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Wim Decock*

Collaborative Legal Pluralism

Confessors as Law Enforcers in Mercado's Advice on Economic Governance (1571)

* KU Leuven; Université de Liège, wim.decock@kuleuven.be

Abstract

Legal pluralism calls into question the monopoly of the modern state when it comes to the production and the enforcement of norms. It rests on the assumption that juridical normativity and state organization can be dissociated. From an early modern historian's perspective, such an assumption makes perfect sense, the plural nature of the legal order being the natural state of affairs in imperial spaces across the globe in the sixteenth and seventeenth centuries. This article will provide a case study of the collaborative nature of the interaction between spiritual and temporal legal orders in Spain and its overseas territories as conceived by Tomás de Mercado (ca. 1520–1575), a major theologian from the School of Salamanca. His treatise on trade and contracts (1571) contained an extended discussion of the government's attempt to regulate the grain market by imposing a maximum price. It will be argued that Mercado's view on the bindingness of economic regulations in conscience allowed for the internalization of the regulatory power of the nascent state. He called upon confessors to be strict enforcers of state law, considering them as fathers of the republic as much as fathers of faith. This is illustrative of the »collaborative form of legal pluralism« typical of the osmotic relationship between Church and State in the early modern Spanish empire. It contributed to the moral justification of state jurisdictions, while at the same time, guaranteeing a privileged role for theologians and religious leaders in running the affairs of the state.

Keywords: legal pluralism, School of Salamanca, economic governance, market interventionism, conscience



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1 Legal Pluralism and the DNA of Pre-Modern Western Law

Both as an empirical phenomenon and a research agenda, »legal pluralism«¹ calls into question the monopoly of the modern state on the production and the enforcement of norms.² It rests on the assumption, challenged by legal positivists, that juridical normativity and state organization can be dissociated. From an early modern perspective, such an assumption makes sense. The plural nature of the legal order was the natural state of affairs in late medieval Christian Europe and imperial spaces across the globe in the sixteenth and seventeenth centuries.³ The »parallel sovereignty«⁴ between the Church of Rome and state powers in pre-modern Europe could even be considered the DNA of Western legal culture, fostering liberty for the individual by stimulating competition between jurisdictions.⁵ The co-existence and interaction of different legal orders is at the very heart of medieval and early modern, pre-nineteenth century legal cultures in Europe and beyond.⁶ The Church's normative system, for instance, was unambiguously recognized as a *ius*, a legal order, alongside the legal order of the secular authorities. They were both subject to the higher principles deriving from the natural legal order. The term »legal pluralism«, then, adequately captures the pluralistic structure of pre-modern law. This legal pluralism stands in marked contrast to the culture of »legal monism« or »legal absolutism« consecrated by the codification movements in the nineteenth and twentieth centuries.⁷ Hence the need to develop a truly »global legal history« which crosses the mental and territorial boundaries that have long characterized national legal histories, rooted

as they were in the desire to combat rival, often religious normative systems in order to impose a single rule of law within national boundaries.⁸

Legal pluralism as a heuristic concept, then, may actually prove less problematic for the analysis of plural legal orders in pre-nineteenth century Europe in a global context than in modern states. The notion of »non-state law« remains a contradiction in terms when considered from a state-centric perspective on law, especially as developed in the Napoleonic tradition of the nineteenth century.⁹ To use Jacques Vanderlinden's laconic words, once a modern state has been established, it is theoretically impossible to have more than one sovereign law within its boundaries, other norms or legal systems being automatically subordinated to the superiority of the state law by the mere fact of being ignored, tolerated, or recognized on the same territory.¹⁰ Granted, recent years have seen the replacement of the notion of »legal pluralism« by looser terms such as »normative pluralism« in an attempt to safeguard the specificity of law in comparison with other norms while recognizing the existence, in practice, of other types of normativity alongside the sovereign law.¹¹ Even so, the pluralistic conception of »law« or »normativity« will remain a challenge in a modern societal context, operating as it does in the shadow cast by the supreme authority of the nation state, established since the nineteenth century. Evidently, it has become a futile attempt to escape any reference to the primacy of the state, even when analyzing alternative normative structures. The term »stateless law«, for instance, confirms the reference status of state law in modern times precisely when acknowledging alternative normative phenomena.¹²

1 GRIFFITHS (1986).

2 OTIS (2012) 9.

3 BERMAN (1983), PRODI (2003), QUAGLIONI (2004), BENTON/ROSS (2013).

4 PRODI (2011) 24.

5 FUKUYAMA (2011) 271.

6 DUVE (2016) 5.

7 GROSSI (2007).

8 SCHMOECKEL (2000) nr. 26, DUVE (2016) 2.

9 HALPÉRIN (2009) 3–27.

10 VANDERLINDEN (2009) 36.

11 GRIFFITHS (2005), cited in DUVE (2016) 13. For a critique of the improper linguistic expansion of the le-

gal domain ensuing from the term

»legal pluralism«, see ROBERTS (1998).

