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THE IMPACT OF THE MERCHANTS' CONFESSION
ON THE DEVELOPMENT OF BUSINESS LAW DURING
THE SIGLO DE ORO: THE CASUISTIC APPROACH
OF TOMÁS DE MERCADO AND MARTÍN
DE AZPILCUETA TO COMMERCIAL LAW

In 16th century Spain, the confessor and the merchant had a privileged relationship, resulting from the new economic practices induced by the Great Discoveries. The merchant must, for the salvation of his soul, engage in commercial activity in accordance with Christian morality. Through confession, the confessor provides legal and theological advices necessary to achieve this purpose, but also judges the morality of his penitent by deciding whether or not to absolve him. Therefore, the confessor must know both the Christian moral precepts designed to govern business life, and the institutions of civil law used in business practice. An issue raised by the penitent is a case of conscience, which the confessor must resolve by formulating a moral resolution. This resolution could be a certain or only a probable one, and therefore subject to debate against other probable opinions. These resolutions were then incorporated among others into the casuistic literature that was to be diffused throughout Europe for the use of both confessors and penitents.

Keywords: *School of Salamanca. – Casuistic literature. – Probabilism. – Confession. – Business.*

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1. INTRODUCTION

The Catechism of the Council of Trent, the profession of faith of Pius IV published in 1566,¹ refuted the Protestant doctrines, described as heretical, that had come from the East.² It established the obligation for the faithful of the Roman Catholic Church to make an annual confession³ at Easter.⁴ Nevertheless, in the Spain of *Siglo de Oro*, the confessor and the merchant already had a privileged relationship that originated in business life. In fact, specific normativity applying to merchants was always part of the medieval casuistic literature,⁵ but this trend was largely intensified

- 1 *Catechismus, ex decreto Concilii Tridentini, ad parochos, Pii Quintii pont. max. iussu editus*, Paulum Manutium, Rome 1566 – Ed. consulted: *Catechismus ex decreto concilii tridentini*, Ex Officina Bernhardi Tauchnitz, Lipsiae (Leipzig) 1856, original text – *The Catechism of the Council of Trent*, George Routledge and Co., London 1852, (translation by Theodore A. Buckley).
- 2 *Ibid.*, Prooemium, Q. VII, 4: „Quamobrem Patres oecuminicae Tridentinae synodi, quum tanto et tam pernicioso huic malo salutarem aliquam medicinam adhibere maxime cuperent, non satis esse putarunt, graviora catholicae doctrinae capita contra nostri temporis haereses decernere, sed illud praeterea sibi faciendum censuerunt, ut certam aliquam formulam et rationem Christiani populi ab ipsis fidei rudimentis instituendi traderent, quam in omnibus ecclesiis illi sequerentur, quibus legitimi pastoris et doctoris munus obeundum esset” (English translation, Preface, 4–5: „The Fathers, therefore, of the oecumenical Synod of Trent, anxious to apply some healing remedy to an evil of such magnitude, and so pernicious an influence, thought it not enough to decide the more important heads of Catholic doctrine against the heresies of our times, but deemed it further incumbent on them, to deliver some fixed form and manner of instructing the faithful people from the very rudiments of faith, which should be followed by those in all churches, to whom are intrusted the duties of a lawful pastor and teacher”).
- 3 *Ibid.*, Part. II, Chap. V, Q. XLIV, 234: „Quo vero potissimum tempore confiteri oporteat, eo canone, de quo antea diximus, sancta ecclesia decrevit; iubet enim semel saltem quotannis fideles omnes peccata sua confiteri” (English translation, 282: „In the same canon [*Concilium Lateranense* IV, 1215] the Church has defined the period, within which we are most particularly bound to confess; for she commands all the faithful to confess their sins at least once a year”). The date of Easter is chosen because of the words spoken by Christ and recorded in John 20:22–23: „Again Jesus said, „Peace be with you ! As the Father has sent me, I am sending you.” And with that he breathed on them and said, „Receive the Holy Spirit. If you forgive anyone’s sins, their sins are forgiven; if you do not forgive them, they are not forgiven.” – Bible, New International Version, 1983.
- 4 Renate Dürr, „Confession as an instrument of Church discipline: A Study of Catholic and Lutheran Confessional Manuals from the XVI and XVII centuries”, *Creativity and Norm-Making: Tensions in the Latter Middle-Ages and the Early Modern Era*, Bill, Leiden 2013, 223.
- 5 See: Hector Menteith Robertson, *Aspects of the Rise of Economic Individualism: A Criticism of Max Weber and His School*, Kelley & Millman Inc., New York 1959 – Odd Langholm, *The Legacy of Scholasticism in Economic Thought*, Cambridge University Press, Cambridge 1998 – Odd Langholm, *The merchant in the confessional: trade and price in the pre-reformation penitential handbooks*, Leiden: Brill, 1992.

as a result of the overseas discoveries that led to an increase in power of merchants in commercial cities, especially in Sevilla.

The work of Pius IV defines confession as „A sacramental accusation of one’s self, made with a view of obtaining pardon by virtue of the keys”, because the sins „are to be confessed as matters of self-accusation, with a desire even to avenge them on ourselves”.⁶ Martín de Azpilcueta, however, offers a more practical and less theological explanation: the sinner’s secret and vocal accusation of his or her own sins to the priestly authority so that the latter may absolve him or her through the sacrament.⁷ Confession thus constitutes the second part of the sacrament of penance. It is preceded by contrition and followed by satisfaction. Contrition is defined as „the real pain that a penitent feels in the regret he has for having offended God by the mere consideration of his goodness, without reflecting on the fear of the torments that sin deserves”.⁸ However, Martín de Azpilcueta defines it directly in the context of the sacrament of penance as „the voluntary, painful and great repentance, real or virtual, of having sinned because it is an offence to God above all else, with the aim of not sinning mortally any more, of confessing and of satisfying oneself”.⁹ Satisfaction, the last part of the sacrament of penance, is the „recompense for the offence done to God by sin, so as not to offend him any more”.¹⁰ Nevertheless, it is accompanied by restitution, that is, the reparation of the damage caused to all

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- 6 *The Catechism of the Council of Trent*, Part. II, Chap. V, Q. XXXVIII, 231: „Eam igitur definiunt esse peccatorum accusationem, quae ad sacramenti genus pertinent, eo susceptam, ut veniam virtute clavium impetremus. [...] Verum accusatorio animo ita enumeranda sunt, ut ea etiam in nobis vindicare cupiamus” (English translation, 278).
- 7 Martín de Azpilcueta, *Manual de Confesores y Penitentes*, Francisco Fernandez de Cordova, Valladolid 1566, 19: „La segunda parte del sacramento de la penitencia, es la confession vocal y sacramental, que añadiendo algo a los modernos se puede definir que es acusación secreta, con que el pecador, se acusa de sus pecados al sacerdote proprio, para que lo absuelva de los sacramentalmente” („The second part of the sacrament of penance is the vocal and sacramental confession, which can be defined as a secret accusation with which the sinner admits his sins to his own priest so that he can be absolved of them sacramentally”, translation provided by the author).
- 8 Alexandre Furetière, *Dictionnaire Universel*, A. et R. Leers, La Haye – Rotterdam 1690, entry „Attrition”, translation provided by the author.
- 9 Martín de Azpilcueta, *Manual de Confesores y Penitentes*, Valladolid, 1566, cap. 1, 4: „Contrición [...] es arrepentimiento voluntario, doloroso, y grandissimo, actual o virtual, de haber pecado por ser ello ofensa de Dios sobre todo lo al amado, con proposito (alomenos virtual) de no pecar más mortalmente, y de confessar y satisfacer”, translation provided by the author.
- 10 *Ibid.*, cap. 4, 23: „Y satisfacción tomando al especialmente, por una parte del sacramento de la penitencia, es recompensa de la ofensa hecha a Dios por el pecado con propósito de no le ofender más”, translation provided by the author.

and the cessation of the sin.¹¹ Thus, once these three stages of the sacrament of penance have been completed, the penitent can obtain absolution.

