failure to produce adequate proof within specified time limits and so on). At best, this rebalanced, to some extent, a legal system that was vulnerable to abuse by powerful litigants wishing to accrue their influence and wealth. At worst, it led to procedural stonewalling and the drowning of lawsuits in legal minutiae.

As we shall see, quibbling and vexatious litigation earned lawyers in Portugal and elsewhere a very bad reputation, which was, however, only partly deserved. The uncompromising combativeness with which litigants fought for properties and rights, sometimes on the basis of tenuous or unverifiable title, is surely as much to blame as the malicious cavilling of lawyers for the personal and social miseries of fruitless legal wrangling.

What happened when litigiousness and legal expertise combined is strikingly illustrated by a dispute heard at the episcopal audience of Coimbra between 1304 and 1306, opposing the abbess and convent of São Mamede de Lorvão, in the centre of Portugal, and the chapter of Coimbra over the tenth owed by three churches and appurtenant properties.² The surviving record of this dispute consists of 62 parchment membranes, each roughly 24 centimetres wide, stitched together to form a 36 metre-long roll (see Figure 2). These 62 membranes contain nothing but the preliminaries of the lawsuit, which are largely taken up by the *exceptiones* churned out, with tangible gusto, by the chapter of Coimbra's proctor (*exceptio excommunicationis, exceptio de re finita per compositionem, exceptio spoliationis, exceptio de consuetudine, exceptio de manifesta offensa*) and all duly turned down by the episcopal auditor as either irrelevant to the action or insufficient to invalidate it. Two of the objections put forward in this instance, concerning excommunication and spoliation, were par for the course in ecclesiastical courts and had been the target of Innocent IV's decretals *Pia consideratione* (VI. 2.12.1) and *Frequens* (VI. 2.5.1), in which the lawyer-pope deplored the fact that overpowering malice could turn what had been intended as a remedy into something harmful.³ Whether or not the defendant's proctor in this case was acting out of overpowering malice or a strictly professional duty towards his client is a matter of perspective. The 36 metre-long physical corollary of his legal performance, however, conveys something about Romano-canonical procedure taken to its ultimate logical consequences that terse

² ANTT, Cabido da Sé de Coimbra, mç. 2, 2.^a incorporação, no. 1.

³ VI. 2.12.1: 'Sed hominum succrescente malitia quod provisum est ad remedium tendit ad noxam'.

court sentences and neat *ordines iudicarii* do not, namely the sheer material weight of litigation. Consider these two passages:

[1] And the said Aymericus complained about the adjournment being set after vespers and for the following day, as it was impossible for him to obtain copies of the proceedings at such short notice; as the trial (*iudicium*) had not yet begun or even been arranged; and, above all, as I, the notary public, am unable to produce the requested copy. And by virtue of the aforesaid grievances and each and every one of them, and among the recorded proceedings, he (i.e. *Aymericus*) called on or appealed to the Roman Church, requiring that a record of proceedings be provided to him to that end. And the said Petrus Lupi (*the auditor*) did not grant the appeal, deeming it frivolous and incautious. I, the said notary public, on the instructions of the same Petrus Lupi, made the above-mentioned copy, as required, for the Chapter's proctor [i.e. *Aymericus*]. And the said Don Aymericus, insisting on his appeal, said that it was pointless to entrust it [i.e. the copy just mentioned] to his good faith, as it was getting late and he could not read and study properly at night, and especially because he had to set off on a journey early the next morning, as Petrus Lupi and many others knew, whence again he demanded three times that the appeals be granted to him. And the said Petrus Lupi said that he was ready to grant him refutatory appeals at the appropriate time established by law.⁴

⁴ 'Et dictus Aymericus posuit pro grauamine assignacionem terminj factam post vespervas usque in sequentem diem, cum copiam actorum non possit habere in tam breuj assignacione, cum eciam iudicium non sit ceptum nec eciam ordinatum, Maxime Cum ego Tabellio non possum dare copiam petitam. Et ex predictis grauaminibus et eorum quolibet et apud acta Romanam ecclesiam prouocauit seu eciam appellauit, Petens acta sibi pro apelationis concedendis. Et dictus Petrus lupi non detulit appellationi tamquam friuole cum inCumtinentj (*sic*). Ego dictus Tabellio de mandato ipsius Petri lupi faciebam copiam supradictam petitam ipsi procuratori dicti Capituli. Et dictus dominus Aymericus insistens sue appellationi dicit quod non sufficiebat commitere fidej sue, cum apropinquet serum et de nocte non possit bene legere et studere, Maxime cum tenetur iter arripere sequenti die mane prout constat ipsi Petro lupi et alijs pluribus, vnde iterum primo, ij°, iij° pecijt apelationes sibi dari. Et dictus Petrus lupi dicit quod paratus erat dare sibj apelationes refutatorias jnfra tempus a jure statutum' (ANTT, Cabido da Sé de Coimbra, mç. 2, 2.^a incorporação, no. 1, membrane 7, *in medio*).