12 MERRY (2015) 5.

The interaction within legally pluralistic orders should not only be expected to be conflictual. In the past, Church and State authorities, the two major institutional players, generally supported each other's interests,¹³ resulting in what we propose to call a situation of »collaborative legal pluralism«. Modern contexts in which »legal pluralism« is studied could easily lead to oblivion of that collaborative aspect of the interaction between multiple legal orders. Positivist legal scholarship in the nineteenth century tried to exclude alternative normative orders by representing them as a threat. Current studies on legal pluralism have a tendency to highlight the antagonistic character of relations between state and non-state normativity. Religious law in Western democracies and traditional normative orders in former colonial states, in particular, are frequently perceived as a menace, for instance to the modern state's monopoly on conflict resolution or its commitment to human rights.¹⁴ It is true that in pre-modern times, secular and religious authorities did compete for power, also leading to conflict, but historians such as Paolo Prodi have emphasized that, overall, the interaction between them should be primarily understood in terms of an »osmotic relationship«, resulting in collaboration rather than opposition.¹⁵ Seen from a global comparative law perspective, the »intimate links« between temporal and spiritual power structures appear to be a typical feature of the Western legal tradition.¹⁶ Gunnar Folke Schuppert has even employed the term »practiced partnership« to denote Church-State relationships in the ancient régime.¹⁷ The Church frequently invoked the secular arm of temporal jurisdiction,¹⁸ while justifying the state's jurisdiction in moral and religious terms. Even in Protestant territories, where the Roman-Catholic Church's institutions collapsed, religious pastors continued to play a fundamental role in the enforcement of state law and authority, while the state itself incorporated

values and norms from the Christian faith in its policies and laws.¹⁹ The complementary tasks of governing souls and governing citizens went hand in hand, without excluding friction.²⁰ That friction did, indeed, exist, and it transpired in endless disputes over the boundaries of jurisdictional competence.²¹ Yet, As Patrick Glenn aptly observed, the jurists of the time, whether canon lawyers or civil lawyers, coped with a variety of sometimes contradictory laws, »with no means of definitive inclusion or exclusion«.²²

2 Economic Regulation and Theology in Early Modern Spain

The historical material used in this case study of »collaborative legal pluralism« comes from sixteenth century Spain, where growing state power saw a concomitant rise in market regulation, especially by means of the official establishment of the grain price. The regulation of the grain price became a central issue for early modern princes since it was one of the main instruments to expand and consolidate political power.²³ To protect Spanish consumers against rising prices, caused by bad harvests and low productivity in arable farming, a maximum price for grain, the so-called *tasa del trigo*, was introduced in 1502 by Ferdinand and Isabelle and re-adopted by Charles V in 1539. King Philip II released a new regulation on the *tasa del trigo* in March 1558, which was eventually included in book 5, title 25 of the *Nueva Recopilación* (1567). As a result, the maximum prize for grain became permanent, alleviating consumers, but aggravating the fate of poor farmers.²⁴ The mixed effects of the *tasa del trigo* only added to the protracted debate about the bindingness of such price regulations in conscience.²⁵ In his decree about the *tasa del trigo*, Philip II warned citizens that his regulation was not only binding in the civil courts, but also in the

13 For the early modern Spanish case, see ROUCO-VARELA (1965) 126–149 (The State serving the Church) and (significantly more voluminous) 150–296 (The Church serving the State), also cited in DECOCK (2013a) 625.

14 TAMANAHA (2015).

15 PRODI (2003) 112, 283.

16 MENSKI (2006) 145.

17 SCHUPPERT (2014) 262–284.

18 HELMHOLZ (1996) 339–365.

19 SCHMOECKEL (2014) 308.

20 LEVELEUX-TEXEIRA/PETERS-CUSTOT (2016) 13.

21 For the early modern Spanish case, see RODRÍGUEZ ARROCHA (2016) 149–157.

22 GLENN (2013) 41.

23 PRODI (2009) 328.

24 DEL VIGO GUTIÉRREZ (2006) 183.

25 GÓMEZ CAMACHO (1998) 187–205.

court of conscience, on pain of eternal damnation of the soul.²⁶ As a matter of fact, the bindingness of price regulations in conscience became one of the central issues debated by jurists and theologians in the early modern period.²⁷ It provides us with a fine example of the interaction between the different legal orders in early modern Spain.

If the civil law was in the hands of the Spanish Crown, the guardians of the law of conscience were theologians such as Tomás de Mercado (c. 1520–1575).²⁸ Mercado entered the religious order of the Dominicans and was active in both mainland and New Spain (Mexico). He belonged to the same religious order as Francisco de Vitoria (1483/92–1546) and Domingo de Soto (1494–1560), the famous theologians promoting the revival of Thomism at the University of Salamanca in the first half of the sixteenth century. Mercado made a significant contribution to spreading the neo-Thomist tradition in the New World, especially through his *Suma de tratos y contratos*, a manual on trade and contracts written at the request of merchants in Sevilla in 1569.²⁹ While the legal notion of conscience as a special jurisdiction will be further detailed in the next section, it is worthwhile recalling that it is no surprise to find theologians such as Mercado discussing economic issues in early modern Spain. Spanish scholastic theologians are well known for having responded to some of the most pressing social, political and economic needs of their time.³⁰ Drawing upon medieval scholastic economics,³¹ but adapting it to the new times, they refined the normative, contractual framework to deal with challenges such as the rise of global trade and international financial networks.³² The issue of price regulation, in particular, attracted attention from dozens of theo-

logians, as meticulous research by Abelardo Del Vigo Gutiérrez has revealed.³³ They universally agreed that specific circumstances can allow the prince to establish a legal price of certain goods, binding on pain of sin, for the sake of the public good;³⁴ however, they disagreed about the desirability of price-fixing and the severity of the obligation in conscience.