In the context of confession, it is the confessor's task to listen to the penitent and then to disclose the moral and religious norm that should be applied in the situation presented to him. Nevertheless, the confessor is not detached from the factual circumstances: he must also show, in the light of the factual circumstances presented by the penitent, how the norm should have been applied in that specific situation, and how it should be applied in the future. Only then, when the penitent shows he is willing to follow the confessor's instructions and advice through attrition and satisfaction, can he obtain absolution.¹² It is therefore the purpose of the confessor to determine, interpret and apply the moral and religious norm according to the context of the specific case of conscience.

Nevertheless, when the confessions of penitents raise questions, these issues are called cases of conscience, which, according to the definition of Marie-France Renoux-Zagamé, reveal a situation in which the implementation of the rules supposedly applied in everyday social and economic relations give rise to doubts and questions, with the aim of saving the soul of the penitent, whether he be a worker, a soldier, a craftsman, a judge, or a merchant.¹³

In an effort to harmonise, as the Church is accustomed to do, the responses given by confessors to penitents, casuistic literature appeared, that is to say, literature relating to the study of cases of conscience, in the form of *Manuals for Confessors and Penitents*. These books, which present cases taken directly from questions asked to theologians, are written both in Latin for academic theologians, who are confessors too, as a methodological guide to be used throughout Europe, but also in the vernacular language so that common clergymen working for the daily life of their churches can answer the interrogations of their penitents, and for the penitents themselves – who are not members of the clergy and therefore not Latinists – in order to find the legal rules to be applied to everyday commercial practices without necessarily going to the confessional.

11 *Ibid.*: „Restitucion, es torna de lo tomado, o paga del danno hecho segun todos, y no es paga de la ofenda hecha a dios por el pecado, antes cessar de pecar, segun la comun” („Restitution is the return of what has been taken, or the payment for the damage done according to all, but it is not payment for the offence done to God by sin, but rather the cessation of committing the sin, according to the common”, translation provided by the author).

12 Marie-France Renoux-Zagamé, „Lois du ciel et lois des hommes selon les Manuels des confesseurs: le pouvoir du pouvoir invisible dans la France laïque”, *Mélange en l'honneur d'Anne Lefebvre-Teillard*, Éditions Panthéon-Assas, 2009, 868.

13 *Ibid.*, 870.

Nevertheless, one should not forget the eminently practical aspect of casuistic literature. In accordance with the scholastic method, the authors found the inspiration for their reflections in the reality of the confessional itself. Although casuistic literature existed since the Middle Ages, the more modern cases of conscience were reported to authorities in the field of moral theology, such as Martín de Azpilcueta, by their fellow friars and clergymen in order to divulge the resolution needed to answer these new cases of conscience. Thus, the work, although it contains rules formulated in a general way, is the conclusion of a study that was carried out outside of books, in the secrecy of the confessional, which implies orality,¹⁴ and which is anchored in the daily life of the faithful. Indeed, the confessional, in the sense of a closed place allowing the priest to hear the confession while guaranteeing the secrecy and anonymity of the penitent, was first mentioned at a Council in Seville in 1516.¹⁵ Casuistic literature is thus a direct testimony to the religious practice of the Middle Ages and the early Modernity.¹⁶

After the Middle Ages, casuistic literature found a new lease on life in the Catholic Counter-Reformation, especially in Spain.¹⁷ Indeed, in the XVI century, Spain was the privileged territory of the Catholic faith, a fact linked to its long history of military catholicism. Although the marriage of Isabella of Castile and Ferdinand of Aragon marked the unification of the Hispanic Kingdoms,¹⁸ the victory over the Caliphate of *Al Andalus* in 1492 put an end to a conflict that had lasted several centuries. Spain therefore became an unified territory, with imperialist tendencies, and decidedly catholic. These religious and warlike impulses, leaving a soil too unfertile for protestant ideas to take roots,¹⁹ were not to be denied thereafter.²⁰

14 *Catechism of the Council of Trent*, 181: „Secrecy as regards confession should be strictly observed, as well by the penitent as by the priest. Hence, no one can, on any account, confess by messenger or letter, because in those cases secrecy would not be possible”.

15 Jean Delumeau, „Prescription and reality”, Edmund Leites (ed.), *Conscience and Casuistry in Early Modern Europe*, Cambridge University Press, Cambridge 1988, 134–158, 148.

16 *Ibid.*, 136.

17 M.F. Renoux-Zagamé, 870.

18 The Spains, in the plural form, refers to the different political entities of the Iberian Peninsula before and during the Reconquista.

19 Nevertheless, some ideas of Protestant inspiration influenced Spanish Catholicism. See: Marcel Bataillon, *Érasme et l'Espagne*, Droz 1998.

20 The Spanish navy won two consecutive victories against the Ottoman Empire: first in 1565 during the siege of Valletta in Malta, then in 1571 at the mouth of the Gulf of Lepanto, thus putting a definitive end to the Turkish Empire's desire for expansion in Europe.

This military Catholicism was coupled with an economic boom unprecedented in world history, leading to new commercial practices. Indeed, in the same year, 1492, which also saw the arrival of Christopher Columbus at the New Continent, Spain acquired the status of a great Western economic power. Thus, in the XVIth century, the last land of Western Europe became the centre of world economic activity, as a gateway to the New World.²¹ Seville then concentrated the monopoly of trans-Atlantic trade, as well as its administration in the *Casa de la Contratación*. Established in 1503, this institution was a real bureaucratic body dedicated to trade with the West Indies, led by a triumvirate of treasurer/controller/notary. This management had the task of ensuring that the royal treasury took its share, by counteracting smuggling and fiscal evasion of the royal tributes paid by the merchants. Therefore, it had to know how many ships to send to the Indies, and the type and amount of goods they needed to carry, which required constant communication with the royal officials present in the area who thus knew the needs of the colonists. But the institution also worked in the other direction: it had to check that the goods arriving in Seville were indeed those that had been shipped from the Indies, goods from which the royal treasury took its share.²² However, the revenues of the Crown passing through the *Casa de la Contratación* were

