Natural and human law in the Atlantic context: Alonso de la Veracruz and Tomás de Mercado

Ley natural y humana en el contexto atlántico: Alonso de la Veracruz and Tomás de Mercado

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Abstract

In this paper on the early Mexican thinkers Alonso de la Veracruz and Tomás de Mercado, a scarcely explored topic will be pursued: the foundational role of natural law and its interpretability through human law. It will be shown that both authors, based on the Salamancan traditions of the 16th century, introduce a method that would affirm the validity of natural law and, at the same time, allow diverse applications of the normative parameters of human law. As Veracruz argues in his critique of tithing for indigenous peoples, the natural law can be reinterpreted based on concrete social facts. In the case of Mercado, even when human law is congruent with natural law, it can be disregarded to avoid personal or public harm mainly in commercial transactions.

Keywords: Natural law, human law, equity, tithing, colonial Mexico, commerce, Alonso de la Veracruz, Tomás de Mercado.

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Resumen

En este trabajo sobre los pensadores novohispanos Alonso de la Veracruz y Tomás de Mercado se seguirá la argumentación de un tema escasamente explorado: el papel fundacional de la ley natural y su interpretabilidad a través de la ley humana. Se mostrará que ambos autores, basados en las tradiciones salamantinas del siglo XVI, introducen un método que afirmaría la validez de la ley natural y, al mismo tiempo, permitir aplicaciones diversas de los parámetros normativos de la ley humana. Esto es posible, como lo sostiene Veracruz en su crítica al diezmo para los pueblos indígenas, cuando la ley natural tenga que reinterpretarse a partir de hechos sociales concretos o cuando, como en el caso de Mercado, la ley humana sea congruente con la ley natural y, no obstante, tenga que desacatarse para evitar perjuicios personales o públicos en el plano comercial.

Palabras-clave: Ley natural, ley humana, epieikeia, décimo, Nueva España, comercio, Alonso de la Veracruz, Tomás de Mercado.

1. Introduction

Spanish expansion in the Americas was a multifaceted process that involved not only military efforts but also the consolidation of political power through public and ecclesiastical institutions. One of the purposes of these institutions was evangelization, since it seemed inconceivable to expand the area of Spanish interest solely through military conquest. As members of various religious orders arrived, first in the Caribbean and later in Mexico and Peru, they saw it as their specific duty to preach to and convert the unbelieving indigenous population to Catholicism. At the same time, both Spaniards and converted Indians needed moral guidelines for proper Christian living that would lead to a clean conscience and, ultimately, good standing in the afterlife.

For these concerns, the theological and legal tradition forged in Salamanca in the early 16th century proved crucial. Thinkers such as Francisco de Vitoria and Domingo de Soto, among many others, had a profound impact as their ideas and writings traveled across the Atlantic. While it is difficult to give a clear and concise definition of what the School of Salamanca is in the transatlantic context, it is impossible to ignore the role that Francisco de Vitoria played in reshaping the theological and moral-political discourse of his time[2]. Vitoria's

[2] Among the numerous publications on the notion of "School of Salamanca", see the more up-to-date discussions in the recent volume by Simona Langella and Rafael Ramis Barceló eds.: *¿Qué es la Escuela de Salamanca?*, Madrid, Sindéresis, 2021. As this volume shows, there is still a tension between an essentialist understanding of the "School of Salamanca" and a somewhat deflationary reading. In any case, the notion of "School of Salamanca" is meaningful as shorthand for a way of

work generally privileges a practical view of issues rather than a metaphysical approach to theological problems[3]. Whether one looks at his *Relectiones* or his lectures on the *Summa theologiae*, his main concern was human action in the perspective of living as fully as humanly possible. As a Dominican friar and priest, Vitoria's thought encompassed those aspects of individual action that would make it possible to establish individual responsibility in this life and the next. The moral authority of priests, who were usually also confessors, consisted in distinguishing those actions that were morally worthy from those that were not. Theologically, the mediating role of the priest is clear, not least because confession is a sacrament. But it is also relevant from a cognitive point of view, because ordinary people do not usually have the capacity to always distinguish between what is morally right and what is morally wrong in such a way as to have a clear conscience. In discussing the approach to natural and human law proposed by two early thinkers in colonial Mexico, I will highlight their reliance on models from Salamanca while showing that they used them to find solutions to local problems[4].

2. The impact of Salamanca in the early days of the colonization of Mexico

From its inception, the Spanish domination of New Spain, as Mexico was known under Spanish rule until 1821, had a strong religious and academic undercurrent. The religious underpinnings of this enterprise seem obvious, and it still pervades the popular imagination that the brutal conquest and subjugation of the indigenous peoples of central Mexico from the time Hernán Cortés set foot there was primarily the result of the Church's interest in converting the unbelieving indigenous peoples by any means necessary. This oversimplified view, while not wrong, does not take into account the various ways in which indigenous self-government was incorporated into the early Spanish administration of New

approaching practical normativity that took place against the background of the many issues that arose in the Hispanic world of the 16th century (expansion into America, the rise of Lutheranism, the wars against the Turks, etc.).

[3] From the recently edited lectures, it seems clear that he does not take any interest in topics such as the demonstration of God's existence; he instead accepts that this matter has already been settled. Francisco de Vitoria, *Comentarios a la Prima Pars, cuestiones 1 y 2*, Pamplona, Eunsa, 2018, p. 152. Aquinas establishes his famous five ways to prove God's existence, on which Vitoria laconically says that there are "quinque propositiones optimas, videte illas".

[4] This idea led to the neologism of "glocalization"; see Thomas Duve, "Pragmatic Normative Literature and the Production of Normative Knowledge in the Early Modern Iberian Empires (16th and 17th Centuries)" [in Thomas Duve and Otto Danwerth eds., *Knowledge of the Pragmatici. Legal and Moral Theological Literature and the Formation of Early Modern Ibero-America*, Leiden Brill, 2020], pp. 1-39.

Spain on a political and even linguistic level[5]. Nor does it consider that writers from various religious orders were outspoken critics of the ways in which the authorities attempted to dominate the indigenous population[6]. Such attempts, as in the case of Veracruz and Mercado, were supported not so much by pastoral activity as by academic works that were either later printed or read as part of the academic year at the university or in convents.