[2] And Stephanus Dominici, portionary, proctor for the Chapter, required a copy of the said schedule (*cedula*) and an adjournment in order to deliberate on it. And required, in addition, that proceedings be suspended until his lawyer could come to court. And the said Petrus Lupi had the said copy made, assigning a time limit for the petitioner to deliberate on and reply to it, namely the first day after Passion Sunday next, at the end of which adjournment any further requests from Stephanus Dominici for more time for his lawyer would not be allowed, if perchance Johannes Gomecii, the lawyer, failed to come to Coimbra within the aforesaid adjournment. (...) On the appointed day, a Monday, namely the nones of April [April 5th], the said Petrus Lupi sitting in court at the entrance to the cathedral church and with the proctors in attendance before him, the aforesaid proctor for the Chapter [Stephanus Dominici] said that Johannes Gomecii, who is counselling the aforementioned Chapter in this suit, having come [to Coimbra] for two days, and seeing as he was involved in the suit from a distance and there were so many and such lengthy arguments that it was impossible to deliberate fully on them in a month or so, let alone in two days, requested that a delay be granted to him so that he could fully deliberate on and reply to the verbose arguments mentioned above.⁵

⁵ 'Et Stephanus dominicij porcionarius procurator Capitulj petijt Copiam dicte cedule et terminum ad deliberandum super ea. Et insuper petijt aduocatum suum expectari. Et dictus Petrus lupi mandauit fieri copiam petitam, assignans terminum petentj ad deliberandum et respondendum, scilicet, primam sequentem diem post dominicam passionis dominij proximo subsequentis, Nollens per hoc terminum currere dicto Stephano dominicij quin postea possit iterum petere suum aduocatum expectari, si forte Johannes gomecij aduocatus non uenerit Colimbrie jnfra terminum supradictum. (...) Quo die adueniente, die Lune, scilicet, nonas mensis Aprilis, dicto Petro lupi sedente pro tribunalj in mediano hostio ecclesie Cathedrali et procuratoribus presentibus coram eo, predictus procurator Capitulj dicit quod cum Johannes gomecij qui aduocat in hac causa pro Capitulo memorato ante terminum per duos dies uenisset, unde ex causa egerat in remotis et tot erant rationes et prolixitas rationum quod non posset deliberare ad plenum super eis fere per mensem Maxime in duobus diebus, ^{pecijt} terminum sibj concedj in quo posset plene deliberare et Respondere prolixis rationibus supradictis' (ANTT, Cabido da Sé de Coimbra, mç. 2, 2.^a incorporação, no. 1, membrane 34, bottom).

We can glimpse here the human messiness and the material constraints of legal practice, the texture of trivialities—such as a proctor's tired eyes or the inconvenience of his matutinal travel plans, assuming they were genuine—that shaped the day-to-day experience of the law and the grinding march forward of procedure. In particular, the organisational strain created by a rapidly expanding mass of records and the *prolixitas rationum* they contained is palpable. The two excerpts above draw attention to the fact that Romano-canonical procedure generated a much greater volume of records than the more or less finished court proceedings, sentences and decretals that make up most of the surviving case material from ecclesiastical courts. The tithe dispute between Lorvão and the chapter of Coimbra engendered, therefore, in addition to Lorvão's 36-metre roll that has reached us (and a twin roll which may or may not have been made at the chapter's behest), a bundle of *cedulae* with the arguments, rejoinders and *gravamina* of both parties and the auditor's interlocutory sentences, turned out as proceedings advanced, presumably at considerable expense to the parties.

