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Foreign Law and Circulation of Ideas in the Early Modern Age: Analyzing an 'allegatio' of Manuel Álvares Pegas on *maioratus*

1. Pegas' works and the objective of this paper[1]

Among Portuguese jurists of the 17th century, Manuel Álvares Pegas (1635-1696) probably was one of the best known. Unlike most of his contemporary jurists of comparable fame, often judges of Portuguese highest court (*Casa da Suplicação de Lisboa*), professors of the only Law school of the kingdom (Coimbra University) or both, his professional activities were connected to the advocacy, to which he dedicated almost four decades from his graduation in 1658 until his death. Diogo Barbosa Machado reported the success of Pegas' career as lawyer, but he emphasized the relevance of his juridical writings, for example in this excerpt: "There was no controversial question among important litigants in ecclesiastical and secular jurisdiction in which his 'flight feather' was not seek"[2]. **1**

A review of the published works of Pegas demonstrates that he cultivated almost all genres of juridical literature of the *ius commune* [3]. Probably his most influential book was the *Commentaria in Ordinationes Regni Portugalliae*, whose fourteen volumes do not approach the Portuguese general Laws (*Ordenações do Reino*) in full, but only its first two books. Pegas wrote also monographic works (*Tractatus de maioratus*) and *resolutiones forenses* (*Resolutiones Forenses Practicabiles in quibus multa, quae in utroque foro controversa quotidie versantur uberrima legum, & Doctorum allegatione resolvuntur*). Amid his large production, this paper will discuss an aspect (the role of foreign law) in a very precise work written by Pegas, the *Allegaçam de direito por parte do excelentíssimo senhor Dom Pedro de Menezes sobre a sucessão do título, e estado de Villa-Real, e Morgados da dita Caza e bens patrimoniais que a ella pertenencem, e ao dito Senhor sucessor de ella*, a book whose essence was related to the practical activities of the author. That demonstrates clearly the way Pegas – a classical representative of the jurist's model in the *ius commune* – usually dealt with juridical problems: he set out with particular cases and built an argument to **2**

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1 A first version of this text was presented at the 2015 American Society for Legal History (ASLH) Annual Meeting in Washington D.C. on October 30th under the original title *Pegas' Allegationes and foreign Law on maioratus*. I thank all the participants during the event, particularly my colleagues on the panel "The circulation of ideas in Ibero-American Legal Cultures (17th-19th Centuries" Prof. Dr. Thomas Duve (MPIeR/Johann Wolfgang Goethe-Universität Frankfurt), Mariana Armond Dias Paes (MPIeR/University of São Paulo) and Pamela Cacciavillani (MPIeR/University of Córdoba). My special thanks to Laura Beck Varela (Universidad Autónoma de Madrid) and Timothy Schroer (University of West Georgia) for their comments and suggestions.

2 D. B. MACHADO, Bibliotheca Lusitana. História, crítica, e cronológica, 3, Lisboa, 1752, p. 174.

3 About the genres of Portuguese juridical literature, see A. M. HESPANHA, História das Instituições. Épocas medieval e moderna, Coimbra, 1982, p. 518-524.

justify a probable solution to the problem with no apparent intention to expand this solution to wider cases nor analyze it in a systematic perspective[4].

2. Allegationes and its arguments

A clear intention of dealing with particular cases could be observed in what Otto Gehrke called *Entscheidungsliteratur*, a generic concept in which both *consilia* (*Konsiliensammlungen*) and *decisiones* (*Rechtsprechungssammlungen*) were addressed[5]. Both have the same feature of proposing a solution for a concrete problem arising from forensic practice, which was exactly the point of departure of every argumentative unit of Pega's book (*decisio*, *consilia*, *consultatio*). In the *decisiones* [6], the authors – often judges – intended to offer solutions to questions faced by the courts; therefore, it is possible to say that judges mainly intended the arguments to convince their colleagues about the correctness of the proposed solution. **3**

The *allegationes* are quite connected to this perspective, but some differences are noticeable: despite its close relation to forensic practice and the structural role in the arguments of casuistry and concrete problems, *allegationes* were not written with the aim of providing a decision, but with the intention of convincing somebody who was endowed with *arbitrium* and power of deciding[7]. As in most of the *consilia*, *allegationes'* authors were lawyers[8], but in *consilia* their role was precisely answering (*responsa*) a question – their opinion was external to the problem and was authoritative enough to constitute a solution to the controversy. In the *allegationes*, the author was an internal participant in the question and had not the same position of the recipient of the text: he was a lawyer hired to defend a point of view and had no impartiality[9]. That is the reason why Mario Ascheri described the *allegationes* as defensive memories of lawyers[10], emphasizing their forensic origins and **4**

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4 J. VALLEJO, L. B. VARELA, La cultura del derecho común (siglos XI-XVIII), in: LORENTE, M., J. VALLEJO (ed.), Manual de historia del derecho, Valencia, 2012, p. 81. In a wider perspective, see V. TAU ANZOÁTEGUI, Causísmo y sistema. Indagación histórica sobre el espíritu del Derecho Indiano, Buenos Aires, 1992.

