Francisco Salgado de Somoza: The *Letrado* between the Authority of the Church and the State

Francisco Salgado de Somoza: el letrado entre la autoridad de la Iglesia y la del Estado

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Abstract. The article outlines the life of Francisco Salgado de Somoza (1591-1665) and those works of his in which he argued in favor of privileges of the Spanish monarchy as regards the ecclesiastical jurisdiction and the Holy See: The right of Spanish courts to assume cases of clerics if these claimed to have been unfairly treated by ecclesiastical authority («recursus ab abusu») and the retention of papal letters by the royal council, respectively.

Keywords. Regalism; Church-state-relations; Early Modernity; Law; *recursus ab abusu*; Placet.

Resumen. El artículo traza la vida de Francisco Salgado de Somoza (1591-1665) y aquellas de sus obras en las que argumentó en favor de privilegios de la monarquía española en cuanto a la jurisdicción eclesiástica y la Santa Sede: El derecho de los tribunales españoles a oír casos de clérigos si estos afirmaban haber sido tratados injustamente por una autoridad eclesiástica («recursus ab abusu») y la retención de cartas papales en el consejo real, respectivamente.

Palabras clave. Regalismo; relación iglesia-estado; temprana Edad Moderna; derecho; *recursus ab abusu*; placet.

1. Francisco salgado de somoza (1591-1665): life, main works and career

Francisco Salgado de Somoza was born in La Coruña (Galicia) in 1591[1]. His father was a jurist who worked as a lawyer at the High Court of Galicia, the «Audiencia de Galicia», founded in 1494. Later, he was promoted to the position of «Fiscal», that is, an advocate of the Crown, appointed by the King. Francisco's older brother also was a jurist who, for a while, held the rather humble legal office of a special military judge for the royal fleet that was anchored in La Coruña («Auditor generalis») and later worked as a lawyer.

Francisco studied law in Salamanca, starting from around 1605, that is, at an age of not more than 15 years. At the time, it was not unusual for young students to be sent away to study at the Universities, especially if an elder brother was already attending the same institution[2]. In Salamanca, his most important teacher was Juan de Solórzano Pereira (1575-1655), who was professor in Salamanca until 1609, when he was appointed to become judge at the «Real Audiencia de Lima» in Peru[3]. Francisco completed his studies in 1610 and, as was customary at the time, stayed at the University for some time to give lectures. As were his father and brother, he was then employed as an advocate at the «Audiencia de Galicia», and, emulating his brother's career, he held the office of «Auditor generalis» in La Coruña.

In 1626, Francisco published his *Tractatus de regia protectione…* This work deals with the right of the Spanish King to protect his subjects, including clerics, from unjust treatment at the hands of ecclesiastical judges by giving them the opportunity to put their case before a secular court. Salgado argued that, in such cases, the Spanish *King* was entitled to exert influence on canonical jurisdiction without being impeded by ecclesiastical immunity (cf. *infra* 2.1). This ran contrary to one of the main tenets of canonical law and also had important implications regarding the political relations between the Holy See and the Spanish Crown. Salgado was conscious of the political importance of his work, as is apparent from the dedications he included in its two volumes: The first one is dedicated to the Conde de Monterrey[4], the second one to the Conde-Duque de Olivares (1587-1645), the all-powerful «valido» of King Philipp IV[5]. Consequently, as early as June 1627, Salgado's book was put on the Roman *Index librorum prohibitorum*[6]. On the other hand, it was highly successful: the second edition was published already in 1627, and there were five more editions in the 17th century. It established him as an expert defender of the legal privileges of the Spanish King concerning the Catholic church and took his

