

TOMÁS DE MERCADO ON SLAVERY: JUST ACCORDING TO LAW, UNJUST IN PRACTICE

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In this article we shall reconstruct the thinking of the Dominican theologian Tomás de Mercado regarding black slavery¹. Although this is not a topic which he discussed very extensively, his considerations and arguments, above all from an economic-moral standpoint (or regarding the morals of an economy), shaped in his "Manual of Deals and Contracts" [*Suma de Tratos y Contratos*] (1571) are of great philosophical interest and originality, like a whole generation of contemporary intellectuals on both sides of the Atlantic².

This Dominican theologian is famous for combining his intellectual background with a direct experience of trade with America on both sides of the Atlantic. Little is known about his life in Seville, where he was born in 1523, except that, at a very early age, he went to Mexico, where he joined the Order of Preachers in 1551. He studied Arts and Theology at the newly founded *Universidad de Nueva España*, where he later became a Professor holding the Chair of *Prima Theologiae*. In 1558 he was ordained a priest and from then on taught at the Convent of Santo Domingo. In 1562 he was sent to Spain to complete his studies in Salamanca, where he graduated with a Master's Degree in Theology. Subsequently, he lived for a time in Seville and died at sea during his return voyage to Mexico in 1575.

Mercado includes his opinion regarding slaves in the framework of his *Suma de tratos y contratos* that had several editions before the end of the XVI century. The book is written in Spanish, a 'common' language, so that without the help of an interpreter, every merchant could know the correct way of doing business, this is, respecting the basic principles of justice. Justice here is understood in a natural law boundary that every merchant was beholden to observe in his contracts, sales, money changing, leases and loans. It was a text where analysis was made of the legality of commercial and financial activities carried by merchants, money changers and bankers.

¹ We thank Jennifer Hincapié Sanchez (*Revista de Filosofía*, Mexico) and Susana Holz (Unisinós, Brasil) for their help in gathering the bibliographical material.

² Cfr. Roberto Hofmeister Pich, "Scholastica colonialis: Notes on Jerónimo Valera's (1568-1625) Life, Work, and Logic", *Bulletin de Philosophie Médiévale* 54 (2012) 65-107.

As any money changing, contracts had to be real and fair, with no cheating or coercion, and to be real and legitimate they had to be free and voluntary. These were the principles of justice from which he analyses concrete cases to take the trader to certainty of which activities he should develop with good consciousness.

The great theme of Book II of the *Suma de Tratos y Contratos* (1571)³ is trade, its benefits and limits. It is in this context that Mercado studies slavery, more accurately in Chapter XXI, under the title *Del trato de los Negros de Cabo Verde*. He does not do so within the sphere of anthropology or theology, but within that of political economy, and it is known that scholastics approach economic issues from a moral perspective, meticulously examining the situations of conflict that might provoke behaviors or contracts that infringe the principles of justice. For this they take Aristotle, especially in the *Nicomachean Ethics* and *Politics* and Thomas Aquinas in the I-II of the *Summa theologiae* as their main references.

In this generation of scholastics there is concern not only about topics such as fair price, interest, currency exchange and monopoly, but also, and with equal intensity, about the purchase, sale and transport of slaves. This generation of theologians from the School of Salamanca writes about topics of economics because of the uncertainties regarding the new trading practices brought about by the discovery of the Americas⁴. It was the scandals committed in trade, usury, simony and all kinds of economic abuse that led these scholars to discuss the topic. These were not academic treatises on economics, but moral treatises for traders and spiritual guides.