To understand the impact of Salmantine thought on sixteenth-century writers in early colonial Mexico, I will briefly mention the institutions dedicated to formal, higher education. The driving force behind the education of at least an elite was the conversion of the indigenous population to Catholicism, which went hand in hand with the political project of integrating these lands into the Spanish Empire. In this regard, it is worth recalling the efforts of Franciscan friars to translate catechisms and other religious literature into Náhuatl[7]. The early utopian ideal promoted by Vasco de Quiroga with his *pueblos-hospitales* also played a prominent role in the intertwining of religion, politics, and education[8].

With the consolidation of public and ecclesiastical authority in the 1530s, it became increasingly important to have readily available personnel: lawyers for the municipal administrations and priests for the church. The obvious alternative was to create centers of higher learning in Mexico, thus avoiding continued dependence on Spain in this regard. The University of Mexico began its first academic year in 1553 with courses in grammar, philosophy, canon and civil law, and theology. It was modeled after the University of Salamanca, but only in its statutes[9]. Financing was precarious and the number of students was at first ridiculous[10]. The interference of the ecclesiastical authorities, especially of the Archbishop of Mexico, Alonso de Montúfar, led to disruptions and, in particular, to the resignation of one of the first lecturers, Alonso de la Veracruz[11].

[5] See Francisco Quijano, *La invención de Nueva España*, Mexico City, UNAM, 2021, p. 49.

[6] An example for this attitude is Bartolomé de las Casas but also, to a minor degree, Alonso de la Veracruz.

[7] One early example is the Flemish Franciscan Peter of Ghent, *Doctrina christiana en lengua mexicana*, Mexico City, Casa de Juan Pablos, 1547.

[8] See the excellent introduction in Thomas Morus, *El buen estado de la república, traducción de Vasco de Quiroga*, Víctor Lillo Castañ introduction and edition, Madrid, Centro de Estudios Políticos y Constitucionales, 2021, p. XI-CCXXXIV.

[9] The founding document issued by Charles V explicitly states that the University of Mexico should have "todos los privilegios, y franquezas, y libertades y exenciones que tiene y goza el estudio e universidad de la ciudad de Salamanca". See María del Pilar Martínez López Cano (ed.), *La universidad novohispana en el Siglo de Oro. A cuatrocientos años de El Quijote*, Mexico City, UNAM, 2006, p. 87.

[10] For a lengthier discussion see Martínez López Cano (ed.), *La universidad novohispana*, pp. 31-60. See also Enrique González González and Víctor Gutiérrez Rodríguez, "La implantación de las universidades hispánicas en el Nuevo Mundo (siglos XVI-XVIII)", in Gian Paolo Brizzi, Antonello Mattone (eds.), *Le origini dello Studio generale sassarese nel mondo universitario europeo dell'età moderna*, Bologna, CLUEB, 2013, pp. 131-146.

[11] Enrique González González and Víctor Gutiérrez Rodríguez, "Los catedráticos novohispanos y

3. Alonso de la Veracruz

Alonso de la Veracruz was born as Alonso Gutiérrez in Caspueñas around 1507. He studied grammar and rhetoric in Alcalá and arts and theology in Salamanca[12], and one of the most influential theologians of the time was active in both universities, the Dominican Domingo de Soto (1494-1560). Veracruz finished his studies in Salamanca in 1532, and while not having been an active student of Soto, he nonetheless refers to him as "my teacher" (*magister meus*)[13]. His relationship with Salamanca was fundamental, as can be seen from many of the arguments advanced in the *Relectio de dominio*, which contains implicit references to Vitoria's *Relectio de indis*[14].

After arriving in Mexico in 1536, he joined the Augustinian order, thus adopting the name Veracruz (after the port city of Veracruz)[15]. Between his arrival in Mexico and the beginning of his brief tenure as professor of theology at the University of Mexico in 1553, Veracruz became an Augustinian novice in 1537 and moved to Michoacán in 1540 to teach at the convent of Tiripetío, where he founded the first library in the Americas. In 1545 he was elected prior of the convent of Tacámbaro, where he remained until 1553. There he had the opportunity to witness the profound impact the Spanish presence had on the indigenous communities; he even learned the Tarasca language spoken in that region.

From 1553 to 1557, Veracruz taught art and held the chair of *Prima* at the Royal and Pontifical University of Mexico. During his tenure there, he published some of his academic works, as well as the *Speculum coniugiorum*, a treatise discussing the validity of indigenous marriages before the arrival of the Spanish. After being named Provincial of the Order in 1561, he was summoned to appear before the Inquisition in Spain because Archbishop Alonso de Montúfar considered 84 propositions of the *Relectio de decimis* suspect or even

sus libros. Tres bibliotecas universitarias del siglo XVI", in Andrea Romano (ed.), *Dalla lectura all'e-learning*, Bologna, CLUEB, 2015, p. 88.

[12] For a critical assessment of Veracruz's biography, see Enrique González González, "Fray Alonso de la Veracruz, contra las reformas tridentinas: el *Compendium privilegiorum pro novo orbe indico*", in M. P. Martínez López Cano and F. J. Cervantes Bello eds., *Reformas y resistencias en la Iglesia novohispana*, Mexico City, UNAM, 2014, pp. 77-110.

[13] González González, "Fray Alonso de la Veracruz", 81. See also Alonso de la Veracruz, *Dialectica resolutio*, Mexico City, Ioannes Paulus Brissensis,1554, p. 5vb.

[14] See C. Ramírez, "Alonso de la Veracruz en la Universidad de Salamanca: entre el tomismo de Vitoria y el nominalismo de Martínez de Silíceo", in *Salmanticensis*, 54 (2007), pp. 635-652, here 642.

[15] Apart from González González, "Fray Alonso de la Veracruz", see Francisco Quijano Velasco, *Las repúblicas de la Monarquía. Pensamiento constitucionalista y republicano en Nueva España 1550-1610*, Mexico City, UNAM 2017, pp. 109-122 and Roberto Heredia, "Semblanza", in Alonso de la Veracruz, *De dominio infidelium et iusto bello. Sobre el dominio de los infieles y la guerra justa*, Roberto Heredia ed., Mexico City, UNAM, 2007, pp. XIII-XVIII.

heretical[16]. After staying in Spain from 1562 to 1572, he returned to Mexico, mainly living in Michoacán. He died in 1584 in Mexico City.