A major concern for Mercado in his discussion on maximum prices was to rebuke the misconception that the *tasa del trigo* had only limited effect in conscience. In fact, the second edition of his influential *Suma de tratos y contratos*, published at Seville in 1571, contained an extra book, offering a more extended treatment of the *tasa del trigo* than the original edition of 1569.³⁵ As Mercado explained in the new book on the legal grain price in the second edition of his *Suma*, one of the main reasons that pushed him to revise his original treatise was to combat the contrary ideas disseminated in the meantime by the *Declaración de la pragmática del trigo cuanto al foro interior del alma*. It contained a declaration on the limited bindingness of the maximum price in the »internal court of the soul«, granting moral approval to small deviations from the legal grain price. The Declaration was probably composed by Mexía, a Spanish jurist of whom little is known.³⁶ Mercado, on the contrary, insisted that human laws strictly bind in conscience if they are just and necessary for good governance, regardless of whether the violation is small or grave.³⁷ Nobody offends God by selling grain above the legal grain price before it is fixed, Mercado explained, but once a legal grain price has been established for the sake of the public good, it is entirely binding in conscience. Moreover, if regulating the market is necessary for the tranquil-

26 NUEVA RECOPIACIÓN (ed. Madrid, Zúñiga, 1745, online available on Google Books), vol. 1, lib. 5, tit. 25, l. 4, nr. 7, p. 832, see also CASEY (1999) 57 and GARCÍA SANZ (1998) 26.

27 PRODI (2012) 172.

28 See new insights on the birth date of Mercado by LAGARES CALVO (2016).

29 DUVE (2012) 36–37.

30 DUVE (2015) 123–137, DECOCK (2016a) 267–268, including references to further literature.

31 LANGHOLM (1998), TODESCHINI (2004), PIRON (2012) 11–26.

32 PRODI (2009), KOSKENNIEMI (2011), DUVE (2015), DECOCK (2016b).

33 DEL VIGO GUTIÉRREZ (1981).

34 DE ROOVER (1955) 186, GORDLEY (1991) 98, CHAFUEN (2003) 140.

35 For this reason, the facsimile of the 1569-edition *Tratos y contratos de mercaderes y tratantes* published in 2015 by the University of Salamanca cannot be used here. The third book of the *Suma de tratos y contratos*, dedicated to the *tasa del trigo*, is also lacking in the Madrid 1975 edition by Restituto Sierra Bravo. The textual basis for this contribution is the Madrid 1977 facsimile of the Seville 1571-edition edited by Nicolás Sánchez-Albornoz, as available online at

<http://www.cervantesvirtual.com/nd/ark:/59851/bmc1c1t9> (unpaginated, last consulted on 14 April 2017).

36 DE DIOS (2014) 416–417.

37 MERCADO, *Suma de tratos y contratos*, lib. 3, cap. 9: »Esta obediencia legal no solamente se ha de tener a la ley humana cuando contiene y encierra en sí algún precepto natural o divino, sino también cuando manda alguna cosa meramente seglar y profana. Si es necesaria al gobierno del pueblo, obliga en conciencia.«

ity and the peace of the kingdom (*estado tranquilo y quieto del reino*), the prince not only has the authority to impose maximum prices, he is even under an obligation to do so, on pain of sin.³⁸

In this exposition on the maximum grain price, Mercado turns out to be a strong advocate of moral control and government interference with markets.³⁹ He shared the view of his colleague Domingo de Soto that, in an ideal world, all prices should be established by the prince for the sake of the public interest.⁴⁰ In those Dominican theologians' view, princes were to be trusted more than merchants. The desire of merchants is to buy low and sell high, according to Mercado, while the commonwealth wants traders to sell as low as possible for the sake of the public good.⁴¹ Mercado was wary about individuals' tendency to seek their own advantage at the expense of their neighbor. Convinced, in true Augustinian fashion, that mankind had been profoundly corrupted by original sin, he insisted that freedom of contract should be restrained by laws, binding the individual will with many ropes.⁴² Moreover, he was driven by profound nationalist and protectionist instincts. A merchant should look to the interest of the nation first, then to the interest of the poor, and only in the last place to the interest of his family.⁴³ He resented foreign merchants, inclined as they were – in his view – to favor their own national interest, promote their own cultural values, and neglect the interests of their hosts.⁴⁴ As a substitute for foreign traders, Mercado recommended public authorities

to appoint a handful of merchants responsible for importing and exporting goods.⁴⁵ They should be paid a moderate salary by the public treasure, just like state officials.

While usually labeled as forerunners of Adam Smith's economic liberalism,⁴⁶ not all theologians working in the tradition of the School of Salamanca were as clearly in favor of free markets at that time, as some of their later followers, such as the Jesuits Luis de Molina (1535–1600), Leonardus Lessius (1554–1623) and Juan de Lugo (1583–1660).⁴⁷ It may be recalled, though, that the almost unconditional theological endorsement by Mercado of legal prices contrasts with the much more critical attitude towards price regulation that can be found in the writings of those Jesuit theologians. For example, Molina did not doubt that legal prices were binding in conscience. He also did not question the necessity to regulate economic life by stimulating moral virtue.⁴⁸ But he was much more skeptical about the presumed usefulness of government intervention in markets, fearing negative side-effects such as corruption, rent-seeking, and favoritism. He required more severe conditions for a legal price to produce the strictest of obligations in conscience, lending precedence to the natural justice of the competitive market price instead.⁴⁹ If merchants did not observe the legal price, because it was clearly violating the natural just price, they were not bound in conscience to make restitution, according to Molina. Yet, he recognized that even under such circumstances citizens would never-

38 MERCADO, *Suma de tratos y contratos*, lib. 3, cap. 9: «Y aun a las veces son estas tales tan necesarias al estado tranquilo y quieto del reino que no solamente tiene autoridad para mandarlas sino también obligación, y pecaría en no mandarlas, según la necesidad común las pide.»