The concentration of legal expertise on points of procedure was certainly not exclusive to the episcopal audience of Coimbra. Quite the contrary seems to be true, in fact, and from quite early on. The 11 parchment membranes that record the 1237 dispute over tithes 'et aliis rebus' between Pedro Salvadores, bishop of Porto, and King Sancho II are largely taken up with procedural objections prior to the *litis contestatio* (Vitória, 2012b: 157–8).⁶ Considerable erudition and creativity were spent on these questions, which allow us, among other things, to get a better sense of the virtuosity of legal practitioners and the extent to which they were attuned to the legal novelties coming from abroad. In the 1237 dispute, the proctors of both parties make extensive and rather impressive use of Gregory IX's constitutions, published scarcely three years earlier. In 1247–1248, the proctor Pedro Anes, representing the clerics of Leiria, based part of his justification for failing to appear before the dean of Lamego by referring to the first two canons of the First Council of Lyon of 1245,

⁶ The dispute was resolved by means of a settlement reached in 1238: ADP, Cabido da Sé do Porto, Livros dos Originais 1664(6), fol. 21r, and 1673(15), fol. 24r.

the content of which he must have obtained either from the definitive collection sent to the universities in August of that year or directly from Innocent IV's register (Ventura and Gomes, 1993; on the Lyon canons, see Kuttner, 1940, 1980: 70–131; Longère, 1998). Peter Linehan and Martin Bertram's exemplary analysis of the 1250 dispute over the church of Abiul that set the irrepressible nuns of Lorvão against the knight Vicente Dias in 1250 has shown that part of the legal proceedings which have survived hinged on the admissibility of Gregory IX's constitution *Romanus pontifex*, invoked by the nuns' proctor in support of his views on the right and proper way of drafting a summons (Linehan and Bertram, 2014). The knight's proctor contended that *Romanus pontifex* was a *novella constitutio* that had not yet been 'insinuated' (that is to say, published) in the kingdom of Portugal, and having, as a consequence, no legal validity there. As with the examples mentioned above, the surviving record of this case amounts exclusively to the procedural matters debated in the preliminary phase of the lawsuit.

The excesses of procedural hair-splitting threatened to smother ecclesiastical justice, as the complexity and sophistication that had made it attractive in the 12th and 13th centuries turned into sclerosis and over-elaboration in the 14th (for the papal context, see Southern, 1990: 133–69). The signs of noble rot are already manifest in the 1304–1306 dispute between the abbess and convent of Lorvão and the chapter of Coimbra. Innocent IV's *Pia consideratione* and *Frequens* were intended to address this problem, as was, to a certain extent, the development of summary procedure (Pennington, 2016; Donahue Jr., 2016). As Portuguese kings saw it, however, this issue was too serious and too socially widespread to be fixed by canon law *aggiornamenti* or to be left to clergymen alone. Any lawyer or proctor worth his salt would find no difficulty in sliding between an ecclesiastical and a secular court in Portugal, since the procedural framework of litigation was fundamentally the same in both. In fact, it may be plausibly argued that this straddling of jurisdictional boundaries by lawyers as well as notaries public, combined with their increasing centrality to the legal process, was instrumental in shaping the distinctly Romano-canonical procedural core of royal law in Portugal from the mid-13th century onwards, even if this was certainly not the sole factor. Portuguese kings had thus every reason to feel

concerned by the *déformations professionnelles* of legal practitioners, of which they seem to have had a keen and informed grasp.

The earliest royal legislation specifically aimed at regulating the activity of lawyers and proctors is roughly contemporaneous with the 1304–1306 Lorrvão-Coimbra dispute. In 1283 (or perhaps 1286) Dinis (r. 1279–1325) issued a decree addressing the maintenance of malicious litigation by lawyers and setting down their maximum remuneration.⁷ Another decree dated 23 August 1303 forbade lawyers and proctors engaged in a lawsuit from perceiving their salary or any gifts of bread, meat or wine before the lawsuit had been determined by a definitive sentence or settled by an agreement between the parties, hoping thereby to remove the incentive they would otherwise have to delay and vitiate proceedings.⁸ These first royal decrees regarding the conduct of legal practitioners were not exceptional measures to root out an isolated problem, but were part of a wider effort to curb judicial corruption and expedite justice, which would continue unabated throughout the reign of Dinis (Vitória, 2018a: 80–3). This sustained effort to reform secular justice can be interpreted as indirect evidence not only of its growth in terms of the volume of litigation flowing to secular courts and the social pressure exerted on them, but also of its increasing professionalisation, both aspects of which cannot be deduced merely from reading the sparse sentences registered in the royal chancery books, which are the sole direct evidence we have of legal practice in secular courts in Portugal for this period.⁹ From the perspective of royal power, therefore, judicial reform and regulation of the legal profession were two sides of the same coin, and it is possible that a socially more constructive role for lawyers was envisaged, at some point, as part of the solution to the latter. In 1308, the University of Lisbon, which had been founded 18 years earlier, was transferred to Coimbra. In the new university statutes

⁷ *LLP*, 190, dated 1283; the same decree was subsequently included in *ODD*, 175, and dated 1286.

