

The impact of the merchant's confession in the development of Business Law during the Siglo de Oro : the Tomás de Mercado and Martín de Azpilcueta's casuistic approach to commercial Law.

The Catechism of the Council of Trent, the profession of faith of Pius IV published in 1566¹, refuted item by item the Protestant doctrines from the East. It established the obligation for the faithful of the Roman Catholic Church to make an annual confession² at Easter³. Nevertheless, in the Spain of the Siglo de Oro, the confessor and the merchant already had a privileged relationship.

The work of Pius IV defines confession as « an accusation of one's sins made in order to receive remission of them by the virtue of the keys, in the sacrament of penance » which consists in « enumerating them with the intention of confessing guilt, and the desire to atone for them on ourselves by penance. »⁴ Martín de Azpilcueta, however, offers a more practical and less theological explanation : the secret and vocal accusation of the sinner of his own sins to the priestly authority so that the latter may absolve him by the sacrament⁵. 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. »⁶ Martín de Azpilcueta defines it 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 satisfying oneself. »⁷ Satisfaction, the last part of the

1 *Romae apud Paulum Manutium*, Rome, 1566 – Ed. consulted : *Catéchisme du Concile de Trente*, Desclée et Cie, Tournai, 1923 – traduction by Marbeau-Charpentier

2 *Idem*, p.222-223 : « Quant au temps où il est particulièrement nécessaire de se confesser, l'Église l'a décidé et décrété dans le Canon dont nous avons déjà parlé [Canon du Concile de Latran IV, 1215]. Elle ordonne à tous les Fidèles de confesser leurs péchés au moins une fois chaque année. » 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

3 Dürr (R.), « Confession as an instrument of Church discipline : A Study of Catholic and Lutheran Confessional Manuals from the XVIth and XVIIth centuries », *Creativity and Norm-Making : Tensions in the Latter Middle-Ages and the Early Modern Era*, Brill, Leiden, 2013, p.215-240 – p. 223

4 *Catéchisme du Concile de Trente*, *op. cit.* – p. 220

5 Martín de Azpilcueta, *Manual de Confesores y Penitentes*, Valladolid, 1566 – p. 19 : « La segunda parte del sacramento de la penitencia, es la confesion vocal y sacramental, que annadiendo algo a los modernos se puede diffinir que es acusacion secreta, con que el pecador, se acusa de sus peccados al sacerdote proprio, para que lo absuelva dellos sacramentalmente. »

6 Alexandre Furetière, *Dictionnaire Universel*, La Haye / Rotterdam, 1690 – entry « attrition » – translation under our care.

7 Martín de Azpilcueta, *Manual de Confesores y Penitentes*, Valladolid, 1566 – p. 4 : « Contricion [...] es

sacrament of penance, is the « recompense for the offence done to God by sin, so as not to offend him any more. »⁸ Nevertheless, it is accompanied by restitution, meaning the reparation of the damage caused to all and the cessation of the sin⁹. 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 rule 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 rule should have been applied in that specific situation, and how it should be applied in the future. Only then, when the penitent shows his good will to follow the confessor's instructions and advice through attrition and satisfaction, can he obtain absolution¹⁰.

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, ...¹¹

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 confessors as a methodological guide to be used throughout Europe, but also in the vernacular language so that penitents, who are not members of the clergy and therefore not latinists, can also find the legal rules to be applied to everyday commercial practices without necessarily going to the confessional.

arrepentimiento voluntario, doloroso, y grandissimo, actual o virtual, de aver pecado por ser ello offensa de Dios sobre todo lo al amado, con proposito (alomenos virtual) de no pecar mas mortalmente, y de confessar y satisfacer. »

- 8 Martin de Azpilcueta, *Manual de Confesores y Penitentes*, Valladolid, 1566 – cap. 4, p. 23 : « Y satisfaction tomando al especialmente, por une parte del sacramento de la penitencia, es recompensa de la offensa hecha a Dios por el pecado con proposito de no le offender mas. » – translation under our care.
- 9 *Idem*, cap. 4, p. 23 : « 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. »
- 10 Renoux-Zagamé (M.F.), « 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, p. 867-887 – p. 868
- 11 *Idem*, p. 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. 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 orality¹², and which is anchored in the daily life of all people. 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 1516¹³. The casuistic literature is thus a direct testimony to the religious practice of the past¹⁴.