39 BOTERO BERNAL (2003).

40 POPESCU (1997) 39–40.

41 MERCADO, *Suma de tratos y contratos*, lib. 2, cap. 6: «El deseo del mercader es el universal de todos, aunque, como dice San Agustín, es, con toda su generalidad, vicioso, conviene a saber: querer mercar barato y vender caro. (...) El intento y deseo de la república es, al contrario, que se venda lo más barato que se pudiere, porque le pertenece promover toda la utilidad y provecho a los vecinos.»

42 DECOCK (2013a) 523.

43 BEUCHOT/IÑIGUEZ (1990) 29.

44 MERCADO, *Suma de tratos y contratos*, lib. 2, cap. 6: «Mas, si son de fuera, mayormente de otro reinos, es admitirlos destruir y disipar toda su prosperidad y meter unos públicos despojadores de su riqueza y abundancia y aun unos labradores o sembradores de abusos y vicios, porque todo hombre desea naturalmente honrar y ennoblecer su patria y procurar de pasar a ella todo el bien y tesoro que a esta pueda coger y despojar; y lo mismo hacen los de aquí cuando están allá. Demás de esto, como se aman y agradan tanto las costumbres, usos, ritos y trajes en cada uno se cría, en cualquier parte que va las quiere injerir y plantar y las predica y persuade, y, como el vulgo es tan antojadizo y novelero, al momento las imite y recibe; las cuales muchas veces son de

suyo dañosas y corruptas, y, si no lo son, a lo menos no convienen a esta tierra como a la suya.»

45 MERCADO, *Suma de tratos y contratos*, lib. 2, cap. 6: «Negocio sería, si alguna ciudad lo hiciese – negocioso y trabajoso, yo lo confieso, mas sería juntamente tan provechoso que el gran provecho fuese paga y recompensa del poco trabajo- dar a dos o cuatro la misma república el dinero con que traigan lo necesario, señalándoles por su factoría un tanto, y no dándoles el caudal, sino que ellos lo pusiesen, concederles una moderada ganancia que fuese a todos leve y fácil.»

46 E. g. KUCHAR (2016) 131.

47 ROTHBARD (2006) 97–133.

48 ALONSO-LASHERAS (2011) 185.

49 SCHÜSSLER (2014) 269–272.

theless sin against their duty, as a matter of conscience, to obey the prince (*obedientia principis*) and show charity towards the nation and the neighbors (*caritas patriae et proximorum*).⁵⁰

3 Cooperating Jurisdictions: The Confessor as a Law Enforcer

Jurisdictional multiplicity or »jurisdictional pluralism« is a central aspect of the plural legal order characteristic of early modern imperial spaces.⁵¹ The notion of »jurisdictional pluralism« seems especially appropriate for analyzing the empirical case study at hand. The bindingness of economic regulations in conscience does not just bring into play the interaction between two different sets of laws – positive human law produced by the Spanish Crown, on the one hand, and the natural and divine laws as explicated by theologians, on the other. More importantly, it brings up the question of how two distinct jurisdictions were interacting, or at least expected to interact, in sixteenth-century Spain and its colonies. Theologians and jurists did not merely debate the bindingness of price regulations in conscience in terms of the theoretical interaction between different sets of laws, but rather investigated its practical consequences for judicial practice and issues of jurisdictional competence. The prevalence of those jurisdictional aspects is manifest in their discussions about whether clergymen were obliged to observe the *tasa del trigo*, benefitting as they were from several privileges that exempted them from the Crown's jurisdiction, such as the right to be judged by their peers or not to be taxed. Regardless

of those jurisdictional privileges, which were merely meant to safeguard the dignity of their status, according to Mercado,⁵² all clergymen, including bishops, are subject to observe the maximum grain price in conscience, since the legal price is a just price according to natural law.⁵³ The *tasa del trigo* is not just a regulation imposed by the king, but also a divine and natural law (*no es solamente ley del rey sino ley divina y natural*), which binds everybody in conscience.

The controversy surrounding the *tasa del trigo* was as much a case of co-existence between different jurisdictions, at that time, as it was about legal pluralism in the sense of the co-existence of different laws. This reasoning must be taken even one step further. Apart from the dual relationship between ecclesiastical and civil jurisdictions, it is necessary to acknowledge that within the Church's jurisdiction a further division emerged between the so-called external ecclesiastical jurisdiction and the sacramental jurisdiction of the interior or the soul (*forum conscientiae*).⁵⁴ In other words, the question of the moral bindingness of the *tasa del trigo* is also a question about the enforcement of a regulation laid down by the Crown in a jurisdiction other than that of the civil or ecclesiastical courts, namely the court of conscience. The judicial character of conscience in the late medieval and early modern Catholic world is a highly relevant fact that has, nevertheless, persistently escaped anachronistic readings of moral theological writings.⁵⁵ The current predominance of the subjective understanding of conscience, not in the least as a result of the Lutheran Reformation, has obscured the profoundly objective and jurisdictional character of the notion of conscience that forms the

50 LUIS DE MOLINA, *De iustitia et iure*, vol. 2: *De contractibus*, Mainz, 1602, tract. 2, disp. 365, col. 478, lit. c: »Esto in principe essete potestas ad condemnandam eam legem in publicum bonum, lexque illa vim obligandi haberet, nihilominus transgressores illius, quamvis peccarent, ad nullam tamen restitutionem tenerentur. Ratio autem est, quoniam ea lex non constitueret iustum commutativum, quod in aequalitate quoad valorem inter rem et pretium consistit, sed solum licite praeciperet frumentum eo pretio vendi in commune bonum, quare transgredientes eam legem peccarent quidem contra obedientiam principis

et forte contra caritatem patriae ac proximorum, posita praesertim ea lege, non tamen contra iustitiam, et idcirco ad restitutionem non tenerentur.«

