CHAPTER 2

Poor and Insolvent: Debtor Relief in Alvarez de Velasco's *De privilegiis pauperum* (1630)

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1 Introduction

At the margins of societies modern and past, the plight of the poor is determined in no small measure by their inability to pay back debts. When debt piles up and insolvency lingers, the danger of marginalization becomes real. It is a sad truism that over-indebtedness, poverty and exclusion go hand in hand. In 16th century Spain, for instance, a conflict emerged over the treatment of foreign mendicants, false pilgrims and vagabonds, a disproportionate amount of whom had been chased away from their homelands because of their inability to meet the demands of their creditors.[1] At the same time, the Spanish nobility was increasingly plagued by high burdens of debt, fears of status degradation frequently turning into grim reality.[2] Under these circumstances, the treatment of poor and insolvent debtors became a matter of imminent concern, especially for the Spanish monarchs. They thought of themselves not only as the defenders of the Catholic faith, with its emphasis on helping the poor, but also as successors to the late Roman emperors, who considered it their duty to protect poor and miserable persons.[3]

This contribution will examine Gabriel Alvarez de Velasco's *De privilegiis pauperum et miserabilium personarum* (Madrid: 1630–1636), particularly in light of the attention it pays to the privileges of poor debtors.[4] While little is

1 Abelardo del Vigo Gutiérrez, *Economía y ética en el siglo XVI*, Biblioteca de Autores Cristianos 659 (Madrid: 2006), 721–880, and Annabel S. Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (Princeton: 2011), 11–36.

2 Wolfgang Forster, *Konkurs als Verfahren. Francisco Salgado de Somoza in der Geschichte des Insolvenzrechts* (Cologne: 2009), 256–93.

3 Laurent Waelkens, *Amne Adverso. Roman Legal Heritage in European Culture* (Leuven: 2015), 241.

4 Gabriel Alvarez de Velasco, *De privilegiis pauperum et miserabilium personarum ad legem unicam, Cod. Quando imperator inter pupillos et viduas, aliasque miserabiles personas cognoscat* (Lyon: 1663, *editio secunda*), pars 2, q. 12, nr. 9, 145. Throughout this article, the popular 1663 edition, available online at the Bayerische Staatsbibliothek, has been used. From a comparison of random passages in the parts relevant for this study, there are no apparent differences

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known about its author, *De privilegiis pauperum* epitomizes the early modern literature on the privileges of poor and miserable persons.[5] Although presenting itself as a commentary on the *locus classicus* for princes' duty to protect needy and miserable persons in the third book of Emperor Justinian's Code (C. 3.14), it offers a vast and autonomous treatment of the special legal regime applicable to the poor and miserable, including poor debtors. As such, it provides a fascinating window into early modern legal debates on rights at the margins of society, even if, as will be shown below, Alvarez de Velasco's definition of poverty was flexible enough also to include members of high society.

From the title page of his work, we know that Gabriel Alvarez de Velasco was a judge in Santa Fe de Bogota at the *Real Audiencia del Nuevo Reino de Granada*, the highest tribunal in the Spanish Viceroyalty of New Granada.[6] When his wife Francisca de Zorrilla died in 1649, Gabriel Alvarez de Velasco resigned from his judicial duties to devote the remainder of his life to writing and works of charity.[7] In a panegyrical poem, he was remembered by his son Francisco as a devout, charitable and learned man, assisting the poor on a daily basis.[8] In 1661, Alvarez de Velasco published *De la ejemplar vida y muerte dichosa de Francisca de Zorrilla*, a hagiographical biography of his wife. The next year saw the publication, in Lyon, of two legal works, namely *Epitome de legis humanae mundique fictione*, about the discrepancy between divine truth and the contrived nature of human legal systems, and *Iudex perfectus*, a treatise on judicial ethics. The latter work can be considered a "mirror-for-judges" about the moral duties and professional qualities of the model judge.[9] Imbued with the legal culture of the *ius commune*, Alvarez de Velasco considers the judge to be the living soul of justice (*iustitia animata*), a dispenser of equity and the protector of the poor by virtue of his office. There is a thematic connection,

between the second edition and the original Madrid 1630–1636 edition, which can be consulted at the HathiTrust Digital Library.

5 Thomas Duve, *Sonderrecht in der Frühen Neuzeit. Das frühneuzeitliche* 'ius singulare' *untersucht anhand der* 'privilegia miserabilium personarum', 'senum' *und* 'indorum' *in Alter und Neuer Welt* (Frankfort on Main: 2008).

6 José Pascual Buxó, *El poeta colombiano enamorado de Sor Juana* (Bogotá: 1999), 33.

7 Buxó, *El poeta colombiano enamorado de Sor Juana*, 34.

8 In this regard, it would be interesting to verify the content of the last will which he drafted in 1658. It has been conserved at the Archivo General de la Nación of Colombia according to Mauricio Novoa, *The Protectors of Indians in the Royal Audience of Lima* (Leiden-Boston: 2016), 8, fn. 25.

9 Carlos Garriga, "*Iudex perfectus*: Ordre traditionnel et justice de juges dans l'Europe du *ius commune* (Couronne de Castille, XV^{e}–XVIII^{e} siècle)," in *Valeurs, représentations, symboles*, eds. DIKÈ – Groupe de recherche sur les cultures juridiques en Europe, Histoire des justices en Europe 1 (Toulouse: 2016), 79–99 (85).

then, between Alvarez de Velasco's two major legal writings. In 1663, a second and widely circulated edition of his treatise *De privilegiis pauperum* appeared in Lyon.

Alvarez de Velasco was, of course, not the first jurist to write a treatise on the privileges of the poor. Immediate predecessors include Cornelio Benincasa, author of a work *De paupertate ac ejus privilegiis* (Perugia: 1562), and Lucas Matthaeus de Apicella, a jurist from Naples who wrote the *Tutamen pauperum* (Bove: 1621). Benincasa's work *De paupertate* contains many traditional[10] views on poverty that were later also supported by Alvarez de Velasco, such as the idea that the legal category of "poor people" also includes noblemen who can no longer afford to live a life in accordance with their status, e.g. because they can no longer afford to have servants.[11] Alvarez de Velasco also follows Benincasa's opinion that, by analogy, privileges for pious causes (*piae causae*) are applicable to the poor. The interest of the *Tutamen pauperum* by Apicella lies in the fact that it specifically deals with debt relief for the poor. It especially discusses the practice of royal letters granting grace periods and the procedure of *cessio bonorum*, allowing the insolvent debtor to surrender his goods instead of being imprisoned. The *Tutamen pauperum* also includes a commentary on an ordinance about the office of judges, again revealing the close connection between the office of the judge and the protection of weaker parties.