⁸ *ODD*, 191.

⁹ It should be pointed out, however, that the sentences extant in the royal chancery books are no more than a small fraction of the total number of sentences initially recorded, since eleven of the nineteen chancery books for the period between 1211 and 1433 are actually 15th-century digests of the originals, put together in the 1460s and 70s by the royal chronicler and custodian of the royal records, Gomes Eanes de Zurara. See Coelho and Homem 1995: 52–3; Costa 1996: 95–102.

granted by the king, the service of well-trained legal practitioners is described as a condition of the proper government of the *res publica*, but perhaps not for the reasons that we would expect: 'Preterea ad rem publicam melius gubernandam, in predicto nostro studio volumus in legibus profesoem, ut rectores et iudices nostri regni consilio peritorum dirimere ualeant subtilles et arduas questiones'.¹⁰ We can only speculate as to whether or not this civic-minded aspiration was enough to persuade at least some of Coimbra's newly minted *iurisperiti* to devote their talents to the 'public' service of counselling judges rather than the 'private' one of advising litigants. The latter aspect of legal practice remained a focus of concern for royal government.

Although the prohibition of gifts of bread, meat or wine was restated in 1314, this initial strictness was abandoned in 1322, when lawyers and proctors became entitled to receive half of their pay at the beginning of the suit and gifts in kind limited to a chicken, a capon, a pitcher of wine and up to half a lamb.¹¹ This was doubtless a sensible adjustment of legislation to entrenched practices of gift-giving, which may have stemmed in part from the realisation that legal practice was a buyer's market and that the impulse to corrupt justice often came from the litigants themselves. Disproportionate restraints might, as a consequence, make a bad situation worse. We are given a glimpse of what could happen in such a scenario in yet another decree by Dinis, dated 15 September 1313, which is a perfect digest of legal procedure at the king's court as it had been developing since the reign of Afonso III. Unsurprisingly, lawyers are taken to task for slowing down the machinery of justice, but what is particularly deplored in this instance is not their inherent malice or greed but the habit of litigants of hiring more than one lawyer to assist them, with the result that the king's court was frequently brought to a standstill because all lawyers were working on the same suit.¹² This brief vignette of court life suggests that the social dynamics of litigation at the Portuguese royal court in the first decades of the 14th

¹⁰ ANTT, Chancelaria Régia, Chancelaria de D. Fernando, liv. 1, fols. 7v–8r (published, with minor spelling variations, in *CUP*, no. 25, 44).

¹¹ *LLP*, 184–5 and 215.

¹² *LLP*, 169–75 at 175.

century were potentially as complex and bound up with the way legal expertise was deployed as those of ecclesiastical courts. Clearly, such social complexity and the legal sophistication through which it expressed itself in court could not be managed without the services of lawyers and proctors, but King Afonso IV (r. 1325–1357) appears to have been determined to prove the opposite. In 1327, he set about his task of de-professionalising the legal system by abolishing the offices of resident lawyer and resident proctor at the king's court, accusing them of obscuring legal proceedings ('o uogado com malícia toruaria o feito') and of dishonestly maintaining lawsuits that they knew were legally unfounded (see Homem, 1994).¹³ Prompted by the success or, as is more likely, by the failure of this first measure, in 1351 Afonso IV decided to bar lawyers and proctors from court proceedings altogether, in what amounted to a general ban on the legal profession (see Farelo, 2009: 79–80).¹⁴

The depiction of lawyers and proctors in Dinis' and Afonso IV's legislation as venal swindlers is a watered down version of the Western literary *topos* of the avaricious and unscrupulous lawyer, who used his silver tongue to ensnare honest men in futile and inexhaustible legal actions, and who willingly prostituted himself by taking money from any paying client (Brundage, 2002). The medieval writers who created what would become an enduring image of lawyers as the scourge of virtuous society (theologians and preachers like Saint Bernard of Clairvaux or John Bromyard, political writers like John of Salisbury or Philippe de Mézières, poets like Dante, even high profile lawyers like Bartolus or Panormitanus) were certainly moved by a genuine moral outrage at what they perceived as the debasement of justice by a class of wicked bloodsuckers and their materialism, but this sentiment was also mingled, in some cases, with social contempt at their seemingly unstoppable rise, often from modest origins. So we should be careful not to take their spiteful diatribes as the 'public image' of medieval lawyers, even if the latter may have been fairly negative. As we have seen, legal professionals thrived not because they were pushy manipulators, but because their services were in demand. Perhaps lawyers were generally seen as a

¹³ *ODD*, 315–34 at 332–4.