- 21 Tomás de Mercado, *Suma de ratos y contratos de mercaderes y tratantes. Edición facsimilar*, Ediciones Universidad Salamanca, Salamanca 2015, 2: „Ansi la casa de la contratacion de Sevilla y el trato della es uno de los mas celebres y ricos que hay el dia de oy, o se sabe en todo el orbe universal es como centro de todos los mercaderes del mundo, porque a la verdad saliendo antes el Andaluzia y Lusitania ser el extremo y fin de toda la tierra, descubiertas las Indias es ya como medio, por lo qual todo lo mejor y mas estimado que hay en las otras partes antiguas, aun de Turquia viene a ella: para que por aqui se lleve a la nuevas, donde todo tiene tan excesivo precio” („Thus the *Casa de la Contratación* of Seville and the business therein is one of the most famous and richest that there is today, as it is known in the whole universal orb as the centre of all the merchants of the world. Because in truth, Andalusia and Lusitania used to be the extremity and end of the whole earth. Now that the Indies have been discovered, it is nowadays the centre, for which all the best and most esteemed things that exist in the other ancient parts, even from Turkey, come there, so that from here they are taken to the new parts, where everything has such an excessive price”, translation provided by the author).
- 22 Antonio Acosta Rodríguez, Adolfo L. González Rodríguez, Enriqueta Vila Vilar, *La Casa de la Contratación y la navegación entre España y las Indias*, Universidad de Sevilla, 2003 – José Cervera Pery, *La Casa de Contratación y el Consejo de Indias (las razones de un superministerio)*, Ministerio de Defensa, Madrid 1997 – Miguel Á. Ladero Quesada, *El primer oro de América: los comienzos de la Casa de la Contratación de las Indias*, Real Academia de la Historia, 2002 – Eufemio Lorenzo Sanz, *Comercio de España con América en la época de Felipe II*, Servicio de Publicaciones de la Diputación Provincial de Valladolid, 1980, 2 Vols – Ramòn M. Serrera Contreras, „La Casa de la Contratación en el Alcázar de Sevilla (1503–1717)”, *Boletín de la Real Academia Sevillana de Buenas Letras*, 2008, 141–176.

considered extraordinary, and thus kept secret in the name of information control.²³ Nevertheless, the merchants of Seville wanted to have a merchant's consulate attached to the *Casa de la Contratación*, in order to resolve civil law disputes between merchants. The *Consulado de Cargadores a Indias* was therefore established in 1543, bringing together merchants dealing with the Indies. Without their own offices, as they were part of the Sevillian bureaucratic institution, the merchants gathered on the steps of the cathedral to conclude their business transactions.²⁴

On the intellectual level, inevitably linked to the religious boom, the University of Salamanca benefited from an international influence. Within this university, the authors of the School of Salamanca, an epistemic community devoted to the production of normative knowledge by the shared use of the scholastic method as a community of practice,²⁵ published works of casuistry among their substantial literature, which were to circulate throughout Europe. These works, with their obvious economic and social connections, sought to reconcile Catholic morality with the emerging practice of commerce.²⁶ Tomás de Mercado defines the merchant as someone whose art and profession consists of bargaining and selling goods, without the substance or quality of these goods changing, but only their prices due to time and place.²⁷ Thus, the Salamanca

23 Bartolomé Bennassar, Jean Jacquart, *Le 16^e siècle*, Armand Colin, Paris 2013, 194.

24 Francisco Morales Padrón, *Historia de Sevilla: La ciudad del Quinientos*, Universidad de Sevilla, Sevilla 1997, Vol. 3, 167.

25 Thomas Duve, „The School of Salamanca: A Case of Global Knowledge Production”, *Max Planck Institute for European Legal History Research Paper Series*, 2020–12, 18

26 Marjorie Grice-Hutchinson, *Early Economic Thought in Spain: 1177–1740*, George Allen & Unwin, 1978 – Ed. consulted: Liberty Fund, 2015, 98.

27 Tomás de Mercado, *Suma de tratos y contratos de mercaderes y tratantes*, lib. 1, cap. 2, 5: „A los quales por el continuo uso que tenian de mercar, y vender, començo el vulgo llamar mercaderes: cuya arte y profession (como dizer Sant Gregorio) es mercar ropa por junto y sin que se mude en otra especie, o se mejore en la suya revendella por menudo, o traella fuera de la ciudad, o llevala a otra parte del reyno, o a otro reyno, el mercader no busca, ni aguarda se mide la sustancia o calidad de su ropa, sino el tiempo, y con el tiempo el precio, o el lugar, verbi gratia mercar en san Lucar cien fardos de ruanes y vender los aqui, dos a dos y tres a tres, o a varas en la tienda, traer también de Granada cinquenta pieças de seda y cargarlas a Indias, en ninguno destes negocios se muda lo que se compro: antes que se venda, o se mejora, sino es en el precio: tratar en esto es proprio del mercader” („Whom the common people began to call merchants, because of the continuous use they had of bargaining and selling: those whose art and profession (as St. Gregory says) is to sell clothes by themselves and without changing them into another specie, or improving their own, to resell them often, or bring them out of the city, or take them to another part of the kingdom, or to another kingdom. The merchant does not look for, nor wait for the substance or quality of his clothes to change, but the time, and with the time the price, or the place, v. g. to buy in San Lucar a hundred bales of wool clothes and sell them here, two by two and three by three, or by the rod in the shop, to bring also from

theologians aim to legitimise the new economic order of things by ensuring a morally acceptable practice of commercial activity through a detailed study of private institutions and new legal tools available to business people, in order to correspond to the Christian ideal of justice and ensure the salvation of their souls.

This golden age of Spain, flourishing politically, economically and intellectually, was called the *Siglo de Oro*. During the XVI century, the casuistic works of the Spanish theologians of the School of Salamanca became the main casuistic literature of the catholic world, intimately blending law and religion, but also the figurehead of conscience against the growing Protestantism of other nations.

In this sense, two works among the massive literary output of the School of Salamanca are of particular interests.

Firstly, the *Manual de Confesores y Penitentes*, by Martín de Azpilcueta, known as Doctor Navarrus,²⁸ published in its most common version²⁹ in Salamanca in 1556 in Spanish,³⁰ the same year as the *Catechism of the Council of Trent*. Its Latin version, published in Rome in 1566, was reprinted 81 times throughout Europe at the end of the century alone.

Secondly, the *Suma de ratos y contratos de mercaderes y tratantes*, by Tomás de Mercado, published in 1569 in Salamanca. The specificity of this treatise is that it is derived directly from the study of contracts related to the trade with the Indies, where writings on the subject were generally subject to censorship in the name of information control. The source of Tomás de Mercado's casuistry is the confessions of the merchants of the *Consulado de Mercaderes de Sevilla*, who commissioned the book.³¹ Moreover, his casuistry is written in Castilian³² and not in Latin, as it was intended for merchants as well as for confessors to whom these merchants

Grenada fifty pieces of silk and carry them to the Indies. In none of these businesses does one change what is brought before it is sold, or improved, except in the price. To deal with this is proper to the merchant", translation provided by the author).