For reasons of space, this chapter will focus exclusively on the protection of poor debtors in Gabriel Alvarez de Velasco's treatise on the privileges of the poor. Hence, Benincasa's work *De paupertate* and Apicella's *Tutamen pauperum* will not be considered. Neither will André Tiraqueau's (1488–1558) *De priviligiis piae causae*, even if the French jurist's treatise on pious causes clearly inspired Alvarez de Velasco. In the same way, this chapter will not enter into a detailed exposition of the scholastics' debates on poverty and debt, although scholastic discussions on debt relief for poor debtors had a profound impact on Alvarez de Velasco.[12] In fact, his *De privilegiis pauperum* abounds with references to works by early modern scholastic theologians. Fernão Rebello's (1546–1608) *Opus de obligationibus justitiae, religionis et charitatis* and Leonardus Lessius's (1554–1623) *De justitia et jure*, in particular, are frequently cited.

10 See Jonathan Robinson's paper in this volume, ch. 1.

11 Christopher F. Black, *Italian Confraternities in the Sixteenth Century* (Cambridge: 1989), 148–49.

12 For an analysis of the scholastic debate on debt and poverty, see Wim Decock, "Law, Religion and Debt Relief: Balancing Over the 'Abyss of Despair' in Early Modern Canon Law and Theology," *American Journal of Legal History* (forthcoming); also published in French as "Droit, religion et remise de dette. Perspectives en droit natural catholique (XVI–XVII^{e} siècles)," *Revue Historique de Droit Français et Étranger* 94 (2016): 393–412.

These Jesuit moral theologians are even expressly mentioned in the preface to *De privilegiis pauperum*.

2 Defining the Poor and Their Privileges

A mere glance at the table of contents of Alvarez de Velasco's *De privilegiis pauperum* reveals that he advocates a wide interpretation of notions such as "the poor" or "miserable persons." The first part of *De privilegiis pauperum* opens with a discussion of more than thirty pages on the definition of "poverty" and "the poor." In the second part of his treatise, Alvarez de Velasco not only raises the more conventional question whether pupils and widows deserve to be called miserable persons, as they were in Justinian's Code (C. 3.14), but also whether soldiers, merchants and students belong to the same category.[13] This extensive interpretation of the traditional juridical category of "miserable persons" is symptomatic of the so-called "particularist" character of the legal order in the *ancien régime*.[14] It is also the outcome of a power struggle between ecclesiastical and lay tribunals, each trying to expand their jurisdiction by claiming that they had inherited the Roman emperors' office of protecting miserable persons.[15] Moreover, the flexible meaning of notions such as "miserable persons" and "the poor," reflects a legal order in which judges, by virtue of their office (*officium judicis*), were expected to take advantage of their discretionary power (*arbitrium*) to mediate between abstract legal principles and individual circumstances so as to contribute to the concrete implementation

13 As far as students are concerned, they were traditionally considered to be "miserable persons," since being successful at the university was supposed to require relentless labor and efforts, even to the point of damaging students' mental and physical health. Moreover, students were thought to suffer like exiles, obliged as they were to be away from their homes for a long time, and without the love and support of their parents and family. Alvarez de Velasco, however, noted that the actual hardships experienced by most students should not be exaggerated, and neither should the risk of damage to their health. Therefore, he did not grant them the status of "miserable persons" unreservedly; *De privilegiis pauperum*, pars 2, q. 12, nr. 9, 145.

14 Heinz Mohnhaupt, "Die Unendlichkeit des Privilegienbegriffs," in *Das Privileg im europäischen Vergleich*, eds. Barbara Dölemeyer and Heinz Mohnhaupt (Frankfort on Main: 1997), vol. 1, 1–12; Thomas Duve, "El 'privilegio' en el antiguo régimen y en las Indias. Algunas notaciones sobre su marco teórico legal y la práctica jurídica," in *Cuerpo político y pluralidad de derechos. Los privilegios de las corporaciones novohispanas*, coord. Beatriz Rojas (Mexico: 2007), 29–43; Duve, *Sonderrecht in der Frühen Neuzeit*, 249–74.

15 Richard H. Helmholz, *The Spirit of Classical Canon Law* (Athens, Georgia: 1996), 116–44; Duve, *Sonderrecht in der Frühen Neuzeit*, 43–136.

of equity (*aequitas*).[16] This noble task of rendering each person his due, in a society where inequality rather than non-discrimination was thought of as the founding principle of justice, presupposed a flexibility in the interpretation and application of legal categories that is alien to the modern mindset.[17]

Against this background, it is only natural to find that Alvarez de Velasco argues that poverty is a relative rather than an absolute concept and potentially included even noblemen. Alvarez de Velasco, in fact, proposes defining poverty as "the lack of money depending on the quality of the person or the affair (*carentia pecuniae secundum personae vel etiam negotii qualitatem*)."[18] While money is broadly understood to include all kinds of financial means, the extensive interpretation given to "depending on the quality of the person" is even more salient. "As a result of the condition of persons," Alvarez de Velasco explains,[19] "the same amount of money can mean poverty for one person and wealth for another." This truth is illustrated through the difference in qualifying a nobleman and a peasant as rich, for which Alvarez de Velasco draws on evidence from both literary sources from ancient Rome and the legal authorities of the *ius commune*. A peasant or anyone from the lower classes can be considered rich if he receives only a hundred *scuta* – a kind of rent, while a nobleman will still be deemed poor even if he receives a thousand such rents. Differences in status and class were taken for granted in Alvarez de Velasco's works, just as they were in real life in the *ancien régime*. The relative nature of the concept of poverty reflects that reality, in which the expenses that upper-class citizens incur largely exceed those of the lower and middle classes.[20] Noblemen, Alvarez de Velasco recalls, are under an obligation to wear more expensive clothes, indulge in more sumptuous meals, and ride horses, while

16 Massimo Meccarelli, "*Arbitrium iudicis* und *officialis* im *ius commune*. Ein Instrument für die Vermittlung zwischen einem allgemeinen Recht und der örtlichen Realität (XIV.–XVI. Jahrhundert)," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung* 115 (1998): 553–65; Duve, *Sonderrecht in der Frühen Neuzeit*, 255–58.