By meticulously analyzing the complexity of these trade activities, they ultimately made significant contributions to the theories of value, price and money, although they were not concerned with economic issues in themselves, but above all with the spiritual salvation of human beings and, more specifically, in determining whether their actions in all fields of their daily social lives were ruled by the principle of justice. This prin-

³ There were several editions of the *Suma de Tratos y Contratos* already in the 16th century, and a first translation even into Italian in 1591. The pioneering translation into English of a fragment of this work by M. Grice-Hutchinson, *The School of Salamanca: Readings in Spanish Monetary Theory, 1544-1605*, Oxford University Press, Oxford, 2009, is particularly interesting. Now we have two accessible publications of his work: Tomás de Mercado, *Suma de tratos y contratos*. Edición y estudio introductorio de Restituto Sierra Bravo, Editora Nacional, Madrid, 1975, and another one in two volumes: Tomás de Mercado, *Suma de tratos y contratos*, edición y estudio preliminar de Nicolás Sánchez-Albornoz, Instituto de Estudios Fiscales, Madrid, 2 vols., 1977. More recent reference works that can be consulted are L. Perdices, *Diccionario del pensamiento económico en España (1500-2000)*, Editorial Síntesis, Madrid, 2004; E. Fuertes Quintana (ed.), *Economía y economistas españoles*, Galaxia Gutenberg-Círculo de Lectores, Barcelona, 2000; F. Gómez Camacho, *Economía y filosofía moral: la formación del pensamiento económico europeo de la Escolástica española*, Síntesis, Madrid, 1998.

⁴ Cfr. Alfredo Culleton, "Second-Scholastic Philosophy of Economics", *The Modern Schoolman* 89 (2012) 9-24.

ciple was a necessary condition not only for individual salvation, but also for the implementation of the political project of Christendom.

If the entire project was to be ruled by principles of justice, economic relations would not be an exception, and therefore the topic of fair price and equity, as well as the maintenance of moral principles in the purchase and sale agreements, and loans were carefully studied. The topic of black slave trade is discussed in this context.

That is the reason why the abolition or not of slavery is not discussed as it was discussed by Francisco de Vitoria or Las Casas with respect to the American natives, but the question here is the legitimacy of the purchase and sale, and a humane treatment of the slaves⁵. The majority of these scholastics study and denounce the treatment given to the blacks during their transport to the colonies, the way they were captured and the life they led, rather than questioning the institution of slavery itself, which was justified, as we shall see, through a reference to Aristotle and to the Roman *ius gentium*. It is thus difficult to agree with the anti-slavery reading that Mauricio Beuchot tries to ascribe to Mercado in his article *Tomás de Mercado y la cuestión de la esclavitud negra*⁶. Another Dominican, Lazaro Sastre Varas⁷, also falls into this apologetic temptation. The Dominicans did not pose the question of abolition in any of these cases. He did not at any time question this institutional liberal abolitionists of the nineteenth century would have it.

Let us see how Tomás de Mercado deals with the subject in his *Suma*. The author dedicates himself specifically to the topic in Book II, Chapter XXI, entitled *Del trato de los negros de Cabo Verde*⁸. This chapter is based on three assumptions: (a) that the King of Portugal has the authority and acts in good faith on the coast of the so-called Cape Verde, (b) the theoretical legitimacy of slavery, and (c) the abuses and injustices that do actually take place. In order to deal with the subject of slavery, the author sheds some light on the *ius gentium* tradition regarding slavery and then discusses the facts and their morality.

He begins by assuming the legitimate jurisdiction of "the King of Portugal in those regions over the native Africans and the laws or pragmatics⁹ that he establishes and enacts over their contracting and sale¹⁰".

⁵ Cfr. Thomas Hugh, *The Slave Trade: the History of the Atlantic Slave Trade, 1440-1870*, Picador, London, 1997, p. 126.

⁶ Cfr. Mauricio Beuchot Puente, "Tomás de Mercado y la cuestión de la esclavitud de los negros", *Revista de Filosofía* 75 (1992) 342-350, especialmente 349.

⁷ Cfr. Lázaro Sastre Varas, "Teoría esclavista de Tomás de Mercado", in *Actas del II Congreso Internacional, Los Dominicos y El Nuevo Mundo*, Editorial San Esteban, Salamanca, 1990, pp. 287-300.

⁸ Cfr. Tomás de Mercado, *Suma de tratos y contratos*, Hernando Díaz, Sevilla, 1571, pp. 107-116.

⁹ 'Pragmáticas' or 'Pragmatica real' were certain laws of legal regulation of the Spanish Old Regime especially related to conversions.