Some of the works of his prolific career were among the first books printed in Mexico. His texts on logic and natural philosophy were printed several times, as well as the *Speculum*. However, the two extant lectures or *relectiones*, *De dominio* and *De decimis*, were published when Ernest Burrus discovered the manuscripts and incorporated them into his edition of the Writings of Alonso de la Veracruz. If his *Relectio de dominio* was concerned with showing if and how the Spanish could exert political power over the indigenous peoples, the *Relectio de decimis* appears to assume that such a power was already effective. Read in public in 1554-1555, it deals with the question of tithing, which was seen as a major source of income, especially for the Church. The fact that the Archbishop of Mexico at the time, Alonso de Montúfar, had forbidden Veracruz to read an abridged version of the *relectio* shows the strained relationship between the two, which, as shown above, resulted in Veracruz being denounced to the Inquisition, let alone publishing this work.

The following remarks on Veracruz and Mercado are intended to partially correct what recent scholarship has neglected: the role of natural and human law in their work. Certainly, the casuistic approach of both authors inaugurates a practical thought that, to a certain extent, incorporates argumentative strategies such as probabilism, and thus shows a different way of dealing with moral problems, which proves to be necessary in order to inquire about the normative basis of individual moral problem-solving.

Since Veracruz and Mercado devote some space to the notion of natural law, it is worth looking first at the *Relectio de decimis*, in which Veracruz analyzes the practice of tithing in the context of Spanish domination of Mexico. Since it was written in Latin rather than Spanish, it is clear that his audience was primarily priests whose interest in the subject seems clear, because tithing was intended for members of the church. Veracruz presents a number of arguments to show that tithing is consistent with natural law, but he also wants to show that it does not necessarily apply to the indigenous peoples of Mexico. In what follows, I will show that Veracruz's view of tithing depends on a particular interpretation of natural law, which, as will be seen, can be interpreted to imply obligations that depend on cultural conditions.

[16] The archbishop Alonso de Montúfar sought successfully to impede the *Relectio de decimis* to be printed, condemning its author; see Alonso de la Veracruz, *The Writings of Alonso de la Veracruz. The Original Text with English Translation, vol. IV: Defense of the Indians: Their Privileges*, Ernest J. Burrus ed., Rome/St. Louis, Jesuit Historical Institute, 1976 IV, p. 732: "Tube modo cómo sacalle el dicho libro; y así lo saque y, vista, halle en el más mal que pensava. Del qual saque las dichas 84 conclusiones, tan endemoniadas; dellas heréticas [unas], otras scismaticas, otras erróneas, otras falsas y escandalosas, como por ellas constara". The complete text of *De decimis* is contained in this volume, from which I will quote Burrus's translation.

As any *relectio* before him, such as the ones read by Vitoria or Soto, the *Relectio de decimis* uses a biblical text to justify the discussion on tithing. The so-called *locus relegendus* proceeds from the book of *Numbers* of the Old Testament. In it, tithing is justified based on a divine order: "And I have given to the sons of Levi all the tithes of Israel as a possession for the ministry wherewith they serve me in the tabernacle of the covenant"[17]. Veracruz is aware that one might conclude that tithing, being a divine command, is prior to any human social order and that it could not be altered or revoked. More scholastico, the question is "whether tithes existed before any law was written"[18]. Crucially, if this were the case, everyone would be compelled to pay the tax.

However, Veracruz immediately identifies an ambiguity in the communication of the divine command to tithe. Although he does not deny that such a command existed in the Old Testament, the process of making it known is more difficult. It depends on corpora of written texts; in fact, even Moses received the commandments in written form, which marks a *terminus post quem* for the validity of the norm:

> All this was instituted before written law existed, and neither divine nor natural law can show that tithes were instituted before the law was given to Moses. Consequently, such an institution of tithes did not take place before the law was given to Moses[19].

The institution of tithing is tied to the existence of a text, so its promulgation is essential. Without it, no law could be known and obeyed, unless one were to say that tithing is a norm of natural law. Since natural law is effective by virtue of its intelligibility alone, no mediating promulgation of a written text would be necessary because natural law is "inviolable, immutable, and the same among all"[20].

The understanding that natural law is detached from human practices is not necessary, for which Veracruz distinguishes three different meanings of natural law: (1) Natural law is expressed as first normative principles, such as evil has to be avoided and good should be done. (2) Natural law can be understood as the conclusions derived immediately from it, which are also considered *de iure naturae*, such as the precepts of the second tablet of the Commandments. (3) Some precepts are considered *de iure naturae* when they are derived from natural law "not immediately but mediately (*mediate*)"[21]. As Veracruz will make clear, this third meaning of natural law is essential when

[17] Veracruz, *De decimis*, p. 133.
[18] Veracruz, *De decimis*, p. 135
[19] Veracruz, *De decimis*, p. 137.
[20] Veracruz, *De decimis*, p. 147.
[21] Ib.

inquiring about the validity of tithing. That a precept of natural law is derived mediately means that it is

> not determined by natural law but is approved by human law or custom. Thus, natural law says that a malefactor is to be punished; but it does not say whether a thief or other evildoer is to be lashed, exiled, or hanged; instead, it is the human law that decrees punishment by hanging[22].

He implies that such a precept, which requires human approval, is unnecessary because such an agreement can change, or it could not have been made in the first place. But once approved, it has been shown to be consistent with the primary and secondary principles of natural law. If the question of tithing is inextricably linked to human consent, then it would seem that the problem shifts to the extent to which this law is binding, since its obligation would depend on human will:

> The cause or reason for a law can cease in two ways: first, in regard to a particular instance (*particulari casu*) and in regard to a particular person (*particulari persona*); secondly, universally in regard to all (*in universum circa omnes*). Thus, if there is a law forbidding the carrying of weapons at night, and, should one do so, he would have to forfeit them. The reason for the law is to prevent the usual quarrels and murders. However, let us imagine that a peaceful man in the nation (who is a danger to no one) carries weapons; the reason for the law in his regard has ceased, but not in regard to others. And, supposing that the reason for such a law had ceased in regard to all, then there would be no danger to anyone if the law itself ceased[23].