17 Heinz Mohnhaupt, "Untersuchungen zum Verhältnis Privileg und Kodifikation im 18. und 19. Jahrhundert," in Heinz Mohnhaupt, *Historische Vergleichung im Bereich von Staat und Recht: Gesammelte Aufsätze* (Frankfort on Main: 2000), 295–348.

18 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 4, nr. 9, 9: "Unde ut omnis cesset difficultas, sic posse diffiniri mihi videor: *paupertas est carentia pecuniae secundum personae vel etiam negotii qualitatem*."

19 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 4, nr. 11, 9: "(…) personarum conditio efficit, ut eisdem facultatibus alter pauper, alter dives dici possit."

20 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 4, nr. 12, 10: "Non enim eaedem expensae, non idem sumptus a vili vel etiam mediocri persona, qui ab honesta nobili vel egregia faciendi sunt. Namque non omnium aequalis debet esse vestitus."

people from the lower classes should be punished if they did so. Privilege, moreover, entails responsibility, or, as the French would put it, *noblesse oblige*.

The relative nature of poverty, to be determined in accordance with each person's condition, is emphasized by Alvarez de Velasco:[21] "Someone may have enough goods to live, but not according to his condition and quality, in which case he is poor." For example, if a father is unable to marry his daughters to men of dignity, then he is called poor, as is a father who cannot offer a proper education to his sons, regardless of how comfortably he lives.[22] Since poverty is dependent on persons and conditions, lawmakers are not the ones to lay down general rules about the poor. The law (*lex*) cannot even lay down a fixed and infallible rule about how to define "poverty."[23] Instead, defining "poverty" is a matter for judges to decide, depending on the circumstances of the case. In other words, Alvarez de Velasco elevates the judge to the rank of supreme guarantor of the privileges of the poor by virtue of his discretionary power (*arbitrium iudicis*). An endless list of authorities from the *ius commune* is cited to corroborate this view, ranging from civilians such as Bartolus (1313–1357) and Baldus (1327–1400) to canonists such as Felinus Sandaeus (1444–1503) and Diego de Covarruvias y Leyva (1512–1577). He refers with particular precision to the work on lease contracts by Vincenzo Carocci (1547–1623), a jurist from Todi whose life remains obscure, but whose work is cited abundantly throughout *De privilegiis pauperum*.[24] In his discussion on the contractual relationship between poor landlords and poor tenants, Carocci decided that the question

21 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 4, nr. 40, 13: "Merito igitur addimus in definitione, *secundum personae conditionem*. Cum licet quis satis bonorum habeat unde vivere possit; non tamen secundum conditionem et qualitatem suam pauper sit."

22 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 4, nr. 44, 14; pars 1, q. 4, nr. 53, 15.

23 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 4, nrs. 74–75, 17: "Apparet evidenter ex tam longe petitis certam determinatamque regulam hac in materia tradi non posse, quis scilicet pauper dicatur, cum ex cuiusque conditione vel etiam negotii qualitate, id pendeat. Quod neque lex providere nec potest comprehendere, certamve et infallibilem regulam constituere. Ideoque iudicis arbitrio relinquitur, qui inspectis personarum, rerum atque locorum qualitatibus, quem pauperem vel non, iudicabit."

24 Carlo Bersani, "Carocci, Vincenzo," in *Dizionario biografico dei giuristi italiani* (*XII–XX secolo*), eds. Italo Birocchi, Ennio Cortese, Antonello Mattone, Marco Nicola Miletti (Bologna: 2013), vol. 1, 460–61. Carocci was a practically oriented jurist. He published treatises on the lease contract (*Tractatus locati et conducti*, Venice: 1584) and on the decisive oath in lawsuits (*De iuramento litis decisorio*, Venice: 1595), a collection of *Decisiones* (Venice: 1601), a work on the benefit of execution (*De excussione bonorum in civilibus et criminalibus causis*, Venice: 1603), and a treatise on procedural remedies against prejudicial sentences (*De remediis adversus sententias prejudiciales*, Venice: 1620). Also of interest are the *Commentaria ad regulam 'Cum quid prohibetur'*, a commentary on rule 39 of Pope Boniface VIII's legal maxims published in Perugia in 1574.

who is "poorer" needs to be resolved on the basis of the judge's discretion.[25] Another work cited with particular emphasis by Alvarez de Velasco is the French humanist jurist Denis Godefroy's (1549–1622) *Praxis civilis*.[26] In a fascinating chapter dedicated to status and class differentiation, Godefroy went to great lengths to explicate the status of poor, rich and noble people, leaving much room for judicial discretion.[27]

A number of specific situations reveal how the assessment of poverty should take place. For example, it is not enough to verify whether a person has sufficient means to live according to his status at the moment of assessment. Following Roman law (D. 50.16.39.1), Alvarez de Velasco recalls that outstanding liabilities, which are due to be paid in the future, need to be taken into account in what can be considered a comprehensive assessment of the person's patrimony. Concretely, if a nobleman is seen to be living according to the standards of his condition, but he is nevertheless head over heels in debt (*debitis implicatus*), then he is considered poor, since the sum of his assets and liabilities is negative.[28] Part of his goods (*bona*) are actually not his, but belong to another person. They are "another person's riches" (*aes alienum*) – a word which, in Latin, means the same as "debt". A second example of the importance of looking beyond appearances concerns people who are rich in terms of the extraordinary value of their real estate only. "The value of a tower or a palace should not be calculated on the basis of its costs or the value of the building," Alvarez de Velasco explains,[29] "but on the basis of the income it generates." Hence, the owner of a castle can be considered poor if he does not have sufficient cash to live a decent life for someone of his status. Moreover, the owner of magnificent family property should not be forced to sell his land,

25 Vincenzo Carocci, *Tractatus locati et conducti* (Venice: 1592), pars 1, q. 5 (*De locatione ex paupertate*), nr. 2 (erroneously referred to as nr. 9 by Alvarez de Velasco), p. 37: "Quid si pauper locat vel serviat pauperi? Est materia de privilegiato contra pariter privilegiatum, et vidi versari iudicis arbitrium quis pauperior sit et similia." Edition available at http://www.mdz-nbn-resolving.de/urn/resolver.pl?urn=urn:nbn:de:bvb:12-bsb10146785-8.