¹⁰ Id., *ibid.*, p. 107.

In other words, if the King of Portugal has the rule and lordship, which today we would call sovereignty, says Mercado, one must suppose that he is acting in "reason and justice"¹¹. Questioning this (the Portuguese's sovereignty) would be to "entering a maze"¹² because he would be obliged to challenge the legitimacy of an entire regime of Royal authority, which is not his purpose in the treatise. He would rather focus the discussion on justice and not on captivity.

For this purpose, Mercado is brief in his treatment of the *ius gentium* tradition and then dedicates himself at greater length to the facts, i.e. how in fact this trade of black people takes place. As to the *Law*, he says, based on the authority of the theologians, that "capturing and/or selling blacks is legal and in accordance with the *is gentium*"¹³, just as sharing and distributing things is in accordance with the *is gentium*. Taking up the legal tradition about this, he says that "there are many reasons and causes why one can be captured and sold"¹⁴, and he lists the three most classical reasons: in war, when the winners enslave the losers, for public offenses, when someone commits certain crimes whose penalty includes loss of liberty, and when extremely poor parents exert their "natural faculty"¹⁵ of selling their children to ensure their own survival.

The author presents an important proviso when he says that among Christians these practices are not performed, but that it is a very general custom, even a "practice that knows no exception" in the other nations and *gentes*, to enslave captives and sell them. He takes some time to compare not only the practices of Christians regarding non-Christians, but also levels of civility according to the degrees of politicization, comparing the populations of Guinea to those of the American Natives¹⁶, both from Mexico and Peru. He claims that in the latter the population's acknowledge, besides their local leaders, a superior political authority in Michoacán, in the case of those of Mexico, and in Cuzco, in the case of those of Peru. He believes that Africans have a different political organization from others, being organized in small landholdings and kingdoms where each people have their lord and king, and "where no supreme Prince obeyed and respected by all is acknowledged"¹⁷. The author ascribes to this political fragility the constant wars and fights for captives, the arbitrary laws and the futile reasons for which parents sell their children.

In this argumentation developed by Mercado we find an enhanced value assigned to politics along the Aristotelian lines, where slavery is

¹¹ Ibid.

¹² Ibid.

¹³ Ibid., p. 108.

¹⁴ Ibid.

¹⁵ Ibid., p. 109.

¹⁶ Related to this comparison cfr. Liliana Obregón, "Críticas tempranas a la esclavización de los africanos", in Claudia Mosquera *et alii* (eds.), *Afrodescendientes en las Américas*, Universidad Nacional de Colombia, Bogotá, 2002, pp. 432 ff.

¹⁷ Cfr. Tomás de Mercado, *Suma de tratos y contratos*, p. 108.

identified with lack of authority and laws, and not with a natural aptitude or a kind of barbarism in relation to the non-Christians. Slavery would be theoretically justified and practiced according to the degree of civility or political development of the different peoples, in such a way that the Christians no longer practiced slavery for any of the three reasons mentioned, substituting slavery in case of war by prison and ransom, the offenses by sentences and the parents' need by the commandment of charity.

It is clear to Mercado that it is not the Portuguese or Spanish who make slaves, but the natives, and that this would be justified if it were in the cases listed: prisoners of war, serious crimes and the parents' need to survive. If these are the cases, they are the only ones that justify the trade in black slaves, but the author raises suspicions as to whether this is really the case and reports evidence to the contrary, which would suspend the legitimacy of this trade. He says:

On this assumption, let it be the general conclusion that all those who come due to one of these three reasons can be sold and traded and taken anywhere, because any one of them is enough to deprive man of his freedom, if it is true. But the problem is that to these three legal and sufficient reasons are mixed infinite pretenses or injustices, so that they come by deceit, violence, being forced and stolen¹⁸.

This is the time of inflection in Mercado's argument. He says that he knows that in fact few Africans are imprisoned and sold for a just cause.

Under the guise of war are mixed many or almost all unjust [...] as when the Portuguese and Castellians give so much for a black without having been war, they hunt each other like deer [...] in this way there are infinite captives who come against all justice¹⁹.

