

## THE ARISTOTELIAN BACKGROUND OF DIEGO DE AVENDAÑO'S MORAL AND LEGAL THOUGHT

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### Introduction

Diego de Avendaño was born in Segovia, Spain, 1594. He moved in a very early age to South America, that is to Lima, where he had as preceptor the famous jurist Juan de Solórzano y Pereira (1575–1655)<sup>1</sup>, who was Professor of Law at the University of Salamanca and later became *oidor* at the Real Audiencia in Lima / Peru. In Lima Diego de Avendaño was educated by Jesuits (in the *Colégio San Martín*), later becoming a Jesuit himself. After having taught in the universities of Cusco (in Andean Peru) and Charcas or Chuquisaca (in pre-Andean Bolivia), where he held the position of rector, Avendaño ended his brilliant career as Professor of Theology in the renowned *Colégio Máximo San Pablo*, in the capital of the viceroyalty of Peru. In Lima he was also provincial

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<sup>1</sup> His works are: Ioannes de Solorzano Pereira [Juan de Solórzano y Pereira] (1575–1655), *De indiarum iure*, Tomus I (Ex typographia Francisci Martinez, Madrid 1629) et Tomus II (Ex typographia Francisci Martinez, Madrid 1636). There is a contemporary edition of Volume I; cfr. Juan de Solórzano y Pereira, *De indiarum iure – Liber I: De inquisitione Indiarum*, ed. C. Baciero – L. Baciero – A. M. Barrero – J. M. García Añoveros – J. M. Soto, (Corpus Hispanorum de Pace – Segunda Serie VIII), Consejo Superior de Investigaciones Científicas, Madrid 2001; Juan de Solórzano y Pereira, *De indiarum iure – Liber II (Cap. 1-15): De acquisitione Indiarum*, ed. C. Baciero – L. Baciero – A. M. Barrero – J. M. García Añoveros – J. M. Soto – J. Uscatescu, (Corpus Hispanorum de Pace – Segunda Serie V), Consejo Superior de Investigaciones Científicas, Madrid 1999; Juan de Solórzano y Pereira, *De indiarum iure – Liber II (Cap. 16-25): De acquisitione Indiarum*, ed. C. Baciero – L. Baciero – A. M. Barrero – J. M. García Añoveros – J. M. Soto – J. Uscatescu, (Corpus Hispanorum de Pace – Segunda Serie VII) Consejo Superior de Investigaciones Científicas, Madrid 2000.

of the Jesuits in Peru and member of the Sacred Court of Faith. His most important works, namely the six monumental volumes of the *Auctarium indicum*, were published in Antuerpia, in the years 1668–1686. As it is well known, the first two volumes were called “Thesaurus indicus” due to their real encyclopedic scope<sup>2</sup>.

In this essay, we will attempt to highlight the connections between Avendaño’s probabilism in practical philosophy and Aristotle’s account of practical knowledge and prudence. After (1) a brief note on substantial differences between Avendaño’s and Aristotle’s views on central political themes and (2) an overview of probabilism as a theory of moral conscience and practical certainty, (3) we describe Avendaño’s explicit account on probable opinion and certainty enough for rectitude in act and (4) Avendaño conviction that his probabilistic theory finds support in Aristotle’s prudential account of practical knowledge. In the Concluding Remarks, we point out to future steps in this research topic, particularly regarding the way in which Avendaño relates probabilism, prudential account of right action and the sphere of law or legal justice. Truly, Avendaño’s pro-

<sup>2</sup> Cfr. J. I. Saranyana et alii, *Teología en América Latina. Desde los orígenes a la Guerra de Sucesión (1493-1715)*, Iberoamericana – Vervuert, Madrid – Frankfurt am Main, Vol. I, 1999, p. 374, note 12; Á. Muñoz García, *Diego de Avendaño. Filosofía, moralidad, derecho y política en el Perú colonial*, Fondo Editorial Universidad Nacional Mayor de San Marcos, Lima 2003, pp. 29-61 (life and works), 63-75 (on Avendaño’s probabilism); Á. Muñoz García, “Diego de Avendaño – Biografía y bibliografía”, in J. C. Ballón Vargas (ed. y coord.), *La complicada historia del pensamiento filosófico peruano, siglos XVII y XVIII (Selección de textos, notas y estudios)*, Universidad Científica del Sur – Universidad Nacional Mayor de San Marcos / Ediciones del Vicerrectorado Académico, Lima, Vol. 2, 2011, pp. 299-343. A secondary literature is mentioned by J. I. Saranyana et alii, op. cit., pp. 376, 378-379, notes 15, 20 e 22, which I reproduce here: D. Yubero Galindo, “El “Thesaurus Indicus” de Diego de Avendaño”, in M. Cuesta Domingo (ed.), *Proyección y presencia de Segovia en América. Actas del Congreso Internacional (23-28 de abril de 1991)*, Editorial Deimos, Segovia – Madrid 1992, pp. 399-408; A. Nieto Vélez, “El índice del “Thesaurus indicus” de Diego de Avendaño”, *Revista Histórica* (Lima) 36 (1987-1989) 51-54; F. de Arzivu, “El pensamiento jurídico del P. Diego de Avendaño S.I. Notas de interés para el Derecho Indiano”, V.V.A.A., *IX Congreso del Instituto Internacional de Historia del Derecho Indiano. Actas y Estudios*, Editorial de la Universidad Complutense, Madrid 1991, pp. 137-150; P. Hernández Aparicio, “La doctrina de Avendaño sobre los repartimientos de indios”, in M. Cuesta Domingo (ed.), *Proyección y presencia de Segovia en América. Actas del Congreso Internacional (23-28 de abril de 1991)*, Editorial Deimos, Segovia – Madrid 1992, pp. 411-419. Cfr. also J. C. Ballón, “Diego de Avendaño y el probabilismo peruano del siglo XVII”, *Revista de Filosofía* (Maracaibo) 60:3 (2008) 27-43.

babulistic thinking in practical philosophy can only be described by surveying long passages, taken from all volumes of his *Auctarium indicum* – the present study focuses on selected passages that we consider to fully represent the Jesuit master's moral doctrines.

## 1. A Non-Aristotelian Thinker?

It is impossible to get an idea of the presence of Aristotle, and the reception of medieval schools of thought in Latin America, without offering an appreciation of the works of intellectuals such as Juan de Solórzano y Pereira and Diego de Avendaño. Especially in the case of Avendaño, the difficulties that we have to face in order to undertake such a task are not only his baroque and sophisticated style of writing in Latin or the fact that before the late 1990s – i.e. before the studies and translations of Avendaño's works done by the Venezuelan researcher Ángel Muñoz García<sup>3</sup> – there was basically no scholarly work available about our Spanish-Peruvian master, but above all due to the strong impression of internal contradictions that his works seem to allow to interpreters, due to his own methodology in investigating theological, philosophical and juridical themes. After all, his methodology itself is deeply influenced by his “probabilism” as a key tool for reaching valid points of view in moral and legal matters.

The attempt of explaining “probabilism” as a system of thought in philosophy, theology and law theory will be done in the following

<sup>3</sup> Cfr. also Á. Muñoz García, “Diego de Avendaño en su *Thesaurus Indicus*”, *Revista de Filosofía* (Maracaibo) 36 (2000) 113-132; Idem, “La América de Avendaño: la ampliación y fin del Imperio”, *Cuadernos Salmantinos de Filosofía* XXX (2003) 29-44; Idem, “Algunas funciones de los Oidores, según Diego de Avendaño”, *Revista de Artes y Humanidades ÚNICA* 9 (2004) 62-87. Cfr. Diego de Avendaño, *Derecho, Consejo y Virreyes de Indias. Thesaurus Indicus, Vol. I, Tít. I-III (1668)*, edición, introducción y traducción de Ángel Muñoz García, Eunsa, Pamplona 2001; Diego de Avendaño, *Oidores y Oficiales de Hacienda. Thesaurus Indicus, Vol. I, Tít. IV-V (1668)*, edición, introducción y traducción de Ángel Muñoz García, Eunsa, Pamplona 2003; Diego de Avendaño, *Corregidores, encomenderos, cabildos y mercaderes. Thesaurus Indicus, Vol. I, Tít. VI-IX (1668)*, edición, introducción y traducción de Ángel Muñoz García, Eunsa, Pamplona 2007; Diego de Avendaño, *Mineros de Indias y protectores de indios. Thesaurus Indicus, Vol. I, Tít. X-XI y Complementos*, edición, introducción y traducción de Ángel Muñoz García, Eunsa, Pamplona 2009.

pages; before proceeding, however, we need to mention a further difficulty regarding the purpose of finding and characterizing relevant aspects of “political Aristotelianism” in Avendaño’s thought. His sources in theology and philosophy are mainly the Church Fathers and eclectic versions of Thomism that he inherited from several Salamanca thinkers; his juridical views not only present a notorious acquaintance with the Roman-Latin tradition of canon law, but are also deeply influenced by Roman civil law; with these two characteristics Avendaño combines a rigid form of Christian universalism<sup>4</sup> up to the point of defending a theocratic basis, not a jusnaturalistic one, for legitimating the “origin of power” and government – hence rendering unfruitful any attempt to characterize any alleged “Aristotelianism” in his thought. His political views, thus, would stay in remarkable contrast to those defended by the Salamanca master Francisco de Vitoria O.P. (1483–1546) more than a century before, who, following Aquinas, proposed that the origin of power and rulership was to be found in nature alone, i.e. in human rational nature, a doctrine which he exposed in his *De potestate civili* (1528) and in his *De indis recenter inventis relectio prior* (1538-1539)<sup>5</sup>.

To the point, Avendaño revisited in a very singular way Vitoria’s views about religious infidelity as a possible reason for denying one’s “rulership” (*dominium*) over things. His unique account is a combination of his probabilistic theory on moral certainty and the interpretation of law, and his political defense of a hierocratic

<sup>4</sup> Cfr. Victor Hugo Martel Paredes, *La filosofía moral – El debate sobre el probabilismo en el Perú*, Instituto Francés de Estudios Andinos – Lluvia Editores – Fondo Editorial de la Universidad Nacional Mayor de San Marcos, Lima 2007, p. 52.

<sup>5</sup> Francisco de Vitoria, “De la potestad civil (*De potestate civili*)”, in Francisco de Vitoria, *Obras de Francisco de Vitoria – Relecciones teológicas*, edición crítica del texto latino, versión española, introducción general e introducciones con el estudio de su doctrina teológica-jurídica, por el padre Teófilo Urdanoz, Biblioteca de Autores Cristianos, Madrid 1960, pp. 149-195; Idem, “De los indios recientemente descubiertos (relección primera) (*De indis recenter inventis relectio prior*)”, in Francisco de Vitoria, *Obras de Francisco de Vitoria – Relecciones teológicas*, edición crítica del texto latino, versión española, introducción general e introducciones con el estudio de su doctrina teológica-jurídica, por el padre Teófilo Urdanoz, Madrid: Biblioteca de Autores Cristianos, 1960, pp. 641-726. Cfr. also Roberto Hofmeister Pich, “*Dominium e ius*: sobre a fundamentação dos direitos humanos segundo Francisco de Vitoria (1483–1546)”, *Teocomunicação* 42 (2012) 376-401; Francisco Bertelloni, “Hacia la superación de la tolerancia. Los derechos de los indios en las *Relecciones de Francisco de Vitoria*”, in Rubén Peretó Ribas (ed.), *Tolerancia: teoría y práctica en la Edad Media*, FIDEM, Porto 2012, pp. 29-47.

regime. As far as the latter topic is concerned, Diego de Avendaño both accepted and brought forth arguments for the legitimacy of the donation made by Alexander VI – in the Bulles *Inter coetera* and others – enabling imperial appropriation of lands and “patronage” of missions by the Spanish Catholic kings<sup>6</sup>, constituting a form of “gubernatio” both in civil and ecclesiastical areas that could only be understood under the background of Boniface’s VIII defense, in the 14<sup>th</sup> century, of the plenitude of power – as conceived above all in the Bulle *Unam sanctam*<sup>7</sup>. Consequently, any kind of civil power happens to be grounded not primarily in nature, but in a form of divine concession, mediated by the Pope’s *potestas*. On its turn, the probabilism we are talking about – further explained in the next Sections – is the notion that for the formation of an individual’s moral conscience, which is to say an individual’s right practical decisions, as well as correct juridical sentences, there is a justifiable room for doubt, notwithstanding the fact that one needs to overcome doubt in order to find rectitude in act. That happens both if the opinion we adopt is provable and justifiable, though less probable than other opinions according to authorities, and if the opinion we adopt is not only provable and justifiable, but also more probable than other opinions according to authorities.