26 Alfred Dufour, "Godefroy (Gothofredus) Denys," in *Dictionnaire historique des juristes français, XII^e–XX^e siècle*, eds. Patrick Arabeyre, Jean-Louis Halpérin, Jacques Krynen (Paris: 2007), 376–77.

27 For his discussion on the status of the poor, see Denis Godefroy, *Praxis civilis* (Frankfurt am Main: 1591), lib. 1, tit. 5 (*De statu hominum*), 365–66. Edition available online at Google Books.

28 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 4, par. 2, nr. 97, 21: "Cum bona quae quis debet, bona non dicantur, sed aes alienum."

29 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, quaest. 4, par. 4, nr. 166, 29 (rubr.): "Turris vel palatium non ex sumptibus et valore aedificii sed ex redditibus aestimandum est."

mansion or castle as a means to obtain the liquidities that can help him out of poverty, since castles or lands that once belonged to his ancestors contribute largely to the honorable state of nobility, which must always be preferred to money.[30] Ultimately, however, it is up to the judge to weigh the circumstances of each case and exercise his discretionary power.[31]

Poverty may well be a miserable condition, entailing a number of particular rights or privileges that the rich cannot invoke. For example, in an insolvency procedure, a poor and unsecured creditor may benefit from preferential treatment among the chirographic creditors, even if he is not, legally speaking, enjoying a preferential status.[32] Under normal circumstances, it is forbidden for the insolvent debtor, subsequent to a *cessio bonorum*, to arbitrarily distribute the remaining assets among the creditors according to his personal choice, or to fully pay one creditor, while ignoring another creditor.[33] But poverty upsets the patterns of ordinary insolvency procedure, according to Alvarez de Velasco. He draws authoritative support for this view from moral theologians such as Thomas Aquinas (1225–1274), Silvester da Prierio (1456–1523) and Juan de Medina (1490–1546). As a matter not only of piety but also of justice in the external courts, a creditor should be allowed to pay a clearly poorer creditor first in cases of contractual debt and compensation for damage.[34] Alvarez de Velasco admits that Lessius rejected this view, but he nevertheless prefers the opinion of Thomas Aquinas. Lessius argued, instead, that a poor creditor should not benefit from preferential treatment, because that would go against both positive law and natural law.[35] Lessius was willing to allow for exceptions to this firm rule when a creditor was hit by extreme or grave necessity, but he

30 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, quaest. 4, par. 4, nr. 174–77, 30–31.

31 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, quaest. 4, par. 4, nr. 178, 31: "Idque iudicis arbitrio relinquendum erit, qui praedictis circunstantiis perspectis, vendi debeat necne res, iudicabit."

32 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, *specialia de cessione bonorum*, nr. 1–4, 259.

33 On *cessio bonorum*, see Forster, *Konkurs als Verfahren*, 89–107.

34 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, *specialia de cessione bonorum*, nr. 4, 259: "Non solum ex pietate, sed etiam ex iustitia quodammodo, quando creditor est prorsus aut notabiliter pauperior, praeferendum priori creditori quoad debitam compensationem illi faciendam propter damnum illatum, sive ex violatione liciti contractus, sive ex alia iniuria asserit."

35 Leonardus Lessius, *De iustitia et iure* (Antwerp: 1621), lib. 2, cap. 15, dub. 7, nr. 46, 184: "Sed contrarium videtur verius. Probatur, quia pauper neque iure positivo habet ius praelationis, ut patet, neque iure naturali, nisi forte sit in extrema vel gravi necessitate, ita ut charitas obliget illi subvenire." Online edition available at the digital library of the Bayerische Staatsbibliothek.

specified that charity rather than justice demanded that the poor creditor be paid first in such cases.

3 Cancellation of Debt for the Poor

The majority of privileges related to contractual obligations discussed by Alvarez de Velasco do not concern poor creditors, but poor debtors seeking relief from their plight. In line with the teachings of the early modern scholastics,[36] it appears that Alvarez de Velasco considered extension of payment as the proper solution to deal with the dire consequences of poverty and indebtedness – as will be discussed below. He was less keen on promoting debt relief in the strict sense of the word, that is partial or full cancellation of debt. Despite the Christian outlook of Alvarez de Velasco's standpoints on poverty and indebtedness – promoting a humane, charitable and equitable treatment of debtors[37] – his views on cancellation of debt remain rather vague.

Alvarez de Velasco does not seriously consider debt cancellation as an appropriate way to relieve poor debtors. For example, the biblical idea of the Jubilee (Lev. 25), the total remission of debt at the end of a cycle of fifty years, is not the subject of special treatment in *De privilegiis pauperum*. A commentary on the central Christian commandment to forgive debtors as contained in the Lord's Prayer (Mt. 6:12: *dimitte nobis debita nostra, sicut et nos dimittimus debitoribus nostris*), is also absent from this voluminous work, which, admittedly, remains profoundly legal in nature. In an indirect manner, however, Alvarez de Velasco does reveal his ideas on the appropriateness of total forgiveness of debt in contractual relationships. He may not have deemed it fitting for a jurist to provide an exegetical commentary on passages from the Old and New Testament, but he did address the legal question whether poverty induces a presumption of donation. Naturally, this legal question comes close to the issue of debt relief, especially if one bears in mind that the scholastic theologians framed the question of the lawfulness of debt cancellation in terms of the validity of gifts. In fact, the early modern scholastics saw debt forgiveness as a donation.[38] Although not excluding the possibility of gift-making in the market, they mostly warned against financial abuse.