¹⁴ *LLP*, 439–40.

necessary evil, but surely their expertise of the law and skills of persuasion were no more to blame than the doggedness of their clients for the delays and deadlocks that plagued the exercise of justice.

Afonso IV's draconian prohibition implies the belief that a legal system without lawyers would meet the expectations of litigants better than the opposite. At the *Cortes* (or estates general) held at Elvas in May 1361, the representatives of the main Portuguese cities and towns made clear to Pedro I (r. 1357–1367) that they did not share this belief. According to them, banning lawyers and proctors from the courts led to the loss of property rights and to a kingdom-wide dumbing down of the legal profession, presumably not a good thing in their view.¹⁵ Their complaint is remarkable because it suggests that they understood two important truths: first, that the socio-political reality in which they lived generated conflicts and tensions that could not all be resolved meekly under a chestnut tree; and second, that the articulation of these conflicts and tensions with the extreme juristic fertility of the *ius commune* and the jurisdictional shifts and overlaps that characterise later medieval politics and society in Western Europe could not be made without specialist knowledge. For those with something to lose and money to spend—such as the urban elites that were the voice of the towns at the *Cortes*, but also the nuns of Lorvão or the cathedral chapter of Coimbra or a nobleman in the North of Portugal—lawyering up might be the only thing preventing, or at least postponing, the transformation of the rule of law into the tyranny of justice.

Rulers naturally saw this problem under a different light. In setting down legitimate channels and procedures for providing clarification and for establishing the better of two contradictory claims, the legal system offered them a formidable tool with which to reshape society and redistribute power and wealth, to the extent that it could be rejigged in their favour. Afonso IV was quite adept at transferring to the courtroom an important part of his strategy of jurisdictional claw-back, which he aimed especially at the Church (a notable example of this can be found in Vitória,

¹⁵ *CPI*, 50, art. 37.

2012a). This can be seen particularly in the 1330s and 40s, when a vast operation of verification of jurisdictional privileges was carried out at his orders (Vitória, 2018b). This operation consisted in a collective summons enjoining all holders of privileged or immune land to appear before the royal auditors and show by what right they held that land, collected taxes and fees and administered justice within its boundaries. The whole enterprise was in fact a blatant distortion of Romano-canonical procedure, grossly skewed in favour of the king. From the moment the summons was made public, landholders were left with only two options: they could either come to court and prove their title or refuse to do so and face charges of contumacy and the unfavourable sentence that would inevitably issue from an *in absentia* trial. The explicit framing of the operation as a massive collective trial, instead of as an administrative survey such as had been carried out in Dinis's time, provided Afonso IV with a socially tolerated and juristically defensible scheme for dealing with uncooperative subjects and automatically depriving them of their possessions. Once before the auditors, the defendant enjoyed none of the protections afforded by the *ius commune*, because the king's proctor made no allegations that could be objected to other than claiming title for the king based on 'common law'. It was actually the landholder who, now like a plaintiff, now like a defendant, was expected to start proceedings with his allegations and then decide whether to proceed to the adjudication phase of the suit or seek a compromise with the king's proctor.

Barring the exceptional intervention of Afonso IV's jurists in the auditors' deliberations, lawyers are notoriously absent from this travesty of procedure (Vitória, 2018b: 475–6). It is not clear why this is so, since the 1327 ban on lawyers and proctors resident at the king's court (which, so far as we know, had not been abrogated, although it might have become a dead letter in the interval) did not preclude external counselling, but perhaps the most likely reason for it is the conciseness of the court sentences recorded in the royal chancery books, which keep the summary of proceedings to their bare essentials. But it is doubtful whether the iron-bound framework of Afonso IV's jurisdictional trials left any space for lawyers at all, just as it is tempting—and, I think, warranted—to place the ban on their professional activities in the broader context of Afonso IV's jurisdictional policies,