Mercado underscores that injustice is also committed by the "Ethiopians"²⁰ themselves, who sell their own people because of their "bestiality and greed". As to the reason for punishing crimes, he draws attention to the arbitrary acts, false witness, ambushes, where entire families are taken prisoner to be enslaved and sold without any guarantee of justice. The same is said regarding the parents' prerogative, when in great need, to sell their children on the public square for sometimes futile reasons. Therefore, Mercado puts the emphasis of the argument of this chapter on

¹⁸ Id., *ibid.*, p. 107: "Esto supuesto, sea conclusión general que todos los que vienen por uno de estos tres títulos se pueden vender y mercar y llevar a cualesquier partes, porque cualquiera de ellos es bastante para privar al hombre de su libertad, si es verdadero. Mas es el mal que a estos tres lícitos y suficientes se mezclan infinitos fingidos o injustos, que vienen engañados, violentados, forzados y hurtados".

¹⁹ *Ibid.*, p. 110: "A título de guerra se mezclan ser muchas o casi todas injustas [...] como los portugueses y castellanos dan tanto por un negro sin que haya guerra, andan a caza unos de otros como si fuesen venados [...]. De esta manera vienen infinitos cautivos contra toda justicia".

²⁰ Usual name given to Africans.

the deviations committed by those who would theoretically have the prerogative to sell slaves, raising suspicions about their fairness.

The Scholastic doctors demand that commutative justice be obeyed as an imperative of morality, but also, and above all, as a requirement of rationality, i.e. the intelligible level of the analysis²¹. What has been agreed upon for the benefit of all—common life and cooperation for the mutual fulfilling of needs—should not benefit or harm some more than others. The moral assumption in the scholastic scheme requires support from reason²².

As to the purchasers, in this case the Spanish, he also shows abuses, and among those he denounces the cheating committed by the Europeans when they attract the blacks to the boats with worthless baubles and then quickly weigh anchor, which constitutes what contemporarily we would call abduction. He also denounces cruelty in the way that they treat the aspects of clothing, food and drink, showing a mastery of concrete data and details about this transport that are characteristic of someone who is very familiar with the market. The author makes an effort to show that these irregularities and distorted uses of the legitimate justifications for slavery have been continuously growing due to the constant increase in the value of blacks in the markets and that the cause for the selling of most blacks is “deceit or tyrannical captivity²³”. Here it becomes clear that Mercado’s reference is not anti-slavery theories, but an Aristotelian-Thomist theory of justice and a humanitarian treatment according to the Christian tradition. He compares the treatment given by Christian traders to the blacks and describes it as being much more cruel than that given by the Turks to the Christians, which was highly criticized at the time, especially if we consider that the blacks were baptized—although this was done in a way Mercado criticizes because of the lack of preparation for the sacrament and the lack of consent by these adults, but who were, strictly speaking, Christian and received a treatment unworthy of this status²⁴.

If from the Christian moral point of view this cruel treatment given to Black Africans when they are captured and transported is reprehensible, it is the obligation of a teacher of the school of Salamanca to explain this on another foundation, which is that of natural law. According to Mercado, while it is true that from the perspective of the *law of peoples* slavery is a legitimate practice, the same law restricts the way it is practiced, and for this an exhaustive argument is necessary. The force and violence with which they are treated is reason enough to not participate

²¹ Cfr. Alfredo Culleton, “The Origin and Autonomy of Money in Martín de Azpilcueta in the *Comentario resolutorio de cambios* (1556)”, *Mediaevalia - Textos e Estudos* (Porto) 31 (2012) 53-68.

²² See John Noonan, *The Scholastic Analysis of Usury*, Harvard University Press, Cambridge, 1957.

²³ Cfr. Tomás de Mercado, *Suma de tratos y contratos*, p. 110.

²⁴ Id., *ibid.*

in this injustice, independently of the effort that it meant for the trader to purchase and transport the slaves. This restriction is justified by the principle, which is clear to Mercado, that the ill fame of the origin of products traded by someone is reason enough to not purchase the product. The reason for this is that if the product was proved to be obtained illegitimately by spurious means, the current owner is obliged to return it to the original owner, without any right to compensation.