Even if the general principles of natural law are unquestionably valid, such as not harming anyone, the practical implementation of this norm depends primarily on whether the reasons for it apply in a given set of circumstances. For example, it makes sense to ban the carrying of guns if there is reason to believe that the crime rate will increase. In Veracruz's view, however, this particular rule does not necessarily make sense if there is no ill will and the society offers peaceful living conditions. If carrying a gun were useless, there would be no reason to pass a law prohibiting it because no harmful consequences could be expected. Crucially, this kind of argument is applied to the issue of tithing.

As we have seen, the reason that makes tithing a norm is the idea that it is mediately derived from natural law, emphasizing the role of human consent in the process. Consent is a consequence of having identified a compelling reason for the existence of this particular commandment, namely, that the service offered by priests produces a spiritual benefit for Christians. In return,

[22] Ib.

[23] Veracruz, *De decimis*, p. 303.

the flock owes, if you will, compensation for the spiritual services received, which consists of the payment of tithes.

With the evangelization and political domination of the American peoples in mind, Veracruz ponders whether the general principle of always paying what is owed can be applied under any circumstances, which is unquestionable from the point of view of commutative justice. Veracruz goes beyond this principled account to ask whether the priests in colonial Mexico did, in fact, always provide spiritual benefits to the newly converted Christian believers. There are certainly priests who should have taken their job more seriously and who failed at it; they should not receive tithes. As Veracruz points out: "Where nothing is given, nothing can be received"[24]. In that case, believers who did not receive spiritual support are exempt from the obligation to pay tithes, the same as the infidel who do not have that obligation[25]. As simple as this argument is, it had the potential to disrupt a steady source of income for many priests. No wonder Veracruz ran into trouble with the ecclesiastical authority.

If the precepts derived from natural law were treated in a mediated way, as if they were human law, their obligation would be the result of the conditions that made the law appropriate: "[…] Although the human law ordering the payment of tithes is holy and just, it loses its binding force when the true reason for which it was enacted ceases"[26]. The case of tithing shows that universal precepts are justified when individual cases merit their application. Since tithing is a real-world phenomenon, it presupposes the existence of priests, a religion, and proper ways to establish fair interaction between priests and believers. Therefore, tithing cannot be considered a direct result of natural law, since it would depend on temporal conditions and the support of human will. In fact, Veracruz considers this human participation to be fundamental in mediating between natural law and particular social and human circumstances. Therefore, he can say that tithing occurs according to natural law and yet depends on the circumstances that would justify its existence.

As we will see, the Dominican Tomás de Mercado also believes that rules and precepts should be based on normative principles, that is, on natural law. He also believes that the application of these rules depends on circumstantial factors, which makes it all the more important to consider the role that active and informed people play in reflecting on these norms.

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[24] Veracruz, *De decimis*, p. 317.

[25] Veracruz, *De decimis*, p. 315: "Ubi non est minister neque pauperum cura, neque fabricae et divini cultus provisio, obligatio legis humanae de decima exsolvenda cessat. Probatur: lex humana quae praecipit decimam pro fine et causa habet ministerium ministri et provisionem pauperum et fabricae, quia certa portio illius decimae pro istis (ut supra probatum est). Ergo ubi ista non sunt, et cessat obligatio legis". And p. 317: "[…] Nullo modo est obligatio magis quam infidelis tenetur ad decimam ratione ministerium".

[26] Veracruz, *De decimis*, p. 325.

4. Tomás de Mercado (c. 1530-1575)

Veracruz's biography shows a strong relationship with Salamanca through education and geography. The same is true of the Dominican friar Tomás de Mercado, who somehow took the opposite route, first coming to Mexico and later establishing himself as a scholar in Spain. This important thinker is introduced by Alonso de la Veracruz himself. In a brief decree found in the first edition of 1569 of *Tratos y contratos de mercaderes y tratantes*, probably written while waiting to be tried by the Inquisition, he considered this book a valuable tool for confessors to clear the consciences of merchants. Naturally, he recommended that it be printed. Although it is often said that Mercado was one of the first to articulate an economic theory and advocate a kind of mercantilism, it is necessary to resist such simplifications generated from a modern perspective. It is true that he delves into theories of the just price and enlightens the discussion with his empirical knowledge of markets and merchants, but he is driven by theological concerns. How is it possible to reach these merchants in such a way that they will behave in a morally satisfactory way and, more importantly, secure the prospect of their salvation? The theoretical foundation of his thought is therefore not so much casuistry, as is often said, but his intention to articulate a theory of commutative justice in the light of the opacity that commercial transactions often imply. His treatise is a kind of business ethics, which led him to address his thoughts to his target audience in the language they understood: Spanish.

Tomás de Mercado's year of birth is uncertain, yet it can be placed between 1520 and 1530 in the Andalusian city of Seville[27]. Hailing from a family of merchants, he must have arrived in New Spain during his adolescence. In 1552 he joined the Dominican order, and under Pedro de Pravia, an alumnus of the University of Salamanca, he was introduced to theology and philosophy. After being ordained in 1558, he started teaching at the convent of Santo Domingo in Mexico-Tenochtitlan until 1563, when he was called for duty in Spain. There he continued his studies at the Universities of Salamanca and Seville, which must have had a significant influence during the writing of *Tratos y contratos*. Two major commentaries on logic were published soon after, and a significantly expanded second edition now called *Suma de tratos y contratos*[28]. In 1574 he

[27] There are several brief biographical accounts, e.g., Mauricio Beuchot and Jorge Íñiguez, *El pensamiento filosófico de Tomás de Mercado. Lógica y economía*, Mexico City, UNAM, 1990, pp. 7-11. Also José M. Gallegos Rocafull, *El pensamiento mexicano en los siglos XVI y XVII*, Mexico City, Centro de Estudios Filosóficos, 1951, pp. 315-326; Nicolás Sánchez-Albornoz, "Introducción", in Tomás de Mercado, *Suma de tratos y contratos*, vol. 1, Nicolás Sánchez-Abornoz ed., Madrid, Instituto de Estudios Fiscales 1977, pp. X-XVIII.