and particularly his utilisation of the legal system as a catalyst for political change (Vitória, 2018b: 461–72; Linehan, 2016). Supposing for a moment that in addition to their proverbial greed and malice lawyers were seen in royal circles as standing in the way of monarchical progress, the question of their social necessity, which was crisply articulated at the *Cortes* of 1361, led to some understandable tergiversation on the part of the ruler. Shortly before the *Cortes* met at Elvas in the spring of 1361, Pedro I relaxed Afonso IV's ban. He authorised legal counselling and representation, but made them subject to royal licence.¹⁶ In a telling coda, the same decree sets extremely harsh penalties for secret counselling (namely, death and confiscation of all properties to the Crown), which suggests that the practice was probably not uncommon during the ban and might equally well undermine the purpose of the new measure. Under pressure from the prelates and the municipal representatives gathered at Elvas, however, Pedro I normalised legal practice altogether by reverting to the state of affairs before Afonso IV's ban.¹⁷ But this re-professionalisation of the legal system was brought to a halt less than a year later, when a new ban was decreed by Pedro I in April 1362, ostensibly in response to the incorrigible habit of lawyers of delaying court proceedings and maintaining untenable lawsuits with the sole purpose of mulcting their clients—and sometimes their opponents too—as much as they could.¹⁸ To all intents and purposes, this ban was dissolved during King Fernando's reign (1367–1383), but the subordination of legal counselling and representation to royal licence had, meanwhile, become the norm (Farelo, 2009: 81). A balance had seemingly been struck between total de-regulation and total prohibition, bringing the buyer's market of the law squarely under monarchical control.

3. Looking outwards: the papal curia and the Italian jurists

So far I have focused mainly on how specialist juristic knowledge shaped legal experience within the confines of the courtroom. But committed litigants with deep pockets often looked beyond the latter, at Rome or Avignon, at Bologna and Perugia.

¹⁶ *CHPI*, 203–4, no. 505.

¹⁷ *CPI*, 50, art. 27.

¹⁸ *CHPI*, 296, no. 636; Lopes, 2007: 33–34.

They did so essentially for two reasons: to appeal to the papal curia and to obtain a learned opinion (or *consilium*) on a particular legal question, which might or might not be the object of a suit. Litigants in ecclesiastical courts had the possibility of appealing to a higher jurisdiction at any stage of the lawsuit; they could even bypass intermediary jurisdictions entirely, such as an archbishop's or a metropolitan's court, and appeal directly to the papal curia. This was one of the very pillars of papal authority over the Church from the 12th century onwards, but also a fundamental safeguard against biased, negligent or oppressive rulings, and a main channel for the diffusion of the *ius commune* and the new canon law in particular, as we have seen above. Taken to extremes, however, the appeal could undermine the legitimacy of lower judges, who needed a firm hand to suppress its use as a delaying tactic or as a way of compelling poorer litigants to desist from pursuing their cases. The determination of litigants to exhaust all possibilities available to them can be measured from the scope of the procurations that they issued to their legal representatives. A typical authorisation to a proctor to appeal to a higher jurisdiction from an episcopal court in 14th-century Portugal usually read like this (the translation from the Portuguese is my own):

[3] (...) and [the litigant gives full power to her proctor] to receive and consent to the adjudication delays that are reasonably assigned; to conclude and renounce, and to request the other parties to conclude and renounce, the sentences, both interlocutory and definitive, favourable or unfavourable; to hear and appeal and interpose a recourse and impetrate the sentences that may be given against her or any appeal that may be made to the Church of Santiago de Compostela, metropolitan of the Church of Évora, as well as to the Court of Rome (...) (Vitória, 2016: 546–7).

Motions to appeal to a higher court from interlocutory sentences seem to have been a common occurrence in episcopal courts in later medieval Portugal. In the 1304–

1306 dispute between Lorvão and the chapter of Coimbra, to which I have made repeated reference, the reaction of the latter's proctor to the auditor's unfavourable interlocutory sentence was to threaten him with an appeal to the bishop of Coimbra, which the auditor turned down as frivolous.¹⁹ Earlier in the proceedings, his colleague Aymericus, who had been furious that his request for extra time to secure copies of the proceedings had been rejected, had already voiced his intention to appeal to the papal curia (see excerpt 1, above).²⁰ These were not isolated occurrences. Of the 2,000 plus original documents concerning Portugal and the papacy that Linehan compiled in his *Portugalia Pontificia* (2013), about 20% concern legal disputes, consisting, for the most part, of mandates to judges delegate to hear and determine complaints, to enforce previous sentences or to investigate complaints, as well as witness depositions, allegations and records of proceedings before the judges delegate or the papal auditors. Outwardly minor matters could lead to an appeal to the papal curia. In 1231, for example, three judges delegate were appointed by Pope Gregory IX to hear the complaint of the lepers of Braga (which was then an episcopal domain) against two laymen concerning ownership of an oven.²¹ Marriage litigation records from episcopal courts in Portugal are extremely rare, but in at least two that have survived (one, from 1302, concerning concubinage, the other, from 1369–1370, a matter of clandestine marriage and bigamy) one of the parties decided to take her case to the papal curia (Linehan, 1997: 336–9; Vitória, 2016: 537).