Although existing since the Middle Ages, casuistic literature found a new lease of life in the Catholic Counter-Reformation, especially in Spain¹⁵.

In the XVIth century, Spain was the privileged territory of the Roman Catholic Church, a truth linked to its long history of military Catholicism. Although the marriage of Isabella of Castile and Ferdinand of Aragon marked the unification of Spains, the victory over the Khalifate of *Al Andalus* in 1492 put an end to a conflict that had lasted several centuries. Spain, in the singular from then on, became a unified territory, with an imperialist vocation, and only Catholic. These religious and warlike impulses, leaving a soil too unfertile for Protestant ideas to take root, were not to be denied thereafter¹⁶.

This military Catholicism was coupled with an economic boom unprecedented in world history. Indeed, in the same year, 1492, which also saw the arrival of Christopher Columbus on 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 World¹⁷. *Sevilla* then concentrated the monopoly of trans-Atlantic trade, as well as its

12 *Catéchisme du Concile de Trente, Op. cit.* – p. 225 : « En quatrième lieu, un des principaux soins, aussi bien du pénitent que du Confesseur, c'est de faire en sorte que tout ce qui se dit en Confession reste enseveli dans le secret. C'est pourquoi il n'est pas permis de se confesser par procureur ou par lettre, parce que le secret ne peut être assez exactement gardé par ces deux moyens. »

13 Delumeau (J.), « Prescription and reality », Ed. Leites (E.), *Conscience and Casuistry in Early Modern Europe*, Cambridge University Press, 1988, p.134-138 – p. 148

14 *Idem*, p. 136

15 Renoux-Zagamé, *op. cit.* – p. 870

16 The Spanish naval power 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 European expansion.

17 Tomás de Mercado, *Suma de ratos y contratos de mercaderes y tratantes*, Salamanca, 1569 – p. 2 : « Ansi la casa de la contratación de Sevilla y el trato della es uno de los mas celebres y ricos que ay 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 soliendo 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

administration in the *Casa de la Contratación*. Established in 1503, this institution had two major functions. Firstly, it was a centre for mapping and studying Indian populations in response to Spain's new imperial ambitions. Secondly, the *Casa de la Contratación* 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 knowing how many goods and ships to send to the Indies, which required constant communication with the royal officials present in the area and thus knowing the needs of the colonists, and therefore close collaboration with the royal treasury. But the institution also worked in the other direction : it had to check that the goods arriving in *Sevilla* were indeed those that had been shipped from the Indies, goods from which the royal treasury took its share¹⁸. However, the revenues of the Crown passing through the *Casa de la Contratación* were considered extraordinary, and thus kept secret in the name of information control¹⁹. Nevertheless, the merchants of *Sevilla* 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 transactions²⁰.

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, a current of thought based on the scholastic method, 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 commerce²¹. Thus, the Salamanca theologians aim to legitimise the new economic order of things by ensuring a morally acceptable and ethically responsible practice of commercial activity through a detailed study of the 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.

y mas estimado que ay en las otras partes antiguas, aun de Turquia viene a elle : para que por aqui se lleve a la nuevas, donde todo tiene tan excesivo precio. »

18 Ladero Quesada (M.A.), *El primer oro de América : los comienzos de la Casa de la Contratación de las Indias*, Real Academia de la Historia, 2002 / Coord. Acosta Rodríguez (A.), González Rodríguez (A.) & Vila Vilar (E.), *La Casa de la Contratación y la nevegación entre España y las Indias*, Universidad de Sevilla, 2003 / Serrera Contreras (R. M.), « La Casa de la Contratación en el Alcázar de Sevilla (1503-1717) », *Boletín de la Real Academia Sevillana de Buenas Letras*, 2008 – p. 141-176