[28] Tomás de Mercado, *In logicam magnam Aristotelis commentarii, cum nova translatione textus ab eodem auctori*, Seville, Fernando Díaz, 1571, and *Commentarii lucidissimi in textum Petri Hispani cum argumentorum selectissimorum opusculo*, Seville, Fernando Díaz, 1571.

was called again to serve his order in Mexico, but during the voyage, he fell ill and died at sea shortly before arriving in Veracruz.

Mercado's two editions of his economic treatise have been designed to offer moral guidelines for merchants; its purpose is practical and theoretical aspects did not play any part initially. Although the first edition of 1569 already seemed to have reached a broad audience, in the second edition, Mercado sought to establish a proper theoretical foundation within the doctrine of natural law as advanced by Thomas Aquinas[29]. As he says, the different approaches to international trade, substantially expanded during the 16th century, could only be understood within the correct normative framework. In this respect, and although Francisco de Vitoria has often – and problematically – been described as the father of international law, it is Tomás de Mercado instead who put a globalized normative perspective into practice.

Mercado's work has been read as one of the first theories that dealt with the forces that drive commercial exchange, reflecting on the role of money as a vehicle for transactions and the reasons for inflation, among others[30]. His theory depends on establishing a normative framework that would make these transactions fair; therefore, he is very interested in exploring the different aspects that would have to be taken into account when the normative standards are not met. He reflects extensively on the vehicles of exchange (*cambios*), especially money, usury, and what follows from unjust transactions, namely restitution. He considers the role of public authorities in setting prices (*tasa*) for different products to be necessary in order to protect the public from indiscriminate profiteering by merchants.

Although Mercado's economic thought had been the focus of academic research, highlighting his insightful analysis of markets and prices, crucially, the aspect of the normative foundation of that analysis has been mostly neglected[31]. In the preface to the second edition of 1571, Mercado expands significantly on the highly successful first edition. It bears reminding that in the edition of 1569, Mercado goes straight into discussing the importance of handing moral guidelines to the merchants, where he says that

> I was moved to compose this opuscule with the following [idea], that it might serve as a light and blade to see the bad steps in the dangerous path of their

[29] For the remainder of this text, I will refer to the second edition using the modern edition provided by Nicolás Sánchez-Albornoz.

[30] For a brief survey see Wim Decock, "Princes and Prices: Regulating the Grain Market in Scholastic Economic Thought", in Jörg Alejandro Tellkamp ed., *A Companion to Early Modern Spanish Imperial Political and Social Thought*, Leiden, Brill, 2020, pp. 172-196. See also Abelardo del Vigo Gutiérrez, *Cambistas, mercaderes y banqueros en el Siglo de Oro español*, Madrid, Biblioteca de Autores Cristianos, 1997, pp. 116-118.

[31] See, for instance, Brunori, Luisa, "The First Doctrinal Consideration on 'Transatlantic' Commercial Law: Tomás de Mercado's *Summa de tratos y contratos*, 1569-1571", in *The School of Salamanca Working Paper Series* 2021-01, pp. 1-16.

> art. With all possible brevity, I will deal with the state and condition of the merchants, especially of those of this republic and their business and dealings: because for their usefulness and convenience, I especially wrote and published it in their native and vernacular language, where without an interpreter they can read and understand how they are to sell and buy, hold their companies, out their dealings, send and supply cargoes, divide costs, interests, and profits[32].

a) The role of natural law

This is the language of a man who wants to reach his audience. By 1571, however, he acknowledges that he may have underestimated his readership's willingness to delve into the intricacies of abstract normative concepts that were missing from the previous edition. For this reason, he added a new first chapter on the role of natural law, which is crucial to establishing the moral guidelines merchants should follow in their commercial transactions[33]. Adequate theorizing on real-world dealings should consider the fundamental justification of the normative notions on which they are based[34]. As a declaration of intent, he states in the second edition:

> Having to treat in this work all human contracts in general and in particular (except marriage) not only its practice and style, but mostly the justice and equity with which they should be conducted, it seems very appropriate to show the merchants the source principle from which flow so many conditions, so many rules and distinctions that the contracts demand and which we will offer[35].

Human interaction in general, and commercial transactions in particular, require a robust set of rules to guide them. Human law is expressed in written form and contains obligations and sanctions. For these obligations to be valid, they must be based on a general normative framework, natural law. In his treatment of natural law, he emphasizes two fundamental aspects. The first is its divine origin. God himself constitutes the intelligibility of reality as it exists and of the regularities and laws on which it is based. As already noted by Thomas Aquinas, these regularities are essentially normative in nature, and they become transparent to anyone who uses right reason[36]. Additionally,

[32] Tomás de Mercado, *Tratos y contratos de mercaderes y tratantes discididos y determinados*, Salamanca, Gast, 1569, p. 2v. All translations of Mercado's texts are mine.

[33] Mercado, *Suma de tratos*, p. 27: "También, como esta suma se compuso para gente muy ocupada en negocios, fue grande el cuidado que tuve de no holgarme, por no ahitar con la lectura. Así acobardado yo, quedó ella en partes corta. Después recibiéronla todos, tan doctos cuan indoctos, con tan buena voluntad, que me pareció podría seguramente extender un poco más muchas de las resoluciones primeras, mayormente habiéndomelo aconsejado así al principio gravísimos doctores".

[34] He also displayed great awareness of the problems of his time, adding a chapter on the legislation (*pragmáticas*) regarding grain pricing.

[35] Mercado, *Suma de tratos*, p. 33.

[36] Mercado, *Suma de tratos*, p. 42-43: "Demás de esto, ¿qué cosa es ley sino una recta razón que

Mercado suggests that natural law is divine law (although, inversely, not all divine laws are natural laws):

> Thus, the natural law, which reason teaches, exists and is also called divine law; His Divine Majesty wants this law to be of greater force and more obligatory than many things that He has commanded beyond it. There are no divine precepts quasi more obligatory than natural ones[37].