51 BENTON/ROSS (2013), also cited in DUVE (2016) 5 and 13.

52 MERCADO, *Suma de tratos y contratos*, lib. 3, cap. 3: »Y todos afirman que el papa y los príncipes los exentaron solamente de lo que era indecente a su estado o les concedieron lo que era decoro y hermosura, como en tener sus jueces por sí, en no dar tributos y pechos, ni otros servicios reales o personales, porque mas libres pudiesen ocuparse en el culto divino y en

apacentar el pueblo con pasto espiritual. Mas a las leyes do se manda algún acto necesario, no repugnante, antes muy decente a su estado, igualmente están sujetos con los seglares.«

53 MERCADO, *Suma de tratos y contratos*, lib. 2, cap. 6, lib. 3, cap. 2, lib. 3, cap. 3.

54 PRODI (2012) 167–169.

55 For legitimate warnings against the oblivion of the objective character of conscience in Catholic moral theological, legal, and political writings of the early modern period, see PROSPERI (2001) 175, REINHARDT (2016) 2, MAIHOLD (2017) 61.

background to scholastic moral theologians' writings in the early modern period.⁵⁶

Luther's allegedly subjectivist understanding of conscience was taken as the perfect foil by the Council of Trent (1545–1563), urging the Fathers of the Council to affirm the juridical conception of conscience. While the confessor's role in the sacrament of penance had traditionally been described as threefold (father, doctor, judge), the judicial role now became predominant.⁵⁷ In order to confess his sins, the penitent presented himself as the defendant in a jurisdictional space specially created for the enforcement of norms in the wake of Trent – the confessional or sacred tribunal of penance⁵⁸ – where his own conscience acted as the accuser and the confessor as a judge.⁵⁹ As the Roman Catechism incorporating the doctrine of Trent emphasized – in line with traditional teaching going back to Saint Augustine and Gratian's *Decretum* – the confessor could not absolve the penitent unless restitution⁶⁰ was made of the harm caused by him (e.g. by selling above the legal price, by not fulfilling a contract, by charging excessive interest rates, by ruining somebody's reputation, by mutilating the victim's body).⁶¹ Upon absolution, the penitent was regularly asked to perform acts of satisfaction such as fasting, praying and works of mercy.⁶²

Martin Luther's proposed shielding of individual conscience from outside regulation by positive, particularly ecclesiastical law and against control by clerics was seen by Catholic jurists and theologians as a fundamental menace to the public order.⁶³ The main objective of early modern Cath-

olic theologians was to oppose just that. They insisted that conscience falls under the jurisdiction of a confessor who is able to establish objectively what laws bind the individual.⁶⁴ Mercado's emphasis on the moral bindingness of the *tasa del trigo*, formulated in his *Suma* less than a decade after the conclusion of the Council of Trent, immediately taps into that context. »It is such a well-established truth that preceptive [imperial and civil] laws, which are the rules of our operations, are binding the subjects [in conscience],« Mercado explained,⁶⁵ »that it is almost a matter of faith, as the Catholic Church establishes and teaches in the Council of Constance, sessions 8 and 15 against Wycliff, and Pope Leo X in his condemnation of Luther (who said the opposite), article 20, and the Council of Trent.« In other words, denying the moral bindingness of the legal grain price did not suit a good Catholic. In the eyes of Mercado, it raised suspicions of sympathies with heretics such as John Wycliff or Martin Luther.

The confessor's role as a judge in the forum of conscience, granting absolution and imposing acts of penance through a proper judicial act (*actus judicialis*),⁶⁶ was considered a crucial policy instrument to guarantee the discipline of the Christian faithful and the stability of the Christian political order.⁶⁷ Claiming authority from Aristotle, Mercado admonished that a well-ordered republic rests on both good laws and wise judges to enforce those laws, mentioning civil laws and civil courts, on the one hand, and divine laws and conscience, on the other. In this manner, Mercado recalled not only the plurality of the legal order, but also the fact that

56 DECOCK (2013a) 69–86, including references to further literature.

57 O'MALLEY (2013) 153.

58 SCHLOMBS (1965).

59 DÜRR (2013) 223.

60 JANSEN (2013).

61 Catechismus Romanus (1566), cap. 5, num. 78.

62 Catechismus Romanus (1566), cap. 5, num. 74.

63 See the worries about the collapse of political stability, ascribed to Luther's allegedly dangerous idea of evangelical liberty, expressed in Pope Adrian of Utrecht's letter to Cardinal Chie-regati, cited in DECOCK (2013b) 583.

64 GONZÁLEZ POIVILLO (2010) 251–255.

65 MERCADO, *Suma de tratos y contratos*, lib. 2, cap. 6: »Bien se haber gran

cuestión entre teólogos en cómo y cuándo obligan en conciencia las leyes imperiales y civiles, al menos los penales. Mas las perceptivas, que son regla de nuestras operaciones, es verdad tan cierta obligar a los vasallos que casi es de fe, como lo determina y enseña la Iglesia católica en el concilio constanciense, sesión 8 y sesión 15 contra Unicleph, y León X, en la condenación del Lutero (que decía lo contrario), artículo 20, y el concilio tridentino.«

66 Council of Trent, session 14 (25 November 1551), canon 9, available online at <https://history.hanover.edu/texts/trent/ct14/html>.