5 H. GEHRKE, Die privatrechtliche Entscheidungsliteratur Deutschlands. Charakteristik und Bibliografie der Rechtsprechungs- und Konsiliensammlungen vom 16. bis zum Beginn de 19. Jahrhunderts, Frankfurt am Main, 1974, p. 3-4.

6 About the theme, see G. C. M. CABRAL, Literatura jurídica na Idade Moderna: as *decisiones* no Reino de Portugal (séculos XVI e XVII), Rio de Janeiro, 2017.

7 About the meaning of *arbitrium* in the context of *ius commune*, see M. MECCARELLI, Arbitrium: un aspetto sistematico degli ordinamenti giuridici in Età di diritto comune, Milano, 1998.

8 *Consilia's* authors were always jurists with technical formation, especially theoretical jurists, professors or even judges.

9 In this point is possible to see another resemblance to the *consilia* literature related to the financial aspect of its gender: the authors of *consilia* were not impartial judges, but professionals contracted by someone to provide an opinion whose influence could be decisive to the final solution of problem. Highlighting this aspect of *consilia* literature, see U. FALK, Consilia. Studien zur Praxis der Rechtsgutachten in der frühen Neuzeit, Frankfurt am Main, 2006.

10 M. ASCHERI, I giuristi consulenti d'Ancien Régime, in: M. ASCHERI (ed.), Tribunali, giuristi e istituzioni dal medievo all'età moderna, Milano, 1989, pp. 185-209, here p. 190-191. This view is shared, among other, by: J. BARRIENTOS GRANDÓN, Derecho común y derecho indiano en el Reino de Chile, in: Memoria del X Congresso del Instituto Internacional de Historia del Derecho Indiano, México, 1995, pp. 133-160, here p. 136, and P. VOLPINI, Las Allegationes Fiscales (1642-1645) de Juan Bautista Larrea, in: Revista de Historia Moderna, 15, 1996, pp. 465-502, here p. 465-467.

the arguments' partiality, as well as their position as the genre of juridical literature in the *ius commune* with the closest relations to forensic practice and advocacy.

As their aim was to convince judges about the correctness of their argument, the authors of *allegationes* needed to construct a very well-reasoned text – actually, a better text than the one presented by the other litigant. To do so, they had to use everything that could persuade the reader. In previous works[11], I have analyzed Portuguese *decisones* literature regarding how some elements (case law, statutes and authority of jurists) acted in the formation of the argument in each *decisio*. The same analysis can be done with *allegationes*, but, considering the limits and the objective of this paper, I will highlight one precise point: the role of foreign law in the argument's construction in the *allegatio*. **5**

3. Foreign law and its use

During the age of *ius commune*, differences between the local origins of authors and books and the context in which the texts were applied were not properly a problem. From what is commonly called rebirth of jurisprudence (around the 11th and 12th centuries) until at least the 17th or 18th centuries, factors like the similarity of the universities' curricula[12], the use of Latin as a *lingua franca* of knowledge and the wide circulation of ideas and works of some jurists contributed to create an ambience in which there were few differences, especially – but not exclusively – in Private Law, in most of Western Europe[13]. This perception has been reinterpreted in some recent studies that criticized this traditional view of the *ius commune* [14], but, despite that, the material collected among Portuguese jurists constitutes evidences that at least until the 17th century the great majority of quoted jurists were not Portuguese[15]. **6**

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11 G. C. M. CABRAL, Literatura jurídica na Idade Moderna (cit. 6); G. C. M. CABRAL, Case law in Portguese decisiones in the Early Modern Age: Antonio da Gama's Decisiones Supremi Senatus Lusitaniae, in: forum historiae iuris – erste europäische Internetzeitschrift für Rechtsgeschichte, 2015, pp. 1-19.

12 An interesting view on the use of the *ius patrium*, especially to provide practical examples, during the classes at the University of Salamanca in the 16th and 17th centuries can be seen in M. P. ALONSO ROMERO, Del "amor" a las leyes patrias y su "verdadera inteligencia": a proposito del trato con el derecho region en la Universidad de Salamanca durante los siglos modernos, in: M. P. ALONSO ROMERO, Salamanca, escuela de juristas: estudios sobre la enseñanza del derecho en el Antiguo Régimen, Madrid, 2012, pp. 165-189. In a similar perspective, but more precisely related to the *modos de pasar* literature: L. B. VARELA, Bártolo y "las demás leyes del Reino": la formación del jurista según del "Modo de pasar del Doctor Bustos" (c. 1587), in:Annali di storia delle universita italiane, 20, 2016, pp. 3-29. In both papers, the formal legal education, at least in Spain, had an important relation with the practical questions that only could be resolved within the use – and, as a logical antecedent, the knowledge – of the *ius patrium*.