28 Martín de Azpilcueta was indeed a native of Navarre and proud of it.

29 The author kept improving his book during his whole life. See: Manuela Bragagnolo, „Les voyages du droit du Portugal à Rome: le 'Manual de confesores' de Martín de Azpilcueta (1492–1586) et ses traductions", *Max Planck Institute for European Legal History Research Paper Series*, 2018–13

30 Ed. consulted: Valladolid, 1566 in Spanish, cited in note 6.

31 Tomás de Mercado, *Suma de ratos y contratos de mercaderes y tratantes, epístola nuncupatoria*.

32 Castilian is nowadays assimilated into Spanish. However, sixteenth-century Spanish is not the same, so we speak of classical Spanish: Pierre Dupont, *La Langue du Siècle d'Or: syntaxe et lexique de l'espagnol classique*, Presse de la Sorbonne Nouvelle, Paris 1998 – Bernard Sesé, Marc Zuili, *Vocabulaire de langue espagnole classique: XVI^e et XVII^e siècles*, Armand Collin, Paris 2006.

would come to seek advice,³³ with the aim of providing a manual of commercial and financial practices that would create a framework for trade in the pursuit of the common good.³⁴ The work therefore brings together cases of conscience taken directly from the confessions made by Sevillian merchants dealing with the New World to the author himself, who provides us with first-hand writing.

Thus, the confession of the penitent is likely to raise new questions for the confessor. The latter must therefore identify the precise elements that make the given situation original, thus establishing it as a case of conscience, in order to carry out a moral and theological analysis with the aim of bringing a morally responsible solution to the penitent. Classical Castilian distinguishes between *legal* and *lícito*. Although the term *legal* refers to the legal system, the term *lícito* refers to moral theology. Thus, a behaviour that is *legal* according to the law can be *ilícito* according to Christian morality. This is the case with gambling, prostitution or the sale of black slaves, for example. Thus, the confessor, while it is not within his competence to judge the legality of a behaviour, judges the licitness of that same behaviour in the eyes of Christian morality.

In order to perform the analysis of the case of conscience, he must refer to the legal framework as a necessary path to understand both legal and moral specificities of the case of conscience. Therefore, it is a question of determining how the confession of the penitent influences the legal analysis of the case of conscience by the confessor, but also the new lessons that the confessor draws from this new situation. These singularities are then used to contribute to the casuistic literature intended to be diffused throughout Europe.

It is then necessary to determine the role of the confessor in relation to the law (part 2), in order to identify the specificities linked to commercial practice (part 3), to then express how the said confessor articulates his moral advice (part 4).

2. THE CONFESSOR, MAN OF SCIENCE AND CONSCIENCE

If law gives religion its social dimension, religion gives law its spirit and direction. In order to operate, law needs consistency in the application of rules, aversion to bad behaviour, equal treatment... But these are

33 Tomás de Mercado, *Suma de tratos y contratos de mercaderes y tratantes*, lib. 1, cap. 1, 2: „Instruir complidamente a un mercader en todo lo que con su ingenio puede entender por reglas” („To instruct a merchant thoroughly in all that he can understand by rules with his wits”, translation provided by the author).

34 André A. Alves, José M. Moreira, *The Salamanca School*, Bloomsbury, 2013, 17–18.

not purely utilitarian concepts: a conviction of their rightness is necessary, and this is achieved through religion.³⁵ Thus, the confessor does not limit himself to the guidance of conscience, for he reinforces the religious character of law. Indeed, it is up to the representatives of the spiritual power to determine how human positive law should be applied in everyday legal acts in order to correspond to Christian morality and thus fulfil God's will, with the aim of ensuring the salvation of the penitent's soul. In this sense, the confessor then bridges the gap between the tribunal of conscience and the application of civil law.³⁶ This requires a scholarly knowledge of legal institutions on the part of confessors.

The basic assumption of the confession, best represented in the casuistic literature, is that every similar case should be treated in a similar way.³⁷ This is also the basic assumption of any legal system. The religious ritual of confession is linked to the legal ritual of trial, for both involve a ceremony resulting in a dramatisation of deeply felt values that directly demonstrates their temporal utility for the welfare of society, and by extension their spiritual utility for the salvation of the penitent's soul³⁸. Confession is then roughly comparable to a trial: the conscience is the accuser, the sinner the accused, and the confessor the judge. Absolution then takes the form of judgment, and the act of penance that of punishment.³⁹ This judicial analogy of confession is found directly in Martín de Azpilcueta: the confessor has, by his priesthood, jurisdiction to confess and power to absolve. Thus, he not only declares absolution as God's representative, but administers it directly.⁴⁰

35 Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion*, Scholar Press for Emory University, Atlanta 1993, 4.

36 Wim Decock, „Collaborative Legal Pluralism: Confessors as Law Enforcers in Mercado's Advice on Economic Governance”, *Rechtsgeschichte*, Vol. 2, 2017, 111.

37 Rm 2,9–13: „There will be trouble and distress for every human being who does evil: first for the Jew, then for the Gentile; but glory, honor and peace for everyone who does good: first for the Jew, then for the Gentile. For God does not show favoritism. All who sin apart from the law will also perish apart from the law, and all who sin under the law will be judged by the law. For it is not those who hear the law who are righteous in God's sight, but it is those who obey the law who will be declared righteous”, Bible, New International Version, 1983.

38 H. J. Berman, 9–10.

39 R. Dürr, 223.

40 Martín de Azpilcueta, *Manual de Confesores y Penitentes*, cap. 4, 25: „El poder consiste, en que sea presbytero, y tenga jurisdiction actual, ordinaria o delegada, que se extienda a los pecados, que le confiesan. [...] porque puesto, que con el caracter sacerdotal recibe poder, y jurisdiction habitual para absolver” („The power means that he is presbyter, and has actual, ordinary or delegated, jurisdiction, which extends to the sins that are confessed to him. [...] because, with the principle authority, he receives power, and habitual jurisdiction to absolve”, translation provided by the author).

In this sense, the activity of the confessor is truly judicial, and the comparison with the judge is appropriate.⁴¹

Moreover, religion shares with law its authority, through the trust that is placed in the sources of law: either written directly in stone by God, or drawn from the knowledge of someone who embodies law through his knowledge of customs, laws, canons, etc.⁴² The confessor corresponds to this second category. Indeed, as Martín de Azpilcueta states, the confessor's knowledge must contain both ecclesiastical and secular norms,⁴³ in order for him to be able to judge both the venial or mortal character of a sin and the licitness of a contract.⁴⁴ In fact, these two aspects are closely linked because the violation of the law and the disobedience to political authorities are in most cases sinful.

This knowledge must therefore be applied in the context of a specific case of conscience. Tomás de Mercado himself states that casuistic literature cannot be sufficient in itself to cover all the diversity of factual situations,⁴⁵ emphasising once again the practical necessity of the confessor. Martín de Azpilcueta, for his part, provides in his manual, which obviously strives to be pedagogical, a series of questions that the confessor must ask in order to obtain a full and complete confession, and therefore a

41 *Ibid.*, cap. 5, 29: „El confesor debe escudriñar la conciencia del pecador, asi como el médico la enfermedad del enfermo, y el juez la causa del pleiteante” („The confessor must investigate the conscience of the sinner, as the physician the illness of the sick, and the judge the cause of the litigant”, translation provided by the author).