67 PROSPERI (2001) 186.

conscience should be considered as a tribunal (*foro y audiencia*).⁶⁸ »The confessor is to Christianity what a prince is to a city,« Mercado explained,⁶⁹ »it is his task to make sure that all live in order and that the law is being observed and executed. He collaborates with the penitents to make sure that they observe the law which they proclaimed at the moment of baptism since confessors are judges of conscience (*jueces de la conciencia*).« Mercado went on to sing the praises of confessors and their noble mission of guaranteeing the Christian order by using their power to enforce the divine law as proclaimed by the preachers. Confessors could sanction the wicked, threatening them with damnation of their souls. »The confessor compels and forces with his power,« Mercado explained, »just like a true judge.«⁷⁰

Confessors contribute to much more than just the enforcement of Christian virtues. They have a fundamental role to play in enforcing obedience to the temporal authorities. Obedience is a central theme developed by Mercado throughout the second and third books of his *Suma de tratos y contratos*. Prelates and confessors embody the ecclesiastical jurisdiction (*jurisdicción*) that Christ gave to his Church for the sake not only of the spiritual, but also of the temporal government of all people

since he knew that human authorities alone would be insufficient.⁷¹ The Church's jurisdiction is essential in guaranteeing obedience to the civil authorities, the sacrament of penance being a divine remedy to ensure obedience.⁷² Imperial and royal laws should be observed not only out of fear of punishment but also for the preservation of conscience.⁷³ »One of the great tasks of the confessor,« Mercado explicated,⁷⁴ »is to make the penitent understand how important it is for salvation that subjects obey their princes.« The duty to obey the prince is entirely natural since political power is a divine gift to mankind to provide for the well-being of the commonwealth. The authorities decide what is necessary for good governance according to particular circumstances. Establishing legal prices is part of that jurisdictional power (*jurisdicción*) that republics have and to which citizens must obey.⁷⁵ Through their regulatory power, political authorities have the task of filling the gaps left by nature, whose vicar they are (*la potestad pública es su vicario*). The establishment of just prices is just one such gap. In Mercado's eyes, a regulation laid down by the secular authorities is a gift from Heaven (*viene del Cielo*) inasmuch as it takes the place of natural law. Once it has been established by the political authorities, the obser-

68 MERCADO, *Suma de tratos y contratos*, lib. 2, cap. 7: »La raíz y razón fundamental de esta doctrina es que de dos cosas esenciales a cualquier república, como son leyes que se guarden y juez y cabeza que la haga cumplir y guardar, la ley más provechosa y substancial entre cuantas ha habido o pudo haber, aun para una vida común de ciudad, fue y es siempre la divina, y el foro y audiencia más necesario el de la conciencia y penitencia.«

69 MERCADO, *Suma de tratos y contratos*, lib. 2, cap. 7: »Es el confesor en la cristiandad como el príncipe en la ciudad, a quien incumbe procurar que todos vivan en orden y se cumpla y ejecute el derecho. Así el confesor trabaja con los penitentes que guardan la ley que profesaron en el bautismo, porque son jueces de la conciencia.«

70 MERCADO, *Suma de tratos y contratos*, lib. 2, cap. 7: »El predicador puede aconsejar y persuadir la virtud, mas el confesor puede compeler y forzar a guardarla, so pena de la vida y cautiverio del alma, que es no absolverle.

Hace lo que el predicador: aconseja, persuade y más en particular y con mayor claridad y libertad, condiciones importantes para ser de efecto el consejo; y mas, necesita y fuerza con su potestad como verdadero juez.«

71 MERCADO, *Suma de tratos y contratos*, lib. 2, cap. 7: »A cuya causa, entendiendo nuestro Redentor que se había de extender su Iglesia y fe por todas las gentes y naciones, instituyó para el gobierno de todas la potestad jurisdicción eclesiástica, que está en prelates y confesores, sabiendo que la humana por sí para todos no basta.«

72 MERCADO, *Suma de tratos y contratos*, lib. 2, cap. 7: »Y es tan menester para que se viva en quietud y sujeción tener enfrenada y temer la conciencia, que la gente que no la teme está muy presta para no obedecer a sus superiores. Así que les es a los gobernadores del pueblo importante este sacramento para conseguir su fin e intento, que es la obediencia y vida pacífica de los ciudadanos, lo cual, sin este medio y remedio divino, no pu-

dieran alcanzar, ni pudieran averiguarse con tantos, regiéndolos por largo tiempo en justicia, equidad y blandura.«

73 MERCADO, *Suma de tratos y contratos*, lib. 3, cap. 3: »Debemos obedecer a las leyes imperiales o reales no sólo por el temor de la pena allí explicada, sino por la conciencia.«

74 MERCADO, *Suma de tratos y contratos*, lib. 2, cap. 7: »Que uno de los grandes cargos que tiene el confesor es dar a entender al penitente cuánto importa a nuestra salvación obedecer los vasallos a sus príncipes (...).«

75 MERCADO, *Suma de tratos y contratos*, lib. 3, cap. 5: »Esto es su autoridad y jurisdicción y esto hace la obediencia que con tanto derecho se le debe.«

vation of the legal price becomes a dictate of reason, obligatory by nature itself rather than positive laws.⁷⁶