19 Bennisar (B.) & Jacquart (J.), *Le 16^e siècle*, Armand Collin, 2013 – p. 194

20 Morales-Padron (F.), *Historia de Sevilla : La ciudad del Quinientos*, Universidad de Sevilla, 1997, Vol. 3 – p. 167

21 Grice-Hutchinson (M.), *Early Economic Thought in Spain : 1177-1740*, George Allen & Unwin, 1978 – Éd. consultée : Liberty Fund, 2015 – p. 98

This golden age of Spain, flourishing politically, economically and intellectually, was called the Siglo de Oro. During this sixteenth 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 the leadership of conscience against the growing Protestantism of other nations.

In this sense, two works of the School of Salamanca are of particular interest.

Firstly, the *Manual de Confesores y Penitentes*, by Martin de Azpilcueta, otherwise known as Doctor Navarrus²², published in its definitive version²³ in Salamanca in 1556 in Spanish²⁴, 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 tratos y contratos de mercaderes y tratantes*, by Tomás de Mercado, published in 1569 in Salamanca. The specificity of this treatise is that it derives directly from the study of contracts related to the trade of the Indies, where writings on the subject, as mentioned above, are generally subject to censorship in the name of information control. The source of Tomás de Mercado's casuistry is the confession of the merchants of the *Consulado de Mercaderes de Sevilla*, who commissioned the book²⁵. Indeed, the name Mercado is frequently mentioned in the records of the city's merchants. Although there is no tangible evidence on the matter, it appears that the author descended from a long line of Sevillian merchants²⁶. Moreover, his casuistry is written in Castellane and not in Latin, as it is intended for merchants as well as for confessors to whom these merchants would come to seek advice²⁷, with the aim of revealing a manual of commercial and financial practices that would provide a framework for trade in the pursuit of the common good²⁸. 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 a first-hand writing.

22 Martin de Azpilcueta was indeed a native of Navarre and proud of it.

23 The very first edition was published in Portuguese in Coimbra, Portugal in 1550, the Emperor Charles V having sent the author there at the request of Juan III, ruler of Portugal.

24 Ed. consulted : Valladolid, 1566 in Spanish.

25 Tomás de Mercado, *Suma de tratos y contratos de mercaderes y tratantes*, Salamanca, 1569 – *epistola nuncupatoria*

26 Bernal (A.M.), « Tomás de Mercado y las 'negociaciones' con las Indias », from Tomás de Mercado, *Suma de tratos y contratos de mercaderes y tratantes*, Salamanca, 1569 – textos introductorios, p. 48

27 Tomás de Mercado, *Suma de tratos y contratos de mercaderes y tratantes*, Salamanca, 1569 – p. 2 : « Instruir complidamente a un mercader en todo lo que con su ingenio puede entender por reglas. »

28 Alves (A.A.) & Moreira (J.M.), *The Salamanca School*, Bloomsbury, 2013 – p. 17-18

Since it thus appears that the context of the confession has a direct impact on the writings of the confessor, the question then arises as to how the confession of the penitent, in all its specificities, can influence the juridical treatment of the case of conscience by the confessor, and thus form the casuistic literature destined to be diffused throughout Europe.

It is then necessary to determine the role of the confessor in relation to the Law (I), in order to identify the specificities linked to commercial practice (II), to then express how the said confessor articulates his legal advice (III).

I/ The confessor, theologian and jurist.

If law gives religion its social dimension, religion gives law its spirit and direction. In order to function, law needs consistency in the application of rules, aversion to bad behaviour, equal treatment... But these are not purely utilitarian concepts: belief in their rightness is necessary, and this is achieved through religion²⁹. Thus, the confessor does not limit himself to the direction of conscience, because he reinforces the religious character of the Law.