42 H. J. Berman, 12.

43 Martín de Azpilcueta, *Manual de Confesores y Penitentes*, cap. 4, 25: „El saber del confesor, para ser perfecto, y por si solo determinar todo, ha de ser tanto que incluya thelogia, canones y leyes, y aun las constituciones synodales de la tierra do oye, como en otro parte lo pusimos” („The knowledge of the confessor, in order to be perfect, and by itself able to determine everything, must be so complete as to include theology, canons and laws, and even the synodal constitutions of the land where he hears, as elsewhere we can see”, translation provided by the author).

44 *Ibid.*, cap. 4, 27: „Es a saber, que estos son obligados a saber juzgar de todo lo que el penitente les pone delante, si es mortal o no, si tiene anexa restitucion o descomunión, si es contrato licito o ilicito, y si le impide la comunión, o no” („It means that they are obliged to know how to judge everything that the penitent submits to them, whether it is mortal or not, whether it has restitution or decommunion attached to it, whether it is a lawful or unlawful contract, and whether it prevents him from receiving communion or not”, translation provided by the author).

45 Tomás de Mercado, *Suma de tratos y contratos de mercaderes y tratantes*, lib. 1, cap. 5, 14: „... quanto obligacion y pura necesidad, ni ay instruction, ni documentos ni libros que tanto ayan menester, porque ningunas reglas se pueden dar tan bastantes que se responda en ellas a todos los casos ocurentes, ...” („... as much obligation and pure necessity, nor instruction, nor documents nor books that are so necessary, because no rules can be provided that are so sufficient to answer in them all the cases that occur, ...”, translation provided by the author).

fruitful one, from his penitent.⁴⁶ Doctor Navarrus being a scholastic, these questions are themselves drawn from the rhetoric of St Thomas Aquinas: *quis, quid, ubi, quando, cur, quem ad modum, quibus adminiculis*, meaning who, what, when, where, why, in what manner, by what means. These questions are intended to cover all the information necessary for the confessor to form an enlightened opinion, both concerning the person of the sinner, the material action of the sin committed, but also the consequences of the sin according to the end intended.⁴⁷ It is then through these circumstances that the theologian, like the confessor, can judge an act as virtuous or vicious, in order to determine whether it deserves punishment or reward,⁴⁸ because the modality of good and evil is not in itself a circumstance, but arises from all circumstances.⁴⁹ These questions appear to be identical to those raised in matters of prosecution and defence,⁵⁰ which once again underlines the judicial role of the confessor.

46 Martín de Azpilcueta, *Manual de Confessores y Penitentes*, cap. 5, 29: „El confessor es obligado, sopena de pecado mortal, a preguntar lo que vee, cree, y advierte ser necesario, para que la confession sea entera y fructuosa ” („ The confessor is bound, under penalty of mortal sin, to ask what he sees, believes, and warns to be necessary in order for the confession to be complete and fruitful”, translation provided by the author).

47 Saint Thomas Aquinas, *Summa Theologica*, c. 1230, Ia-IIae, q. 7, a. 3, co: „Et ratio huius annumerationis sic accipi potest. Nam circumstantia dicitur quod, extra substantiam actus existens, aliquo modo attingit ipsum. Contingit autem hoc fieri tripliciter, uno modo, inquantum attingit ipsum actum; alio modo, quantum attingit causam actus; tertio modo, inquantum attingit effectum” („The reason of this enumeration may be set down as follows. For a circumstance is described as something outside the substance of the act, and yet in a way touching it. Now this happens in three ways: first, inasmuch as it touches the act itself; second, inasmuch as it touches the cause of the act; third, inasmuch as it touches the effect”, translation by Fr. Laurence Shapcote (1864–1947), The Aquinas Institute, <https://aquinas.cc/la/en/~ST.I-II.Q7.A3>, last visited on 29.04.2021).

48 *Ibid.*, Ia-IIae, q. 7, a. 2, ad3: „Ad theologum autem, cui omnes aliae artes serviunt, pertinent omnibus modis praedictis, nam ipse habet considerationem de actibus virtuosis et vitiosis, cum morali et considerat actus secundum quod merentur poenam vel praemium, cum rhetore et politico” („To the theologian this consideration belongs, in all the aforesaid ways: since to him all the other arts are subservient: for he has to consider virtuous and vicious acts, just as the moralist does; and with the orator and politician he considers acts according as they are deserving of reward or punishment”, translation by Fr. Laurence Shapcote (1864–1947), The Aquinas Institute, <https://aquinas.cc/la/en/~ST.I-II.Q7.A2>, last visited on 29.04.2021).

49 *Ibid.*, Ia-IIae, q. 7, a. 3, ad2: „Ad secundum dicendum quod iste modus qui est bene vel male, non ponitur circumstantia, sed consequens ad omnes circumstantias” („This mode well or ill is not a circumstance, but results from all the circumstances”, translation by Fr. Laurence Shapcote (1864–1947), The Aquinas Institute, <https://aquinas.cc/la/en/~ST.I-II.Q7.A3>, last visited on 29.04.2021).

50 Durant W. Jr. Robertson, „A note on the Classical Origin of ‘Circumstances’ in the Medieval Confessional”, *Study in Philology*, January 1946, Vol. 43, n. 1, 6–14.

From then on, the penitent merchant understands and learns the law through the confessor, when the latter dictates to him the moral precepts derived from Christian morality that should govern the conduct of his business. For his part, the confessor grants absolution to the merchant who practices a morally responsible commercial activity. As Marie-France Renoux-Zagamé writes, „it is thus up to the representative of the spiritual power to determine how the norms of this world should be implemented so that, through them, Christians are assured of fulfilling the will of God”.⁵¹ However, in order to answer the questions of the merchants, it is essential that the knowledge of the confessor includes the legal rules of commercial practice.

3. THE CONFESSOR AND THE BUSINESSMAN

Although the confessor is theoretically supposed to know everything about law and legal institutions, the reality is obviously more complex. Indeed, the confessor adapts to his audience and to the specificities of the place where he exercises his priesthood. As a result, a confessor who is competent to confess a person in one place will not be competent to confess another person in another place.⁵² Therefore, a place that is likely to have more complex cases of conscience must have a confessor who is sufficiently qualified to respond to them. For this reason, Martín de Azpilcueta makes a gradation of the competence required to confess according to the geographical situation: the confessor practising in a farming village does not need to know as much as the one practising in a city. Similarly, the confessor who practices in a landlocked city does not need to know as much as the one who practices in a maritime city. Finally, the most competent confessor should be the one who confesses for an entire kingdom or overseas territory.⁵³ Moreover, the very person of the penitent is also responsible for the practical conduct of the confession: the confes-

51 M. F. Renoux-Zagamé, 868–869, translation provided by the author.

52 Martín de Azpilcueta, *Manual de Confesores y Penitentes*, cap. 4, 27: „Se sigue, que qualquier que es idoneo para confessar a un hombre, o en un lugar, no sera idoneo para confessar a qualquier otra, ni en qualquier lugar, que es un gran desengano para muchos” („It follows, that whoever is fit to confess one man, or in one place, will not be fit to confess an other, or in another place, which is a great disincentive to many”, translation provided by the author).