In an important passage found in Volume IV of his *Auctarium indicum*, where Avendaño criticizes Bartolomé de Las Casas (ca. 1484-1666) and other thinkers who showed sympathy to Las Casas’s theses about radically peaceful missionary activity and his questioning of the right of conquest by the Spanish Catholic kings<sup>8</sup>, the Jesuit master discusses again, briefly, the thesis that, based on natural law and the law of peoples, *dominium* might be conferred

<sup>6</sup> On the relationship between Church and State and on the role of Alexander VI in 15<sup>th</sup>-16<sup>th</sup> Century politics, cfr. Joseph Höffner, *Colonização e evangelho. Ética da colonização espanhola no Século de Ouro*, tradução de José Wisniewski Filho, Presença, Rio de Janeiro 2<sup>a</sup>1977, pp. 19-46, 197-216.

<sup>7</sup> On Boniface VIII, his famous Bulle and the impact of his determination in medieval political theory, cfr. Jürgen Miethke, *De potestate papae. Die päpstliche Amtskompetenz im Widerstreit der politischen Theorie von Thomas von Aquin bis Wilhelm von Ockham*, Mohr Siebeck, Tübingen 2000, pp. 45-56, 68-82.

<sup>8</sup> Didacus de Avendaño S.J., *Auctarii Indici Tomus Secundus, seu Thesauri Indici Tomus Quartus*, Apud Iacobum Meursium, Antuerpia 1675, Pars Octava, Sectio L, *De censura quadam Scriptoris adducti circa res Indicas, et aliis observatione dignis erga ipsas*, § 616, p. 420: “[Contra Episcopum Chiapensem unde institui possit concertatio]. Citatus Chiapensis Praesul, cuius scripta iam pridem

to the indigenous peoples, even though they are infidels<sup>9</sup>. Avendaño considers the contrary opinion, that infidelity and idolatry deprive people from true rulership, as at least *probable*, for it is defended by a high number of authorities in theology and law; consequently, in the balance of probabilities, there is a fair legal-moral claim in favor of the concession or conquest of those lands by the Christian princes – who may wage a just war of conquest against their inhabitants, if necessary. Such an opinion would be *even more common and more useful* to the catholic faith. Avendaño is acquainted with the Council of Constance (1414-1418), where Jan Hus (1369-1415) and John Wyclif (ca. 1328-1384)<sup>10</sup> had been condemned for defending

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oblitterata, nescio quo spiritu sine licentiis necessariis denuo recusa, cum revera in illis libellus infamatorius Indicorum Conquistorum, et multorum aliorum videatur contineri, ut eidem obiecit Genesisius de Sepulveda *Obiectione* 12 in Catholicos Reges, et nationem Hispanam maledicentia redundante, ut merito visum fuerit ea colligi et asseruari, Regia auctoritate, pro ut videri potest apud Dom Solorzanum *Tomus I de iure Indiarum lib. 2 Cap. I num. 23 vers. Sextus, quoddam*, qui praefati scriptoris, acerrimi quamvis, virtutes agnoscit, et cum multis, quod adducit, depraedicat *eodem Cap. I num. 26 et 27* quibus ego nihil detractum velim, dum aliqua ipsius effata refellenda propono: sic enim in multis accidisse compertum est eximiae sanctitatis commendatione celebribus quorum sententiae aliquae a vero penitus deviarunt, ut opus fuerit illas a scriptoribus fidei sincere refelli”.

<sup>9</sup> Didacus de Avendaño S.J., *Auctarii Indici Tomus Secundus, seu Thesauri Indici Tomus Quartus, Pars Octava, Sectio L, § 617, p. 420*: “[Propositio eiusdem de infidelium dominio in suis regnis]. Sic ergo ille Proposit. 10. *Entre los Infeiles, que tienen Reynos apartados, que nunca oieron nuevas de Christo, ni recibieron la fe, ay verdaderos Señores Reyes y Principes, y el Señorío y dignidad y preeminencia Real les compete de derecho natural, y de derecho de las gentes, en quanto el tal Señorío se endereza al regimiento y gobernacion de los Reynos confirmado por el derecho divino Evangelico, lo mismo a las personas singulares el Señorío de las cosas inferiores: y por tanto en el advenimiento de IESU Christo, de los tales Señoríos, honras, preeminencias Reales y lo demas, no fueron privados en universal, ni en particular ipso facto, nec ipso iure.* [Oppositum censet haereticum, pro quo et censura alia]. Sic cum statuerit, statim Proposit. 11 ita subdit: *la opinion contradictoria de la precedente Proposicion es erronea y perniciosissima, y quien con pertinacia la defendiere, incurrirá formal heregia. Es asi mismo impiissima, iniquissima, y causativa de innumerables robos, violencias y tiranías, estragos y latrocinios, daños irreparables, y pecados gravissimos, infamia, hedor y aborrecimiento del nombre de Christo y de la religion Christiana, y eficacissimo impedimento de nuestra Catholica Fe, muerte, perdicion y jactura de la mayor parte del linage humano, damnacion certissima de infinitas almas: y finalmente de la piedad, mansedumbre, y costumbre Evangelica y Christiana cruel y capital enemiga. Sic ille”.*

<sup>10</sup> On Wyclif's political thought, cfr. Jürgen Miethke, “A teoria política de João Wyclif”, *Veritas* 51:3 (2006) pp. 129-144, especially pp. 140ff.

that mortal sin precludes rulership in civil dimensions; one of the reasons displayed against those two "heretics" would apparently be the rejection of the doctrine that infidelity is a reason for denying *dominium*. But, again, there are several forms of *dominium*: it is not simply reducible to "absolute property" (*absoluta proprietas*). Rather, *dominium* might be understood as "administration" (*administratio*), "possession" (*possessio*), or mere "use" (*usus fructus*). We would do well to remember that Avendaño and the several authorities he invokes support a hierocratic regime, and thus the explanation of power and rulership has to change; it is defensible that infidels have one of those last three forms of "dominium", as if they were faithful Christians, but since only the Church has absolute property, it is in fact legitimate that it takes away *dominium*, if relevant forms of "offense" (*iniuria*) are committed. So, we are once again in the realm of the insecurity caused by a denial of rights that are based on natural law: that infidels are politically free and rule over things and lands, happens to be just a religious concession, a "tolerant" attitude that philosophically<sup>11</sup> is not a matter of obligation<sup>12</sup>.

<sup>11</sup> Cfr. Didacus de Avendaño S.J., *Auctarii Indici Tomus Secundus, seu The-sauri Indici Tomus Quartus, Pars Octava, Sectio L, § 620, p. 421*: "Secundo obicit potest in Concilio Constantiensi damnatum fuisse errorem Ioannis Hus et Wicleph asserentium dominium rerum ipso iure amitti propter peccatum. Qui et fuit error Armachani, in libro, cui titulus, *Defensorium pacis*, improbatus a Ioanne Maiore in 2. dist. 42 et Iacobo Almaino in 4 dist. 15 Quaest. 2 Col. 10. Ex quo arguit Covarrubias supra num. 2 et Iululentius Dom Solorzanus citato Cap. 10 nu. 56 et seqq. Concilium siquidem negans per peccatum dominium rerum amitti, nullum speciale excipit; et cum absoluta decisio sit, infidelitatem etiam comprehendit. Ad quod in primi dici potest Infideles non privari ratione infidelitatis eo domino, quaecumque illud sit, quod ipsis etiam stante in fidelitate potest competere, quatenus sine alicuius iniuria rebus, quas possident, uti pro libitu possunt, dum auctoritate Ecclesiae ab eisdem non auferuntur. Domini enim nomine aliquando venit non solum absoluta proprietas, sed administrationem, possessionem, aut usum fructum, ut notavit Dom Solorzanus citato Cap. 11 nu. 26. Qui ibidem nu. 6 et seqq. respondet verum dominium in Infidelibus dari, sed ab Ecclesia posse iusta de causa ad fidelia regna transferri et sic Hostiensis sententiam, aliorumque defendit problematico ritu. Atqui Hostiensis et multi alii cum eo sentientes existimant verum dominium et absolutam iurisdictionis et bonorum proprietatem apud Infideles non extare, et sic ex eorum mente proponitur ab ipso citato Cap. 10 num. 1 et seqq. et ita non videtur exacta et accommodata responsio: licet iuxta sententiam aliam possit verosimilius sustineri, si dicatur apud Infideles verum extare dominium, sed auctoritate Ecclesiae auferri ab illis posse, et fidelibus Principibus praerogari".

<sup>12</sup> Cfr. Didacus de Avendaño S.J., *Auctarii Indici Tomus Secundus, seu The-sauri Indici Tomus Quartus, Pars Octava, Sectio L, § 622, p. 421*: "Cum ergo solius

## 2. Some Basic Notions on the Debate around Probabilism

These non-Aristotelian aspects of Avendaño's political doctrines notwithstanding, we believe that there are elements of Aristotelianism in his moral philosophy that will play, at least in the form of a substantial foundation and an implicit "Aristotelian discourse", an important role in the Jesuit master's political philosophy *lato sensu* and, more specifically, in his juridical thought. Thus, it is appropriate to offer, in what follows, a short introduction – without any pretense of originality – to the historical debates around probabilism.

Basically, what is the "probabilism" we are talking about<sup>13</sup>? According to Julia A. Fleming, probabilism has as a primary area the *catholic moral theology* of the 17<sup>th</sup> century, both in its academic and pastoral dimensions<sup>14</sup>. Literature on moral theology answered to new phenomena: the discovery of the New World (where different patterns of behavior and human relationships could be verified), the expansion of protestant confessions (which at least at a "positive" theological level proposed several changes concerning the ideals of a moral and perfect life) and the increasing independence of the sciences of nature (which could have a singular effect on religious views and, of course, could induce criticism to ecclesiastical authority in matters of practical life). European catholic culture expe-

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*Ecclesiae auctoritate dominium ab Infidelibus auferri queat, ex sententia praedicta non illa sequuntur absurda, quae a Praelato dicto proclamantur: in ordine enim ad eorum damnificationem, ut erga ipsos non liceat, perinde se habet bonorum possessio, ac si verum, proprium, et maxime legitimum dominium asseratur. Sic ab haereticis ante sententiam condemnatoriam aut criminis declaratoriam, nequeunt bona auferri, quia ante illam aut dominium eorum habent, aut iustam possessionem, ut ait P. Sancius supra nu. 18<sup>o</sup>.*

<sup>13</sup> Cfr. Julia A. Fleming, *Defending Probabilism. The Moral Theology of Juan Caramuel*, (Moral Tradition Series) Georgetown University Press, Washington, D. C. 2006, pp. 1-7. Cfr. also J. Mahoney, "Probabilismus", in G. Müller (Hrsg.), *Theologische Realenzyklopädie*, Walter de Gruyter, Berlin – New York, Band XXVII, 1997, pp. 465-468, as well as the magnificent article by Th. Deman, "Probabilisme", in A. Vacant – E. Mangenot – É. Amann (éds.), *Dictionnaire de Théologie Catholique*, Librairie Letouzey et Ané, Paris 1936, pp. (numbered columns) 417-619.

<sup>14</sup> Julia A. Fleming, *op. cit.*, p. 1. Cfr. also J. A. Gallagher, *Time Past, Time Future: A Historical Study of Catholic Moral Theology*, Paulist Press, New York – New Jersey 1990, pp. 29-47.



rienced a profound moralization of all spheres of life<sup>15</sup>. Confession (and of course the sacrament of penance, of which confession is just the *second* formal element) came to play a major role in catholic christianity – and this, as the studies by J. Delumeau showed at a deep theoretical and historiographical basis – was one of the practical results of the Council of Trent<sup>16</sup>. Confession turned into a “casuistry”<sup>17</sup> of decisions for relief of conscience and formation of right conscience<sup>18</sup>. Diagnosing sins and solving “concrete moral dilemmas”, pursuing the healing of the soul, the overcoming of doubts, the awareness of guilt and the announcement of forgiveness, became the central aspects of moral theology<sup>19</sup>. If all this demanded, *first*, the pastoral concern for the “existential situation” of the penitent, it required *second* the power of distinguishing “imaginary” (hence objectively “false”) from “real” (hence, objectively “true”) guilt<sup>20</sup>.

If it is correct to affirm that an action can be evaluated either according to the action as such or to the “person who performs it”, the emphasis in the moral debate on conscience relies on the second aspect, i.e. the reasonable and intentional responsibility of the agent. More narrowly, probabilism can be viewed as a method “for ensuring moral responsibility in the absence of speculative mo-

<sup>15</sup> Cfr. Julia A. Fleming, *op. cit.*, p. 2. Cfr. J. Delumeau, *Le péché et la peur. La culpabilisation en Occident (XIIIe.-XVIIIe. siècles)*, Fayard, Paris 1983, pp. 236-272, 369-388; J. Delumeau, *L'aveu et le pardon. Les difficultés de la confession XIIIe.-XVIIIe. siècle*, Fayard, Paris 1990, especially pp. 13-49, 123-149.

<sup>16</sup> *Ibid.*, pp. 15ff.; cfr. also J. Delumeau, *Le catholicisme entre Luther et Voltaire*, Presses Universitaires de France, Paris 1971, pp. 256-292 (above all pp. 280-290).