Indeed, it is up to the representatives of the spiritual power to determine how human positive law is to be enforced in everyday legal acts in order to correspond to Christian morality and thus to accomplish the will of God, 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 implementation of civil law³⁰. 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 way³¹. 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 ceremonial resulting in the dramatisation of deeply felt values that directly demonstrates their

29 Berman (H.J.), *Faith and Order : The Reconciliation of Law and Religion*, Scholar Press for Emory University, 1993 – p. 4

30 Decock (W.), « Collaborative Legal Pluralism : Confessors as Law Enforcers in Mercado's Advice on Economic Governance », *Rechtsgeschichte*, Vol. 2, 2017, p. 103-114 – p. 111

31 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

temporal utility for the welfare of society, and by extension their spiritual utility for the salvation of the penitent's soul³². 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 punishment³³. This judicial analogy of confession is found directly in Martin 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 directly³⁴. In this sense, the activity of the confessor is truly judicial, and the comparison with the judge is appropriate³⁵.

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...³⁶ The confessor corresponds to this second category. Indeed, as Martin de Azpilcueta states, the confessor's knowledge must contain both ecclesiastical and secular norms³⁷, in order to be able to judge both the venial or mortal character of a sin and the licitness of a contract³⁸.

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 situations³⁹, emphasising once again the practical necessity of the confessor. Martin de Azpilcueta, for his part, provides in his manual, which has an obvious pedagogical vocation, a methodology of questions that the confessor must ask in order to obtain a full and complete confession, and therefore a fruitful one, from his penitent⁴⁰. Dr Navarrus being a scholastic, these questions are themselves drawn from the rhetoric of St Thomas Aquinas : *quis,*

32 Berman, *op. cit.* – p. 9-10

33 Dürr, *op. cit.* – p. 223

34 Martin de Azpilcueta, *Manual de Confesores y Penitentes*, Valladolid, 1566 – cap. 4, p. 25 : « El poder conciste, en que sea presbytero, y tenga jurisdiction actual, ordinaria o delegada, que se estienda a los pecados, que le confiesan. [...] porque puesto, que con el caracter sacerdotal reciba poder, y jurisdiction habitual para absolver. »

35 *Idem*, cap. 5, p. 29 : « El confessor deve escudriñar la conciencia del pecador, asi como el medico la enfermedad del enfermo, y el juez la causa del pleyteante. »

36 Berman, *op. cit.* – p. 12

37 Martin de Azpilcueta, *Manual de Confesores y Penitentes*, Valladolid, 1566 – cap. 4, p. 25 : « El saber del confessor, 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 puamos. »

38 *Idem*, cap. 4, p. 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 impid la comunión, o no. »

39 Tomás de Mercado, *Summa de Tratos y Contratos de Mercaderes*, Salamanca, 1569 – lib.1, cap.5 – p. 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, ...

40 Martin de Azpilcueta, *Manual de Confesores y Penitentes*, Valladolid, 1566 – cap. 5, p. 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. »

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 specificities of the factual situation, 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 pursued⁴¹. 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 reward⁴². These questions then appear to be identical to those raised in matters of prosecution and defence⁴³, which once again underlines the judicial role of the confessor.

From then on, the penitent merchant understands and learns the law from the mouth of 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, « 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. »⁴⁴

II/ The choice of a confessor learned in commercial practice.

If 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. It follows that a confessor capable of confessing a person in one place will not be capable of confessing another person in another place⁴⁵. Therefore, a place that is likely to have more complex cases of conscience must have a confessor who is sufficiently knowledgeable to respond to them. This is why Martin de Azpilcueta gradates the competence required to confess according to geographical location : the confessor practising in a farming village does not need to know as much as the one practising in the city. Similarly, the confessor who practises in a

41 Saint Thomas Aquinas, *Summa Theologia*, c. 1230 – Ia-IIae, Quaestio 7.3

42 Saint Thomas Aquinas, *Summa Theologia*, c. 1230 – Ia-IIae, Quaestio 7.2

43 Robertson (D.W.), « A note on the Classical Origin of "Circumstances" in the Medieval Confessional », *Study in Philology*, Janv. 1946, Vol. 43, n°1, p. 6-14