53 *Ibid.*, cap. 4, 28: „Lo que quien se pone a confessar en una aldea de simple labradores, no ha menester saber tanto quanto quien en una ciudad ni quien se pone en una ciudad mediterránea tanto, como quien en una marítima, ni quien en esta tanto, quanto quien en todo un Reyno, o una India...” („He who confesses in a village of simple peasants does not need to know as much as the one who confesses in a city, nor the one who confesses in a Mediterranean city as much as who confesses in a maritime

sor should only ask the penitent about the sins commonly committed by those of his condition.⁵⁴

However, it is not only the person of the penitent that directly influences the course of the confession. In fact, Tomás de Mercado paints a specific portrait of the ideal confessor for the penitent practising a commercial activity. It is up to the merchant to choose a confessor who is a man of science and conscience and who is educated in commercial practice,⁵⁵ *id est*, a letrado,⁵⁶ meaning a theologian,⁵⁷ a trained confessor with a solid knowledge of both law and theology able to resolve cases of conscience. The author also emphasizes that, even if the casuistic literature provides answers to the merchant's questions, it is still up to the confessor who is an expert in business and understands the practice to judge its application.⁵⁸ The confessor is thus indispensable to the penitent.

city, nor this fellow as much as someone who confesses in an entire Kingdom or the Indias...”, translation provided by the author).

- 54 *Ibid.*, cap. 5, 29–30: „La primera que no pregunte todo lo que puede hacer cometido el penitente, sino solo aquello que comunmente, los de su cualidad suelen hazer. Por lo qual no ha de preguntar al caballero, de lo que comunmente solos los Eclesiasticos hazen ni al Eclesiastico de lo que comunmente solos los caballeros. La secunda que no pregunte, sino de los pecados acostumbrados, que todos los saben hazer, cuales son la transgression de los diez mandamientos, ...” („The first is that he should not ask everything that the penitent can do, but only that which those of his kind are commonly used to do. For this reason, he should not ask the knight about what is commonly done by the ecclesiastics alone, nor the ecclesiastic about what is commonly done by the knights alone. The second, that he should not ask, except about the usual sins, which everyone knows about, such as the transgression of the ten commandments, ...”, translation provided by the author).
- 55 Tomás de Mercado, *Suma de tratos y contratos de mercaderes y tratantes*, lib. 1, cap. 5, 14: „Ultimamente, debe tener un confessor señalado hombre de ciencia y consciencia, aunque a la verdad, no es tan consejo esto en el mercader: ...” („Ultimately, he must have a confessor man of science and conscience, although in truth, this is not so much advised in the business: ...”, translation provided by the author).
- 56 *Ibid.*: „... sin ser demasiado escrupuloso, que cierto el letrado, corto, falto de experiencia y cargado de escrupulos, no es conveniente para el mercader, mas ellos se libran y salen comúnmente estas angustias confesandole con idiotas que les absuelve de lo hecho, ...” („... without being too scrupulous, because the short, inexperienced and unscrupulous lawyer is not suitable for the merchant, but they usually get out of these troubles by confessing to fools who absolve them of what they have done, ...”, translation provided by the author).
- 57 Bernard Sesé, Marc Zuili, 270.
- 58 Tomás de Mercado, *Suma de tratos y contratos de mercaderes y tratantes*, lib. 1, cap. 5, 14: „... quanto obligacion y pura necesidad, ni ay instruction, ni documentos ni libros que tanto ayan menester, porque ningunas reglas se pueden dar tan bastantes que se responda en ellas a todos los casos occurrentes, antes aun en ellas pocas, que se escriben, se dexa la aplicacion dellas al juyzio de un hombre experto en los negocios que entienda la platica: ...” („... as for obligation and pure necessity, there is no

Likewise, it is as much for the salvation of the penitent's soul as for the confessor's that the merchant chooses a confessor with whom he can speak freely to reveal his conscience.⁵⁹ In fact, according to Tomás de Mercado, a confessor who is too scrupulous, limited and short on experience would be more easily misled by the merchant, who would obtain absolution from him all too easily, whereas a more experienced and paradoxically less scrupulous confessor would be better suited.⁶⁰ Martín de Azpilcueta defines scrupulosity as the apparent knowledge of something, which nevertheless goes against what one knows, thinks, or doubts, without making a judgement contrary to the truth.⁶¹ The scrupulous confessor is then the one who is either too easily misled by the merchant to accept sinful behaviour, or quite the opposite considering everything illicit and judging with severity many practices he does not really know.⁶² However, as Martín de Azpilcueta states, the confessor commits a mortal sin if he does not correctly judge the licitness of a contract because he lacks sufficient knowledge.⁶³ Thus ignorance of the rule of law does not excuse the confessor.

instruction, nor documents nor books that are so necessary, because no rules can be provided that are so sufficient to answer in them all the cases that occur, the few that are written down leave their application to the judgement of an expert in business who understands the subject: ...” translation provided by the author).

59 *Ibid.*: „... como veremos en este opusculo, pues quanto sera provechoso, y a que a de seguir parecer ageno, tomar el de su confesor sabio con quien hablara clara y libremente: como con persona a quien suele descubrir su consciencia, bien estoy, en que primero que lo escoga, se informe, si est docto, sabio y entienda algo de negocios: ...” („... as we shall see in this opuscle, just how advantageous it would be, although it may continue to seem strange to him, to take up a wise confessor with whom he will speak clearly and freely: as with a person to whom he usually reveals his conscience, of that I am certain that before choosing him, he should inform himself, if he is learned, wise and knows something about business: ...” translation provided by the author).

60 See note n. 53.

61 Martín de Azpilcueta, *Manual de Confesores y Penitentes*, cap. 27, 791: „Escrupuloso es conocimiento de algo, que representa alguna apariencia contra lo que se sabe, cree, opina, o duda, sin hazer juzgar lo contrario ” („Scruulous is knowledge of something, which represents some appearance against what one knows, believes, thinks, or doubts, without judging the opposite”, translation provided by the author).

62 Scruples are not science, faith, opinion or doubt. These notions will be explained below.

63 Martín de Azpilcueta, *Manual de Confesores y Penitentes*, cap. 4, 28: „El confessor, que no sabe determinar los casos de que puede, o no puede absolver, [...] y no sabe al menos dudar acerca de los contratos dudosos, no se escusa de pecado mortal...” („The confessor, who does not know how to determine which cases he can or cannot absolve, [...] and does not at least know how to question dubious contracts, does not excuse himself from mortal sin...” translation provided by the author).

It is therefore up to the merchant to choose a confessor who is able to judge his affairs judiciously. Indeed, the penitent merchant cannot himself judge his sins and claim to have a knowledge of legal institutions. He must therefore choose a prudent, wise and free confessor,⁶⁴ but above all one who is well versed in commercial practice.