13 As previously described in G. C. M. CABRAL, Literatura jurídica na Idade Moderna (cit. 6), p. 17-18, I consider Western Europe, regarding the expansion and presence of ius commune, especially the following areas: Iberian Peninsula, France, Italian Peninsula, Low Countries, Scotland and Holy Roman Empire. See also A. WIJFFELS, Orbis exiguous. Foreign legal authorities in Paulus Christianaeus's Law Reports, in: S. DAUCHY, H. W. BRYSON, M. C. MIRROW (ed.), Ratio decidendi. Guiding principles of judicial decisions, volume 2: 'Foreign' Law, Berlin, 2010, pp. 37-62, here p. 39-40.

14 T. DUVE, Von der Europäischen Rechtsgeschichte zu einer Rechtsgeschichte Europas in globalhistorischer Perspektive, in: Rechtsgeschichte – Legal History, 20, 2012, pp. 18-71; D. OSLER, The myth of European Legal History, Rechtshistorisches Journal, 16, 1997, pp. 393-410.

15 G. C. M. CABRAL, Literatura jurídica na Idade Moderna (cit. 6), p. 171-175, 225-230, 265-270, 312-318, 353-359 and 402-408.

Bartolus, Baldus, Alexander de Tartagnis, Filippo Decio, Giacomo Menochio, among others, were quoted and their opinions were useful because of their importance to *ius commune* and precisely to the *opinio communis*. Their names were so important that they functioned as arguments from authority. Relating how an author's opinion became endowed with authority goes beyond the objectives of this paper[16]. The authority's undeniable character can be seen otherwise when, for example, Portuguese General Law (*Ordenações do Reino*) recognized as formal source of law (Book 3, Title 64, 1) the opinions of Accursius and Bartolus. There was no similar measure for the opinion of Portuguese jurists, what proves that the authority was not related to local origin. **7**

Despite the close relations and interactions between particular laws and *ius commune*, the differences amid legal systems were noticeable. Legal pluralism, here understood as a plurality of legal orders in the same community and the same space[17], guaranteed heterogeneity and the coexistence of many legal systems in the same territory, because the space of each legal system could coincide with the space of other legal systems, including in the same territory[18]. With national laws (*ius patrium* or, more precisely, *ius regnum*, in the terms proposed by Italo Birocchi[19]) the interaction appeared in a different way. Foreign law was used by national courts, as the work of Dauchy, Bryson and Mirow demonstrated[20], but, except with the opinion of foreign authors, it was not that common, despite the possibility of what was described by Gino Gorla as the application of a *lex alii loci* or *externa* when in *lex loci* or in *ius commune* a *decisus* was not found[21]. Considering the use of statutes and judicial decisions of other states in the Portuguese *decisiones* literature, it is perceptible that, in the few cases it happened, the quotation was indirect, often through *decisiones* books written by authors from other countries. **8**

As the main feature of the *allegationes* was exactly being a lawyer's trial brief, and that means the necessity of using strong arguments to convince the judges (who were the recipients of the original texts) about the allegation, arguments such as those picked up from foreign law are found. In the following pages, the use of foreign law in Pegas' *allegationes* will become clear. **9**

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16 About *opinio communis*, see, among others, G. C. M. CABRAL, Literatura jurídica na Idade Moderna (cit. 6), p. 15-24.

17 See HESPANHA, ANTONIO MANUEL (2016), Pluralismo jurídico e direito democrático. Prospetivas do direito no séc. XXI, Lisboa.

18 An introduction to the discussion about legal spaces can be seen in M. MECCARELLI, The assumed space: pre-reflexive spatiality and doctrinal configurations in juridical experience, in: Rechtsgeschichte, 2015, 23, pp. 241-252; M. MECARELLI, M. J. SOLLA SASTRE, Spatial and temporal dimensions for Legal History: an introduction, in: M. MECARELLI, M. J. SOLLA SASTRE (ed), Spatial and temporal dimensions for Legal History: research experiences and itineraries, Frankfurt am Main, 2016, pp. 3-24; B. ALBANI, S. BARBOSA, T. DUVE, La formación de espacios jurídicos ibero-americanos (s. XVI-XIX): actores, artefactos e ideas. Comentarios introductorios, in: Max Planck Institute for European Legal History research paper series, 2014, 7.

19 I. BIROCCHI, La formazione dei diritti patri nell'Europa Moderna tra politica dei sovrani e pensiero giuspolitico, prassi ed insegnamento, in: I. BIROCCHI, A. MATTONE (ed.), Il diritto patrio tra diritto comune e codificazione (secoli XVI-XIX), Roma, 2006, pp. 17-71, here, p. 32-40.

20 S. DAUCHY, H. W. BRYSON, M. C. MIRROW (ed.), Ratio decidendi. Guiding principles of judicial decisions, volume 2: 'Foreign' Law, Berlin, 2010. See especially M. C. MIRRROW, Conclusion: foreign law and the birth of comparative law, in: S. DAUCHY, H. W. BRYSON, M. C. MIRROW (ed.), Ratio decidendi. Guiding principles of judicial decisions, volume 2: 'Foreign' Law, Berlin, 2010, pp. 229-236.