In answering the question whether poverty leads to a presumption of donation, Alvarez de Velasco displays the same kind of suspicion towards gifts that

36 Decock, "Law, Religion and Debt Relief."
37 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 44, nr. 36–37, 203.
38 Decock, "Law, Religion and Debt Relief."

was typical of the *ius commune* and early modern scholastic theology. A mistake rather than a donation should be presumed, as an early 16th-century gloss to law *Generaliter* (Cod. 4.30.13) explained.[39] Gifts cannot be presumed, since gifts represent a loss for the donator, and "nobody can be presumed to want to lose or to abandon his right."[40] Alvarez adduced canon *Super hoc* (X 1.9.5) to corroborate this view. It concerns the renunciation of ecclesiastical benefices.[41] Pope Clement III (1187–1191) deemed that it should first be investigated whether the renunciation was not the product of coercion rather than a voluntary decision. After all, obtaining a benefice requires painstaking efforts and heavy sacrifices. In fact, this reluctant attitude towards acts of donation was even strengthened by the early modern scholastics. Their wariness of the logic of gift pervaded their analysis of the morality of bargaining, convinced as they were that a gift is not to be presumed in the market (*donatio non praesumitur*).[42] In the sphere of contracts and business, particular evidence must be provided to warrant charitable behavior on the grounds of a just cause, for instance blood ties or friendship. If not, donations between debtors and creditors are suspect. More often than not they are the product of fraud, duress and abuse of power, especially by powerful debtors such as kings.

Alvarez de Velasco left room, though, for two exceptions. Firstly, royal authority can decide to grant partial debt relief under exceptional circumstances. In this regard, he cites the famous policy of "seisachtheia" by King Solon in 594 BC to solve the debt crisis in Athens, which Alvarez de Velasco deems to be a praiseworthy example of humanity and benignity.[43] Secondly, if a gift is made by a rich man to a poor man and remains moderate in quantity (*in moderata quantitate*), then a donation can be presumed.[44] Alvarez de Velasco draws on

39 Glossa *eamque causam* (attributed to Tommaso Grammatico, fl. 1530) ad Cod. 4.30.13, in *Corpus iuris civilis* (Lyon: 1604), vol. 4, col. 854, online edition available at http://amesfoundation.law.harvard.edu/digital/CJCiv/CJCivMetadata.html.

40 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 21, nr. 3, 102: "Perdere autem vel iactare velle ius suum nemo praesumitur."

41 X 1.9.5, in *Corpus iuris canonici* (Rome: 1582), cols. 226–28, online edition available at http://digital.library.ucla.edu/canonlaw/.

42 Wim Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune* (*c. 1500–1650*) (Leiden-Boston: 2013), 558–59.

43 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 44, nr. 32–33, 203. See Robin Osborne, "Seisachtheia," in *Brill's New Pauly*, eds. Hubert Cancik and Helmuth Schneider et alii, consulted online on 30 November 2016, http://dx.doi.org/10.1163/1574-9347_bnp_e1107070.

44 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 21, nr. 8, 102: "Paupertatis ratione praesumitur donatio, si a divite pauperi in moderata quantitate fiat."

Carocci's *De deposito, oblationibus et sequestro* to make this point.[45] This opinion can also be found, however, among other doctors from the medieval *ius commune* in their commentaries on canon *Etsi quaestiones* (X 5.3.18), which explains that in the distribution of gifts, the quality of the contracting parties needs to be considered, for instance whether the donator is rich and the donee poor. On the basis of this line of argument, Gabriel Alvarez de Velasco probably also approved, without concern, of debt relief for the poor in circumstances where the outstanding debt was moderate and the creditor rich. In general, though, he would have advocated extension of payment rather than outright cancellation of debt. If, despite extension of payment, poor debtors were still unable to meet the demands of their creditors, then they could benefit from the general privilege accorded to insolvent debtors, namely the *cessio bonorum*, meaning that they could surrender their assets instead of being deprived of their liberty.[46]

4 The Case for Extension of Payment

Rather than canceling debt, Alvarez de Velasco thought of extension of the deadline for payment as the appropriate way of alleviating the burden of debt. Ultimately, this may be considered a logical conclusion for a jurist imbued with respect for the moral principle that debts must be paid. In point of fact, Alvarez de Velasco expressly quotes the famous injunction from Seneca's work *De beneficiis* that people should return what they owe (*redde quod debes*).[47] At the same time, he rejects the severity of the punitive sanctions that were adopted in the past to enforce this principle, citing the example of the Egyptian pharaoh Asychis, who was said by Herodotus to oblige debtors to pawn the corpse of their father and to deny burial to bad debtors.[48] He also regrets the rigor of the Law of the Twelve Tables, which allowed bad debtors to be sold as slaves or to be torn to pieces.[49] Instead, he invites creditors to remember the

45 Vincenzo Carocci, *De deposito*, pars 2, q. 125 [Alvarez de Velasco erroneously quotes q. 25], in *Tractatus practicabiles de deposito, oblationibus et sequestro* (Venice: 1593), 333: "Si quantitas sit parva, dans sit dives et accipiens pauper, praesumitur donatio."

46 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, *specialia de cessione bonorum*, nr. 1, 259.

47 Seneca, *De beneficiis* 3.14.3.

48 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, quaest. 44, nr. 19, 201.

49 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, quaest. 44, nr. 20, 201. The reference to the Twelve Tables as an example of a harsh attitude towards debtors was a commonplace in the early modern period. The interpretation of the harsh sanctions on insolvency in the Twelve Tables is disputed, however, by modern scholars, see Gennaro Franciosi, "'Partes secanto' tra magia e diritto," *Labeo* 24 (1978): 263–75.

words of the Roman jurist Ulpian, quoted in a passage from Justinian's Digest (Dig. 22.1.33 pr.) as calling for moderation, benignity and humanity in collecting debt.[50] However, unlike Alvarez de Velasco, Ulpian was addressing himself to provincial officials collecting money owed to the public authorities, which might be a different situation from private creditors demanding payment from their debtors.

Alvarez de Velasco welcomes the common practice by kings to allow debtors to request "letters of grace" (*litterae gratiae*) or "letters granting delay" (*litterae moratoriae*) to temporarily escape the anger of their creditors.[51] It was daily business for royal administrations across Europe in the early modern period, indeed, to answer such requests and award letters of grace to poor debtors.[52] In France, they were better known as the "lettres de répit" or "lettres d'état," in Germany as "Anstandbriefe," in the Duchy of Savoy as "rescripta moratoria" or "rescripta respirationis." Alternative names of the letters referred to the duration of the grace period, such as "litterae annales" or "litterae quinquennales."[53] Still other names emphasized the protection they granted to the debtor, such as "litterae salvi conductus" or "litterae securitatis." The French humanist jurist Jacques Cujas (1522–1590) claimed that this practice went back to the Roman emperors Gratian, Valentian II and Theodosius I (Cod. 1.19.4).[54] Apparently, the practice of issuing royal letters in which deadlines for payment were delayed became so widespread in the early modern period, that fraud was rampant. Just a couple of years after the publication of the second edition of *De privilegiis pauperum*, King Louis XIV of France issued two new ordinances in which he took back control over the issuing of letters of grace after Charles IX

50 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 44, 202.