4. THE CONFESSOR AND THE CASUISTIC LITERATURE

According to Martín de Azpilcueta, in order for the confessor's knowledge to be perfect, he must also know how to doubt, and thus seek advice from another cleric, secular or not.⁶⁵ The author defines doubt as „the knowledge of two contrary things, without judging the truth of one or the other”.⁶⁶ Thus the confessor must present the case of conscience to another cleric. This consultation can also take place through the confessional, where the confessor comes to ask for absolution for his ignorance since, as stated above, the confessor commits a mortal sin if he does not judge correctly the licitness of a contract because he lacks sufficient knowledge.⁶⁷ The confessor must know, according to natural law, all that is necessary to do his work well.⁶⁸ But when this is not the case, it is up to the penitent confessor to confess his ignorance in order to amend it, by

64 Tomás de Mercado, *Suma de tratos y contratos de mercaderes y tratantes*, lib. 1, cap. 5, 15: „No ha de estar a la cobdicia, y juyzio ciego del mercader ignorante de las letras, en lo qual advertiran quanto interesan ellos mismos en escoger un confesor prudente, sabio y libre” („It dos not have to be up to the greed and blind judgment of the merchant ignorant of letters, in which they will realise how much they themselves are interested in choosing a prudent, wise and liberal confessor”, translation provided by the author).

65 Martín de Azpilcueta, *Manual de Confesores y Penitentes*, cap. 4, 26: „Los religiosos se podrán confesar como antes con cualquier clérigo seglar o no seglar. El saber del confesor, para ser perfecto, y por si solo determinar todo, ha de ser tanto qui incluya theologia, [...] o al menos, que sepa dudar en lo que alcanza aquellos, que medianamente saben y tengan quien a quien preguntar lo que dudare, quando, y como conveniere” („Religious can confess as before with any secular or non-secular cleric. The knowledge of the confessor, in order to be perfect, and by itself determining everything, must be that it includes theology, [...] or at least, that he knows how to doubt in the understanding of those of moderate knowledge and have someone to ask what he doubts, when and how it is convenient”, translation provided by the author).

66 *Ibid.*, cap. 27, 791: „Duda es conocimiento de dos cosas contrarias, sin juzgar de alguna dellas ser verdadera”, translation provided by the author.

67 See note n. 56.

68 *Ibid.*, cap. 4, 27: „Y porque hombre ha de saber lo que es necessario, para hazer bien su officio aun por ley de naturaleza” („And because a man must know what is neces-

consulting another cleric who is instructed in the matter, whether through confession or not.⁶⁹ Therefore, the theologian's knowledge, when it is not sufficient, calls for penance.

Nevertheless, Tomás de Mercado raises the question of when the confessor should urge the merchant to follow his opinion and when he should not.⁷⁰ The case of conscience arises in this case in a situation where the merchant himself proposes a solution from the casuistic literature to his problem. Indeed, the confessor is free to advise his penitent to follow the „most certain” opinion, when this opinion is supported by enough authors and conforms to reason, because it is the most „probable” opinion.⁷¹ It appears, then, that in order to be probable, an opinion must either be the fruit of a solid argument of reason, or be sustained by a great authority. This reasoning is called probabilism. According to Stefania Tutino, early modern probabilists, such as Martín de Azpilcueta and Tomás de Mercado, maintained that whenever it was not possible to identify with certainty the correct solution, the confessor could legitimately follow a specific course of action if such course of action was supported by a probable opinion, however disputable the probable opinion in question might be. Thus, probabilism was a means to integrate changes and novelties within the Catholic theological and intellectual system, in order to manage the uncertainties of these times.⁷² However, Wim Decock defines probabilism in a more pragmatic way as a system for resolving cases of conscience in

sary in order to fulfill his office well, even by the law of nature”, translation provided by the author).

- 69 *Ibid.*: „Y porque la obediencia no excusa de pecado al confessor, que sabe que no entiende lo que basta para confesar, y confiesa [...]. Ca solamente excusa al que duda, si sabe o no, lo que basta” („And because obedience does not excuse that confessor from sin, who knows that he does not understand what is sufficient to confess, and confesses anyway[...]. That only excuses the one who doubts, whether he knows or not, what is enough”, translation provided by the author).
- 70 Tomás de Mercado, *Suma de tratos y contratos de mercaderes y tratantes, Tabla*, entry C: „Quando debe el confessor compilar al mercader, a que siga su parecer y opinión, y quando no [...]. 1,5,15” („When the confessor must compel the merchant to follow his opinion, and when he does not [...]. 1,5,15”, translation provided by the author). The overall problem is then covered in this passage, which contains the majority of the quotations that follow.
- 71 *Ibid.*, lib. 1, cap. 5, 15: „... y la que sigue es probable, y tiene sus razones, fundamentos y autores: basta a aconsejarle, lo que tiene por mas cierto, o mas le agrada...” („... and the one that follows is probable, and has its reasons, bases and authors: it is enough to advise him, what he holds to be more certain, or more pleasing to him...”, translation provided by the author).
- 72 Stefania Tutino, *Uncertainty in Post-Reformation Catholicism: A History of Probabilism*, Oxford University Press, 2017, preface. See also: Rudolf Schüßler, *The debate on Probable Opinions in the Scholastic Tradition*, Boston: Brill, 2019.

order to distinguish between probable and improbable opinions for the purpose of judging the lawfulness of a behaviour.⁷³

Martín de Azpilcueta defines opinion as the knowledge with which the confessor judges something that he does not see clearly, therefore without firmness and with the fear that the opposite is true.⁷⁴ In this sense, it is thus directly opposed to science, which is the judgment by clear and firm knowledge of what is perceived by the five senses,⁷⁵ or to faith, which is „the knowledge by which one judges firmly of what is not seen”.⁷⁶ Thus, an opinion should not be considered a law, since there are equally probable contrary opinions, supported by other theologians, that is.⁷⁷ Tomás de Mercado, on the other hand, distinguishes between proof and probable opinion: while proof does not lead to further discussion and must be followed in all circumstances because it is a matter of science or faith,⁷⁸ it is up to the theologian, through his knowledge and faculty of judgment, to determine which opinion to follow and which to reject.⁷⁹

73 Wim Decock, *Le marché du mérite: penser le droit et l'économie avec Léonard Lessius*, Zones sensibles, Bruxelles 2019, 77.

74 Martín de Azpilcueta, *Manual de Confesores y Penitentes*, cap. 27, 791: „Opinion es conocimiento con que juzgamos de alguna cosa, que no vemos ser así, pero no firmemente, con temor que lo contrario sea verdad” („Opinion is knowledge with which we judge of something, which we do not see clearly, but not firmly, with fear that the opposite might be true”, translation provided by the author).

75 *Ibid.*: „Annadimos, que ciencia es conocimiento, con que se juzga lo que se ve. Por ver, entendemos tambien el tocar, oír, gustar, y oler que son los cuatro sentidos exteriores” („We add that science is knowledge, with which we judge what we see. By seeing, we also mean touching, hearing, tasting and smelling, which are the four external senses”, translation provided by the author).

76 *Ibid.*: „Fe es conocimiento, con que firmemente juzgamos ser así, lo que no vemos”, translation provided by the author.