44 Renoux-Zagamé (M.F.), *op. cit.* – p. 868-869 – translation by our care.

45 Martin de Azpilcueta, *Manual de Confesores y Penitentes*, Valladolid, 1566 – cap. 4, p. 27 : « Se sigue, que qualquier que es idoneo para confesar a un hombre, o en un lugar, no sera idoneo para confesar a qualquier otra, ni en qualquier lugar, que es un gran desengano para muchos. »

Mediterranean town does not need to know as much as the one who practises in a maritime town, the distinction here being made on the basis of the commercial vocation of the place. Finally, the most competent confessor must be the one who confesses for an entire kingdom or overseas territory⁴⁶. Moreover, the person of the penitent is also responsible for the practical conduct of the confession: the confessor should only ask the penitent about the sins commonly committed by those of his condition⁴⁷.

Tomás de Mercado therefore 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 practice⁴⁸, meaning a *letrado*⁴⁹, a term that can be translated as lawyer or jurisconsult⁵⁰. The author also emphasises 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 the business and understands the practice to judge its application⁵¹. The confessor therefore remains indispensable to the penitent.

On the contrary, it is as important for the salvation of the penitent's soul as it is for the confessor's that the merchant chooses a confessor with whom he can speak freely to reveal his conscience⁵². In fact, according to Tomás de Mercado, a confessor who is too scrupulous, limited and inexperienced would be more easily deceived by the merchant who would obtain absolution too easily, whereas a more experienced and paradoxically less scrupulous confessor would be better

46 *Idem*, cap. 4, p. 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 mediterranea tanto, como quien en una maritima, ni quien en esta tanto, quanto quien en todo un Reyno, o una India,... »

47 *Idem*, cap. 5, p. 29-30 : « La primera que no pregunte todo lo que puede hacer cometido el penitente, sino solo aquello que communmente, los de su qualidad suelen hazer. Por lo qual no ha de preguntar al cavellero, de lo que comunmente solos los Eclesiasticos hazen ni al Eclesiastico delo que comunmente solos los cavalleros. La secunda que no pregunte, sino de los pecados acostumbrados, que todos los saben hazer, quales son la transgression de los diez mandamientos, ... »

48 Tomás de Mercado, *Summa de Tratos y Contratos de Mercaderes*, Salamanca, 1569 – lib. 1, cap. 5, p. 14 : « Ultimamente, debe tener un confessor señalado humbre de sciencia y consciencia, auque a la verdad, no es tan consejo esto en el mercader : ... »

49 *Idem*, lib. 1, cap. 5, p. 14 : « ...sin ser demasiado escrupuloso, que cierto el letrado, corto, falta de experiencia y cargado de escrupulos, no es conveniente para el mercader, mas ellos se libran y salen comunmente destas angustias confessandole con idiotas que les absuelen de lo hecho, ... »

50 Merlin Walch (O.), *Dictionnaire Juridique Français/Espagnol Espagnol/Français*, LGDJ, 2012, 6th edition : entry « letrado,a »

51 Tomás de Mercado, *Summa de Tratos y Contratos de Mercaderes*, Salamanca, 1569 – lib. 1, cap. 5, p. 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 : ... »

52 *Idem*, lib. 1, cap. 5, p. 14 : « ... come veremos en est opusculo, pues quanto sera provechoso, y a que a de segir parecer ageno, tomar el de su confessor sabio con quien hablara clara y libramente : 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 : ... »

suited⁵³. Martin de Azpilcueta defines scrupulosity as the apparent knowledge of something, which nevertheless goes against what one knows, what one thinks, what one doubts, without making a judgment contrary to the truth⁵⁴. The scrupulous confessor is then the one who claims to know but who nevertheless goes against true knowledge⁵⁵. Now, as Martin de Azpilcueta states, the confessor commits a mortal sin if he does not judge correctly the licitness of a contract because he lacks sufficient knowledge⁵⁶. Thus ignorance of the rule of law does not excuse the confessor.

It is therefore up to the merchant to take a confessor who is able to judge his affairs wisely. The penitent merchant must, in order to ensure the salvation of his soul, since he cannot himself judge his sins or claim a learned knowledge of legal institutions, choose a prudent, wise and free confessor⁵⁷, but above all one who is well versed in commercial practice.