The divine origin of natural law and its intelligibility underscore a point worth exploring. If natural law is obligatory by virtue of its intelligibility alone, how can anyone be punished for violating it? Mercado asks, "how does reason force the human being if it cannot punish the one who disobeys?"[38]. Divine punishment is obvious because it is God Himself who would prevent anyone from entering the glory of the afterlife if their behavior did not conform to divine and natural standards[39]. The question of human punishment is more problematic, because it depends on the existence of human institutions and written human law, which could in principle be unjust and subject to change. Like Aquinas before him, Mercado assumes that the human legislator must be able to inquire about the correctness of a given body of laws in the light of the transparent and rational principles of natural law. Only when there is congruence between the two can it be said that natural and human laws are binding in the court of conscience, but only the latter have legal effects in the "real" world of human beings living in societies striving for the common good[40].

Like the theological and legal tradition before him, Mercado identifies a set of rules that would be immediately binding and that would entail punishment if disobeyed. Examples include the prohibition against disrespecting elders, or the Golden Rule, whose intelligibility is based on the fact that human beings are rational; these rules are transparent to all, and all should recognize their validity. In fact, the Commandments are laws of reason: "So this part, which is the Decalogue, is so in agreement with reason that she herself teaches it".[41]

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enseña y veda como conviene? Y no hay duda que a todos nos dio Dios la razón recta, por lo cual se debe decir habernos dado a todos ley. Cierto es que primero que los hombres mandasen castigar el hurto y el homicidio, lo tenían por cosa perversa y mala; si por mala no la tuvieran, no la castigaran, alias no lo mandaran".

[37] Mercado, *Suma de tratos*, p. 37. This approach is essentially a continuation of what Thomas Aquinas has held, further developed by Vitoria and Soto. Aquinas *Summa theologiae* I-II q. 90 a. 1 c.: "[…] Lex quaedam regula est et mensura actuum, secundum quam inducitur aliquis ad agendum, vel ab agendo retrahitur, dicitur enim lex a ligando, quia obligat ad agendum. Regula autem et mensura humanorum actuum est ratio […]".

[38] Mercado, *Suma de tratos*, p. 35.

[39] Mercado, *Suma de tratos*, p. 37: "Así podemos decir que, si no castiga la razón al que le es rebelde y contumaz, Dios, supremo juez, castiga severísimamente a los transgresores de sus preceptos […]".

[40] See Decock, *Princes and Prices*, p. 183.

[41] Mercado, *Suma de tratos*, p. 43.

After all, divine laws imply natural laws, which in turn must be understood by all rational beings. Whether they actually understand them is another question[42]. Mercado is not interested in natural law for the sake of advancing abstract theories; for him, it proves central to show that the usually arid disquisitions have an immediate practical scope:

> You will also see how in the issuance of all these contracts, sales, purchases, exchanges, leases, loans (which are those of which in this work, we write) the Christian merchant is not asked more than what the Turk and the Arab must keep, because the justice and truth that they must have, at least in substance –such as selling for the right price, not more expensive on credit than cash, lend free without interest, celebrate real deals and avoid the void ones–, comes from and is of natural law, to which all of any state and profession are equally subject[43].

Commercial transactions are an important form of human behavior, and they require the same basic rules that every human being should follow when dealing with others:

> All this shows clearly how obligatory natural law is and how reasonable it is to condemn a contract that is against what it [i.e., the natural law] commands because then it will be against the will of God, who particularly and generally obliges us to always keep the natural law[44].

As a rule that applies to individual behavior in a social context, natural law boils down to a set of rules that belong to commutative justice[45]. Its primary function is to establish equality in human interaction, perhaps the most prominent example of which is commerce, which is a matter of positive legislation and not just natural law. The application of the normative framework of human law extends to matters not covered by the very general directives of natural law. The function of human law is to adapt these norms to a body of rules that would deal, in a general way, with different issues related to civil and criminal norms. What Mercado wants to solve is how to specify the rules that apply to contracts, given that their general character leaves room for interpretation regarding their application. Such a general guideline would ensure fairness and avoid unfair consequences between contracting parties.

[42] This emphasis is reminiscent of Vitoria's *Relectio De eo ad quod tenetur homo cum primum venit ad usum rationis* from 1535.

[43] Mercado, *Suma de tratos*, p. 45.

[44] Mercado, *Suma de tratos*, p. 46.

[45] Mercado, *Suma de tratos*, p. 53: "Esta justicia conmutativa se ejercita y resplandece principalmente en los contratos que entre sí los hombres unos con otros celebran".

b) The fairness of human law

The one inescapable principle that makes human law equitable is its purpose to promote the common good, which is seen as integrating rules of avoidance (preventing harm) and active support (improving the lives of citizens) at both the individual and societal levels[46]. In principle, every action involving individual and social interests can be considered just and fair when it promotes the common good, which in the Aristotelian tradition also encompasses the individual good. In other words, no individual can be said to interact with other people in a morally meaningful way if their interests are not considered an integral part of the deliberative process. In the context of commercial transactions, this means that whenever a buyer and a seller agree to a deal, they should be sure that the value of the object being sold and the price agreed upon match. However, as Mercado knows all too well, this is often not the case. Although there are general rules that are beyond dispute, such as honoring contracts, the specific conditions under which a transaction is made are subject to human laws. Mercado takes into account the peculiarities of transactions and the human psyche, which may distort the market price and the terms under which a contract was signed. In addition, there is always the possibility that the transactions are not made in good faith.

Mercado establishes a business ethic based on principles of justice to give merchants the moral certainty to conduct their affairs correctly. Natural law is undoubtedly the same for everyone, and, as Mercado believes, it should be transparent enough to be understood by everyone. Although the obligation of natural law is based on its intelligibility alone, as we have seen, it is not sufficient to compel a person to refrain from bad behavior. Norms that carry the threat of punishment in a court of law are found at the level of positive or human law, which is designed to cover types of actions, such as murder and theft, not individual actions. For example, it is established that theft is generally forbidden, and John's individual act of stealing would be one instance among many forbidden by the law.