<sup>17</sup> On this subject, cfr., for example, the studies collected in: J. F. Keenan – Th. A. Shannon (eds.), *The Context of Casuistry*, Georgetown University Press, Washington, D. C. 1995, especially pp. 55-187.

<sup>18</sup> Cfr. also L. Testa, *La questione della coscienza erronea. Indagine storica e ripresa critica del problema della sua autorità*, Pubblicazione del Pontificio Seminario Lombardo in Roma, Roma 2006, pp. 110-164; H. E. Braun – E. Vallance (eds.), *Contexts of Conscience in Early Modern Europe 1500-1700*, Palgrave Macmillan, Hampshire – New York 2004. M. W. F. Stone, “Scrupulosity and Conscience: Probabilism in Early Modern Scholastic Ethics”, in H. E. Braun – E. Vallance (eds.), *Contexts of Conscience in Early Modern Europe 1500-1700*, Palgrave Macmillan, Hampshire – New York 2004, pp. 1-16 (notes pp. 182-188), offers a useful overview of probabilistic ethics in early modernity.

<sup>19</sup> Cfr. Julia A. Fleming, *op. cit.*, pp. 2-3.

<sup>20</sup> *Ibid.*, p. 4.

ral certitude", thus putting forth a solution to "practical doubts" – which, if we remember Aquinas' view, can exist in the determinations of positive judgments, although not in the *synderesis*. In the face of the maxim that it is wrong to act "upon a doubtful conscience" or with justifiable and relevant "fear" (*formido*) that the intended decision might be wrong, and conscious that *practical* certainty is always of a special kind, i.e. *ut in pluribus*, which if mistakenly understood would impose standards to human life that usually cannot be accomplished in every relevant action, above all in immediate concrete acting, ethics had to find means of helping agents to effectively act with responsibility. In order to do so, different systems were proposed. "Tutorism" "required selection of the "safer" course [of action], i.e., the choice that best insured that the agent would avoid sin". "Equiprobabilism" was a moral system that allowed that, in cases of doubt, one could follow an opinion which favors freedom, as long as it was as equally probable as the opposite opinion; practically, if in face of some moral challenge the agent has no notion of an existing rule or law and has doubts about the promulgation of any, he or she can be led by his or her freedom<sup>21</sup>. "Probabiliorism" would allow for the agent "to take a position in favor of liberty" (that is, in favor of a non-certain opinion) only if it were objectively "more probable (i.e., supported by stronger arguments, stronger authorities, or both) than the judgment" which constrained someone "by [a given] moral obligation"<sup>22</sup>. "Probabilism", which is in fact the view espoused by Diego de Avendaño, as we will stress in the course of this essay, "offered the greatest latitude for moral choice. Under certain circumstances, it allowed the agent to follow a probable opinion, even if contrasting views were arguably stronger

<sup>21</sup> *Ibid.*, pp. 4-5. Alphonsus Maria de' Liguori (1696–1787) is usually counted among the most notorious "equiprobabilists"; cfr. Alphonsus Maria de' Liguori, *Dell'uso moderato dell'opinione probabile*, 1765. Cfr. also Théodule Rey-Mermet, *Afonso de Ligório, uma opção pelos abandonados*, Editora Santuário, Aparecida 1984; Moésio Pereira de Souza, "Norma e consciência na determinação da verdade moral", *Kairós – Revista Acadêmica da Prainha* 4:2 (2007) 297-302 (282-308).

<sup>22</sup> Cfr. Julia A. Fleming, *op. cit.*, p. 5. Cfr. also V. H. Martel Paredes, *La filosofía moral – El debate sobre el probabilismo en el Perú*, Instituto Francés de Estudios Andinos – Lluvia Editores – Fondo Editorial de la Universidad Nacional Mayor de San Marcos, Lima 2007, pp. 41-42. Representatives of "probabiliorism" were, for example, Daniel Concina (1687-1756), Juan Vicente Patuzzi (1700-1769), and Fulgencio Cuniliati (+ 1759).

in some way". 17<sup>th</sup> century debate focused on the adequation of such *just probable* opinion to yield *responsible* moral action<sup>23</sup>.

There is a major agreement that, in historical line, the debate around probabilism followed an intriguing interpretation by the Dominican Bartholomew of Medina (ca. 1527-1581)<sup>24</sup>, a pupil of Francisco de Vitoria and later professor of theology in Salamanca. What turned to be known as "central principle of probabilism" was a conclusion to be found in his commentary to Thomas Aquinas's *Summa theologiae* IaIIae: "It seems to me that, if an opinion is probable, then someone has the permission to follow it, even if the opposite [opinion] is more probable"<sup>25</sup>. Medina identified the "conformity with probable opinion as the rule of thumb for ensuring "the minimal standards of moral rectitude"<sup>26</sup>. Medina's "system soon became the common teaching of theologians, to the point that in the introduction to his "Regula Morum" Father [Anthony] Terill" (1623-1676) "was able to say that until 1638 Catholic theologians of all schools were probabilists"<sup>27</sup>. Francisco Suárez S.J. (1548-1617), in his turn, would expand this approach about principles of rectitude in decision to the juridical realm, making use of the special hermeneutics of the doctrine of law<sup>28</sup>. As matter of fact, "probabilism" achieved major adhesion both

<sup>23</sup> Cfr. Julia A. Fleming, *op. cit.*, p. 5. Cfr. also W. Redmond, "Conscience as Moral Judgement. The Probabilist Blending of the Logics of Knowledge and Responsibility", *Journal of Religious Ethics* 26:2 (1998) 392 (389-405); M. Vidal, *Nueva moral fundamental*, Editorial Desclee de Brouwer, Madrid 2000, pp. 460-469.

<sup>24</sup> Cfr. also J. Franklin, *The Science of Conjecture: Evidence and Probability Before Pascal*, John Hopkins University Press, Baltimore 2001, pp. 74-76; *cfr. ibid.*, pp. 64-101 (Chapter Four: "The Doubting Conscience and Moral Certainty"). Cfr. also F. O'Reilly, *Duda y opinión. La conciencia moral en Soto y Medina*, Cuadernos de Pensamiento Español, Pamplona 2006, pp. 65-90.

<sup>25</sup> Cfr. Bartholomaeus a Medina [Bartolomé de Medina] O.P., *Expositio in Primam Secundae angelici doctoris dibi Thomae*, Typis haeredum Mathiae Gastii, Salmanticae [1577] 1578 [Apud Petrum Dehuchinum, Venetiis 1580], q. 19 a. 6, p. 179: "[...] sed mihi videtur, quod si est opinio probabilis, licitum est eam sequi, licet opposita probabilius sit: [...]".

<sup>26</sup> Cfr. Julia A. Fleming, *op. cit.*, p. 5.

<sup>27</sup> Cfr. the entry "Probabilism", in *New Advent - Catholic Encyclopedia*, [www.newadvent.org/cathenc/12441a.htm](http://www.newadvent.org/cathenc/12441a.htm), last access on May 31, 2017.

<sup>28</sup> Cfr. Francisco Suarez [Francisco Suárez] S.J., *De bonitate et malitia humanorum actuum*, in Francisco Suárez, *Opera omnia*, Vives, Paris, Vol. IV, 1856, XII, 5, 8; XII, 6, 8; *cfr. also ibid.*, VI, 8, 6; XII, 1, 6; XII, 2, 5; XII, 2, 7; XII, 3, 2. Cfr. also O. Lottin, *Morale fondamentale*, Desclée, Paris - Tournai 1954, pp. 312-316, 332-336. Cfr. also Robert Aleksander Maryks, *Saint Cicero of the Jesuits: The Influence of the Liberal Arts on the Adoption of Moral Probabilism*, Ashgate Publishing - In-

in the academy and in the pastoral spheres by the middle of the 17<sup>th</sup> century. From the middle of the 17<sup>th</sup> century on and for the next hundred years, it progressively lost its status as a major theory in moral philosophy; perhaps the main internal reason for such loss were the accusations of laxism or “excessive leniency” in moral life<sup>29</sup>, which ended in the jansenist crisis and, as a consequence, touched the other sides of catholicism in the 17<sup>th</sup>-18<sup>th</sup> centuries, namely the desire for and the challenges to ecclesiastical and political unity. We will thus find formal condemnations of probabilism as early as 1665-1666, by Alexandre VII, and in 1679, by Innocence IX<sup>30</sup>. In fact, a little more than one century later, the VI Council of Lima, in 1772-1773, on the wake of several – also politically motivated – European condemnations of the Jesuit Order and pressed by massive anti-Jesuit propaganda, condemned probabilistic views as well<sup>31</sup>.

### 3. Avendaño as Probabilistic Thinker

If we turn our attention to Avendaño as a probabilistic thinker, it is correct to say *first* that his probabilism at the theoretical level does not differ much from the views shared by his European interlocutors – he relies heavily on central figures of the Jesuit school, such as Francisco Suárez<sup>32</sup>, as well as on Juan Caramuel Lobkowitz

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stitutum Historicum Societatis Iesu, Aldershot – Rome 2008, pp. 123-125; Luis E. Bacigalupo, “The Reasonable Ways of Probabilism – A Briefing on Its Essentials”, in Roberto Hofmeister Pich and Alfredo Santiago Culleton (eds.), *Scholastica colonialis: Reception and Development of Baroque Scholasticism in Latin America in the Sixteenth to Eighteenth Centuries*, FIDEM, Barcelona 2016, pp. 84-85 (75-85).

<sup>29</sup> Cfr. Julia A. Fleming, op. cit., p. 6. Accused of “laxism” were authors such as Antoninus Diana (1585-1663), Thomas Tamburini (1591-1675) and perhaps also Juan de Caramuel (1606-1682).

<sup>30</sup> Cfr. Julia A. Fleming, op. cit., p. 6-7. Cfr. también D. Concina, *Historia del probabilismo y rigorismo*, Oficina de la Viuda de Manuel Fernández, Madrid, 2. Vols., 1772.

<sup>31</sup> Cfr. Victor Hugo Martel Paredes, op. cit., pp. 109-141. In that context, the most famous anti-probabilistic pamphlet was certainly Juan Lope de Rodó, *La idea sucinta del probabilismo, razones que establecen el probabilismo, que contiene la historia abreviada de su origen, progresos y decadencia: el examen crítico que lo establecen, y un resumen de los argumentos que lo impugna*, Lima 1772.

<sup>32</sup> A brief, yet insightful, exposition of the role played by Francisco Suárez in the history of probabilism in 17<sup>th</sup> century is offered by Robert Aleksander Maryks, op. cit., pp. 123-125.

O. Cist. (1606-1682)<sup>33</sup>. His own exposition, revisions and criticisms of probabilistic and anti-probabilistic literature are frequent in his large volumes; in this and in the following Section I will work on selected passages that should illustrate some of Avendaño's central tenets on probabilism. Such an example appears in the Volume III of his *Auctarium indicum*, having as a departing point a practical dubious question in ecclesiastical law, i.e. "whether [...] in the Indies, because of necessity, [...] a Bishop can be consecrated without the apostolic letters"<sup>34</sup>. There are substantial doubts on this matter<sup>35</sup>; both from texts by Church authorities and reported Church traditions it seems that there are no unanimous premises that allow reaching a conclusion unequivocally right on that matter, so that one can conclude only a probable judgment. Shortly after the exposition of that concrete ecclesiological issue, Avendaño writes

<sup>33</sup> On the place of Diego de Avendaño in the debates around probabilism, cfr., for example, J. C. Ballón Vargas, "El *Thesaurus indicus* [1668] de Diego de Avendaño y los orígenes coloniales de la filosofía en el Perú", in J. C. Ballón Vargas (ed. y coord.), *La complicada historia del pensamiento filosófico peruano, siglos XVII y XVIII (Selección de textos, notas y estudios)*, Universidad Científica del Sur – Universidad Nacional Mayor de San Marcos / Ediciones del Vicerrectorado Académico, Lima, Vol. II, 2011, pp. 281-298; J. C. Ballón Vargas, "Entre la extirpación de la idolatría y la reconciliación intercultural. Lugar histórico del probabilismo en el pensamiento peruano", in J. C. Ballón Vargas (ed. y coord.), *La complicada historia del pensamiento filosófico peruano, siglos XVII y XVIII (Selección de textos, notas y estudios)*, Universidad Científica del Sur – Universidad Nacional Mayor de San Marcos / Ediciones del Vicerrectorado Académico, Lima, Vol. II, 2011, pp. 377-398; Anónimo, "La Antorcha Luminosa – Manuscrito anónimo de fines del siglo XVIII (Selección, edición y notas de J. C. Ballón Vargas y R. Katayama)", in J. C. Ballón Vargas (ed. y coord.), *La complicada historia del pensamiento filosófico peruano, siglos XVII y XVIII (Selección de textos, notas y estudios)*, Universidad Científica del Sur – Universidad Nacional Mayor de San Marcos / Ediciones del Vicerrectorado Académico, Lima, Vol. II, 2011, pp. 419-471.