1. The following outline is based on Forster, 2017, pp. 23-127 which in turn is a revised Spanish version of Forster 2009, pp. 7-85.
2. Forster, 2017, pp. 33 at note 52; *e. g.*, the Conde-Duque de Olivares was sent to the university at the age of 14; cf. Helmholz, 2018, p. 175: Covarrubias attended the University of Salamanca at the age of 10.
3. On Solórzano Pereira, cf. Mirow, 2018, García Hernán, 2007 and Sánchez Maíllo, 2010.
4. Manuel de Acevedo y Zúñiga (1586-1653), 6th Count of Monterrey, brother-in-law of the Count-Duke of Olivares, was member of the «Consejo de Estado» since 1624, and held many other offices in the service of Philipp IV. The dedications seem to appear only in the first edition of 1626.
5. On the Conde-Duque, cf. Elliott, 1986; Spanish version: Elliott, 2017.
6. Martínez de Bujanda, 2002, p. 798 (Decree dated 17.6.1627).

career to new heights. Around 1632, he was appointed as «Vicarius generalis» of the Archbishop of Toledo, who was Ferdinand of Austria (1609-1641), the younger brother of King Philipp IV. Ferdinand, also known as the «Cardenal-Infante», had been invested as Archbishop of Toledo in 1620, at an age of about 11 years.

Salgado's second book, the *Tractatus de supplicatione…* (1639) —again dedicated to the Conde de Monterrey[7]— also argued in favor of the special rights and privileges of the Spanish Crown with respect to the Holy See, a position later called Spanish regalism («regalismo»)[8]. It deals with the purposed right of the royal council to inhibit the publication of papal bulls and letters in Spain («retención de bulas», cf. *infra* 2.2). Salgado finished this work in 1634 and wished to publish it in France, as he had done with his first book. However, the Holy See intervened. Consequently, the *Tractatus de supplicatione…* was published in 1639 in Madrid. Its publication was immediately followed by its inclusion in the *Index librorum prohibitorum* in 1640[9]. In this context, Cardinal Antonio Marcello Barberini (1569-1646; brother of pope Urban VIII), in a letter to the Apostolic nuncio in Madrid qualified Salgado as one of the authors «che ora sono chiamati incendiarii di questi stati, peste del mondo e ministri dell'Antichristo»[10].

A nomination (1636) of Salgado as «Judge of the Monarchia Sicula»[11] was revoked in 1639 (while Salgado had already travelled as far as Genoa), probably to de-escalate the diplomatic tensions in the matter of Salgado's pro-Spanish *Tractatus de supplicatione…* In 1639, he was appointed to be judge («Oidor») at the «Audiencia y Chancellería» in Valladolid. There he familiarized himself with the intricacies of insolvency proceedings, especially of noble houses that had their wealth tied up in entails («mayorazgos») and were inclined to finance short-term cash needs, especially for dowries, with long-term credit instruments, which in the end they were unable to service. The «Audiencia y Chancellería» had developed a procedure for these cases by adapting the measures stipulated in Roman and Castilian law texts, thereby creating a new type of procedure. Salgado's description of this procedure and the legal arguments for it, which appeared in his *Labyrinthus creditorum concurrentium…* in 1651, had a decisive influence on the development of European insolvency proceedings well into the 19th century.

7. Salgado, *Tractatus de supplicatione…*, [p. 5]: «Illustrissimo […] Don Emmanueli […] Azevedo, Comiti Montis Regii […]».

8. Cf. Escudero, 2012, pp. 786-789.

9. Martínez de Bujanda, 2002, p. 798 (Decree dated 17.12.1640).

10. Letter of 1.10.1639 to Cesare Fachinetti, Vatican library, Barberini, Latina, fascicle 8445, fol. 58v: «Il libro […] et l'altro del Salgado […] mi fanno sentire il danno della Chiesa […] e con minori principii hanno cominciato quelli autori che ora sono chiamati incendiarii di questi stati, peste del mondo e ministri dell'Anticristo»; cited in Leturia, 1949, p. 63.

11. On the «Monarchia Sicula» cf. Hitzbleck, 2016; Koenigsberger, 1951, p. 145: «supreme authority, or *Monarchia*, over the Sicilian Church —an authority not unlike the supremacy of the English Kings over the English Church».