Recognizing that a particular case is one in which a general norm applies requires a certain attitude on the part of the person making the judgment. Human law, even if it is just, cannot be sufficiently specific to be automatically applied to certain cases, and there remains the possibility that the application of these laws could be detrimental to the persons involved. For example, if someone received a weapon from another person with the promise to return it upon

[46] Mercado, *Suma de tratos*, p. 81: "Este ha de ser el bien común y el aumento de estado público, pretendiendo proveer con su industria a los vecinos de los alimentos necesarios, porque consta y es averiguado entre hombres de buen juicio que siempre se enderezan y se hacen nuestras obras principales por el bien general de todos y se pretende en ellas el acrecentamiento y comodidad de la república".

request, it would be insufficient to return it if that person clearly intended to harm someone with that weapon. What is needed is the intervention of someone with the right attitude to resolve the issue. For Mercado, this problem involves the virtue of *epieikeia* or equity. Mercado understands that traditionally the proper subject for the virtue of equity is the prince or ruler who has the power to override the explicit meaning of the law. But he goes beyond what he seems to identify as a limitation, since any change in a law could only be made by the ruler, and not by the subjects themselves. If the normative principles of natural law can be understood by everyone, then everyone can develop the virtue of equity. In the context of commerce, this would mean that the merchants themselves could behave in an equitable way, thus going beyond the literal meaning of the law to ensure justice.

Mercado frames the issue of equity by discussing the "binding power of human law"[47]. Already Aristotle pointed out that reflection on moral issues cannot follow simple mathematical guidelines, in the sense that there is necessarily one and only one adequate response to a moral problem. There must be a reasoned consideration of which principles are relevant and under what circumstances they should be applied. For Aristotle and Mercado, individual moral dispositions come into focus, particularly in the form of prudence and equity.

Like the theory of natural law in the first book of the *Suma de tratos y contratos* of 1571, the chapter on equity was not part of the original 1569 edition. The third book of the 1571 edition is devoted to the hotly debated topic of price controls on wheat and bread[48]. Various legal decrees since the reign of Ferdinand and Isabella sought to limit the real or imagined excessive profits that merchants were allowed to make, which might have contributed to shortages and inflation. Mercado believes that the legal spirit of the texts addresses a real problem that is unlikely to disappear over the years, since food shortages and profiteering were a constant threat in 16th-century Spain. The rulings (*pragmáticas*) of Charles V and Philip II underscored the need for rulers to have the appropriate normative instruments at their disposal to prevent abuses in the marketplace. Therefore, Mercado explains:

> Thus, I understand that this ruling (*pragmática*) will be perpetual and therefore it will be appropriate to write about it, especially being so beneficial for ordinary people to understand it and know its strength and force, how and when it obliges them, not only in the judicial *foro exteriori* but also in conscience[49].

[47] Lorenzo Maniscalco, *Equity in Early Modern Legal Scholarship*, Leiden/Boston, Brill/Nijhoff, 2020, p. 134. Maniscalco's reference is to Soto, but Mercado believes the same.

[48] Mercado, *Suma de tratos*, p. 253: "Libro tercero: Do se explica brevemente la pragmática del trigo que en los reinos de Castilla y Andalucía estableció el rey don Felipe, nuestro señor".

[49] Mercado, *Suma de tratos*, 254s.

Although this is not the place to go into the details of Mercado's criticism of Luis de Mexía's *Elucidario sobre la tasa del pan* and his theory of public price controls, it is worth pointing out that his arguments regarding the validity and the obligatory nature of the legal norms in question show a way to interpret them in a non-rigid way. Simplifying the conceptual path taken by Mercado, one might break it down as follows:

- Every human law should be equitable and just.
- The justice of these laws is guaranteed by natural law.
- The justice of human law is not established by necessary deduction, but it is the legislator who must establish its meaning and adjust it to the core of natural law, given the prevailing circumstances in which human law might be applied.
- Crucially, even if human law is considered just in this sense, its application could still be harmful. It is in this context that the virtue of equity plays a central role.

Since the concept of equity has already been extensively studied, I will limit my remarks to a few aspects that should help to identify how Mercado uses it and what function it has in the context of his theory of natural and human law. Mercado is aware that Aristotle had identified equity as a crucial concept that should serve as a counterweight to the lack of specificity of general legal norms. Equity is thus "not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality"[50]. Significantly is the idea that equity should serve as a correction of human law whenever its literal application creates more problems than it solves.

Thomas Aquinas also thinks that the purpose of any law is to deal with types of morally and legally relevant actions, such as stealing, killing, or keeping a promise. When asking whether everyone must obey human law (*Summa theologiae* I-II q. 96 a. 5), he answers that this is the case. However, like Aristotle before him, Aquinas thinks that following the law to the letter could lead to undesirable consequences, either because following it would create a clear and immediate danger (*subitum periculum*) or because it would be detrimental to the common good. When there is an obvious danger, the meaning of the law must be interpreted by all concerned. But problems that affect the *civitas* should be assessed by experts, such as legislators, judges, or priests. Unlike Aristotle, Aquinas emphasizes that the role of equity is to interpret

[50] Aristotle, *Nichomachean Ethics* V, 10 (1137b25ss). Translation by Ross, revised by Urmson, in *The Complete Works of Aristotle. The Revised Oxford Translation*, ed. Jonathan Barnes, vol. 2, Princeton 1984 (Princeton University Press).

the law, not to correct it. In question 120 article 1 of *Summa theologiae* II-II, Aquinas discusses equity in more detail, but he ultimately insists that equity, as a virtue, seeks to set aside the letter of the law in order to preserve the spirit of the law as a norm directed toward the common good and justice[51].

Cajetan, commenting on these passages, was "concerned with the limits of human law, rather than with interpreting the intentions of the legislator"[52], a point echoed by Domingo de Soto, who had a great influence on Mercado. In the same context proposed by Aquinas, Soto approaches the malleability and obligation of human law in a way similar to that of Cajetan. Assuming that the law could lead to consequences contrary to the common good, it could be the competence not only of the legislator but also of the ordinary citizen to make use of the virtue of equity, at least when a negative outcome is obvious to everyone[53]. These would be exceptions, and normally the interpretation of legal texts (*interpretatio verba legis*) falls within the functions of the legal and political authority. Soto concern is to preserve the integrity and intelligibility of the law while allowing for divergent interpretations, for example, in cases of extreme necessity: "Who in that case of necessity acts contrary to the texts of the law, does not pass judgment on the law but on the particular case regarding which he thinks it [the law] cannot be followed"[54].