<sup>34</sup> Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarium Indicum seu Tomus Tertius ad indici thesauri ornatius complementum, multa ac varia complectens extra rem indicam sacrarum professoribus profutura*, Apud Iacobum Meursium, Antuerpiae 1675, Tomus III, Pars I, Sectio I (*De consecratione Indicorum Episcoporum*), nn. 1-12, pp. 1-4; nn. 13-24 (*Difficultas specialis: An post Breve Alexandri VII, talis in Indiis occurrere necessitas possit, ut Episcopus valeat sine Litteris Apostolicis consecrari*), pp. 4-6.

<sup>35</sup> As far as we can tell, the decision on that matter gains importance after a Brief (*Breve*) by Pope Alexander VII (born *Fabio Chigi*, 1599-1667; his pontificate ranges over 1655 until his death). As a theologian, Alexander VII was an enemy of Jansenism (see above all his Letter *Ad Sanctam Beati Petri Sedem*, issued 16.10.1656, discussing and condemning five "Jansenist" propositions) and sympathised with the Society of Jesus.

a quite long "Appendix on probable opinion and the obligation [...] according to the degree of probability", and after that he still adds a detailed excursus on the very same issue<sup>36</sup>.

*Second*, before central aspects of Avendaño's defense of probabilism are touched, it is important to stress that the above mentioned doubtful issue as well as any other on a similar level of practical doubt bring objective difficulties to conscience and to the very act of achieving moral decision under a more or less known rule – supported by a general rule and explicitly provided by divine, canon or civil law. Important questions at the concrete level of human affairs need the mediation of positive laws or determinations that usually help agents seeking a safe path to right action, after deliberation on particular goods to be found and done in the circumstances of time and space. Following Aristotle's and Aquinas's views one must overcome doubt in order to act with excellence (in a virtuous-prudential act) or in a right conscience<sup>37</sup>. In such deliberative situations, the question to be faced is: What is the "epistemic" quality that the practical judgment must have in order to be protected by a practical certainty which is enough for the rectitude of act: "Safe", "more probable [than]", "as probable as" or just "probable"?<sup>38</sup> The same question will be treated by Avendaño regarding other doubtful issues that we could consider as much more interesting and compelling to moral and legal discussions, such as the ones our author faced in the context of the culturally complex 17<sup>th</sup> century Peruvian viceregal society, which faced the challenge of living together in peace and under a common juridical horizon. Some examples of them: (a) If I were to play a central political role in my country, should I give permission to the conquest of territories on the basis of a presumed state of – civil or natural – servitude of their inhabitants? (b) Should I decide to conduct a war merely because I had received reports of large scale crimes against innocent human beings and natural law? (c) Considering the situation of a particular group within a society,

<sup>36</sup> Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarium Indicum*, Tomus III, Pars I, Sectio I, nn. 1-186 (especialmente nn. 25-94 and nn. 95-186), pp. 1-45. Cfr. also Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarium Indicum*, Tomus III, Pars I, Additiones ad Appendicem Sectionis Primae, nn. 456-727, pp. 109-200.

<sup>37</sup> Cfr. Thomas Aquinas, *Summa theologiae* I q. 79 a. 13; IaIIae q. 19 aa. 5-6. Cfr. also T. Urdánoz, "La conciencia moral en Santo Tomás y los sistemas morales", *La ciencia tomista* 79 (1952) 529-576; F. O'Reilly, op. cit., pp. 11-30.

<sup>38</sup> Cfr. the brief descriptions of moral systems sketched in Section 2.

like indigenous people accustomed to nomadic or basic agricultural life, and considering that every human being has a duty to work and earn his incomes, paying taxes within a society organized by public institutions which are supposed to provide public utilities, should I defend the view that mine workers are not obliged to pay taxes, since this kind of work severely abbreviates their life expectation? (d) A man has lived a dissolute life, meeting in the course of it several women and becoming a father of several children. By adopting the Catholic faith, which woman and family should be recognized as his, providing them, as a result, the expected *debitum*?

*Third*, we should be able to understand (A) what is a "probable opinion" and (B) why it is considered to be enough – as a case of moral knowledge – to the "security of conscience". Although our Jesuit thinker relentlessly quotes an entire legion of different authors of his century, he intensely contrasts his views with an otherwise quite unknown Portuguese opponent, the jurist and moral thinker Mateus Homem Leitão<sup>39</sup>, and demonstrates that he was fully acquainted with the well known controversy between the tutiorist Prospero Fagnani (1588-1678)<sup>40</sup> and the probabilist Juan Caramuel<sup>41</sup>. Regarding the first point, (A) "What is a probable opinion",

<sup>39</sup> The dates of birth and death of Mateus Homem Leitão, who was born in Braga (Portugal), are unknown. He was a Doctor in Canon Law and Professor at the University of Coimbra. In 1646 he was an Inquisitor in Évora, and in 1649 an Inquisitor in Coimbra. In 1645 he published *De iure lusitano, Tomus Primus in tres utiles tractatus divisus*, Ex officina Emmanuelis de Carvalho, Conimbricæ. But the work Diego Avendaño refers to is another one, that is Matthæus Homem Leitonius [Mateus Homem Leitão], *De conscientia vera et singularis observatio*, Apud Sebastianum Cramoisy et Gabrielem Cramoisy, Parisiis 1652. Mateus Homem Leitão wrote it as he still was Inquisitor in Coimbra. Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarium Indicum*, Tomus III, Pars I, Sectio I, § I, n. 25, pp. 6-7: "[...] Is est Matthæus Homem Leitonius, Eborensis et Conimbricensis Apostolicus Inquisitor. Prodiit etiam Prosperi Fagnani opus, in quo ex professo stabilire contendit ad securitatem conscientiae non sufficere opinionem probabilem, stante obligatione amplectendi partem tutiorem. Contra quam *Apologema* citatum edidit Dom Caramuel, cuius eruditum discursum quantum ad veritatem, quam defendit, de tuta minus probabilis opinionis sequela, amplecti potius, venerari et admirari promptum est, quam novis fundamentis additis promovere. Sed forte erit aliquid, quo possit veritas illa (circumscriptis censuris) quam propugnat aliquantulum roborari".

<sup>40</sup> Cfr. Prosperus Fagnani [Prospero Fagnani Boni] (1588-1678), who published, in 1665, in Rome, the work *De opinio probabilis tractatus ex commentariis Prosperi Fagnani Super Decretalibus seorsum recusis*.

<sup>41</sup> Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarium Indicum*, Tomus III, Pars I, Sectio I, n. 25, p. 6. Ioannes Caramuelis or Juan Caramuel

Avendaño offers both a view about the concept of "probable" and the concept of "opinion". The adjective "probable", when attached to an opinion, means, objectively, any view that can be defended or can receive proof on its behalf, does not go *against* the Scripture, the Fathers of the Church and the explicit (dogmatic) determinations of the Church, and nonetheless contains, because of the nature of its object, a room for uncertainty or "fear" concerning its truth. So, "probable" is or can turn to be the epistemic quality of a judgment, a mental act. Any judgment made by someone at any time, written and transmitted or otherwise, *under this objective basis* keeps, *subjectively*, the character of being made with fear that its contrary part may be true. "Opinion" for Avendaño is a kind of mental act – perhaps "probable", but not necessarily "probable", perhaps "improbable", but not necessarily improbable; but necessarily not strictly certain. Avendaño's account of opinion is both Aristotelian and Thomasian. After all, Aristotle once said that opinion "is the non-necessary understanding of a proposition, which is not confirmed by any certain argument". And on the same topic Aquinas stated that "[...], the intellect gives assent to something not because it is sufficiently moved by the object itself, but rather because of a given election which inclines voluntarily to one part more than to the other; and if, in fact, this [election] is made with doubt and fear of one part, it will be an opinion"<sup>42</sup>. Accordingly, the

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Lobkowitz (1606–1682), a Cistercian monk and main representant of the probabilism Avendaño was also a follower, expressed his theses on moral truth in the work *Theologia moralis fundamentalis*, Frankfurt 1652, Roma <sup>2</sup>1656, and later in *Apologema pro antiquissima et universalissima doctrina de probabilitate. Contra novam, singularem, improbabilemque D. Prosperi Fagnani Opinationem*, Laurentii Anisson, Lugduni 1663. On this last work and especially on the controversy between Juan Caramuel and Prospero Fagnani, cfr. J. A. Fleming, *Defending Probabilism. The Moral Theology of Juan Caramuel*, 2006.

<sup>42</sup> In fact, it is difficult to exactly determine to which passage of Aristotle's *Analytica posteriora* Diego de Avendaño is referring to here. At any rate, this meaning of "opinion" clearly appears in Aristoteles, *Posteriorum resolutiorum, Libri Duo*, in Aristotelis Stagiritae, *Aristotelis Opera cum Averrois Commentariis*, Primi Voluminis Pars II, Apud Iunctas, Venetiis 1562-1574 [Minerva, Frankfurt am Main, unveränderter Nachdruck 1962], Textus 44, pp. 394-400. Cfr. also Sancti Thomae Aquinatis, *Summa theologiae*, IIaIIae, ed. Leonina, cura et studio Sac. P. Caramello, in *Sancti Thomae Aquinatis Summa theologiae*, Marietti, Torino 1962, q. 1, a. 4. Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarium Indicum*, Tomus III, Pars I, Sectio I, § I, n. 26, p. 7: "Iuxta Aristotelem Libro I de Demonstratione cap. 26 Textu 44, *Opinio est propositionis nullo certo argumento confirmata comprehensio*



following points are defended by Avendaño, who claims to follow Aristotle's and Aquinas's views – although his account of opinion and probability relies heavily on Cicero's rhetorical treatment of “*opinio probabilis*”<sup>43</sup>: (a) a probable opinion is a judgment performed for some reason; (b) the argumentative reasons are not conclusive, therefore the judgment is made with *formido*; (c) nonetheless, there are reasons for the opinion expressed, therefore every opinion is up to a certain point *capable* of being object of proof or rational support, even if there are more things to be said in favor of the contrary of it<sup>44</sup>; (d) since there is not enough evidence for taking something for

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*non necessaria. Ubi nomine comprehensionis conceptus mentis designatur, seu iudicium de re incerta. Quod magis dilucidum ex Divo Thoma Hallae q. 1 a. 4 in corpore, ubi sic ait: Alio modo intellectus assentit alicui, non quia sufficienter moveatur ab obiecto proprio, sed per quamdam electionem voluntarie declinans in unam partem magis quam in aliam. Et si quidem haec sit cum dubitatione et formidine alterius partis, erit opinio. Si autem sit cum certitudine absque tali formidine, erit fides”.*

<sup>43</sup> Cfr. Cicero, *Rhetorica ad Herennium*, with an English Translation by H. Caplan, Harvard University Press, Cambridge, Massachusetts – London 2004. Cfr. also Robert Aleksander Maryks, *Saint Cicero and the Jesuits. The Influence of the Liberal Arts on the Adoption of Moral Probabilism*, pp. 83-105.

<sup>44</sup> Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarium Indicum*, Tomus III, Pars I, Sectio I, § I, n. 36, p. 9: “[...]. Contra quem est, rationem probabilis in opinione non solum sumi formaliter ab assensu in illam tendente, secundum quod actus intellectus est, sed etiam obiective: nam antequam quis assensum praestet obiecto sibi proposito, dici illud potest probabile, quatenus vim habet inclinandi intellectum modo dicto, Quemadmodum res non dicitur vera solum, aut vere talis, ab actu tendente in illam, sed ex se habet intellectum, ad vere assentiendum inclinare. Quamvis Spinula *Tractatu de electione agibilium* pag. 65. contendat nihil ex se esse probabile, quia in se verum est, et tantum est natum inclinare intellectum ad sui veram cognitionem. Unde ad summum id, quod diximus, erit verum respectu opinionis verae, non tamen falsae. Sed quidem cum res obiectae sint causa assensus probabilis falsi, quam vim non accipiunt ab ipso assensu, ita et probabiles dici possunt, dum ex aliquo accidenti impeditur genuinus ad veritatem influxus: et quemadmodum plurium testium assertio probabilem in iudice elicit assensum circa Rei crimen: ita rerum multarum concursus pro testimonio est, et ita probabilitas in eis obiectiva resplendet. Licet ergo assensus in alterius intellectu existens, non sit proprius eius, qui contrarium tenet; motiva tamen non magis alterius, quam sua sunt: et potest prudenter philosophari sic: Haec quidem motiva me non convincunt, ut assensum praestem, at qui convincunt tali viri sapientis intellectum: potest ergo aliquid in illis subesse, quod ego non assequor, unde et prudenter possum iuxta illius opinionem operari. Et videmus non semper contrarium sentientem plus assequi propter quod ad assensum moveatur; dici tamen potest ob specialem intellectuum dispositionem, quaedam magis uni quam alteri adaequari: unde non solum aequo sapiens, sed sapientior dicere potest alterius se opinionem sequi, quia non

true or right, the will plays a role in the assent, thus making room for subjective preferences; this can even affect decision making concerning opinative contrary parts which are equally strong, i.e. such an equipollence of probability force does not necessarily hinder practical reasonable judgments, for with the help of the will, or because of the structure of an individual will, weights can be bestowed on a opinion in order to decide, relieve conscience and solve disputes<sup>45</sup>; (e) many practical judgments, i.e. those that express how a decision should be or what should be done by a given agent, have exactly these characteristics; (f) a "probable" opinion for a given agent means, in a probabilistic system, merely the one part of a given contrariety of practical propositions or propositions about what is good / right to

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levia motiva aestimari debent, quae intellectui viri sapientis coaptantur. Sicut in auxiliis divinis accidit: aliquod enim quandoque minoris virtutis physicae movebit quempiam; cum tamen aliud maioris efficaciter non moveat alium, iuxta receptam doctrinam Societatis".