51 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 44, nr. 24, 202: "Licet autem pauperum debitorum iure regio deterior sit facta conditio, quam antea iure fuerant communi, adhuc tamen patens eis facilisque aditus relictus est, quo ab instantibus creditoribus, eorumque acerbitatibus liberentur, sufficientique temporis spatio solutionem commode facere valeant, seque possint tueri, an interim executionis fulgur evadant, principem adeundo, eique offerendo preces, quatenus eorum paupertate et impotentia attenta, moratorias dignetur literas concedere, quas frequenter assolet princeps indulgere."

52 For a legal historical account of these letters of grace from the Late Middle Ages until art. 1244 Code Civil, see Arrigo D. Manfredini, *Rimetti a noi i nostri debiti. Forme della remissione del debito dall'antichità all'esperienza europea contemporanea* (Bologna: 2013), 161–252.

53 See the title of the *Tractatus de literis dilatoriis annalibus, quinquennalibus, status et aliis* by Pierre Rebuffi (1487–1557), in his *Commentarii in constitutiones regias* (Lyon: 1551), 64–90, often cited by Alvarez de Velasco.

54 Jacques Cujas, *Observationes et emendationes* (Paris: 1556), lib. 2, cap. 10, 19–20, also cited (from a later edition) in Manfredini, *Rimetti a noi i nostri debiti*, 161–62.

had delegated this power to the judges in 1560, which, in the eyes of the "roi-soleil," had only led to abuses.[55]

Alvarez de Velasco, then, urges individual creditors to refrain from harsh treatment of debtors and grant extension of payment instead. If necessary, debtors can request letters of grace from the king or his judicial delegates, but it would be more convenient if creditors themselves adopted a more equitable and humane attitude towards their debtors. It is a matter of well-ordered charity, he believes, that creditors should want to treat their debtors fairly.[56] Alvarez de Velasco cites the Protestant German jurist Oswald Hilliger (1583–1619) to the extent that extension of payment makes perfect sense, certainly from the point of view of natural reason, divine law and Christian charity.[57] The Christian inspiration behind Alvarez de Velasco's views on debt collection are even more clear from his citations from Old Testament texts such as Exodus, Deuteronomy and the Book of Isaiah. Of particular relevance is the passage in Exodus 22:25 and its early 15th-century interpretation by the Spanish exegete Alonso Tostado (Abulensis), urging foreign lenders not to oppress Yahweh's poor people living among them by exacting payment from them in a harsh and austere way (*cum magna duritia et austere*).[58] The creditor should not abandon his rights, but he should grant the debtor suspension of payment until improvement of his condition (*quosque melior debitori superveniat conditio*).[59]

5 Delayed Restitution for the (Noble) Poor

Of particular interest is Alvarez de Velasco's discussion of the question whether poverty can justify suspension of the duty to make restitution in the large sense of returning what is not yours, either because of contractual obligation, a duty to compensate for damages, or criminal liability. "It is a most trite rule of

55 Manfredini, *Rimetti a noi i nostri debiti*, 189.

56 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 44, nr. 37, 203: "Ex quibus summa cum aequitate, summaque cum ratione ac de iustitiae honestate moratorias literas pauperibus debitoribus per principem concedi constat. Idque etiam ex praesumpta creditoris mente vel quae saltem in tali casu esse debebat, secundum bene ordinatam charitatem (…)."

57 Oswald Hilliger, *Donellus enucleatus* (Jena: 1613), pars 2, lib. 22, cap. 9, lit. N, 972: "Ex quibus omnibus jam liquet hoc jus [sc. dilationis] non ita odiosum esse, aut aequitati adversari, sed modo abusus absit qui frequens est, juxta requisita relata, summam rationem habere, etiam naturalem ac legi divinae charitatique Christianae convenientem."

58 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 44, nr. 36, 203.

59 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 45, nr. 4, 215.

law (*iuris regula*)," Alvarez de Velasco recalls,[60] "that sin is not forgiven unless what has been taken away is restored." The influential doctrine of restitution – which provides the basis of the theory of unjustified enrichment in Western legal systems up till today[61] – goes back to a famous dictum by Augustine in his letter to Macedonius.[62] It was fully integrated into the medieval and early modern *ius commune*, not least through its inclusion as the fourth maxim in Pope Boniface VIII's Eighty-eight Rules of Law (1298). The legal status of this rule is clearly beyond doubt for a jurist such as Alvarez de Velasco. At the same time, he quotes traditional authorities from the medieval and early modern theological tradition such as Thomas Aquinas and Sylvester da Prierio to lend additional moral support to this rule of law. Moreover, he is eager to show that the doctrine of restitution relies on divine authority, citing Saint Paul's famous exhortation in his letter to the Romans (Rom. 13:7) to pay back their debts (*reddite omnibus debita*). Additional passages from the Bible are quoted to lend divine authority to the doctrine of restitution, for instance Jesus's statement that one should render unto Caesar the things which are Caesar's (Matt. 22:21), or a passage in the Book of Tobit explaining that it is unlawful to eat or touch what has been stolen (Tobias 2:21).

In keeping with the scholastic doctrine of restitution, Alvarez de Velasco also reads the duty to make restitution against the background of the Seventh Commandment not to steal (Ex. 20:15). As a result, the positive duty to make restitution should be interpreted as the affirmative reflection of a negative precept. This is relevant, because prohibitions directly bind all subjects always and everywhere, meaning that restitution should be made immediately (*statim*).[63] Restoring what belongs to another person should not be delayed or suspended. To support his view, Alvarez de Velasco cites major representatives of the early modern scholastic and canon law tradition such as Tommaso de Vio (1469–1534), also known as Cardinal Cajetanus, Martín de Azpilcueta (1492–1586), referred to in the primary sources as Dr. Navarrus, and Luis de

60 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 27, nr. 1, 126: "Tritissima iuris regula est, peccatum non dimitti, nisi restituatur ablatum." On the rules of law, see Peter Stein, *Regulae iuris: From Juristic Rules to Legal Maxims* (Edinburgh: 1966), and Rosalía Rodríguez López, "*De regulis iuris* y *De verborum significatione* en la enseñanza del derecho," in *Scritti per Alessandro Corbino*, ed. Isabella Piro (Tricase: 2016), vol. 6, 299–326.