Confessors are necessary for the well-being of the republic since they make sure that Christian citizens obey the prince. Through their judicial power in the court of conscience, they compel penitents to observe not only the divine law revealed in the Gospel but also the civil laws issued by the prince. For that reason, confessors should not indulge in laxism, certainly not when faced with merchants complaining about over-regulation.⁷⁷ Mercado required confessors to enforce the laws in the strictest of ways, especially by not tolerating the slightest deviation from the maximum grain price.⁷⁸ Through their power in the internal court of conscience, confessors are seminal in ensuring also the external respect for justice (*la observancia exterior de justicia*) and in laying the foundations of the political life and order (*orden y vida política*).⁷⁹ They foster a culture of reconciliation and even help to collect a debt that can no longer be recovered through the external court for lack of proof.⁸⁰ »Fathers confessors,« Mercado concluded, »are very much fathers of the republic (*padres confesores muy padres de la república*).«⁸¹ Therefore, he strongly advised princes to involve confessors in the temporal government of the republic, quoting Antonio de Mendoza (1496–1552), first viceroy of Mexico, allegedly saying that

for good governance of the republic nothing is more indispensable than good confessors.⁸²

4 Collaborative Legal Pluralism and the Internalization of State Law

The tenet that confessors are not just »fathers-priests« but also »fathers of the republic« perfectly sums up the convergence of political and religious interests strived for by Mercado in the plural legal universe of the sixteenth-century Spanish empire. Civil laws as much as divine laws should be enforced by confessors considered as real judges in the tribunal of conscience. The binary, often conflicting logic of Church-State relationships in the modern period does not contribute to understanding Mercado's collaborative vision of the interaction between ecclesiastical and temporal jurisdictions. Instead, this interaction must be understood in terms of an »osmotic relationship« (Prodi), a »practiced partnership« (Schuppert) or »intimate links« (Menski). Modern notions of law and morality do not improve our understanding of the early modern jurisdictional complexity either. For modern jurists, the coercive power of the state makes the difference between »the pious hopes of morality and the grim certitudes of law,« to quote Michael Barkun's description of the positivistic creed.⁸³ For early modern governors such as Anto-

76 MERCADO, *Suma de tratos y contratos*, lib. 2, cap. 6: »Demás de esto, certísimo es que todos están obligados a vender cada cosa por lo que vale. Esto es un dictamen natural de la razón, que, sin doctor ninguno ni ley positiva, lo enseña a todas las naciones.«

77 MERCADO, *Suma de tratos y contratos*, lib. 2, cap. 7: »Quejense los mercaderes que les pone la república muchas leyes y les tasa tan corto la ropa que perderían del costo si la guardasen. Y algunos confesores hay tan blandos que, informados de ello, pasan de ligero con el pecado y los absuelven. Cierito, a mi juicio, yerran ambos, y por ventura más gravemente el confesor en no reprehendérselo con aspereza y negarles la absolución con severidad si no se enmiendan, que el penitente en pecar.«

78 MERCADO, *Suma de tratos y contratos*, lib. 2 and lib. 3, *passim*, see also CASEY (1999) 57.

79 MERCADO, *Suma de tratos y contratos*, lib. 2, cap. 7: »(...) cosa importantísima aun para la observancia exterior de justicia, porque remedian muchos daños, deshacen grandes agravios imposibilitados a deshacerse por otra vía, impiden no pocos males, son causa continuamente de bien, no sólo espiritual sino común y corporal. Las deudas, que no se pueden averiguar en juicio, las hacen restituir; la fama, que aun no sabía el otro quién se la había quitado y robado, se la hacen volver, haciendo al murmurador se desdiga; los que mal se quieren mucho, los apartan; los mal apartados conciertan; reconcilian los discordes; arrancan los rencores; apagan el fuego y afición; reprehenden los vicios, plantan virtudes, cualidades y medios sumamente requisitos, aun para un orden y vida política.«

80 Interesting, in this regard, is Mercado's quotation of Saint Paul to the

effect that God does not want man to enter heaven as long as he is bound by outstanding debt. MERCADO, *Suma de tratos y contratos*, lib. 3, cap. 9: »no quiere Dios que entre en el cielo hombre adeudado, sin libre de débitos.«

81 MERCADO, *Suma de tratos y contratos*, lib. 2, cap. 7.

82 MERCADO, *Suma de tratos y contratos*, lib. 2, cap. 7: »Para el buen gobierno temporal de la república no hay cosa que más se requiera y aproveche que buenos confesores.« Mendoza is famous for relying on the clergy in running New Spain, requiring the clergy to live by the highest standards of discipline, see ARON (1927) 104–105.

83 DECOCK (2013a) 86.

nio de Mendoza, however, it was obvious that conscience, as a tribunal, made the difference between the aspirations of civil law and its enforcement in practice. The confessional created a sacramental-legal space for the internalization and the implementation not only of divine but also of civil laws.

At the end of his exposition on the legitimacy of the *Pragmática del trigo*, Mercado developed a short theory about the unity of the law of the land and the law of conscience, which is typical of what has been called the »anti-penalist« current in scholastic political thought.⁸⁴ As the name indicates, »anti-penalism« reacts against the »purely penal law theory«. This theory holds that some laws are merely of a penal nature, viz. they just prescribe a punishment for a certain action. The violation of such merely penal laws does not constitute a sin in the court of conscience.⁸⁵ In his work *De potestate legis poenalis* (1550), on the power of the penal law, the Franciscan theologian Alfonso de Castro (1495–1558) had recognized that such laws, however exceptional, could exist.⁸⁶ But following Domingo de Soto and the majority of Catholic theologians in his day, Mercado rejected the purely penal law theory.⁸⁷ For the sake of the peace and the tranquility of the republic (*pax et tranquillitas reipublicae*), they argued that crime and sin are inseparable, thus contributing to the internalization of positive law and the sacralization of the nascent state. Violating a just law does not only constitute a crime, but it is also a sin that will be venial or mortal according to the gravity of the matter.⁸⁸ The theologians, then, considerably contributed to the moral legitimation of the rise of the modern state, which heavily drew on the rhetoric

of »peace and the tranquility of the republic.«⁸⁹ It is not a coincidence that Mercado's exposition on the moral bindingness of the legal grain price abounds with references to the argument of »peace and tranquility of the republic« (*quietud y paz pública / quietud del pueblo / páz de la república / el estado tranquilo y quieto del reino* etc.) as necessitating absolute obedience to the prince in conscience.⁹⁰