An appeal to Rome or Avignon, as the case may be, was a costly and materially complex business, both aspects of which can be glimpsed from the records of legal practice that have survived. A summary of the suit or even an entire dossier recounting previous court proceedings and containing all the elements relevant to the matter (*libellus* and exceptions, allegations, witness depositions, written evidence, interlocutory and definitive sentences) had to be put together, duplicated

¹⁹ ANTT, Cabido da Sé de Coimbra, mç. 2, 2.^a incorporação, no. 1, membrane 44 (bottom half).

²⁰ Membrane 6 (top).

²¹ ADB, Gaveta das Propriedades Particulares, no. 749.

and dispatched overland or by sea to the papal curia.²² Proctors had to be retained to represent the parties at the curia or before the judges delegate appointed to hear and determine the case (see, *inter alia*, Linehan, 1979 and 1980; Schwarz, 2016), and their salaries must be paid out promptly, lest they deliberately obstruct proceedings at their end in retaliation, which is precisely what happened in 1338 to the abbess of Santa Clara of Coimbra and her proctor at the *audientia litterarum contradictarum* in Avignon.²³ But it is ultimately thanks to the clerical bustle—the procuring of copies of court proceedings, the copying out of title deeds and witness depositions, the safekeeping of papal rescripts relevant to a case—that was sparked off by petitions made directly to the papal curia or by the decision to appeal to it against a sentence from a lower judge that a great deal of the extant records of legal practice from Portuguese ecclesiastical courts in the 13th and 14th centuries was preserved (see, for example, Branco, 2006 and 2018; Vitória, 2016).

Curial proctors and auditors were not the only ones whom the grim persistence of Portuguese litigants forced to reflect on the dealings of distant foreigners bearing unfamiliar names and moving in social and historical realities about which those proctors and auditors could know but very little. Jurists solicited for advice were in a similar, perhaps even more difficult, position, for they needed to provide their clients with legal grist to the latter's ramshackle mill of disputed facts and conflicting claims. This pattern of legal expertise, which has received considerable attention in recent decades from legal historians such as Mario Ascheri, Massimo Vallerani, Julius Kirshner, Vincenzo Colli and many others, has been entirely overlooked by Portuguese medievalists, even though it constitutes a valuable indicator of the level of sophistication of legal practice and, from a purely juristic standpoint, a unique means of observing the subtle interweaving of historical fact and legal and political thinking.

Possibly the earliest surviving evidence of a Portuguese request for advice on legal matters is the letter sent in 1207 or 1208 by the abbot of Pendorada and a certain

²² The 1305 royal decree regulating notarial practice (see note 1) stipulates the use of parchment for documents intended for litigation outside the kingdom, paper being considered suitable enough for domestic litigation: *LLP*, 66, no. 17.

²³ ANTT, Santa Clara de Coimbra, documentos particulares, mç. 18, no. 27.

Master Lucius to the canonist Melendus, precentor of Porto, former law professor in Bologna and a member of the crack legal team assembled in Rome by Thomas of Marlborough in 1206 to represent the abbey of Evesham in the dispute that opposed it to its former abbot and the bishop of Worcester (Boureau, 2000: 51; on what is known of Melendus's life and career, see Fleisch, 2006: 122–5; Kuttner, 1943: 301–3; Weigand, 2008: 76–7).²⁴ We do not know if Melendus answered the request (in fact, few of Melendus's writings have survived), but we do know of other instances in which Portuguese litigants asked for and obtained legal counsel from auditors of the Sacred Palace such as Petrus de Corduba, Petrus de Bonipetris, Beltraminus Paravicini and Oliverius de Cerzeto,²⁵ the *collegium* of civil law professors of Bologna²⁶ or first-rate jurists such as Oldradus de Ponte or Baldus de Ubaldis. The two *consilia* Baldus wrote at the end of the 14th century about certain specific social and political consequences of the interregnum crisis of 1383–1385 represent arguably his clearest and most developed statement of the undying nature of royal office and the legal obligations contracted in its name by the king (see, *inter alia*, Canning, 1985: 209–21, especially 216–20; Kantorowicz, 1957: 336–450; Riesenbergh, 1956: 129–60; Izbicki, 1982).²⁷ The *consilium* Oldradus wrote, sometime between 1329 and 1335, on the long-standing conflict that opposed the church of Porto and the kings of Portugal led him to ponder over the thorny complexity of the relationship between spiritual and temporal jurisdictions (Vitória, 2012a). Other *consilia* dealt with far less lofty matters. Oldradus's *consilium* 316, for example, concerns a dispute between a certain Gonçalo Miguéis and Master Bernardo Martins, prior of S. Salvador de Figueiredo, over the inheritance of the late archbishop of Braga, the distinguished canonist Silvestre

²⁴ The letter is printed in Ribeiro 1810: 258–9.