61 Jan Hallebeek, *The Concept of Unjust Enrichment in Late Scholasticism* (Nijmegen: 1996); James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford: 2006).

62 Gaylon L. Caldwell, "Augustine's Critique of Human Justice," *Journal of Church and State* 7 (1960): 17–20; Nils Jansen, *Theologie, Philosophie und Jurisprudenz in der spätscholastischen Lehre von der Restitution* (Tübingen: 2013), 25–28.

63 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, quaest. 27, p. 126, nr. 2.

Molina (1535–1600). Yet, these very authors had tried to argue that exceptions to the general principle of immediate restitution may exist. In fact, the early modern scholastics developed a sophisticated analysis of situations that might justify the suspension of restitution.[64] Therefore, by recognizing the authority of these theologians and canon lawyers, Alvarez de Velasco showed his loyalty to one of the fundamental tenets of the moral and legal order while, simultaneously, paving the way for a more flexible interpretation of the duty of restitution.

"Poverty," Alvarez de Velasco acknowledges, "excuses from making immediate restitution, as long as the debtor's deliberate intent is to make restitution."[65] The miserable condition by which a poor debtor is affected can justify the temporary suspension of his duty to make immediate restitution, since nobody is bound to do what is morally impossible or goes beyond his forces (Dig. 50.17.185). In the eyes of his Divine Majesty, it is enough to do what lies in your capacities.[66] Alvarez de Velasco's text abounds with references to canon law and early modern scholastic authors to justify this view, and rightly so. In what proved to be a very influential decision,[67] Pope Gregory IX had decided not to inflict excommunication for debt upon Odoardus, a poor cleric, provided that Odoardus could ensure that he would pay his debts in the future, "when he came to a fatter fortune."[68] Following the gloss on canon *Odoardus* (X 3.23.3), the Franciscan theologian John Duns Scotus (d. 1308) argued that the claim of the creditor was temporarily suspended albeit not extinguished by virtue of the moral incapacity of the debtor. The legal remedy against the poor debtor was "put to sleep" and could only be re-activated when the debtor was more solvent. Elaborating upon canon *Odoardus* and Scotus's use of it, the early modern scholastics developed a whole casuistry around the principle that

64 Decock, "Law, Religion and Debt Relief."

65 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 27, nr. 5, 126: "Paupertas tamen a restitutione statim facienda eum, qui animum deliberatum restituendi habet, excusat."

66 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 27, nr. 5, 126: "Nemo enim ad moraliter impossibile, neque ad id, quod proprias excedit vires, tenetur, satisque est quoad Divinam Maiestatem, ut quilibet, quod in se est, ad emendationem facit."

67 Wolfgang Forster, "'Et est casus singularis': Odoardus (X 3.23.3) – ein mittelloser Kleriker und die Rechtsfolgen der Vermögensaufgabe," in *Das Recht der Wirtschaft*, eds. David von Mayenburg, Orazio Condorelli, Franck Roumy and Mathias Schmoeckel, Der Einfluss der Kanonistik auf die europäische Rechtsgeschichte 3 (Vienna: 2016), 173–86.

68 X 3.23.3 in Emil Friedberg (ed.), *Corpus iuris canonici* (Leipzig: 1879; reprinted Graz: 1959), vol. 2, col. 532: "Mandamus (…) ut, si [Odoardus] ad pinguiorem fortunam devenerit, debita praedicta persolvat."

restitution should be made immediately, except when the debtor is in a situation of moral impossibility.[69]

Both the scholastics and Alvarez de Velasco were of the opinion that moral impossibility, allowing for delayed restitution, referred not only to situations of the most grave necessity or extreme poverty, but also to situations where a debtor could not pay back his debts without incurring difficulties. Although the terminology he used was not always entirely consistent, Alvarez de Velasco also describes the latter situation as grave poverty or grave necessity.[70] The crux of the matter, then, was the question which difficulties can be considered to give rise to the kind of moral impossibility that excuses one from immediate restitution. Following the scholastic discussions, Alvarez de Velasco holds that difficulties include situations where immediate payment may lead to spiritual damage, material losses or social status degradation. Following Lessius and other scholastics, Alvarez de Velasco thinks that restitution should be delayed if there is a risk that the debtor forces his daughters into prostitution or his sons into burglary to find the means to pay back his debts, thus clearly endangering his soul and that of his children.[71] It is more important to provide for your spiritual salvation than to pay back debts, according to Lessius.[72] By the same token, if external goods of a higher order, such as reputation, health or life are endangered by immediate restitution, restitution is not a priority.[73]

The more thorny issue was whether the risk of material loss and subsequent status degradation is a sufficient ground to grant extension of payment. In accordance with his "horizontal"[74] definition of poverty, which takes the normal and previous state of the person as a benchmark rather than an objective, mathematically determined standard of poverty, Alvarez de Velasco reasons that the danger to external goods of a lower order such as material damage or financial loss should be considered relative to each person's status.[75]

69 Decock, "Law, Religion and Debt Relief."

70 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 27, nr. 9, 126: "Ampliatur secundo supra dicta principalis conclusio, ut non solum gravissima vel extrema paupertas aut necessitas a restitutione statim facienda, sed etiam gravis excuset, quando non nisi cum magna difficultate restitutio posset fieri, quia tunc eam differre licet."

71 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 27, nr. 17–18, 127–28.

72 Lessius, *De iustitia et iure*, lib. 2, cap. 16, dub. 1, nr. 21, 188: "Ratio est, quia quisque magis tenetur saluti animae suae et suorum consulere quam debita solvere."

73 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 27, nr. 18, 128.

74 On the notion of "horizontal" poverty, see Martin Ravallion, *The Economics of Poverty: History, Measurement, and Policy* (Oxford: 2016). I am grateful to Jonathan Robinson for drawing my attention to this work.

75 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 27, nr. 10, 126: "Magna autem debitoris difficultas, gravis iactura vel detrimentum ex personarum conditione cognoscitur, induciturque."