<sup>45</sup> Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarium Indicium*, Tomus III, Pars I, Sectio I, § I, n. 44, pp. 10-11: "Sed potest argui ex receptissima sententia, iuxta quam ex duobus bonis aequaliter propositis potest voluntas unum eligere, altero relicto. Verum ex hoc nequit sufficienter urgeri, quia voluntas pro sua libertate potest quidem bonum quodlibet ex propositis eligere; et nequit facere ut intellectus ea proponens, stante propositione talis iudicium mutet, et dictet unum illorum esse eligendum, quia specialis ratio in eo extat, iam enim sibi contradiceret, et sine novo motivo in obiecto novam reciperet mutationem. Quod quidem in casu nostro accideret. Nam cum duae sententiae omnino aequales occurrunt, intellectus iudicat unam non esse altera probabilior, quia pro opposito iudicio deest motivum sufficiens, unde si illud haberet, sibi contradiceret: diceret enim esse simul veram et falsam, quia utramque esse veram, aut utramque falsam non est unde possit affirmare. Ex qua certa, ut videtur, positione infert P. Arriaga indicem inter duos litigantes aequae probabilibus fundamentis non posse rem, pro qualis movetur, uni adiudicare, sed inter eos dividendam, si nullus possideat; quod quidem et alii tenent, quos adducit et sequitur P. Palaus *Tomo I Tractatu I Disputatione 2 Puncto 10 n. 2 et 3*, et Diana *Parte I Tractatu 13 Resolutione 3*. Sed Leitoniis contra resolutionem dictam acerrime praeliatur, concludens n. 163 iudicem in eo casu debere a iudicando se abstinere; quod si compellatur, in favorem rei dicendam sententiam, nisi actor favorabiliorem causam prosequatur: est autem favorabilior causa matrimonii, dotis, libertatis, pupilli, peregrini, viduae (circa quam, si dives sit, non ita certum, ut in *Thesouro dixi Tomo 2 in Additionibus n. 139*) et generaliter quae pia est, ubi religio locum habet superiorem. Pro quo haec satis sint in praesenti, si addam Leitoniis assertionem quoad abstinendum a sententia, numquam locum habituram, sicut rarissime P. Arriagae quoad [di]visionem, quia modus talis non est in usu, licet soleant iudices in eventu simili compositionem partibus suadere, aut si iudex compromissarius sit, de quo et *inferius*".

which she confers weight and adheres to, even though the contrary side might have *objectively* greater, similar or equal probability: an opinion is something that someone has if it becomes probable to her by conferring it the weight that one does confer it, to the point that it becomes, hence, someone's opinion<sup>46</sup>.

As to the second point, i.e. (B) that a mere "probable opinion" as defined does justify a given act and is enough for causing "security of conscience", this is a matter of determination of what human beings can actually and reasonably do when using their minds for the sake of morality. It is a central view in Avendaño's system that both legitimate and possible moral judgments to human beings are or can be just probable opinions in the above mentioned sense, and concerning (many) positive determinations for religious, ecclesiastical, civil and legal conduct these are essentially the kind of opinions that specialized literature and corresponding authorities produced<sup>47</sup>.

<sup>46</sup> It is understandable – and most likely correct (see Concluding Remarks) – that some authors believe that Avendaño, by explaining probable opinion in the practical realm in that way, is *not* endorsing Aquinas's or even Aristotle's classical theory, according to which for a mind to adopt an opinion is to adopt or recognize probability or more probability in it, so that such epistemic qualities turn to be immediately absent in the other side of the contrary opposition. Cfr. also F. O'Reilly, *op. cit.*, pp. 11-30; L.-M. Régis, *L'opinion selon Aristotele*, Vrin, Paris 1935, p. 126.

<sup>47</sup> Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarium Indicum*, Tomus III, Pars I, Sectio I, § I, n. 27, p. 7: "His positis contendit citatus Leitonius sententias Doctorum non esse vocandas opiniones, quia nomen hoc tantum significat specialem cuiusque assensum, qui est in materia conscientiae principaliter attendendus: non enim quid alii sentiant, sed quid opinetur qui operaturus est, pro regula habetur. Abusive ergo et non proprie dicuntur opiniones. Sic *Cap. 2 n. 5 et 35*. Et multo magis cum ipsi sententias suas resolute proponuntur, formidinem circa aliam partem non exprimendo. In quo quidem cum quaestio de nomine sit, non videtur circa illam obstinatius digladiandum. Nihilominus cum non sit peculiaris cuiusque iuris receptas vocum significationes immutare, et penitus abrogandas velle, ubi praesertim sapientium receptissimus consensus vim iam inde ab antiquis temporibus contulit, quod in praesenti evenit, merito est usus talis retinendus, et novantes refellendi. Deinde arguo. Nam Doctor suam sententiam proponens, id exprimit, quod sibi visum est verum, sed non certum, quia motiva ad assentiendum talia non sunt, ut certitudinem ex se inducant. Atqui sic assentiri, ut vidimus, opinari est: ex quo clare inferitur assensum talem exterius prolatum opinionem dici posse, quia opinio ex eo quod manifestetur non desinit esse talis; immo magis proprie id videtur habere: sicut haeresis exterius prolata maxime est proprie talis". Cfr. also Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarium Indicum*, Tomus III, Pars I, Sectio I, § I, n. 28, p. 7: "Verum quidem est Doctores multoties assertiones suas ita proponere, ut formidinem circa partes contrarias non insinuent, immo ut

The "suspicion from the roots" (*formido radicalis*), as Caramuel had mentioned, that the contrary side of the opinion may be true is present or may be present at any time<sup>48</sup>. After all, following Diego de Avendaño, this equivalence holds true: (i) actual fear of the con-

certas sibi, ob fundamenta, quibus eorum intellectus convictos profitentur. Sed nihilominus assertiones huiusmodi opiniones dici possunt, licet ex parte subiecti ita adhaereant, ut actualem formidinem excludant: id enim contra rationem opinionis non est, ut ex Doctoribus, quos citat, agnoscit praefatus scriptor, n. 4. Sicut ergo cum quis ita assentitur, ut propter intellectus sui dispositionem formido actualis absit, opinio proprie est, etsi exterius proferatur, opinionis proprietatem retinebit; ita etiam de aliorum sentiendiis sentiendum, ut scilicet proprie dici opiniones possint". Mateus Homem Leitão's strict (truly "tutorist") views on the connection between probability and truth in the so-called "probable opinion", which should therefore exclude "fear" of the possible truth of the contrary part, can be clearly read in Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarium Indicum*, Tomus III, Pars I, Sectio I, § I, n. 29, pp. 7-8: "Addit n. 6 idem esse opinionem et veram probabilitatem, et quasi synonyma, quomodo illis terminis utuntur Sanchez *Libro I Operis moralis Cap. 9 n. 2* in principio, ibi: *Quandocumque opinatur, et dicitur probabilis, seu opinio*. Sayrus in *Clavi regia Libro I Cap. 5 n. 2* ibi: *Alicuius opinionis, seu conscientia probabilis*. Et constat ex definitione, quae ita competit probabilitati, sicut et opinioni; et communis usus solet frequentius exprimere opinionem per terminum *probabiliter*, verbi gratia hoc fuisse, vel esse, quo significat assensum cum formidine. Unde quamvis de opinione quatenus est sententia Doctorum dici possit quod est probabilis, de vera tamen opinione dici nequit sine superfluitate et ineptitudine, nam, cum sit assensus noster, non potest non esse probabilis; vel sine falsitate, si dicatur opinio improbabilis; quae qualitates sentiendiis tantum Doctorum, sive eorum opinionibus, non nostrae et verae, quae hic attenditur, competere possunt, nisi probabilitas sumatur abusive. Sic ille discurret". Mateus Homem Leitão's thesis is rejected by our Jesuit master in Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarium Indicum*, Tomus III, Pars I, Sectio I, § I, n. 30, p. 8.

<sup>48</sup> Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarium Indicum*, Tomus III, Pars I, Sectio I, § I, n. 39, p. 9: "Quae quidem regula non videtur admittenda. Nam in primis unius Doctoris sententia, licet nihil mihi in contrarium occurrat, certitudinem non fundat, licet excludat actualem formidinem, iuxta dicta n. 23 pro quo Cardinalis Lugo *Disputatione 2 de Fide n. 90* inde probans cum assensu fidei stare posse assensum opinativum: assensus namque probabilis secundum suam substantiam non est formido formalis, sed radicalis, scilicet talis assensus, ex quo nasci posset formido, si non impediretur. Quam radicalem formidinem Illustrissimus Caramuel n. 83 vocat obiectivam: quam autem proprie non est serio discutiendum. Talis ergo est assensus, de quo loquimur, qui ex dispositione subiecti formidine caret, quia nihil, quod eam excitare possit, occurrit. Estque manifestum non posse habere certitudinem, quia non est unde eam habere queat: si enim aliunde, maxime ex auctoritate Doctoris docti et pii; at inde nequit, quia ipse Doctor eam non habet, et nemo, quod non habet, dare potest. Quod est verum, etiamsi Doctor talis evidentem reputet suam sententiam; quod contingere posse tradit P. Arriaga, *Tomo I in 1.2 Disputatione 24 n. F'*.

trary part and (ii) absence of conclusive reasons for the assented part equally imply a mere opinative judgment<sup>49</sup>. Truly, a system of justification of right conscience such as Avendaño's probabilism opens the door to the idea that one can be morally justified without acting according to what is morally true – there can be justifiable moral action because of right conscience *and* objective practical falsity. This means that in moral thought a *good conscience* can be achieved *without any knowledge of practical truth*. There are cases in which someone makes *bona fide* and with invincible ignorance an assent of verisimilitude, which is justifiable and able to warrant good conscience concerning the subject who has to decide (as, for example, a judge, who is in fact supposed to be a prudent person or able to judge and act *prudenter*, does on the basis of testimonies of idoneous persons, who nonetheless happen to be mistaken and, thus, enhance objective falsity<sup>50</sup>).

<sup>49</sup> Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarium Indicium*, Tomus III, Pars I, Sectio I, § I, n. 32, p. 8: "[...]. Contra quem in primis stat auctoritas Innocentii Tertii adducta *nu. 28*, dum enim opinionem unam aliis probabiliorē dicit, manifeste declarat posse dari contrarias opiniones, ut alias docet. Deinde arguo. Nam assensus probabilis tunc dari potest, cum motiva, non sunt ex se efficacia ad convincendum intellectum, quem tamen cum formidine adversae partis inclinant: Atqui stare potest, ut pro contraria patet, circa quam formido est, motiva occurrant, quae ad illam intellectum inclinant: ergo erunt duo contrarii assensus, non quidem respectu eiusdem, sed diversorum, aut eiusdem pro diversis statibus, respectu cuius stare simul potest assensus probabilitatis, utriusque, in quo contrarietas nulla est; et cum assensus probabilis, opinio sit, sicut duo dantur assensus probabiles contrarii, ita et contrariae pariter probabiles opiniones, de quarum probabilitate poterit doctus legitime pronuntiare".

<sup>50</sup> Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarium Indicium*, Tomus III, Pars I, Sectio I, § I, n. 34, p. 8: "Neque urget quod dicitur, ex duabus opinionibus unam esse falsam, si contrariae sint. Si enim id aliquando obstaret, fieret ex eo neque assensum circa aliquid cum fundamentis sufficientibus ad inclinandum intellectum, licet cum formidine oppositi, posse dici probabilem. Nam forte falsus est, etiamsi probabilis videatur. Quod cum dici nequeat, videat sic arguens quomodo id stare queat, ut quod falsum est, probabile esse possit. Id quod explicari potest applicatione doctrinae ex Aristotele et Divo Thoma propositae *n. 26*. Ita enim falsum proponi potest, ut prudenter quis possit circa illud firmare iudicium, aut assentiendo eidem, aut saltem iudicando posse iuxta id, quod apparet, prudenter operari. Si enim multoties ita res occurrunt, ut sine ulla formidine homines verum iudicent, quod re ipsa falsum est, quanto illud potius accidat respectu formidolosi assensus vel iudicii de ipsius verisimilitudine? Sic iudices duorum aut trium testificatione reum condemnant, nihil circa causam formidantes, cum tamen illi fidem tantum probabilem fundare queant, unde et accidere potest id esse falsum quod etiam cum iuramento affirmarunt, ut non pauca experimenta comprobarunt". Cfr.