III/ Doubt and probable opinion.

According to Martin de Azpilcueta, in order for the confessor's knowledge to be perfect, he must also know how to doubt, and thus seek the advice of another cleric, whether secular or not⁵⁸. The author defines doubt as « the knowledge of two contrary things, without judging the truth of one or the other. »⁵⁹ 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 for lack of sufficient knowledge⁶⁰. The confessor must

53 *Idem*, lib. 1, cap. 5, p. 14 : « ...sin ser demasiado escrupuloso, que cierto el letrado, corto, fulto de experiencia y cargado de escrupulos, no es conveniente para el mercader, mas ellos se libran y salen comunmente destas angustias confessandole con idiotas que les absuelen de lo hecho, ... »

54 Martin de Azpilcueta, *Manual de Confessores y Penitentes*, Valladolid, 1566 – cap. 27, p. 791 : « Escrupuloso es conocimiento de algo, que representa alguna aparenca contra lo que se sabe, cree, opina, o duda, sin hazer juzgar lo contrario. »

55 Scruples are not science, faith, opinion or doubt. These notions will be explained later.

56 Martin de Azpilcueta, *Manual de Confessores y Penitentes*, Valladolid, 1566 – cap. 4, p. 28 : « El confessor, que no sabe determinar los casos de que puede, o no puede absolver, [...] y no sabe alomenos dudar acerca de los contratos dudosos, no se escusa de pecado mortal... »

57 Tomás de Mercado, *Summa de Tratos y Contratos de Mercaderes*, Salamanca, 1569 – lib. 1, cap. 5, p. 15 : « No a de estar a la cobdicia, y juyzio ciego del mercader ignorante de las letras, en lo qual advertiran quanto interesan ellos mesmos en escoger un confessor prudente, sabio y libre. »

58 Martin de Azpilcueta, *Manual de Confessores y Penitentes*, Valladolid, 1566 – cap. 4, p. 26 : « Los religiosos se podran confessar como antes con qualquier clerigo seglar o no seglar. El saber del confessor, para ser perfecto, y por si solo determinar todo, ha de ser tanto qui incluya theologia, [...] o alomenos, que sepa dudar en lo que alcanza aquellos, que medianamente saben y tengan quien a quien preguntar lo que dudare, quando, y como conveniere. »

59 *Idem*, cap. 27, p. 791 : « Duda es conocimiento de dos cosas contrarias, sin juzgar de alguna dellas ser verdadera. » – translation under our care.

60 See note n°56.

know, according to natural law, all that is necessary to do his work properly⁶¹. But when this is not the case, it is the task of the penitent confessor to admit his ignorance in order to correct it, by consulting another cleric instructed in the matter, whether through confession or not⁶². Therefore, the theologian's knowledge, when it is not complete, calls for penance.

Nevertheless, Tomás de Mercado raises the question of when the confessor should force the merchant to follow his opinion and when he should not⁶³. The case of conscience arises in the situation where the merchant himself proposes a well-sourced solution to his problem. According to the author, the confessor is then free to advise the merchant to follow this solution⁶⁴, although this is very stubborn and arrogant if this is not also the opinion of the confessor, who would then be unable to absolve him in case of sin⁶⁵. Thus, not to respect the confessor's prescription is not a sin when other authors hold the merchant's proposed solution to be licit⁶⁶.

Indeed, the confessor is free to advise his penitent to follow the « most certain » opinion, when this opinion is sustained by enough authors and conforms to reason, because it is the most « probable » opinion⁶⁷. Thus, to be probable, an opinion must either be the fruit of a solid argument of reason, or be supported by a great authority. This reasoning is called probabilism, which according to Wim Decock, is defined as a system for resolving cases of conscience that distinguishes between probable and improbable opinions for the purpose of judging the lawfulness of a behaviour⁶⁸.