In 1653, he became a member of the «Contaduría de Hacienda», a jurisdictional body within the highest fiscal authority of the Spanish Crown, which was (after 1602) called the «Consejo de Hacienda y su Contaduría Mayor». Some time later, in 1658, he was appointed to the highest Royal institution, the «Consejo Real de Castilla». With this office, he attained the highest rank in any letrado's career. Indeed, Salgado's career comes close to fulfilling the Spanish letrados' collective dream, as described by John H. Elliott: «Appointed to an *audiencia*, one or two of the fortunate ones might hope eventually to be promoted to one of the Councils at Court, with a place in the Council of Castile as the pinnacle of their ambitions»[12].

Only one year later, in 1659, he became abbot of the «Abadía de Patronato Real» in Alcalá la Real (Jaén). There, Francisco Salgado de Somoza died on 12.2.1665. His testament, dated 2./3.2.1665, has been published in 2002[13], thus giving us the opportunity to gain insight into the economical circumstances of a successful letrado.

2. Salgado de somoza: a letrado in the service of spanish regalism

2.1. The «recursus ab abusu»

The «recursus ab abusu» (in Spanish: «recurso de fuerza») is an institution in the Spanish law of the early modern age that allowed clerics who were subjects of the Spanish King to appeal to his, that is to say to secular, courts, in cases where they claimed to have been unfairly treated by the ecclesiastical jurisdiction. In this sense, they could take «recourse» to secular courts from an «abuse» or a «violence» done to them by an ecclesiastical court. The political implication of such an institution is clear: It gave the royal bureaucracy leverage against the local bishops, as the secular courts thereby had the power to suspend any decision of an ecclesiastical instance for the purpose of reviewing it for «oppression» of the cleric or nun affected by its measure. Thus, virtually any decision of any bishop —and especially any disciplinary measure— was prone to be reviewed by secular lawyers, that is, letrados, in the service of the Spanish King[14].

The first explicit description of the «recurso de fuerza» appears in the *Ordenanzas reales de Castilla* (1484), compiled by Alonso Díaz de Montalvo (1405-1499), hence also called *Ordenanzas de Montalvo*. However, this text contains nothing more than an assertion that there existed an old usage of the Spanish Kings to hear and judge cases of «injurias violentas: y fuerzas» between clerics concerning «igle-

12. Elliott, 1990, pp. 178-179.
13. García de la Puerta López, 2002.
14. The similar institution in French law, the «appel comme d'abus», seems to have been used with a different goal: It was applied by the aristocracy to nullify marriages of noble youths not authorized by their respective parents («mesalliances»), claiming that any such marriage was a case of abduction («rapt de séduction») and that a canonical marriage celebration constituted «abuse», cf. Basdevant-Gaudement, 2014, p. 373.

sias o beneficios»[15]. Moreover, the whole paragraph, like many more in his compilation, was created by Montalvo himself. Thereby, Díaz de Montalvo wanted to support the politics of Ferdinand and Isabella against the ecclesiastical hierarchy.

In turn, Ferdinand and Isabella required their judges to swear an oath that they would defend the royal jurisdiction against any attack by ecclesiastical authorities, without clarifying if «recurso de fuerza» was part of the royal jurisdiction[16].

The definitive wording of the «recurso de fuerza» came about with a law passed by Emperor Charles V (Charles I of Spain) in Toledo in 1525, which later was called «ley Regia» or «ley 36», the latter designation being derived from its insertion in the compilation of laws of 1567, the so-called «Nueva Recopilación», in book II, title 5, nr. 36. There, Charles binds the presidents and judges of his higher Courts to oblige ecclesiastical judges to deliver any process before them to their court if anybody applies to these secular courts with the argument of suffering a «fuerza» by the hands of an ecclesiastical judge:

> […] nos pertenece alzar las fuerzas, que los jueces eclesiásticos […] hacen en las causas que conocen, […] por ende mandamos a nuestros Presidentes y Oidores de las […] Audiencias […] que cuando alguno viniere ante ellos […] manden traer a […] nuestras Audiencias el proceso eclesiástico originalmente[17].