At the theoretical level, the discussion that Avendaño will undertake with his peers in Peru and in Europe can be summarized in the form of two problems: (1) whether the (mere) probability he conceives could provide *practical certainty* enough for right conscience or to morally justified decisions; (2) whether the probability to be attached to a morally justified judgment is really bound to *formido*. It is at this point that an interpretation of Aristotle plays an important role: Avendaño wants to relate his view to Aristotle's theory of right practical judgments or prudential acts. So, although Aristotle is not frequently mentioned in Avendaño's Third Volume of the *Auctarium indicum*, his authority is discussed several times in the Fourth Volume, where in several Sessions Avendaño presents current debates on probabilism in European soil and systematically defends Caramuel's system against criticisms made by many different authors. By providing a revision of current literature on moral conscience and criticisms to Caramuel, Avendaño finds many critical views that focus on Aristotle's criterion for an excellent action, i.e. the prudent action, in which certainty enough for practical excellence is to be found.

#### 4. Avendaño's Probabilism and Aristotle's Account of Prudential Acts and Practical Knowledge

As a matter of fact, in some contexts Avendaño is challenged to agree or disagree with a set of propositions, which were supposed

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also Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarium Indicum*, Tomus III, Pars I, Sectio I, § I, n. 35, pp. 8-9: "Neque hoc est inventum Theologorum, ut sic liberum sit illis secundum opinionem, quae liberit, operari. Quod quidem non sine illorum iniuria dici potuit: quaerere inquam non legitimas vias ad suas et aliorum laxandas conscientias. Quod quidem si de uno aliquo, aut uno pluribus contingisset dici, tolerabile forsitan fuisset: at pronuntiatum dictum omnes tangit, et in iis sapientissimos et sanctissimos, ac Theologiae Principes. Non est ergo illorum inventum ob praedictum finem, sed ob manifestandam veritatem ex solidissimis deductam fundamentis et conscientiarum offencicula submovenda: cum negari nequeat varietatem opinionum ad id conducere non parum; quod erudite prosequitur Dom Caramuel in citato *Apologemate*, et alii. Unde et Pontifices multoties ea utuntur pro gravissimarum causarum decisione, ut vidimus n. 10, 28 et 33. Et iuxta eas responsa etiam in Iure Canonico extant, et praeter adducta egregium specimen occurrit in *Cap. Maiores de Baptismo*, ubi de infusione habituum supernaturalium in Baptismo parvulorum".

to invoke theoretical inconsistencies in any pure probabilistic system in moral philosophy<sup>51</sup> – partially, at least, such inconsistencies would be caused by a mistaken understanding of Aristotle together with the exegesis of him offered by Aquinas<sup>52</sup>. So, for example, Diego de Avendaño, endorsing Juan Caramuel's system, sees no need of censorship in a proposition that enunciates: "In every probable opinion, there is an invincible ignorance to be found; therefore, the following of such opinion is licit [i.e. it is licit to act according to the just probable opinion, or: probable opinion gives enough support to right conscience]"<sup>53</sup>. But a certain author (apparently Franciscus Bonae Spei<sup>54</sup>) raises a criticism<sup>55</sup> to this by affirming, on the one hand, that the licitude of action demands certainty or knowledge of what is *tutum*, and certainty *excludes* probability; on the other hand, a probable opinion *as such* offers to both contrary parts in dispute just persuasive reasons, and so it is actually grounded on doubt. A passage taken from Aristotle's *Topics* (*Topicorum* I 9) is quoted, where Aristotle would have affirmed that in the presence of doubt there is no room for right action. As a "merely" probable opinion brings *formido* with itself, it cannot possibly be the fundament of any certain assent in an honest – that is, morally good – action<sup>56</sup>.

<sup>51</sup> Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarii Indici Tomus Secundus, seu Thesauri Tomus Quartus*, Apud Iacobum Meursium, Antuerpia 1675, Pars V, Sectiones I – XXXVI, nn. 1-342, pp. 1-93.

<sup>52</sup> So, for example, Avendaño agrees with what is proposed in Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarii Indici Tomus Secundus, seu Thesauri Tomus Quartus*, Pars V, Sectio I, p. 2: "Circa propositionem istam: Ut actio quaequam sit peccaminosa oportet ut procedat ab homine, qui noscit et percipit, quid boni malive in ea sit: et antequam id videat, aut animum reflectat, actio neque bona est, neque mala".

<sup>53</sup> Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarii Indici Tomus Secundus, seu Thesauri Tomus Quartus*, Pars Quinta, Sectio II, p. 4: "De propositione ista: Ignorantia invincibilis in omni opinione probabili invenitur, unde licita est illius sequela".

<sup>54</sup> Franciscus Bonae Spei [François de la Bonne Espérance sive François Crispin] O.C.D. (1617–1677) was the author of *Apologema retortum, seu retorta Disputatio apologetica de ignorantia invincibili*, Louvain – Anvers 1665; as a matter of fact, he controversially wrote against Juan Caramuel, and Diego de Avendaño discusses Bonae Spei's work in this part of the *Auctarium Indicum*, Tomus IV.

<sup>55</sup> The four examples of debates on the interpretation of Aristotle's account of prudence that I selected, in the following paragraphs, are just a sample – there are many others in Avendaño's text. The presented sequence of examples also quite my own.

<sup>56</sup> Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarii Indici Tomus Secundus, seu Thesauri Tomus Quartus*, Pars V, Sectio II, n. 9, p. 4: "Habet illam

Avendaño's answer is short and offers an interpretation of the authority of Aristotle that favors Caramuel's system, as well as his own, on the relation between "probable" and "practical certainty". In probable opinion, there is doubt indeed, but to the point that it does not impede complete assertion. Aristotle, and his interpreter Aquinas, would both say that practical judgment is made with *formido*, which includes "doubt" within it. Whoever considers an opinion to be licit – for reasonably conferring it some weight – may also act according to it. Otherwise it would not be a *probable* opinion – that is, provable or supportable opinion – but the judgment would rather be just "speculativum". Moreover, from the fact that the judgment is, say, "just" probable, it does not follow that it is not licit. There is no contradiction between probability short of evidence and licitude. Truly, it would be a sin or an error to simply challenge an existing morally "certain" judgment, for by so doing the acting person would be exposing herself to danger. But there is no moral error when there is invincible ignorance or whenever it is impossible to fully explore the truth or falsity of sentences<sup>57</sup>.

Dom. Caramuel in Apologemate *nn.* 80. Et contra illam accerrime insurgit Auctor pag. 26. *nu.* 4. et seqq. pag. 82. *nu.* 3. et seqq. pag. 99. *nu.* 30. et seqq. Sed praesertim pag. 86. *nu.* 12. Et seqq., arguens unico fundamento scilicet quia ignorantia invincibilis fundat certitudinem moralem, quod ex ea operando non peccetur peccato novo et distincto ab eo, in quo est voluntaria: Atqui nulla opinio probabilis praestat talem certitudinem: Ergo etc. Maior est certa, et Minor probatur *Primo*, Quia opinio probabilis praecise pro utraque parte habet rationes suasibiles, et ita dubitationem fundat ex Aristotele I. *Topicor.* Cap. 9. *in principio*: ubi de Problematibus. {...}.

<sup>57</sup> Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarii Indici Tomus Secundus, seu Thesauri Tomus Quartus*, Pars V, Sectio II, n. 11, p. 4: "Sic ille arguit, cuius fundamento, ut probationibus obarmato, uno respondeamus verbo, in opinione quidem probabili dubium extare, sed tale ut absolutam non impediatur assertionem, ut est receptissima doctrina: de qua dictum *Parte I. nn.* 26. ex D. Thoma, et omnibus eum secutis sine controversia. Videndus *I. p. q. 79. arti. q. ad 4.* et *2.2. q. 1. arti. 4* et *q. 2. arti. 1.* et *Lib. I. Posteriorum lectione I.* qui et Aristotelis doctrinam amplexus. Stat ergo assensus cum formidine, quae dubium comitatur: et cum absolute quis censet licitam esse operationem, consequens est ut et iuxta tale iudicium operari queat, alias opinio probabilis non esset, et tale iudicium, esset inutile, ac semper pure speculativum. Neque sequitur ex eo quod etiam sit probabile non esse licitum, cum qui dicto modo operatur, probabiliter peccatorum, unde peccatorum certo, quia se exponit periculo, nam ut probatum a nobis *Parte I. et 4.* ubi contra nonnullos rigidos Scriptores egimus, cum iudicio dicto concurrat aliud moraliter certum de licita operatione cum sententia probabili. Cum ergo in eo peccatum non sit, recte stat ignorantiam invincibilem suffragari, quandoquidem impossibile est veritatem et falsitatem sententiarum explorare, et ita prudens eligitur modus iuxta illas operandi".



In another example, the same author – Franciscus Bonae Spei? – would criticize Juan Caramuel by resorting to Aristotle, in *Ethica Nicomachea* VI, where the Greek philosopher affirmed that prudence is the “active habit with reason”. But “true” or “real” opinion is not grounded on “true” or “real” reason, but on “fallible” reason, as Aristotle would have explained in *Magna Moralia* I, 33 and *Ethica Nicomachea* VI, 3. So, any opinative judgment would be outside of the sphere of prudence. Whoever assumes opinative judgments as a rule for acting neither acts prudently nor has moral virtue, since prudence is the general rule of (morally justifiable) human acts, and it has a “completing character” (*completiva*) towards every moral virtue. Again, this account of right action is supposed to have support in Aristotle’s *Ethica Nicomachea* VI, 5 and massive support in Thomas Aquinas’s authority<sup>58</sup>. In the first part of his answer,

<sup>58</sup> Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarii Indici Tomus Secundus, seu Thesauri Tomus Quartus, Pars V, Sectio III (Argumenta aliqua, quorum solutione asserta amplius lucidatur)*, n. 15, p. 5: “Arguit ergo apud Auctorem pag. 180. nu. 180 et seqq. Primo ex Aristotele 6 *Ethicor. Cap. 5.* ubi prudentiam, ait esse habitum cum ratione activum. Atqui opinio probabilis non fundatur in ratione vera, sed fallibili, et habet idem in 1. *magnor. moral. Cap. 33.* et 6. *Ethicor. Cap. 3.* Ergo iudicium opinativum est extra sphaeram prudentiae, et ita illud assumens pro regula suarum actionum, non agit prudenter, nec habet virtutem moralem, cum prudentia sit generalis regula humanorum actuum, et completiva omnium virtutum moralium, ut dicitur in 6. *Ethicor. dicto Cap. 5.* Et docet D. Thomas 2.2. q. 166. *arti. 2. ad 1. et in 3. dist. 9. q. 1. arti. 1 et dist. 27. q. 2. arti. 4. quaestiu. 2.* In another passage, Avendaño’s opponent affirms that in order to act with honesty and prudently someone needs the certainty of the act honesty. But, whoever relies on probable opinion falls short of that moral certainty. Therefore, whoever acts based upon probable opinion alone does not act righteously and prudently. The minor premise can be proved, for any operation that equally relates to truth and falsity, as it is the case of an act based upon the “probable” alone, is “uncertain”. Again, the critic of Caramuel invokes Aristotle’s *Magna moralia* I, 13. Avendaño answers to that by saying that he concedes the major premise, but he denies the minor premise. Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarii Indici Tomus Secundus, seu Thesauri Tomus Quartus, Pars V, Sectio V (Discursus alii adversantium penitus infirmati)*, n. 26, p. 9: “[...], ubi etiam D. Fagnanus ea exhibet suae sententiae fundamenta, [...]. Primo quia ad honeste et prudenter operandum necessarium est ut quis habeat certitudinem de honestate operationis. [...] Sed qui utitur opinione probabili non habet hanc moralem certitudinem: Ergo non agit recte et prudenter. Minor probatur, quia operatio incerta est, cum se habeat ad verum et falsum, ut inquit Aristoteles saepius allegatus in I. *Magnor. moral. Cap. 13, Existimatio est, qua in omnibus ferimur ancipiles, ea ne ita, an secus.* Respondeo concessa Maiori, negando Minorem, et ad probationem concedo opinionem incertam esse, sed praeter assensum circa illam dari alium de illius licita sequela, iam explicitum.

Diego de Avendaño shows agreement with the role of prudence in human action, but he does not agree with the view according to which any action lacking prudence would be simply illicit. After all, following the received sentence (from Aristotle?) there is no moral obligation of always acting according to the rules of prudence; for an individual can perform "indifferent acts" indeed. From the fact that sometimes one acts like that (i.e. following just a probable equipollent judgment) it does not follow that one lacks prudence, for one can exert it in respect to other things as well. Moreover, our Jesuit master accepts the major premise of the opponent's argument, i.e. "that prudence is an active habit with reason", but he denies the minor premise, i.e. "that a probable opinion is not grounded on true reason, but on fallible reason alone". After all, as long as one embraces probable opinion, one embraces a rule of prudent men, and this is to follow prudence — once again confirming Diego de Avendaño's stance that the idea of "probable" includes at very least offering reasons or bringing external authorities, even though opinion is not a rule to be taken as "certain" in the *ratio* of the object itself. Such a cognitive procedure does not simply amount to adopt a merely fallible rule for action<sup>59</sup>.