Martin de Azpilcueta defines opinion as the knowledge with which the confessor judges something that he does not see clearly, and therefore without firmness and with the fear that the opposite is true⁶⁹. In this sense, it is thus directly opposed to science, which is the judgement by

61 *Idem*, cap. 4, p. 27 : « Y porque hombre ha de saber lo que es necesario, para hazer bien su officio aun por ley de naturaleza. »

62 *Idem*, cap. 4, p. 27 : « Y porque la obediencia no escusa de pecado al confessor, que sabe que no entiende lo que basta para confessar, y confiesa [...]. Ca solamnete escusa al que duda, si sabe o no, lo que basta. »

63 Tomás de Mercado, *Summa de Tratos y Contratos de Mercaderes*, Salamanca, 1569 – *Tabla*, entry C : « Quando debe el confessor compelar al mercader, a que siga su parecer y opinion, y quando no [...]. 1,5,15. » The whole issue is then covered in this passage which contains the majority of the quotations that follow.

64 *Idem*, lib. 1, cap. 5, p. 15 : « Cada uno es libre para seguir la que escogiere. »

65 *Idem*, lib. 1, cap. 5, p. 15 : « ... pero si al penitente le desagrada : y lo que haze, se puede hazer y lo aprueban muchos autores aprobados : gran tochedad y arrogancia seria : porque el lo reprueve, no absluelle. »

66 *Idem*, lib. 1, cap. 5, p. 15 : « Que haziendo lo contrario no es peccado : porque ay muchos doctores que lo tienen por licito. »

67 *Idem*, lib. 1, cap. 5, p. 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... »

68 Decock (W.), *Le marché du mérite : penser le droit et l'économie avec Léonard Lessius*, Zones sensibles, 2019 – p. 77

69 Martin de Azpilcueta, *Manual de Confesores y Penitentes*, Valladolid, 1566 – cap. 27, p. 791 : « Opinion es conocimiento con que juzgamos de alguna cosa, que no vemos ser ansi, pero no firmemente, con temor que lo contrario sea verdad. »

clear and firm knowledge of what is perceived by the five senses⁷⁰, or to faith, which is « the knowledge by which one judges firmly of what is not seen. »⁷¹ Thus, an opinion should not be considered as law, since there are undoubtedly equally probable contrary opinions, meaning those supported by other theologians⁷². Tomás de Mercado thus makes a distinction 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 faith⁷³, it is up to the theologian, through his knowledge and faculty of judgement, to determine which opinion to follow and which to reject⁷⁴. In the context of the resolution of a concrete case of conscience, the discernment of the probable opinion from the improbable opinion is thus carried out at the arbitrariness of the confessor, in the words of the author, although this judgment is obviously subject to reason⁷⁵.

Thus, when knowledge of a matter is imperfect, the confessor resorts to probabilism to derive probable knowledge and attenuate the uncertainty⁷⁶. 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.

It results from this that the opinion formulated in the casuistic literature of theologians is obviously not in itself binding, and that it is indeed up to the confessor to determine the advice he will give to his penitent for the resolution of this case of conscience, but also in the overall conduct of his affairs, for the purpose of respecting and ensuring the observance of Christian morality. The *Manuals for Confessors and Penitents* are not intended to replace confession, but only to divulge the general rule so that the confessor can apply it to a concrete situation.

70 *Idem*, cap. 27, p. 791 : « Annadimos, que sciencia es conocimiento, con que se juzga lo que se vee. Por ver, entendemos tambien el tocar, oyr, gustar, y oler que son los quatro sentidos exteriores. »

71 791 : « Fe es conocimiento, con que firmemente juzgamos ser assi, lo que no vemos. » - translation under our care.

72 Tomás de Mercado, *Summa de Tratos y Contratos de Mercaderes*, Salamanca, 1569 – lib. 1, cap. 5, p. 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 autores la tienen, leen y defienden. »

73 *Idem*, lib. 1, cap. 5, p. 15 : « ...discernir entre lo que ay evidencia, o sola opinion y probabilidad, y no tener cada cosa en mas de lo que es... »

74 *Idem*, lib. 1, cap. 5, p. 15 : « ...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... »

75 Gómez-Camacho (F.), *op. cit.* – p. 68

76 *Idem*, p. 76