2.1.1. The «recursus ab abusu» in the perspective of canon law

From the perspective of canon law, this institution constituted a blatant infringement of the «privilegium fori», the principle that required «clerics to be tried only before spiritual tribunals»[18]. One could argue that, in this case, it is the cleric who himself turns to the secular authority. However, this issue must be viewed in the context of the convoluted and, in the age of absolutism, highly contentious problem of the delineation of ecclesiastical and secular jurisdiction. The canonical position was quite clear and based on an uncontested fundament: The jurisdiction concerning clerics was exclusively ecclesiastical[19]. As an Austrian canonist of the 17th century

15. *Ordenanzas reales de Castilla* (1495), II.1.5 (fol. 19v): «Los reyes de Castilla de antigua costumbre y aprobada usada y guardada pueden conocer y proveer de las injurias violentas: y fuerzas que acaescen entre los perlados y clérigos: y eclesiásticas personas sobre iglesias o beneficios». This norm later was included in the so-called *Nueva Recopilación* of 1567, cf. *Recopilación de las leyes destos reinos* (1640), I.6.2.

16. *Recopilación de las leyes destos reinos* (1640), III.6.16: «Otrosí, que juren que, a todo su leal poder, que directe, ni indirecte no procurarán que sean leídas cartas de los jueces eclesiásticos, de las cuales resulte impedimento a nuestra jurisdición real; y si supieren que los jueces y ministros de la Iglesia en algo la usurpan, o se entremeten en lo que no les pertenece, les hagan requerimiento que no lo hagan […]».

17. *Recopilación de las leyes destos reinos* (1640), II.5.36.

18. Helmholz, 1996, p. 302.

19. Helmholz, 1996, p. 116: «[…] canon law undertook from the start to fix upon jurisdictional principles that would accord with the church's spiritual mission in the world. The result that issued from this understanding of its mission in the world was twofold: first, a claim to exclusive personal jurisdiction over the clergy; and second, an assertion of a subject matter jurisdiction over some selected and quite disparate areas of substantive law. The first embraced virtually all aspects of the life of the clerical order. The

put it, there was nobody who did not know that clerics were exempt from secular jurisdiction by divine law, as the Pope and Council Fathers had laid out. Significantly, he nonetheless cites a Spanish canonist, Diego de Covarruvias (1512-1577)[20], who listed arguments to the contrary[21]. The ecclesiastical jurisdiction over clergy therefore could not be acquired by laymen, not even by means of a long period of usance[22]. Clerics themselves could not renounce it, neither by oath nor in cases concerning merely temporal matters[23].

The Tridentine Council affirmed this position[24]. The best-known papal document that deals with the defense of ecclesiastical jurisdiction is the so-called bull «In coena Domini». It was regularly declared on Maundy Thursday, the day commemorating the Last Supper of Christ; hence its general name, while the «incipit» of the actual bulls differ[25]. «In coena Domini» penalized several offences with (automatic) excommunication. Among those were, to name but a few, heresy, schism, piracy, falsification of papal documents and attacks on cardinals or papal delegates. The passages in this bull relevant to the question of «recursus ab abusu» are the chapters concerning the violation of ecclesiastical immunity, and especially the chapter that deals with interferences in ecclesiastical jurisdiction. There, «In coena Domini», in its version from 1577 onward, explicitly threatened with excommunication «those that, evading the ecclesiastical judge, turn to chancelleries and other secular courts, and there procure prohibitions and writs; also those who decide on this and execute it or give help, counsel, patronage and favor to it»[26]. This is clearly directed against

second depended, at least in some measure, upon the classification of matters according to religious principles». Helmholz goes on to describe the development of ecclesiastical jurisdiction concerning «miserabiles personae», that is, disadvantaged persons, especially widows and orphans.