This is, from the point of view of Law, the central argument of the entire Chapter XXI. Trade in black slaves does not present the two minimum requirements for its legitimacy, viz. legitimate provenance and treatment given. As any product, it must have been legitimately acquired and well treated, and this not only from a humanitarian or Christian perspective, but also from that of the law of peoples, which claims to be universal. Mercado adds the proviso that if this goes for any product, so much more when what is at stake is "freedom that has no value nor price"²⁵.

Even in the case of any piece of clothing, which is not capable of offense as it is irrational, if someone just believes that it has been spuriously acquired or belongs to someone else, they cannot trade it, but must return it to its owner. For this reason we condemn the merchants of old clothes when they trade something that they believe is probably stolen and the silversmiths if they trade something from those whom they believe are thieves. So one has even more reasons to refrain from trade blacks about whom one is certain that most of them have been spuriously acquired or, even worse, betrayed²⁶.

Even if there is no reference to the laws of the Roman Caesars, as in Chapter XI when discussing purchasing and selling, to the canonists in the Institutions of Justinian, nor to the sources of the theological-moral tradition of Saint Paul or Aquinas, as he does in several passages of his *Suma de Tratos y Contratos*²⁷, he appears to be discussing something that is evident to his readers, the merchants of Seville: it is not right to trade merchandise of doubtful origin under pain of losing everything. The general rule, in his words, "is that for a legal sale and purchase, it is necessary for me to be sure that what the trader sells really belongs to him, and that he has acquired it in a fair manner; at least it is necessary that he do not have a reputation to the contrary²⁸", in which case its purchase is forbidden. Doubt in this case does not favor the transaction, but forbids it.

²⁵ *Ibid.*, p. 112.

²⁶ *Ibid.*: "Aun cualquier otra ropa, con no ser capaz de injuria siendo irracional, con solo creer probablemente ser mal habida o ajena, no puede nadie mercarla sino para solo volverla a su dueño; por lo cual condenamos a los ropavejeros cuando mercan lo que probablemente creen ser hurtado y a los plateros si mercan de los que creen verosí-milmente ser ladrones. Cuánto menos convendrá mercar negros de quien se tiene por cierto que o los más o muchos de ellos son mal habidos y peor traídos".

²⁷ See Chapter I.

²⁸ Cfr. Tomás de Mercado, *Suma de tratos y contratos*, p. 113: "[...] es que para ser una venta y compra lícita es menester que esté seguro yo sea suyo del mercader lo que vende y lo tiene con justo título; a lo menos requiérese no haya fama de lo contrario [...]".

The penalty for whosoever commits this kind of business, with any kind of merchandise, is not only a moral but also a material punishment: he is obliged to return the purchased good. In the case of the trade in blacks, says Mercado, the case is much more serious because it is difficult to make restitution, so that an even greater injustice is committed by those who remove them from their lands than those who unfairly capture them. This is because it is impossible for them to regain their freedom if they are so far away from their land, while "in their land, even if they were unfairly captive, they would ultimately have the hope of becoming free²⁹". Mercado has a very special sensitivity to see the practical consequences of possible speculations that could induce an error.

According to Mercado, even if some civil laws are ambiguous or equivocal compared to natural law, in this case they are not, so that "they [the civil laws] rather determine that, once the violence or deceit that has been committed against them is confirmed, they should be given back perfect freedom", which is very difficult once at the other side of the ocean. He gives the example of a black man in Mexico who, having made a formal complaint to the Royal Court of being shipped against his will, was freed, and the sellers had to return the money received from his sale. The punishment in this case is against the trader, rather than against the owner, even if both were the purchasers.

With this example the author wishes to use strictly economic arguments to discourage traders from purchasing and selling blacks. He emphasizes that the only way to avoid possible economic losses in this activity is to avoid it directly and points to a broad range of practical consequences: (a) for the Spanish traders at whom this book is aimed, the possibility of exerting safer and more sustainable trade in economic terms; (b) it would moderate the greed of Portuguese suppliers who depended on the Spanish traders; and (c) it would alert the authorities to the methods that were being used, who presumably ignored the abuses and violence committed in Cape Verde.