21 G. GORLA, Il ricorso ala legge di um "luogo vicino" nell'ambito del diritto comune europeo, in: Il Foro Italiano, 1973, 96, 5, pp. 89-108, here p. 89-90.

4. *Allegaçam de direito por parte do excelentíssimo senhor Dom Pedro de Menezes*: an overview

According to the literature review conducted by Diogo Barbosa Machado in the 18th century[22], Pegas published nine *allegationes* during his lifetime[23], and four of them were reprinted in Lisbon in 1728 under the title *Allegaçoens de Direito*. The text here discussed is one of the reprintings[24], although the year of the first publication was not indicated on its cover. **10**

Like three of the four books in the 1728 edition, the *Allegaçam de direito por parte do excelentíssimo senhor Dom Pedro de Menezes* dealt with issues on *maioratus* and their succession. A *maioratus* was a right of succession in a good, often a real property, that should be conserved in a family[25], and this succession was required to obey primogeniture rules. Primogeniture was in the center of the maioratus' definition of the most relevant work about it, the one written by the Spanish jurist Luís de Molina[26]. António Manuel Hespanha, mentioning Jorge de Cabedo[27], affirmed that the **11**

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22 D. B. MACHADO, Bibliotheca Lusitana (cit. 2), p. 176.

23 *1) Allegaçam de direito a favor do Senhor Conde de Figueiro D. Ioseph de Lancastro sobre a sucessam do Estado e Casa de Aveiro; 2) Allegaçam de direito pelo Reverendos Deão, & Cabbido da Santa Igreja Cathedral do Porto. Na causa que trás no juizo, e Tribunal da Nunciatura sobre a perrogativa dos assentos das cadeiras do coro e nulidades da sentença arbitrária, e forma do procedimento dos árbitros nomeados, e gravame della, em que é parte o ill.mo Senhor D.João de Sousa, bispo do Porto; 3) Allegação de direito a favor de Gomes Freire de Andrade sobre a casa da Bobadella e suas pertenças, e jurisdições; 4) Allegaçam de direito por parte dos senhores condes do Vimiozo sobre a sucessam da capitania de Pernambuco; 5) Allegação de Direito por parte de D. Pedro de Menezes sobre o título, e sucessão de Villa- Real, e Morgado da dita Casae bens patrimoniaes dela; 6) Allegação de Direito por parte de D. Luiz Angel Coronel Ximenes de Aragão sobre a sucessão dos Morgados instituídos por António Gomes Angel e sua mulher Joana Jerónima; 7) Allegação de direito em favor do excellentíssimo senhor Dom Augostinho de Lancastro sobre a successão da comenda de S. Miguel de Caparrosa da Ordem de Christo, situada no bispado de Viseu; 8) Allegação de direito em favor do excellentíssimo senhor Dom Augostinho de Lancastro sobre a successão e titulo do Marquesado de Portoseguro; 9) Allegação de direito sobre a accuzação que fas Natália Ribeira Machado, da morte que se fes a seu filho o mestre de campo Manoel Dantas da Cunha Cavaleiro professo da Ordem de N. Senhor Jesu Cristo na Estrada pública da Vila de Turpim para a praça de Almeida onde foy morto por conjuração, assessino de propozito e caso pensado, traição, e homicídio voluntário.*

24 The others were the following: 1) *Allegação de direito a favor de Gomes Freire de Andrade sobre a casa da Bobadella e suas pertenças, e jurisdições; 2*) *Allegação de Direito por parte de D. Luiz Angel Coronel Ximenes de Aragão sobre a sucessão dos Morgados instituídos por António Gomes Angel e sua mulher Joana Jerónima; 3) Allegação de direito sobre a accuzação que fas Natália Ribeira Machado, da morte que se fes a seu filho o mestre de campo Manoel Dantas da Cunha Cavaleiro professo da Ordem de N. Senhor Jesu Cristo na Estrada pública da Vila de Turpim para a praça de Almeida onde foy morto por conjuração, assessino de propozito e caso pensado, traição, e homicídio voluntário.*

25 "Maioratus est ius succedendi in bonis, ea lege relictis, vt in família perpetuo conseruentur, & deferantur proximiori primogenito, per ordinem successiuum". A. C. AMARAL, Liber utilissimus iudicibus et advocatis, Ulysipone, 1610, p. 222 (*maioratus*, 1).

26 "Maioratus igitur, seu Primogenitura (vt alias imperfectas, ac ab omnibus iamdudum reiectas diffinitiones omittamus) est, ius prioris aetatis honorificum & vtile competens filio, quia primus est in ordine nascendi". L. DE MOLINA. De Hispanorum primogeniorum Origine ac natura : libri quatuor, Coloniae, 1601, p. 2 (Lib. 1, Cap. 1, 5).