20. On this letrado in the service of both church and state cf. Helmholz, 2018.

21. Engel, *Collegium universi juris canonici*, p. 318 (II, § 5, 38): «Exemptionem Clericorum a jurisdictione Laicorum nemo est, qui ignoret, eamque *jure divino* sic ordinatam esse Pontifex & Patres […] aperte pronunciarunt; quos sequimur […] non curantes, quae in contrarium afferuntur a Covar […]»

22. Engel, *Collegium universi juris canonici*, p. 321 (II, § 5, 49): «non autem consuetudine, vel praescriptione etiam immemoriali […]».

23. Engel, *Collegium universi juris canonici*, p. 318 (II, § 5, 38): «Igitur *personae Ecclesiasticae* coram nullo alio Judice, quam Ecclesiastico conveniri possunt, quod beneficium, cum non sit personale, […] Clerici etiam cum juramento, ac in causa quoque *mere temporali* eidem renunciare non possunt».

24. Concilium Tridentinum, 1615, sessio 25 de reformatione, cap. 3, p. 219 (concerning sentences of excommunication): «Nefas autem sit saeculari cuilibet magistratui prohibere Ecclesiastico iudici, ne quem excommunicet; aut mandare, ut latam excommunicationem revocet […]; cum non ad saeculares, sed ad Ecclesiasticos haec cognitio pertineat» and cap. 20, pp. 232-233: «Propterea que admonet Imperatorem, Reges, res publicas principes, et omnes, et singulos, cuiuscumque status et dignitatis extiterint, ut […], quae Ecclesiastici iuris sunt, […] venerentur; nec ab ullis Baronibus, Domicellis, Rectoribus, aliisve dominis temporalibus, seu magistratibus, maximeque ministris ipsorum Principum laedi patiantur, sed severe in eos, qui illius libertatem, immunitatem, atque iurisdictionem impediunt, animadvertant […]».

25. Krämer, 2009, p. 438; cf. Paul V, *Pastoralis*, 8.4.1610, p. 393: «Pastoralis […] hodierna die, quae anniversariae Dominicae Coenae commemoratione solemnis est […]».

26. Paul V, *Pastoralis*, 8.4.1610, p. 395: «§. 16. […], ac etiam eos, qui […] fori Ecclesiastici Judicium eludens, ad Cancellarias, & alias Curias saeculares recurrunt, & ab illis prohibitiones, & mandata […] procurant, eos quoque, qui haec decernunt, & exequuntur seu dant auxilium, consilium, patrocinium & favorem in eisdem».

all those engaged in the Spanish institution of «recurso de fuerza», including its theorists, like Salgado de Somoza.

2.1.2. Salgado's argument for the legitimacy of the «recursus ab abusu»

Salgado defended the Spanish institution of «recursus ab abusu» in his treatise of 1626, the *Tractatus de regia protectione vi oppressorum appellantium a causis et judicibus ecclesiasticis*. As indicated in its main title, «de regia protectione», Salgado bases his argument on the institution of the king: The purpose of the office of any king is to maintain justice and to provide protection for the oppressed (or the underprivileged, to use a more modern term). Salgado refers to a passage in the commentary of St. Jerome on Jeremiah 22, 3[27]. This had been included in the immensely important and influential compilation of texts of canon law, the *Decretum Gratiani* (*c.* 1140), thus giving Salgado's argument for the rights of the Spanish King a firm canonical basis and the combined authority of St. Jerome, a Doctor of the Church, and of the «Pater Juris Canonici», the Father of Canon law, Gratian. In the *Decretum Gratiani*, Jerome's argument reads: «Regum est proprium, facere iudicium atque iusticiam, et liberare de manu calumpniantium ui oppressos, et peregrinis pupilloque et uiduae, qui facilius obprimuntur ab potentius»[28].

Salgado's argument is that those clerics who are positioned lower in hierarchy are in need of protection against oppression. They are in danger of being «subdued by force», meaning that they fall into the category of the «vi oppressi» mentioned by St. Jerome. Therefore, their defense and protection is relevant to the advancement of the common good: «defensio, et protectio clericorum est causa publica»[29].