In a third example, the opponent who criticizes Caramuel's probabilistic system brings forth the thesis that (i) it is one thing to have enough certainty in moral issues based on several probable accounts, while (ii) having "probable certainty" is another issue altogether. After all, (i) in moral sphere having several probable

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Nihil certe novi discursus praefatus exhibet, unde et potuit omitti, nec repetitione inutili lectorum patientiam fatigare".

<sup>59</sup> Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarii Indici Tomus Secundus, seu Thesauri Tomus Quartus*, Pars V, Sectio III, n 15, p. 5: "Respondeo. Primo concedendum totum, praeter id, quod dicitur, de generali defectu prudentiae, quia iuxta receptam sententiam non est obligatio moralis operandi semper iuxta regulas prudentiae, cum possint dari actus indifferentes in individuo, et qui id negant, probabilitatem huius sententiae recognoscant. Ex eo autem quod aliquoties quispiam ita operetur, non sequitur esse virtute prudentiae destitutum, cum circa multa alia illam possit exercere, et eos ipsos actus indifferentes ex se, postea ad honestatis praerogativam elevare. Secundo respondeo concessa maiori negando Minorem, quia dum quis opinionem probabilem amplectitur, virorum prudentium dictamen amplectitur, quod iuxta regulas prudentiae est: minime enim ita operaretur, si manuductionem talem prudentiae non haberet, et licet opinio regula certa non sit in ratione obiecti; quod tamen illam sequi liceat, stante prudenti illo dictamine, regula fallibilis non est in ordine ad operationem. Cum sit dogma firmissimum eum imprudenter non agere, qui prudentium consilium amplexus operatur. [...]".

arguments and reasons or "probabilia" at disposal may suffice for generating certainty in the intellect and, as a consequence, producing honest action without the "fear" (*formido*) of the possible truth of the opposite part. (ii) But the same criticizer would say that probable certainty as sufficient criterion for moral action is just a false proposition, for there is no "probable certainty". It is indeed a contradiction to combine *certitudo* and *probabilis*. After all, certainty is the precise determination of the intellect into one direction or side of a contradiction, while (mere) probability is related indifferently and indeterminately to the right or the left, and hence probable judgment is never prudential judgment, for it does not have as its object the truth nor is it under the reason of the truth. It is bound to *formido*. Aristotle in *Ethica Nicomachea* I, 3 would endorse the view that certainty and probability are mutually destructive. The opponent – again, apparently Franciscus Bonae Spei – clearly focuses on the statistical success or acceptance of practical premises, i.e. he repeats the view that practical certainty follows what holds or is transmitted "in the most cases" (*ut in pluribus*) – even though this is not strict evidential knowledge or knowledge through demonstration. So, *ex probabilibus* – here understood as "in the most cases", as opposed to "equipollence" or equal probability – one can reach true opinion, and as a result practical certainty. Aristotle, thus, would be in search of a probable reason for supporting prudential judgments which excludes both the immutable character of scientific truths and *formido*. After all, practical knowledge is neither science nor opinion<sup>60</sup>.

<sup>60</sup> Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarii Indici Tomus Secundus, seu Thesauri Tomus Quartus, Pars V, Sectio IV (Probationes aliae propositae et enervatae, ex quibus lux amplior receptissimae positioni)*, § 20, p. 7: "[...] Ait ergo aliud esse in moralibus sufficere certitudinem ex probabilibus, et aliud sufficere certitudinem probabilem. Itaque tum dicimus, in moralibus sufficit certitudo, quae oritur et generatur in intellectu ex argumentis et rationibus probabilibus, propositio vera est, quia plures rationes probabiles sunt aptae natae generare in potentia rationali moralem certitudinem de honestate operationis absque ulla formidine partis oppositae [...]. Et haec est illa certitudo surgens ex probabilibus, quae in morali materia sufficit ad recte operandum. Cum vero dicimus, *In moralibus sufficit certitudo probabilis*, propositio est falsa, quia ista certitudo probabilis non datur; immo implicat contradictionem quod sit certitudo, et sit probabilis; quia certitudo est praecisa determinatio intellectus ad unum; probabilitas autem indeterminate, et indifferenter se habet ad rectum et obliquum, unde iudicium probabile non est prudentiae, cum non habeat, pro obiecto verum, et sub ratione veri, sed est obnoxium formidini etc. Unde certitudo et probabilitas se mutuo destruunt ex Aristotele 1.

In his brief reply to this objection, Avendaño confirms the Aristotelian view that, as far as moral matters are concerned, it suffices that what is true is revealed through a knowledge *ut in pluribus*. But, in fact, such Aristotelian point of view reinforces a thesis of probabilism, namely that in practical judgments one does not have any support on "total" and "infallible" certainty – that falsity or simply the contrary side of a given opinion holds true, remains a possibility. After all, who can deny that a certainty generated "ex probabilibus" suffices to a determination – a "decision" – about the cause or causes of a given effect? Still, the certainty thus generated does not change the fact that the matter remains in a state of probability. In fact, one testimony in the court is usually insufficient, it is rather necessary to have more accounts; and yet, a plural testimony remains only probable, for it may be false<sup>61</sup>.

In a fourth – and here last example –, following the notion that several authorities with a common opinion on a practical issue,

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*Ethicor. Cap. 3.* dum ait in morali materia satis esse ut verum ostendatur pingui quadam Minerva, et adumbrata figuracione, atque de iis, quae plerumque eveniunt, ratiocinari, et ex iis similia etiam concludere. Quibus verbis tantum intendit ut in materia morum non requirantur probationes per rei evidentiam, seu demonstrationem, sed satis est verum ostendere per coniecturas probabiles, arguendo etiam a communiter accidentibus, et a similibus, quod et se fateri affirmat. Verumtamen oportet secundum Aristotelem, ut his coniecturis et argumentis probabilibus ostendatur verum, et sic non sufficit ut ostendatur probabile, quod longe distat. Quare qui probabilibus rationibus ostendit opinionem probabilem, non satis facit menti Aristotelis requirentis ut ostendatur verum, excludens scilicet formidinem, et ita obiectum virtutum intellectualium, quod est immutabile, unde et prudentiam ab opinione distinxit".

<sup>61</sup> Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarii Indici Tomus Secundus, seu Thesauri Tomus Quartus*, Pars V, Sectio IV, n. 23, p. 8: "Et in primis quod ad Aristotelem attinet, pro opposita non obscure sententia facit, cum dicat in moralibus satis esse ut verum, pingui Minerva, adumbrata figuracione, ex frequenter evenientibus, et similibus, ostendatur. Haec enim manifeste indicant non esse necessariam omnimodam et infallibilem certitudinem, qualis ab Auctore exigitur: sicut et verum immutabile; hoc enim non pingui Minerva verum est, ut liquet. Quod neque in sic arguentis sententia stare potest, cum accidere queat esse falsum id, quod ut certum quis, dum operatur, amplectitur. Deinde D. Antonini doctrina cum Aristotelicae consonet, sinistre ad contrarium sensum inflectitur. Iam quod certitudo ex probabilibus genita ad caussarum decisionem sufficiat quis negat? Illud tamen negari merito debet, certitudinem scilicet talem extrahere rem iudicio subiectam ab statu probabilitatis. Unus quidem testis non satis ad iudicium probabile de veritate, si non sit sublimi aliqua praerogativa qualificatus, [...]. Sed in ordine ad iudiciale forum duo sunt satis [...]. Atqui id quod illi affirmant, tantum est probabile, quia falsum esse potest, [...]"

similarly to several and similar cases of prior and posterior states of affairs or causes and effects in nature, work as a criterion of certain knowledge *ut in pluribus*, thinkers such as Franciscus Bonae Spei and Prospero Fagnani raise the criticism against Caramuel, holding that an opinion, in order to become probable as far as the matter it deals with is concerned, needs more than the authority of one Doctor, no matter how wise, probe and pious he is. After all, never has there been an idea so absurd and vain that it found no pious and probe Doctor in favor of it. Prospero Fagnani mentions Aristotle in *Topicorum* I, 1, where it is affirmed that it is probable whatever seems to be grounded on the views of all wise men and the most renowned men (in the plural)<sup>62</sup>. But, as an answer to the first point, Avendaño denies that whoever follows the sentence of one Doctor alone is then lead into it only *through authority*; he usually is or can be led into it also *through reason*, for the Doctor can only persuade to the point of producing a subjective probability, with an objective basis, if he has a good grounding for the thing in question. Now, regarding the passage by Aristotle, Avendaño affirms that Aristotle is not an opponent, but rather a promoter of the idea that the view by one wise man is or can be probable. After all the meaning of the passage is not that it is necessary that *many* wise men agree regarding one sentence, but that to every truly wise man a probable view must be a prerogative, and so it will be for future wise persons, too. A probable view, therefore, can be taken as a universal proposition, whose "truth" will be, in the future, in such singular instances of wise persons, truly confirmed. Neither it is the case that probity and wisdom of one person grows from the excellence

<sup>62</sup> Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarii Indici Tomus Secundus, seu Thesauri Tomus Quartus, Pars V, Sectio VIII (De unius Doctoris auctoritate pro concilianda sententiae alicui probabilitate)*, n. 59, p. 17: "[...] Circa quod Auctor [...] statuit *Primo* ad opinionem probabilem, in materia, de qua agimus, non sufficere praecise auctoritatem unius Doctoris, etiam docti, pii, et probi. Et probat in primis, quia alioqui, cum nihil sit ita fatuum, absurdum, et sceleratum, quod non habeat auctorem et patronum alias pium, doctum, et probum, nihil erit ita fatuum, absurdum, et exorbitans, quod non liceat sequi. Deinde, auctoritas praecisa ratione est fatua et absurda. Atqui neque illud, neque istum sequi licet, ut per se est manifestum. Ergo. Confirmat Fagnani exaggerationibus, de quibus nuper, ex eo D. Caramuelem perstringens, adductis pro se, quos iam dedimus n. 52. Item ex eodem addicente Aristotelis auctoritatem ex 1 *Topicor. Cap. 1*. Ubi ait possibilia esse, quae videntur omnibus, aut sapientibus, et his maxime notis, quod Alexandri et Boethii expositione corroborat. [...]".

of many; nor it is so that the excellence of many is needed to give one wise man faith. Avendaño adds, still, that the words of Aristotle are not repeated properly. After all, after "omnibus" in the text we would have "aut sapientibus". Aristotle *contrasts* "of all" and "of the wise". Thus, it follows that the probability of a given opinion can be perceived, even if the wise are not many<sup>63</sup>.

This exercise in discussing critical views and interpretations of passages in *Topica*, *Ethica Nicomachea* and *Magna Moralia* was important so Avendaño could find in the authority of Aristotle a kind of support for his probabilistic system in practical philosophy, both concerning (A) the nature of probable opinion as a kind of mental act and (B) the sufficiency of probable opinion to bestow conscience and moral action with some degree of practical certainty which is short of evidence, but is enough to overcome doubt – thus, enough to rectitude. Avendaño does not affirm that Aristotle's position on prudential acts is the same as the probabilistic view about moral action. Rather, what he attempts to do is to show that probabilism as a moral system is coherent with Aristotle's account of prudential acts: they share a common point in probability and reason. Granted that a prudential act for Aristotle is both reasonable and not strictly evident, the probabilist thinker would happily insist that is has, for objective reasons, the presence of reason (provability) and *formido* – just like the probable opinion. Moreover, we believe that, for Diego de Avendaño, the following four theses about probabilism

<sup>63</sup> Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Auctarii Indici Tomus Secundus, seu Thesauri Tomus Quartus*, Pars Quinta, Sectio VIII, nn. 62-63, p. 18: "[62] Omnia autem praedicta facili responsione convelli. Ad Primum enim dici potest considerata Doctoris qualitate neutiquam praesumendum esse, stultam, absurdam, et sceleratam illius esse sententiam; quod quidem sine ipsius nequit iniuria proferri, vel etiam cogitari. Et licet verum haberi possit id, quod additur de auctoritate praecisa, negandum tamen est suppositum, quod scilicet cum quia sententiam unius Doctoris amplectitur, sola auctoritate ducatur, sed etiam ratione, dum sibi persuadet Doctorem tantum non posse non pro illa solidum habere fundamentum. [63] Ad Secundum. Aristotelem non esse contrarium, sed fautorem, dum ait, *Aut sapientibus*. Neque enim est sensus ut necessarium sit plures sapientes in unam sententiam convenire, sed quod cuicumque vere tali ea sit praerogativa, supponendo plures futuros sapientes: est enim propositio universalis, cuius veritas in singulis vere talibus comprobatur. Neque unius sapientia, probitas, et aliae qualitates ex aliorum excellentia crescunt, unde neque illa necessaria est, ut eidem fides adhibeatur. Addo Aristotelis verba non integre adduci: post illud enim *Omnibus* habet, *Aut pluribus*: his autem contraponit sapientes: Ergo ex his probabilitas desumi potest, etiam si non plures illi, ut expendi *Parte 1. num. 634*".

have support in Aristotelian authorities, following the sequence of the above mentioned four examples: (1) Licit moral acts are or can be in its constitution "probable" and "with doubt"; (2) prudential acts do not eliminate "opinative judgments" or an only fallible certainty, short of evidence and within the scope of "formido" or "fear" / "suspicion"; (3) there is some "certainty" or objective judicative force enough for "good conscience" in mere "probable opinion", and even certainty *ut in pluribus* is fallible and just probable, after all; (4) probability can be found just in "provability" by intrinsic and extrinsic reasons, even when it is not only or mainly supported "in most of the cases" or by most authorities.