Mercado raises a hypothetical possibility which is that the trader should perform a meticulous and scrupulous investigation about the origin and condition of each of the slaves that were being sold, before doing business. He himself elaborates this possibility appealing to Aristotle, without a precise reference, and to reason itself, saying that "the good counselor does not only advise the best, if it is not feasible, but what can be easily implemented, especially in these business matters involving traders³⁰", so that pointing to this possibility would not be prudent since it is very difficult to accomplish and, in the best of cases, would render business unfeasible. It is once again clear that Mercado applies the so-called practical reasoning, which not only considers what is good, but the nature of who is going to do it.

²⁹ Id., *ibid.*, p. 114.

³⁰ *Ibid.*

In a slightly confusing passage at the end of Chapter XXI, Mercado also highlights an aspect of Law and theology in this new round and globalized world by asking: Do you think that here we have another Law and another theology³¹? With this question he intends to underscore that there is a single Law and a single theology, whether these sciences be proclaimed in Seville, Salamanca, Coimbra, the Americas or Africa. It is not that one is proclaimed by the scholars and the other experienced by traders who are distant from the intellectual centers or places of power. There is a clear conflict between the good faith of kings, whether the Catholic ones or the King of Portugal, and what was really happening in legal and moral terms in the territories conquered in their name. From the institutional standpoint there is a policy supported by a project of Christendom, based on the Christian faith, on Greek reasoning and on the tradition of Roman law, which makes it mandatory to have a certain consistency in the practices that would be scandalous and detestable in the eyes of these leaders themselves. According to Mercado, it is the excessive ambition and lack of scruples of the conquerors and traders that leads to these cases of violence.

Even though the sovereigns do not hear about the atrocities committed, there are still two warnings by Mercado to guide the traders' actions: first of all the certainty of a God whom he calls "all-knowing and all-seeing Divine Majesty³²", to whom accounts will be rendered regarding all human actions, and secondly another certainty that does not have its source either in theology or in Law, but is a personal conviction which he expresses as follows: "[...] already in this life what was dishonestly earned, this and its owner, are lost³³". He reinforces this with an experience that in his opinion is had by everyone: the case of those who attempted to prosper trading in blacks shows that their prosperity lasted a short while, and he ascribes this to how much it displeases God and how quickly God punishes it.

He ends the chapter appealing to a principle of authority that was significant for the time, namely to "have talked with, entered a disputation and conferred with good academics in Salamanca, Mexico and here (Seville)³⁴", meaning that this is not the result of his bias nor of revelation, but the result of the erudition of the most outstanding Dominican scholars. He concludes abruptly with the sentence: "For the rest, each one should consult their confessor³⁵", a corollary in which one can identify the respect for the individual conscience and its freedom, which is something

³¹ Ibid.

³² Ibid.: "La Divina Majestad, que todo lo ve y lo sabe".

³³ Ibid.: "También sé que aún en esta vida lo mal ganado, ello y su dueño, se pierde".

³⁴ Ibid.: "[...] he dicho lo que entiendo, después de platicado, disputado y conferido con buenos letrados, así en Salamanca, en México y aquí".

³⁵ Ibid.: "En lo demás cada uno consulte su confesor".

that all human beings have and for which there is no rule, so that it can only be dealt with case by case. These are the new times that are beginning, those of freedom of conscience.

RESUMEN

El artículo reconstruye el pensamiento del teólogo dominicano Tomás de Mercado relativo a la esclavitud negra. Aunque no sea un tema que él trate muy extensamente, sus consideraciones y argumentos, sobre todo desde el punto de vista de la moral económica (o de una moral de la economía), plasmados en su *Suma de Tratos y Contratos* (1571), son de gran interés y originalidad filosóficos así como lo es toda una generación de intelectuales contemporáneos en ambos lados del atlántico.