27 "Quia de natura omnium maioratum est, licet aliter in institutione non exprimatur, vt eorum sit praecipuus finis in familiae & memoriae conseruationem (...). Idq; multo magis, vbi instituitur maioratus expressim propter ipsius instituentis memoriam, & perpetuam familiae conserutionem, ac proinde cum ex monialis successione, etiam per tempus dumtaxat vitae suae, memoria institutoris & familiae eius conseruatio euanescat, aut saltem sopiatu, & obdormiat, credendum est institutorem, qui condidit maioratum, ad familiae suae propagationem, noluisse facere vocationem, ex qua familia eius posset extingui, & memoria supprimi". J. CABEDO, Practicarum observationum sive decisionum Supremi Senatus Regni Lusitaniae, pars prima, Antuerpiae, 1620, p. 150 (Dec. CXXXIII, 1-2).

intention of every *maioratus* was preserving the family's memory, and that should be considered in the interpretation of the succession rules – they must reinforce rather than disturb this objective[28].

12 In this case specifically, Pegas discussed the succession of a land called *Casa de Villa-Real*, which allegedly would be up to D. Pedro de Menezes, Pegas' client in this lawsuit. The succession included not only the land itself, but also the *maioratus*, the jurisdiction over the land, the privileges and all the goods attached to the propriety, as well as the title of Marquis of Villa-Real[29]. Against the succession right of D. Pedro de Menezes raised both the Portuguese Crown and the Count of Castanheira, a nobleman with interest in the land.

13 The controversy was related to the origins of the rights over the land, which were based on a royal donation dating off to the beginning of the 14th century and subject to the general rules of succession of royal goods, the Mental Act (*Lei Mental*). If these rules controlled the case, D. Pedro de Menezes would not be considered the legitimate heir because he was a descendent in female line of the original land's owner, the Count of Villa-Real[30]– according to the Mental Act, no woman could be donee of a royal good in the Kingdom. Pegas did not deny the familiar origins of Dom Pedro de Menezes. According to his proposal, the *Casa de Villa-Real* and the rights over that land and other lands, especially over the lands of Leiria, should not be considered royal goods, and consequently not subjected to the Mental Act, but a patrimonial *maioratus* subject to the general rules of succession described in the *Ordenações do Reino* (Book 4, Title 100)[31]. With the acceptance of Pegas' arguments by the court, D. Pedro de Menezes would be restored as owner of the land.

5. How foreign law appeared in the text

14 The short description of the book's content meets the objective of this paper, which is to understand how foreign law was used by Pegas. To comprehend the role of foreign law is much more important than to analyze the arguments presented by the author. This section of the paper will consider three elements of foreign law that arose in this instance: statutory law, case law and authority of jurists[32].

15 In many places in the text, Pegas compared the Portuguese laws about *maioratus* and royal donations with Castilian laws. That happened with one of the most important arguments of the text, when he argued that the Mental Act, as well as its Castilian parallel[33], should not be applied

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28 A. M. HESPANHA, Como os juristas viam o mundo (1550-1750): Direitos, estados, pessoas, coisas, contratos, ações e crimes, Lisboa, 2015, §1479 (5.4.1).

29 M. A. PEGAS, Allegaçoens de Direito, Lisboa, 1738, p. 1-2 (§4).

30 According to Pegas, the first Count of Villa-Real, D. Fernando de Noronha, was nephew of the king D. João I and received from his uncle the land, revenues and jurisdiction disputed in this case. The King also promised an amount of money (around sixteen thousand *coroas em ouro*, Portuguese currency that time) destined to buy lands in which a *maioratus* must be constituted, but neither D. João I nor his successor, King D. Duarte, have accomplished the promise. M. A. PEGAS, Allegaçoes de Direito (cit. 29), p. 3-4 (§20).

31 Pegas transcribed the deed dated of 18/03/1475, by which the *maioratus* was established. Cf. M. A. PEGAS, Allegaçoes de Direito (cit. 29), p. 4-5 (§§23-28).

32 Alan Wijffels wrote a work using a quite similar method. See A. WIJFFELS, Orbis exiguous (cit. 13).

33 Leg. 9, tit. 10, lib. 5, Recopilat.

to royal donations subsequently converted into an onerous contract[34] [35]. According to Pegas, the lands of Leiria were object of a bilateral contract between the King and one of his vassals, and the King was obliged to accomplish their contracts as a private person[36], argument based on the *opinio communis* [37]. Pegas transcribed an excerpt of Castilian laws[38] about remunerative donations just before quoting theologians like Isidore of Seville and Saint Gregory[39], and then affirmed the possibility of donating lands and jurisdictions as a remuneration for services and merits[40].