Consequently, even a nobleman should benefit from the privileges of the poor to delay restitution if immediate payment would mean that he risked losing the privileges attached to his status, such as riding horses.[76] By the same token, a high-ranking citizen should not be forced to take on a laborer's job for the sake of paying back his debts.[77] Alvarez de Velasco's text clearly echoes the opinions of Martín de Azpilcueta and Leonardus Lessius, to whom he refers explicitly. Azpilcueta affirmed that a nobleman should not be obliged to make restitution if that would prevent him from "living decently according to the dignity of his status."[78] Lessius contemplated the case of a nobleman forced to deprive himself of all his retinue, including servants and horses – forced also to stay away from his peers; or the case of a member of the high society obliged to take on a laborer's job for which he had received absolutely no training.[79] Although Alvarez de Velasco's abundant references would seem to indicate otherwise, the early modern scholastics remained nevertheless divided on this topic.[80] Molina, for instance, who is wrongly cited in favor of Alvarez de Velasco's standpoint, actually argued that the creditor's interests normally prevail even if that results in status degradation for the poor debtor.[81]

6 Conclusion

Gabriel Alvarez de Velasco's discussion on the privileges of poor debtors is the reflection of a "particularist" legal order that is different from the legal structure underlying modern societies.[82] Alvarez de Velasco defines poverty in relation to status, allowing him to consider as poor not only those people starving

76 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 27, nr. 10, 126: "Quia si vir nobilis sit, nec statim solvere, nisi se omni famulorum obsequio atque equorum privet, possit, suique consimilium cogatur abstinere consortio; vel si civis primarius, non nisi ita se privet, ut artem mechanicam sibi insuetam subire vel manuales operas exercere cogatur, differre restitutionem, donec absque status sui iactura possit, licebit."

77 See Jonathan Robinson's contribution to this volume for similar observations in the work of Bartolus.

78 Martín de Azpilcueta, *Enchiridion sive manuale confessariorum et poenitentium* (Antwerp: 1575), cap. 17, nr. 63, 304.

79 Lessius, *De iustitia et iure*, lib. 2, cap. 16, dub. 1, nr. 25, 188.

80 Decock, "Law, Religion and Debt Relief."

81 Molina, *De iustitia et iure* (Mainz: 1602), lib. 2, dub. 754, col. 1670: "Non facile contra creditoris voluntatem est permittendum, debitorem restitutionem differre, esto necesse sit eum a suo statu cadere, praesertim quando ipse fuit in culpa, quod per iniustitiam ad eas deveniret angustias."

82 Duve, "El 'privilegio' en el antiguo régimen y en las Indias," 29–43.

from hunger, but also rich citizens threatened with status degradation, thus enabling them to benefit from the privileges of the poor. Imbued with early modern scholastic thought on the subject, Alvarez de Velasco considers extension of payment as the proper remedy to grant interim relief to poor debtors. Although he approves of debt relief for the poor in the strict sense of cancellation of debt in circumstances where the outstanding debt is moderate and the creditor rich, his belief in the fundamental principle that debts must be paid and promises honored makes him suspicious of granting full or partial debt relief. He rather advocates the royal authorities' power, mostly delegated to judges, to grant "letters of grace" to extend the deadline for payment. According to Alvarez de Velasco, the judge has a central role to play, indeed, in using the discretionary power of his office for the sake of protecting poor and miserable persons. De Velasco's Christian convictions and experience as a judge stimulated him to highlight the duty of both creditors and law enforcers to promote humane treatment for poor debtors.

From this encounter with Alvarez de Velasco's *De privilegiis pauperum et miserabilium personarum* it is obvious that the primary sources from the early modern period abound with juridical treatises on privileges of all categories of people, including the poor, that can improve our understanding of both academic and practical engagements with the rights of people at the margins of society in the *ancien régime*.[83] Importantly, those sources reflect conceptions, norms and values prevailing in a societal order of the not-so-distant past that is profoundly different from modern European societies. In as much as the *ancien régime* started from the basic tenet that fundamental differences between citizens exist, particularly in terms of status, and that those differences should result in a multi-layered, "particularist" legal order, it offers a pluralistic model of society that is alien to the modern mindset, which takes the principles of equality, legal universalism and non-discrimination for granted. Moreover, the connection between poor relief and the noble office of the judge, considered to be the soul of the law, is much more obvious in Alvarez de Velasco's work than it is in modern legal systems.

In the eyes of Alvarez de Velasco, the main guardians of justice are the jurists (*jurisprudentes*) and the judges (*judices*), not lawmakers. Giving each person his due, especially the poor, is a complex task that only jurists and judges

83 Heinz Mohnhaupt, "Privatrecht in Privilegien," in *Vorträge zur Geschichte des Privatrechts in Europa. Symposion in Krakau*, eds. Uniwersytet Jagielloński Instytut Historyczno-Prawny Kraków and MPIeR Frankfurt, Ius Commune Sonderhefte 15 (Frankfort on Main: 1981), 58–76, reprinted in Mohnhaupt, *Historische Vergleichung*, 275–94; Karl Otto Scherner, "Arme und Bettler in der Rechtstheorie des 17. Jahrhunderts," *Zeitschrift für neuere Rechtsgeschichte* 10 (1988): 129–50.

can adequately fulfill on account of their expertise and discretionary power, respectively. In that sense, the endless references to classical literature, jurists from the *ius commune*, and theologians from the School of Salamanca, which are typical also of Alvarez de Velasco's contemporaries, are not just a matter of humanist erudition or blind obedience to authority. They are evidence of Alvarez de Velasco's status as a learned man who is actually capable of living up to the task of governing the republic through his office as a jurist and judge, especially to act as a guardian of the poor and insolvent. Erudition, in this case, is not a matter of intellectual *Spielerei*, but of guaranteeing social stability. Alvarez de Velasco pointedly notes at the beginning of his treatise on the privileges of the poor that Rome was the center of the world as long as it was governed by learned men and experts, but it collapsed as soon as this order was destroyed.[84]

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84 Alvarez de Velasco, *De privilegiis pauperum*, pars 1, q. 6, nr. 44, 45: 'Et dum Romanae Reipublicae regimen apud literatos doctosque stetit, et ipsa quoque perstitit, floruit, mundique domina effecta est. Corruit cum hic perversus est ordo, illiteratique fuerunt electi.'

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