Mercado has these texts in mind when he considers the possibility of disobeying or reinterpreting an otherwise valid law. However, he places the emphasis elsewhere. While Soto believed that necessity and danger were sufficient to justify disobeying the law, Mercado emphasizes the negative consequences that could result from obeying the law. In the context of the chapter in which he discusses equity, it seems plausible that the legal text of the *pragmática* must be counterbalanced by the possibility that its obligation could endanger people's lives, or at least have an adverse effect on the lives of merchants and customers.

He tends to understand equity as an interpretation of law, which does not so much inquire into the original intention of the legislator, but rather examines whether the conditions require the application of the law. Strictly speaking, the law ceases to have its proper coercive meaning when the reason for it ceases to exist. However, this is rarely the case in commerce because the reasons for legal

[51] Thomas Aquinas, *Summa theologiae* II-II q. 120 a. 1 c.

[52] Maniscalco p. 130. As Cajetan says, the shortcomings of human law are inherent to its universal nature because its literal observance would lead to harmful results. The role of *epieikeia* or *aequitas* consists of applying discretional criteria to avoid harm and preserve the spirit of the law. Mercado follows this interpretation.

[53] Domingo de Soto, *De la justicia y el derecho*, Spanish trans. by P. Marcelino Gonzáles Ordóñez, Madrid, Instituto de Estudios Políticos, 1967, with a fascimile of *De iustitia et iure,* Salamanca, Portonariis, 1556, I, q. 6 a. 8 p. 72. Here Soto uses Aquinas' example of a law prohibiting the opening of the doors of the city wall. Applying the law could have negative consequences if the city were under siege, and if continuing to obey the law prevented the citizens from fleeing the attacking army.

[54] Mercado, *Suma de tratos*, p. 73.

norms in the realm of commerce are always present. One should take the text of the law seriously and yet know when to adapt it to the practical requirements at hand. Therefore, equity determines "when it is convenient and decent to do the opposite of what the text [of the law] establishes as just causes, keeping and following the fundamental justice of the law (*la justicia fundamental de la ley*)"[55]. It is, thus, "legal discretion"[56].

The emphasis on the role of knowing when to modify or stop the application of the law means that equity is, as in Cajetan, a form of prudential interpretation and not, as in Aristotle or Aquinas, correction. The expertise of knowing how to interpret the law depends heavily on the acquisition of experience that guides the individual through the difficult task of discerning what is just when the law itself does not provide sufficient guidance. In this case, it may be necessary to do the opposite of the law without making mistakes[57]. This prudential intervention can only be done when there are sufficient reasons to think that it would be harmful to do what the law orders: "Thus, in order to know whether a law is binding, it is not necessary to consider whether its observance is beneficial in its kind, but whether it is harmful"[58].

These are difficult decisions to make, because to interfere with the meaning of the law would be to give more weight to matters of conscience than to the apparent meaning of the legal text. What this shows is that Mercado believes that ultimately the main criterion for distinguishing and applying human laws is to be found at the level of natural law, that is, what everyone can grasp. Beyond that, to say that an otherwise just law can be harmful under certain conditions, and to suspend its obligation, requires the intervention of someone with the cognitive and moral acumen found not so much in the legislator as in the priest, who theoretically has the virtue of equity through continuous practice[59].

5. Concluding notes

The preceding remarks on Alonso de la Veracruz and Tomás de Mercado emphasized (a) their dependence on a conceptual apparatus that had been sharpened and modified by Salamantine teachers such as Vitoria and Soto. (b) Both developed these concepts in light of the urgent new social reality that emerged with the Spanish presence in the Americas. I wished to emphasize their principled approach to practical normativity, intertwining their interpretation

[55] Mercado, *Suma de tratos*, p. 303.
[56] Mercado, *Suma de tratos*, p. 304.
[57] Mercado, *Suma de tratos*, p. 305: "Saber cuándo convendrá hacer lo contrario de la ley sin errar".
[58] Mercado, *Suma de tratos*, p. 306.
[59] Mercado, *Suma de tratos*, p. 302: "Cierto, dado que muchas cosas se alcancen por especulación y estudio escolástico, las que pertenecen a la prudencia, virtud moral, no se entienden bien sino con el continuo ejercicio".

of natural law with human law. A proper reflection on the social conditions that emerged in the context of Spanish domination of colonial Mexico required acknowledging the fundamental role of natural law. At the same time, neither Veracruz nor Mercado focus primarily on the metaphysical justifications for natural law; instead, they draw on the conceptual elements they consider most relevant to advance their ideas about the malleability of human law.

The function of natural and human law is to establish clear criteria of justice and thus to provide guidelines for human social behavior. Although natural law already establishes firm rules for individual behavior, such as not killing or stealing, it is not enforceable; it is not punishable in a court of law because there is no proper authority for such punishment. This means that, strictly speaking, violations of natural law are dealt with in the court of conscience. The lack of enforceability of natural law makes human law necessary to be binding *in foro conscientiae* and in a court of law. Both authors, who draw on the long-standing discussion of the origin of human law and its obligation, do not arrive at radically new theoretical conclusions; they rely primarily on an authoritative corpus of texts by Cajetan, Vitoria, and others. However, their interest in natural law was motivated by new social circumstances, such as the conquest of the Americas with its many peoples and cultures, and the expanding commercial interests of the Spanish Empire.

From the Spanish perspective, the ever-expanding epistemic horizon of understanding and dealing with these cultures required an adaptable normative framework that would at the same time resist the temptations of moral relativism. Real-world interpretation of natural and human law does just that. Given the right conditions, anyone with the right knowledge and experience could interpret the law, suggesting that Veracruz and Mercado share the kind of optimistic rationalism characteristic of the revival of Aquinas by Vitoria and his disciples. However, if someone lacked relevant knowledge, there usually would be someone who can be trusted. That such a trustworthy person is a priest, not a lawyer or judge, is also in keeping with Vitoria's deepest convictions.

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