²⁵ ADB, Gaveta de Braga, no. 21, now published and carefully analysed in Linehan, 2019: 109–17, 185–201. AHMP, Autos e sentença, A-PUB 5514, 138–41 contains unpublished *allegationes* by Beltraminus. See also ANTT, OFM, Província de Portugal, Convento de São Francisco do Porto, liv. 11, no. 232 (formerly Coleção Costa Basto, no. 13) for the involvement of Oliverius de Cerzeto in a dispute between the bishop of Porto and the Franciscans and Dominicans of that city.

²⁶ BAV, Vat. lat. 2660. This *consilium* and Baldus de Ubaldis' *consilia* i/271 and iii/159 will form the core of an essay on legal consultation and Portuguese politics at the end of the 14th century that I am currently finalising.

²⁷ Baldus, *Prima pars consiliorum*. fols 60rv; and *Tertia pars consiliorum*, fols 33v–34v.

Godinho.²⁸ *Consilium* 209 addresses a dispute opposing the wealthy Cistercian monastery of Alcobaça to the bishop and chapter of Lisbon over the Hospital of the Saints Paul, Eligius and Clement.²⁹

In this incipient republic of letters, where law-trained prelates and law-hungry kings came into contact, directly or indirectly, with the foremost legal minds of the age, information of all sorts travelled over long distances so that the juristic essence of a case could be distilled from its particularities and their underlying web of interests and interactions, and then systematised and translated into the authoritative language of the *ius commune*. In this respect too, geographic insularity did not prevent litigants in Portugal from participating in the broader trends that marked the development of the *ius commune* in the high and later Middle Ages, which were, in reality, as much a part of Portuguese history as they were of that of any other region of Western Europe.

4. Conclusion

The lengthy and complex case material one comes across every now and then while sifting through 13th- and 14th-century cathedral records; the evidence it contains of the ways in which the specialist knowledge of lawyers and proctors was deployed; the increasing prominence of the legal profession and the tensions it set off; the apparent straightforwardness with which Portuguese litigants petitioned and appealed to the papal curia and the extreme technicality of the juristic advice that they procured abroad: all these elements point to an awareness of the mechanisms of the law and of the legal means by which one's claims could be made to prevail that was as much an aspect of legal experience as the decrees and ordinances issued by the kings of Portugal. Although there is surely more to be said about it and its relation to legal practice, royal legislation has, it seems to me, exerted too long and too strong a monopoly on the attention of legal historians, and it is greatly to be hoped that the social, political and intellectual history of legal practice can at last

²⁸ Oldradus, *Consilia*, fol. 142v. On Silvestre Godinho's legal training, see Costa, 1963; Kuttner, 1943 and 1966; García y García, 1976.

²⁹ Oldradus, *Consilia*, fols 81r–82r.

take its place as the main focus of their labours. There is much research work to be done in the archives and on the medieval sources of legal and political thinking before a sharper, less solipsistic image of the transformation of law and legal practice in medieval and early modern Portugal can finally emerge. This particular patch of grass may not be wide or green enough to sooth the craving eyes of every student of the Portuguese Middle Ages, but it is well worth tending all the same.

Abbreviations

ADB = Arquivo Distrital de Braga; ADP = Arquivo Distrital do Porto; AHMP = Arquivo Histórico Municipal do Porto/Casa do Infante; ANTT = Arquivo Nacional da Torre do Tombo; BAV = Biblioteca Apostolica Vaticana; *CHPI* = *Chancelarias Portuguesas (D. Pedro I)*; *CUP* = *Chartularium Universitatis Portugalensis (Vol. I)*; *CPI* = *Cortes Portuguesas (D. Pedro I)*; *LLP* = *Livro das Leis e Posturas*; *ODD* = *Ordenações Del-Rei Dom Duarte*; *VI* = *Liber Sextus Decretalium*

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