Indeed, the institution of «recursus ab abusu» mirrors the argument that popes and canonists had used to justify the jurisdictional competence of ecclesiastical courts in cases concerning socially disadvantaged persons, especially travelers, orphans and widows (as noted in Jerome's text) who had suffered oppression by «injuria» or «violentia». In the terms of canon law, these people would be called «miserabiles personae»[30]. Accordingly, Salgado's title directly references the argument that the king has a duty to protect the disadvantaged: his is a «Tract on the royal protection of those oppressed by force that appeal from ecclesiastical cases and judges». Furthermore, his duty is inherent to the position as king; it is one of the «regalia» that cannot be relinquished without relinquishing the position itself[31].

27. Hieronymus, *In Hieremiam prophetam*, p. 201: «Regum autem proprium est facere iudicium atque iustitiam et liberare de manu calumniatorum ui oppressos et peregrino pupilloque et uiduae, qui facilius opprimuntur a potentibus, praebere auxilium»; Hieronymus Stridonensis, *Opera omnia*, vol. 4, col. 811; English translation in Hieronymus, *Commentary on Jeremiah*. Cf. Forster, 2017, pp. 53-54.
28. Decretum Gratiani, 1879, C. 23 q. 5 c. 23, col. 937. In the «Editio romana», a quasi-official edition printed in Rome in 1582, the text begins «Regum officium est […]»; Salgado cites this version in Salgado, *Tractatus de regia protectione…*, I, 1, 97 [= book I, chapter 1, marginal nr. 97], p. 20.
29. Salgado, *Tractatus de regia protectione…*, I, 1, 98, p. 20.
30. Helmholz, 1996, p. 126; cf. *supra* note 19.
31. Cf. *infra* note 58.

But this and the many more arguments made by Salgado's letrado-predecessors and by himself in defending the rights of the Spanish crown have an implicit problem: Even if protection is the underlying purpose of the office of the king, this does not necessarily mean that he should have a jurisdictional competence, let alone that he had somehow effectively acquired such a jurisdiction. Any argument would have to confront the strong position of the canonists (cf. supra). Faced with this problem, Spanish letrados including Salgado attempted to interpret a bull allegedly authored by Pope Martin V[32] in their sense, that is, that the pope had thereby accepted the institution of «recursus ab abusu»[33]. This argument tries to utilize the fact that, according to canonical teaching, laymen could acquire jurisdiction over certain clerics or certain cases by papal privilege[34]. Salgado conveniently does not mention the fact that this bull gave a privilege only to the King of France (then: Charles VII), and only concerning cases dealing with the protection of possession[35] of benefices pertaining to this King, upholding the sanction for all other cases[36]. Also in a more abstract perspective, this argument suffers from several weaknesses: Being based on the interpretation of a papal bull, it can be refuted by a contrary

32. The text of this alleged bull was published by the French jurist Guido Papae (Gui Pape, † 1477) in his *Decisiones Parlamenti Delphinalis* (Papae, *Decisiones Guidonis Papae…*, I, 4, pp. 1-2), which he collected and annotated and which were printed under diverse titles until the beginning of the 17th century. Papae claimed to have found it in the archive of the Royal Court of Lyon, cf. Papae, Decisiones Guidonis Papae…, I, 4, p. 1: «[…] rescripto Papali extracto per me a registris Curiae Regiae Lug. Cuius tenor sequitur de verbo ad verbum». Papae indeed worked in Lyon as an advocate for about an year, cf. Giordanengo, 2007, p. 606.

33. Salgado, *Tractatus de regia protectione…*, I, 1, 175: «Hanc etiam consuetudinem cognoscendi Principes supremos per modum defensionis extrajudicialis, ad tollendas violentias inter Ecclesiasticos approbavit Martin. Pontifex, cujus Bullam ad litteram refert Guido Papae in [Decisiones Parlamenti Delphinatus] quaest. 1 & quaestio. 85. [recte: 552]»; Salgado, *Tractatus de regia protectione…*, I, 1, 291.