77 Tomás de Mercado, *Suma de tratos y contratos de mercaderes y tratantes*, lib. 1, cap. 5, 15: „... pero no deve darsela por regla y ley inviolable, si como digo de suyo no es mas que opinable, y ay en contrario ygal o quasi ygal probabilidad: ygal se entiende quando en publicas escuelas y universidad los discipulos de sus authores la tienen, leen y defienden” („... but it should not be regarded as a rule and inviolable law, if, as I say, it is only a matter of opinion, and there is a similar or almost similar probability of the opposite: the same is understandable when in public schools and universities the disciples of its authors uphold, read and defend it”, translation provided by the author).

78 *Ibid.*: „... discernir entre lo que ay evidencia, o sola opinion y probabilidad, y no tener cada cosa en mas de lo que es...” („... to discern between what is evidence, or just opinion and probability, and not take each thing for more than it is...”, translation provided by the author).

79 *Ibid.*: „... todo esto que tengo dicho a de estar al arbitrio del confessor y theologo, que es leydo, y sabe quando se sufre seguir une opinion, y quando no...” („... all this that I have said should be at the discretion of the confessor and theologian, who is well learned, and knows when it is necessary to follow an opinion, and when it is not...”, translation provided by the author).

In practice, the author states that the confessor is free to advise the merchant to follow the solution which he himself has provided,⁸⁰ although it would be very stubborn and arrogant if it is not also the opinion of the confessor who could not therefore absolve him in case of sin.⁸¹ Thus, the penitent's failure to respect the confessor's prescription does not constitute a sin when other authors hold the merchant's suggested solution to be licit.⁸² In the resolution of a concrete case of conscience, the differentiation between a probable opinion and an improbable one is thus made at the confessor's own discretion, in the words of the author himself, although this judgment is obviously subject to reason.⁸³

Thus, when knowledge of a matter is imperfect, the confessor resorts to probabilism to derive probable knowledge and lessen the uncertainty.⁸⁴ In addition to pronouncing absolution, he sanctions a legal opinion on his own authority, committing both his soul and that of the penitent to the resolution of the case of conscience. Mercado's work highlights the degree of uncertainty inherent in the commercial professions, which makes it difficult for the confessor to determine the course of action to adopt. Confession then becomes an exchange of opinions and probable alternatives between the confessor and the penitent.⁸⁵

It follows that the opinion formulated in the casuistic literature of theologians is obviously not in itself binding, and that it is always up to the confessor to determine the advice he will give to his penitent for the a particular case of conscience, but also in the overall conduct of his affairs, for the purpose of upholding Christian morality. The *Manuals for Confessors and Penitents* are not intended to replace confession, but only to divulge the general rules so that the confessor can apply them to a concrete situation. Thus, the confessor proposes only the course of action that he believes is safest for the soul of his penitent. For his part, the penitent is

80 *Ibid.*: „Cada uno es libre para seguir la que escogiere” („Everyone is free to pursue the one he chooses”, translation provided by the author).

81 *Ibid.*: „... pero si al penitente le desagrada: y lo que haze, se puede hazer y lo aprueban muchos autores aprobados: gran tochedad y arrogancia sería: porque el lo reprueve, no absluelle” („... but if the penitent disagrees with it: and what he is doing, can be done and is approved by many approved authors: it would be great folly and arrogance: because he who reproves it, won't absolve him”, translation provided by the author).

82 *Ibid.*: „Que haciendo lo contrario no es pecado: porque ay muchos doctores que lo tienen por licito” („That to do otherwise is not a sin: for there are many scholars who hold it to be lawful”, translation provided by the author).

83 F. Gómez-Camacho, 68.

84 *Ibid.*, 76.

85 José L. Egío García, „Tomás de Mercado y la transfretación global de bienes y normas”, *Cauriensa*, Vol. 15, 2020, 182.

free to act according to his own judgement as long as it is well founded.⁸⁶ It thus appears that casuistic literature, though performative in vocation, nevertheless recognizes the free will of the penitent up to a certain point.

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⁸⁶ *Ibid.*, 188.

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УТИЦАЈ ИСПОВЕСТИ ТРГОВАЦА НА РАЗВОЈ
ПОСЛОВНОГ ПРАВА ТОКОМ ЗЛАТНОГ ДОБА:
КАЗУИСТИЧКИ ПРИСТУП ТОМАСА ДЕ МЕРКАДА
И МАРТИНА ДЕ АСПИЛКВЕТА ТРГОВАЧКОМ ПРАВУ

Сажетак

Шпанија 1492, као капија ка Индији, постаје центар светске економске активности. У Севиљи је био концентрисан монопол транс-атланске трговине, и њене администрације оличене у Кући уговарања* (Casa de la Contratacion). Управо је Католичко шпанско краљевство постало колевка контра-реформације, водивши ка правом католичком буђењу. Овај контекст интелектуалног и економског процвата, учинио је шеснаести век шпанским Златним добом (Siglo de Oro). Последично, пало је на моралне теологе Школе у Саламанки, уједно и правнике и свештенике, да дају одговоре на питања хришћанства о новим економским праксама, те да се упознају с протестантским доктринама које надиру с истока.

У светој исповести, дужност је исповедника да слуша свог покајника, те да му потом разоткрије морално правило које се примењује на ситуацију коју му је изложио. Питања покајника називју се случајеви савести и откривају ситуацију у којој је примењено морално и правно правило намењено за даљу примену у свакодневним друштвеним и економским односима зависно од чињеничних околности, недоумица и питања која се појаве. У напору да се хармонизују одговори исповедника покајницима, појавила се литература казуистике, то јест, литература која се односи на изучавање случајева савести у облику Приручника за исповеднике и покајнике. Ове књиге случајева, преузете директно од питања упућених теолозима, написане су и на латинском, као методолошко упутство, за исповеднике, али и на колоквијалном језику не би ли и покајници – који не припадају свештенству, те стога нису латинисти – такође могли да пронађу правна правила за примену у свакодневној трговачкој пракси, без потребе да иду у исповедаоницу.

Како би осигурао спас своје душе, трговац је привредну активност морао да води у складу с хришћанским моралом. Кроз исповест, исповедник је давао правни и теолошки савет неопходан не би ли се остварила та сврха, али је такође судио о моралности свог покајника одлуком о томе да ли да му да опрост или не. Морао је, стога, да зна хришћанске моралне заповести справљене да диригују пословним животом, али и институције грађанског

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права које су се користиле у пословној пракси. Исповедник је, такође, морао да разреши случај савести који му је изложен формулишући своје морално мишљење. То мишљење, подложно полемици, уношено је у казуистичку литературу која је потом расејавана по Европи на коришћење како исповедницима, тако и покајницима.

Две књиге доктора казуистичке литературе Саламанке ово савршено илуструју. Најпре, Приручник исповедника и покајника, Мартина де Аспилквета (Martín de Azpilcueta), у коначној верзији објављеног у Саламанки 1556. Његова латинска верзија је распрострањена широм Европе. А затим и Збирка понуда и уговора трговаца и понудилаца, Томаса де Меркада (Tomás de Mercado), објављена 1569. у Саламанки, која садржи случајеве савести преузете директно из исповести севиљских трговаца у пословима с Индијцима.

Кључне речи: *Школа у Саламанки. – Казуистичка литература. – Веровајноћа. – Исповест. – Бизнис.*

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