If finding direct mentions of statutory law in this book is not hard, the same does not happen with **16**
case law. Pegas referred only once to decisions of a foreign court, the Rota Romana. The mention was nevertheless generic and indirect, because he made it by the mediation of authors like Francesco Merlino, Girolamo Mariliani and Garsia Mastrillo, who had referred to decision of the Rota Romana in their works, and the *allegatio* did not include even minimal details such as the judgement's date or names of judges and litigants[41]. Detailed references about the judgements, which were common in the *decisiones* literature[42], can be found in this work only once, when Pegas referred to a case decided by the Casa da Suplicação[43].

From these three elements, the authority of jurists is doubtless the one in which foreign law is **17**
most perceptible. That happened not only because of the quoted authors, mostly not Portuguese, but actually because of how their opinions were used by Pegas in his arguments. An overview on the quoted authors and the number of quotations is important to prove something that is not a surprise: they were mostly foreign, especially Italians and Spaniards. If, by one hand, there are more quoted Portuguese authors than in books of the previous century, such as in António da Gama and Álvaro Valasco[44], by the other it is undeniable the leading role of authors identified with the *opinio*

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34 M. A. PEGAS, Allegaçoes de Direito (cit. 29), p. 9-10 (§53).

35 "At vero as rendas de Leiria foraõ a poder do Conde, por titulo de compra, de que se segue que não ficou feita subrogaçaõ, porque as rendas de Guimaraes tornaraõ à Coroa por deixarzao que dellas fez o Conde Dom Pedro, e as rendas de Leiria ficaraõ patrimoniaes do mesmo Conde, e desmembradas da Coroa per la compra que dellas fez, como a mesma escritura declara (...)". M. A. PEGAS, Allegaçoes de Direito (cit. 29), p. 20 (§93).

36 "(…) os Reys nos contratos que fazem cò seus vassalos ficaò obrigados, como pessoas particulares". M. A. PEGAS, Allegaçoes de Direito (cit. 29), p. 12 (§64).

37 The authors quoted in this argument were Valenzuela, Antonius Faber, Franchis, Tapia, Larrea and Garsia Mastrillo, and no one was Portuguese. M. A. PEGAS, Allegaçoes de Direito (cit. 29), p. 12 (§64). The same argument is back some pages after, when Pegas affirmed that "Porque em os contractos se representa, e julga o Principe como pessoa particular". M. A. PEGAS, Allegaçoes de Direito (cit. 29), p. 31 (§146).

38 Partit. 2, l. 3, tit. 10.

39 M. A. PEGAS, Allegaçoes de Direito (cit. 29), p. 23-24 (§§109-111).

40 Partit. 2, leg. 2, tit. 1, and leg. 8; M. A. PEGAS, Allegaçoes de Direito (cit. 29), p. 25 (§116).

41 Pegas referred only to "Rota Romana elegant decisions". M. A. PEGAS, Allegaçoes de Direito (cit. 29), p. 48 (§211).

42 G. C. M. CABRAL, Literatura jurídica na Idade Moderna (cit. 6). To the specific case of António da Gama, see G. C. M. CABRAL, Case law in Portuguese (cit. 11).

43 The case involved the succession of the Casa de Aveiro, the most important and powerful Portuguese noble house except the royal family. The decision took place in 14/03/1668, with the judges Luiz Gomes de Basto, Luiz Fernandes Teixeira, João Velho Barreto, Christóvão Pinto de Paiva, João Lamprea de Vargas and Lançarote Leitão de Noronha. M. A. PEGAS, Allegaçoes de Direito (cit. 29), p. 63-64 (§262).

44 G. C. M. CABRAL, Literatura jurídica na Idade Moderna (cit. 6), p. 125-238.

communis – most of them not Portuguese[45]. Among the ten most quoted authors in this *allegatio*, only Jorge de Cabedo was Portuguese. We could find five Italians (Giacomo Menochio, Bartolo, Baldus de Ubaldis, Giovanni Pietro Sordi and Girolamo Gratii), three Spaniards (Luís de Molina, Juan del Castillo Sotomayor and Juan Bauptista Valenzuela) and one French (André Tiraqueau), most of them with specific works dedicated to succession, primogeniture and *maioratus* [46].

Author	*N° of mentions*	*Origin*
Giacomo Menochio	54	Italian
Bartolus de Saxoferrato	31	Italian
Luís de Molina	29	Spanish
Juan del Castillo Sotomayor	27	Spanish
Baldus de Ubaldis	24	Italian
Juan Bauptista Valenzuela	23	Spanish
Giovanni Pietro Sordi	20	Italian
André Tiraqueau	18	French
Jorge de Cabedo	17	Portuguese
Girolamo Gratii	15	Italian
Garsia Mastrillo	15	Italian
Juan de Solórzano Pereira	15	Spanish
Álvaro Valasco	15	Portuguese
Juan Bautista Larrea	14	Spanish
Agostinho Barbosa	13	Portuguese
Mario Giurba	13	Italian
Marco Antonio Pellegrini	13	Italian
Alexander de Tartagnis	12	Italian
Gabriel Pereira de Castro	12	Portuguese

45 What Osler (1997) has described in his seminal article could not be perceived in Portugal until the 18th century, notwithstanding the changes in the lists of quoted authors, which became more and more Portuguese, in books published in the second half of the 17th century. See D. OSLER, The myth of European Legal History (cit. 14).