Mercado's plea in favor of mutual jurisdictional collaboration between spiritual and temporal authorities was not new, but rather a strong reaffirmation of traditional Catholic theology of law and politics.⁹¹ Like much of early modern scholastic political doctrine, it was aimed at the restoration of the medieval dream of a Christian commonwealth.⁹² In the spirit of the Council of Trent and the neo-scholastic revival movement at Salamanca, Mercado re-affirmed the basic principle of Thomistic political theology that just laws, issued for the sake of the common good, are binding in conscience.⁹³ Drawing on a famous passage in Saint Paul's letter to the Romans, explaining that all power comes from God,⁹⁴ Mercado insisted that resisting legitimate power was tantamount to resisting the divine order.⁹⁵ Fearing the disruptive potential of Martin Luther's idea of evangelical liberty, or, for that matter, Jean Gerson and Jacques Almain's doctrine of merely penal laws,⁹⁶ all authors mentioned in Mercado's exposition on the *tasa del trigo*, he considered the view that civil laws are not binding in conscience as heretical. The background to his advocacy of a system of collaborative legal pluralism was as much driven by the contemporary concern about the Lutheran heresy, then, as it was by the need to

84 DEL VIGO GUTIÉRREZ (2006) 581, 584–585, 589.

85 DANIEL (1968) 38.

86 CONDORELLI (2012) 91.

87 CONTRERAS (2016) 94–99.

88 MERCADO, *Suma de tratos y contratos*, lib. 3, cap. 10: »Todas las leyes (...) siendo justas, obligan en conciencia a su observancia, más o menos, esto es o debajo de mortal o venial, según la gravedad y peso de su materia y conforme a la necesidad que hay de guardarse (...).«

89 SIMON (2004) 218–225.

90 For example, MERCADO, *Suma de tratos y contratos*, lib. 3, cap. 1, lib. 3, cap. 7, lib. 3, cap. 9, lib. 3, cap. 10.

91 CONDORELLI (2012) 56.

92 MECCARELLI (2014) 130.

93 MERCADO, *Suma de tratos y contratos*, lib. 3, cap. 9: »Cuando las leyes civiles imperiales o reales son justas, con las condiciones que su equidad demanda, hechas por la utilidad universal de todos, de cosas graves y necesarias, obligan en conciencia, y quebrantarlas es ofender a Dios, cuya voluntad es se obedezcan los ministros de su justicia que, en su lugar, en diversos reinos presiden.«

94 Rom. 13:1, also discussed by Domingo de Soto and many other scholastic theologians, see DECOCK (2015) 328.

95 MERCADO, *Suma de tratos y contratos*, lib. 3, cap. 9: »Conforme a esto, sin discrepar punto, es lo que dice San Panblo escribiendo a los romanos: Toda ánima está sujeta a las potestades mayores, esto es, a los príncipes y reyes, porque no hay potestad sino de Dios, y las cosas que Dios hace, todas son rectas y justas. Así que quien resiste a la potestad, resiste a la ordenación divina.«

96 DANIEL (1968) 23.

back up the Spanish imperial endeavor with religious legitimation. Contrary to Luther, the Catholic theologians saw conscience primarily as the locus for the internalization of human laws, not as a bulwark of resistance for the autonomous individual against them.⁹⁷

As is clear from the above exposition, Mercado was in favor of strong government intervention in the economy, advocating strict enforcement of Philip II's ordinance about the *tasa del trigo* in the court of conscience. True to the spirit of scholastic political philosophy, he nevertheless remained loyal to the proposition that with power comes responsibility. Spanish scholastics, in particular, stressed the constitutional nature of political power and its limits,⁹⁸ even if Jesuits such as Molina, Lessius, and Suárez seem to have harbored stronger anti-absolutistic instincts than Dominican theologians such as Vitoria, Soto, and Mercado.⁹⁹ The prince should keep in mind that not every-

thing that lies in his power is, at the same time, expedient for the republic. When the state seeks to regulate the market, it should proceed carefully. Prices should not be fixed in an arbitrary way but after careful consideration of several circumstances. This is the point where theological advice should be considered useful by the prince. He could request the advice of confessors, experts in natural and divine law, and »voices of conscience«. ¹⁰⁰ A good example was the Portuguese king João III, who had shown the right way by establishing the »Mesa da Consciência«, a board of theological advisers. ¹⁰¹ If the Church legitimated the jurisdictional power of the prince, he was expected to accept the legal order of the spiritual authorities. Giving and taking on both sides was the necessary condition to safeguard the collaborative plural legal order in early modern Spain. ■

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97 GRUNERT (2017) 297, GERMANN/ DECOCK (2017b) 16.

98 FERNÁNDEZ-SANTAMARÍA (2005–2006).

99 An indirect example is the discussion on the moral bindingness of contractual formality requirements, DECOCK (2013a) 329–418.

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