### Concluding Remarks: Probabilism and Law in a Multicultural Society

As we have said in earlier sections, Avendaño does not explicitly discuss doctrines of Aristotle's *Politica* – his *Politica* is Solórzano y Pereira's *Politica indiarum*. But his probabilistic view in moral philosophy has played a direct and obvious role in his richly diverse exercises of juridical interpretation and determination of practical judgments reported in the volumes of the *Auctarium indicum*. Avendaño did not offer a theoretical treatment of law – in a "*De legibus* treatise" of sorts –, but rather provided accounts of preferable positive legislation in Peruvian 17<sup>th</sup> century multicultural society. At this point, it must be clear that the Jesuit master combines an account of probable opinion regarding right conscience with the view that the Aristotelian virtue of prudence is coherent with (just) probable opinion in matters of (moral) acts, and a similar doctrinal affinity should be seen also regarding the interpretation of principles of law and determinations of positive laws in human affairs.

Historians agree that the 17<sup>th</sup> century was a period of stabilization in Peruvian viceregal society, where the main challenge was to create adequate means for long term coexistence in a quite multicultural society. The presence of Spanish settlers and institutional apparatus provoked, of course, a huge impact in social, political, economical, spatial, and religious forms of life. It was absolutely central to develop moral and juridical procedures that would allow mutual understanding in a heterogenous society – and it was wi-

thin a probabilistic framework in practical philosophy that such an understanding was pursued<sup>64</sup>. The room for doubt in moral and juridical sphere as the place of offering a just *probable* view because of the absence of certainty concerning different contrary opinative judgments or prescriptions seems to be a valid framework to understand Avendaño's *exercises of legislation and juridical interpretation*, especially where the "Indios" are concerned<sup>65</sup>. In bringing moral judgments and legal determinations to the realm of opinions, different subjectivities – either individual or collective – begin to play a prominent role in moral and legal thought. If we keep in mind our previous definition of probabilism, we see *also in law* the importance of a rule containing "intrinsic properties" (immanent reasons in the object or moral content as such) and "extrinsic properties" (defensible external authorities and successful cases in favor of it). Avendaño will use this structure of law as a possibility for collectivities such as indigenous groups and societies to express towards the prescribed form of law a so-called "reflex judgment", i.e. a subjective or intersubjective approximation of their conscience to a given norm, unveiling a space for discussing a probable opinion in their favor<sup>66</sup> or in favor of their well established traditions and moral sensitivities – something that must be considered before any official or definite promulgation of a law.

So, for example, in the First Volume of his *Thesaurus indicus*, Diego de Avendaño widely practices such a probabilistic reasoning in legal interpretation – in the most interesting cases, he is explicitly playing the role of someone who morally-legally advises the Spanish Catholic Kings, who are responsible for protecting the Indios – *servi liberi* of the empire – from legal offenses (*iniuria*) and have the duty of finding for the relevant cases the right conscience or moral decision: (1) in the case of producing and selling of the coca leaf, one must directly follow the prescription that "The production of something must be prohibited when it is destined to a bad usage", but, while regarding the minor premise that "The production of coca leaf is destined to a bad usage (i.e. some traditional offerings to Andean or Incan divine entities)", one must also consider the reflex judgment "The production of coca leaf is a tradi-

<sup>64</sup> Cfr. also P. Macera, "Probabilismo en el Perú durante el siglo XVIII", *La Nueva Crónica* (Lima) (1963) 8-31.

<sup>65</sup> Cfr. Victor Hugo Martel Paredes, *op. cit.*, pp. 53-55.

<sup>66</sup> *Ibid.*, p. 56. Cfr. also the literature mentioned in footnotes 2, 3 and 33.



tional activity for the sake of a traditional medicinal usage, and its prohibition would generate hostilities"<sup>67</sup>. Such a "reflex judgment" as a presumption of costume, under the framework of a probable opinion, occurs immediately or can immediately be presumed in cases of invincible ignorance and "good faith", i.e. in cases in which there is no knowledge of an existing law, and proceeding in such a manner does not constitute illicit act. Such a social background for legislation, combined with a probabilistic system, would theoretically allow for normativity in Latin America to concede a larger room for cultural phenomena, where opinions are then transformed into positive laws – or at least help forming just sentences – according to the conveniences and inconveniences of situations<sup>68</sup>.

Truly, the same structure of direct sentences of law and reflex probable judgments can be seen in other legal situations described by Avendaño in the First Volume of the *Thesaurus indicus*: (2) "It is a benefit to the empire that everyone of its subjects works and pays tributes to the crown", but together with the practical judgment that "The Indios should work and pay tributes to the crown" one must consider the reflex judgment that "The Indios are probably unfit to some kinds of work such as mining work and should not be forced, but rather excused of it", since their population has severely decreased and because in mining work they are put outside of their natural milieu<sup>69</sup>. (3) "It is correct that political subjects have a duty to work and pay taxes to those who are their protectors and for the good of public institutions which are supposed to provide public utilities", but together with the practical judgments that "The Indios should be [conveniently] forced to work", including here "forced to work in the mines", one must consider the reflex judgment that "The Indios should be [conveniently] forced to work, but in case they

<sup>67</sup> The premises in quotation marks are paraphrases of my own, which should be loyal to the contents in Didacus de Avendaño [Diego de Avendaño] S.J., *Thesaurus indicus, seu generalis instructor pro regimine conscientiae, in iis quae ad INDIAS spectant. Tomus Primus*, Apud Iacobum Meursium, Antuerpia 1668, Titulus I, Cap. XIV, § IV (*Assertio septima circa cocam, et notanda quaedam circa illam*), nn. 138-148, pp. 31-33. Cfr. Victor Hugo Martel Paredes, op. cit., p. 190.

<sup>68</sup> Cfr. Victor Hugo Martel Paredes, op. cit., pp. 60-62.

<sup>69</sup> The premises in quotation marks are paraphrases of my own, which should be loyal to the contents in Didacus de Avendaño [Diego de Avendaño] S.J., *Thesaurus indicus*, Tomus Primus, Titulus I, Cap. XII (*Minerisne effodiendis possint Indi, talem non meriti poenam, sine labe culpae lethalis addici*), nn. 109-118, pp. 24-27. Cfr. also Victor Hugo Martel Paredes, op. cit., pp. 185-188.

work in the mines they should not be obliged to pay taxes", after all that kind of work is brutally hard and severely abbreviates their life expectation<sup>70</sup>. Many other interesting examples could be given about several other classes of labours and the relationship between their incomes and the duty of paying taxes<sup>71</sup>, as well as about the work of the Indios in textile workshops, specifically the taxation on communities, persons, and women<sup>72</sup>, etc. As we have seen, the "reflex judgment" necessary to fix the promulgation of any law – especially of those that appear doubtful or insufficiently promulgated and, therefore, should rather be taken as "projects of law" –, in Diego de Avendaño's legal hermeneutics, is the moment of probable opinion and freedom: it considers as intrinsic properties the will of the indigenous people, the "provability" of such reactive judgment based on costume, good faith and reason. This highlights a legitimate resistance towards the new state of affairs or new legal system in face of the practical impossibility of its observance. Under the framework of probable opinion to moral and legal determination, there is a possibility of reaching collective subjective resolutions, by means of convenience, and again this is not an objective epistemic protection of error, but a "certainty" and "security" strong enough to conduct persons to prudential action or to prudential laws.

A more thorough research on Avendaño's specific views on further Aristotelian themes in law and politics remains yet to be done, including debates on the nature of law, the relationship between law and justice and the hypothesis that his exercises of legal interpretation and positive legislation has some connection, given the fragility of the certainty provided by laws, to an account of equity as a means to approximate the generality of rules and the justice due to particular and concrete human affairs. As far as Avendaño's

<sup>70</sup> The premises in quotation marks are paraphrases of my own, which should be loyal to the contents in Didacus de Avendaño [Diego de Avendaño] S.J., *Thesaurus indicus*, Tomus Primus, Titulus I, Cap. XII, nn. 109-118, pp. 24-27; Cap. XVII (*Reges Catholici ut possint tributa Indis imponere*), nn. 170-180, pp. 37-39. Cfr. also Victor Hugo Martel Paredes, op. cit., pp. 191-196.

<sup>71</sup> Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Thesaurus indicus*, Tomus Primus, Titulus I, Cap. XVII, nn. 170-180, pp. 37-39. Cfr. also Victor Hugo Martel Paredes, op. cit., pp. 191-203.

<sup>72</sup> Cfr. Didacus de Avendaño [Diego de Avendaño] S.J., *Thesaurus indicus*, Tomus Primus, Titulus I, Cap. XIV, §§ I-III, V, nn. 125-137, 149-152, pp. 28-31, 33-34. Cfr. also Victor Hugo Martel Paredes, op. cit., pp. 88-189, 191-203.

— quite heterodox! — understanding of prudence is concerned, we are once again faced with an attempt to show that just as probabilistic views on moral conscience should be coherent with Aristotle's prudential account of human acts, so a probabilistic interpretation of laws should be coherence with Aristotle's views on them, too<sup>73</sup>, and, above all, with Aristotle's view on the "positive laws", that is, the "laws of the city". After all, these exist, as just means to promoting virtues and, thus, the good of society<sup>74</sup>, only through the political art. i.e. through wise legislation and promulgation by a political authority<sup>75</sup>. And laws are essentially common or general<sup>76</sup>, covering entire "classes of actions" and, thus, only the majority of cases, which means that individual actions are judged according to laws that have general prescriptive content<sup>77</sup>. Further research on Diego de Avendaño's account of law and equity might reveal, it seems to us, important appropriations of Aristotelian discourses to what would certainly be a non-Aristotelian purpose: an interpretation of laws and a legislation practice that tends not to jurisprudence, but rather to casuistry.

### Resumen

El artículo muestra la existencia de vínculos, en el pensamiento de Diego de Avendaño S.J. (1594-1688), entre el probabilismo y el tratamiento aristotélico del conocimiento práctico y de la prudencia. El pensamiento probabilista de Avendaño puede ser descripto solo mediante el análisis de largos pasajes tomados de los seis monumentales volúmenes de su *Auctarium indicum* (Amberes, 1668-1686). Aunque en sentido estricto las ideas políticas de Avendaño no son las de un pensador aristotélico, intenta apoyarse en Aristóteles para sostener su tesis según la cual la certeza práctica suficiente para la recta consciencia moral puede ser la certeza

<sup>73</sup> Cfr., for example, Aristotle, *Politica* III 16, 1287a18; VII 14, 1326a29-. Cfr. also W. Von Leyden, "Aristotle on the Concept of Law", *Philosophy*, 42 (1967) 1-19; D. N. Schroeder, "Aristotle on Law", *Polis*, 4 (1981) 17-31; R. Kraut, *Aristotle. Political Philosophy*, Oxford University Press, Oxford 2002, pp. 105-132, 451-457.

<sup>74</sup> Aristotle, *Politica* III 9, 1280b12; *Ethica Nicomachea* V 3, 1129b19-24; V 5, 1130b24-.

<sup>75</sup> Aristotle, *Ethica Nicomachea* V 3, 1129b19-24; V 5, 1130b24-; *Rhetorica* I 1, 1354a31-35.

<sup>76</sup> Aristotle, *Politica* II 8, 1269a11; III, 11, 1282b4-6; III 15, 1286a10-.

<sup>77</sup> Aristotle, *Politica* III 11, 1282b4-6; III 16, 1287b22-; *Ethica Nicomachea* V 14, 1137b14-25; V 14, 1137b26-29.

meramente probable —en fin de cuentas, la certeza probable es todo lo que la prudencia puede ofrecer al agente moral (y político)—. Avendaño considera que su probabilismo es coherente con un tratamiento prudencial del conocimiento práctico, y eso, además, es algo que Avendaño relaciona con la esfera de la ley. Uno de los resultados de esa conexión entre una doctrina probabilista-prudencial de la rectitud moral y la exigencia de justicia legal fue la creación, no de una tradición de jurisprudencia en sentencias jurídicas, sino de una hermenéutica legal orientada por la comunidad y por los casos individuales: en otras palabras, la muy criticada casuística legal de los jesuitas.