46 Among them, the most famous works were André Tiraqueau's *De nobilitate et jure primogeniorum* (1549) and Luís de Molina's *De primogeniorum Hispanorum origine ac natura.*

Melchor Peláez de Mieres	12	Spanish
Ettore Capecelatro	11	Italian
Francesco Mantica	11	Italian
Filippo Decio	10	Italian
José Ramón	10	Spanish
António da Gama	9	Portuguese
Aymon Cravetta	9	Italian
Carolo de Tapia	9	Italian
Juan Pedro Fontanella	9	Spanish
Gregório López	9	Spanish
Mario Cutella	9	Italian
Antonio Gómez	8	Spanish
Francisco Caldas Pereira	8	Portuguese
Nicolau Rodríguez Fermosini	8	Spanish
Giacomo Antonio Marta	8	Italian
Aires Pinhel	7	Portuguese
Marcus Salón de Paz (Burgos de Paz)	7	Spanish
Diego Covarrubias y Leyva	7	Spanish
Sebastiano Guazzini	7	Italian
Nicolas Bohier	6	French
Prospero Farinacci	6	Italian
Filippo Franchi	6	Italian
Hugo Grotius	6	Dutch
Francesco Merlino Pignatelli	6	Italian
Paolodi Castro	6	Italian
Petro Anchorano	6	Italian
Rolando do Valle	6	Italian

Tiberio Deciani	6	Italian
Antonio de Sousa de Macedo	5	Portuguese
Alfonso de Azevedo	5	Spanish
Ludovico de Casanate	5	Spanish
Giasone del Maino	5	Italian
Giulio Claro	5	Italian
Juan Gutiérrez	5	Spanish
Juan de Matienzo	5	Spanish

Table 1 – Books cited more than five times in the Allegaçam de direito por parte do excelentíssimo senhor Dom Pedro de Menezes, by Manuel Álvares Pegas

Table 2 – Origins of the authors quoted more than five times in the Allegaçam de direito por parte do excelentíssimo senhor Dom Pedro de Menezes, by Manuel Álvares Pegas

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Tables 1 and 2 reinforce the relevance of Italian authors in Portugal still in the middle of the 17th century, because 26 of the 54 authors with more than five mentions are somehow related to the Italian Peninsula. Most of the authors were known by their works concerned about *ius commune* problems and in an *ius commune* perspective, such as Bartolus de Saxoferrato, Baldus de Ubaldi, Paolo di Castro or Giacomo Menochio. Despite that, there are names in the list whose works, especially *decisiones* and *allegationes*, were directly related to their particular juridical experiences. Sicilians Mastrillo (*Decisiones S. Regiae Conscientiae Regni Siciliae*) and Giurba (*Decisiones novissimae Consistorii S. Regiae Conscientiae*), Marta (*Decisionum novissimarum almi Collegii Pisani causarum delegatarum vel ad consilium sapientis transmissarum vota doctoris Martae*) and Neapolitans Capecelatro (*Decisiones novissimae S. Regii Consilii Neapolitani*) and Tapia (*Decisiones Sacri Neapolitani Concilii*), for example, were quoted because of their *decisiones*; Merlinus' books were related to Neapolitan Courts and Lucca's ecclesiastical Court; Francesco Mantica published both *decisiones* (*Decisiones Rotae Romanae*) and a purely *ius commune* monography (*Tractatus de Coniecturis Ultimarum Voluntatum*). The long-term influence of Italian jurists in Portugal is unquestionable when names of the 14th and 15th centuries, particularly those who wrote *consilia* (Paolo di Castro, Alexander de Tartagnis, Filippo Decio or Giovanni Pietro Sordi) were still in use.

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As other jurists of his time, Pegas largely used the authority of foreign authors to support his statements. One of the leading arguments in which the *allegatio* was based, the king's obligation of fulfilling promise established in a donation[47], illustrates that. He supported this remark with a

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47 "Fazendo o Principe contrato, ou Doaçaõ, he obrigado por razaõ da promessa a comprilla, e por nenhum caso a pode alterar". M. A. PEGAS, Allegaçoes de Direito (cit. 29), p. 36 (§164).

citation of Castilian law[48] and especially foreign authors (Juan de Matienzo, Giovanni Pietro Sordi and Juan de Solórzano Pereira), but he also mentioned literary sources (the medieval poem *Ligurinus*, attributed to Gunther of Paris) as well as religious (the Bible), in a clear example of how an author constructed his argument using all sources he considered persuasive, independently of a territorial context. To support his statement that D. Pedro de Menezes should not suffer any damage as a consequence of the judgement that confiscated the goods of the last Marquis of Villa-Real, Pegas used Mariano Soccino Junior, Angelo di Castro, Carpan and Sebastiano[49].

In the Section VI of the *Allegaçam*, when the author defended the already mentioned necessity **22**
of fulfilling contracts and donations, Pegas introduced three arguments: justice and fairness, public convenience and reason of state. In this last point the influences of foreign authors are quiet perceptible. Unlike most arguments, the idea of reason of state is not properly an *ius commune* discussion in the same categories of donations, succession or *maioratus*. It had been introduced in the first half of 16th century by works such as *The Prince* of Niccolo Machiavelli, but its reception, especially in Catholic countries, happened, at least officially, through the rereading of Tacitus' works. The long discussion about reason of state in this *allegatio* reflects the same combination of elements of other parts of the text, which included references to foreign statutes[50], literature[51] and jurists, such as Jerónimo Castillo de Bobadilla and Aymon Cravetta, but it included also names seldom observed in lists of quotation in authors of the same age, such as Tacitus and Jean Bodin. Pegas probably was one of the first Portuguese jurists to discuss state reason in both theoretical and forensic perspectives[52], using the theme to defend in this case the limitation – in this very word[53] – of the king's power[54].

Lastly, the use of foreign authors by Pegas could be useful to refer to practical situations that **23**
happened in other countries with no impact in the courts. Pegas transcribed an excerpt of an *allegatio* of Juan Bautista Larrea[55], in which he dealt with the enlargement of the office of *Correo Mor* in Castile[56]. As an example of royal donation latter converted into an onerous contract, in the same

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48 Partit. 2, leg. 3, tit. 4.

49 M. A. PEGAS, Allegaçoes de Direito (cit. 29), p. 57 (§241).

50 Partit. 2, lege 3, tit. 10. See M. A. PEGAS, Allegaçoes de Direito (cit. 29), p. 35 (§159).

51 Pegas mentioned classic authors like Pomponius and Seneca. M. A. PEGAS, Allegaçoes de Direito (cit. 29), p. 34 (§§157-158).

52 He referred to reason of state in his *Commentaria*, a work with limited relations to the forensic life, unlike the *Allegaçam*. The best reason to believe that he was the first one to deal with the theme is the absence of references in the authors whose works are identified with Public Law problems, such as Jorge de Cabedo, Gabriel Pereira de Castro and Domingos Antunes Portugal.

53 "E por esta razaõ he preciso na defeza deste contrato, e Doaçoens mostrar que he razaõ de Estado mandar-lhe dar comprimento, naõ só pela razaõ da paz, mas porque atributo he de Deos, e a mayor de suas regalias, a Omnipotencia sem necessidade de ninguem: todos os Principes Christãos a cofessaõ cada dia em o Symbolo da Fé, e reconhecem seu limitado poder, em a necessidade que tem de seus vassalos, naõ ha Reino sem elles, seus serviços Reaes, e pessoaes, saõ os que sustentaõ o pezo da Coroa (...)". M. A. PEGAS, Allegaçoes de Direito (cit. 29), p. 33 (§155)

54 About reason of state, see M. STOLLEIS, Staat und Staatsräson in der frühen Neuzeit: Studien zur Geschichte des öffentlichen Rechts, München, 1990.

55 J. B. LARREA, Allegationum fiscalium pars prima, Lugduni, 1699, p. 268 (alleg. 50, §10).

56 M. A. PEGAS, Allegaçoes de Direito (cit. 29), p. 72 (§287).

way of what would have happened with the lands of Leiria, Pegas quoted Juan Bauptista Valenzuela in a reference to a donation established in Castile by the King Philip I[57].

6. Final comments

This review of the *Allegaçam de direito por parte do excelentíssimo senhor Dom Pedro de Menezes* illuminates 24
the circulation of ideas in the age of *ius commune*. The way Pegas used foreign law as an element to reason statements reveals an important feature of this context. Statutes, case law and opinion of authors of other countries, including even enemy states, such as Castile when Pegas wrote this text, seem to have had the same importance as other sources of law. The origins, in a territorial perspective, of the authorities cited were not important, provided that their reasoning was enough to convince the reader – or, in other words, that they had enough authority. The table of citations reveals the presence of Portuguese authors with a frequency much higher than in books of the 16th and first haft of the 17th centuries, notwithstanding the unquestionable leading role of foreign authors.

An element of great importance to understand the use of foreign law during the age of *ius commune* 25
emerges precisely from the nature of the text here analyzed: the *allegationes* were a memorial written by a lawyer. Consequently, the way foreign law appeared and was used by jurists reflects its presence in the forensic practice of Portuguese courts, influencing the latter construction of national law in a crucial moment of the European legal history. Analyzing these texts, whose character makes them a genre of juridical literature at the intersection of forensic practice and scholarly knowledge, we can observe that some modern differences, such as theory and practice and even national and foreign law, must be seen in a diverse perspective. The circulation of ideas was not limited by barriers of national contexts.

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