34. Engel, *Collegium universi juris canonici*, II, 2, 49, p. 321: «An privilegio, […] Laicis jurisdictio in Clericos acquiri possit? Posse acquiri privilegio Pontificis saltem quoad certas personas, vel causas».

35. The «iudicium possessorium» as opposed to the question who in the end had a valid legal claim to a certain good, the «iudicium petitorium».

36. Papae, *Decisiones Guidonis Papae…*, I, 4, pp. 1-2: «Martinus episcopus, servus servorum Dei, […] quod […] clerici ecclesiasticaeque personae, qui suas causas & querelas […] saecularibus iudiciis se submittere […] praesumebant, gravibus […] poenis tam spiritualibus, quam temporalibus […] alligarentur. […] Nos […] statuimus & etiam ordinavimus, quod quicunque ex clericis, […] nisi a praemissis desisteret, […] ipseque in graves tunc expressas, & alias iuris poenas incurreret, prout in dictis litteris […] continetur. Cum autem […] Caroli regis Francorum […], nuper nobis fuisset expositum, quod a nonullis vertitur in dubium: an […] derogare voluerimus iuri & iurisdictione regiae, praesertim in causa possessorii retinendae possessionis, super suis ecclesiis & Beneficiis ecclesiasticis suorum regni Franciae, & Delphin. Vien. […] Nos […] eiusdem regis in hac parte suis supplicationibus inclinati […] declaramus, nostri intentionis non fuisse […] eidem regi, & eius regiae iurisdictioni, per quam […] tam rex, quam sui progenitores, super huiusmodi possessorio […] consueverunt cognoscere, […] derogari voluisse […] quoquomodo, ipsosque regem & iudices, decernentes partes molestatas super […] suorum Beneficiorum possessionem ipsius regis auxilium implorantes […] poenas […] nullatenus incurisse […] Per hoc autem nullum ius seu iurisdictionem, in praemissis, cognoscendi, eidem regi de novo acquiri volumus, sed antiquuum, si quod habeat, tantummodo conservari. […] Datum Romae […], Kal. Maij, pontificatus nostri anno 12». Salgado reprints this text in *Tractatus de regia protectione…*, I, 1, praeludium V, 191-192, pp. 44-45, but with the difference that he has «saecularibus negotiis» instead of «saecularibus iudiciis».

interpretation, especially as the Holy See can point to the fact that the authority that sets a norm is in the position of giving the authoritative interpretation of this norm. Furthermore, even if there were a more general papal privilege in this bull, it might be revoked in the same manner, by a papal bull, so that «In coena Domini» would stand nonetheless.

Salgado circumvents all these obstacles by constructing an overarching argument: In his role as protector of the oppressed, the king acts extra-judicially[37]. Therefore, he is not exercising jurisdiction, and consequently, does not infringe upon ecclesiastical jurisdiction; his protection of clerics faced with «violentia» is a purely political action that has absolutely nothing to do with jurisdiction[38]. Again, this argument ties in well to the structure of the passage of St. Jerome as it reads in the *Decretum Gratiani*: If the king's office is to hear cases and uphold justice on the one hand, and to aid and liberate oppressed persons on the other hand, then these are two different tasks. This juxtaposition allows a conceptual differentiation between the first and the latter: Helping oppressed clerics, as it falls under «liberare […] ui oppressos», is something different from «facere iudicium», and therefore it is extra-judicial. This extra-judiciality is Salgado's main —and new— argument for the legality of the «recursus»[39].

2.2. The right of «retentio bullarum»

2.2.1. The practice of retention of papal letters

Salgado's second work, the *Tractatus de supplicatione ad sanctissimum a litteris et bullis apostolicis, […] et de earum retentione interim in senatu* (1639), deals with the other main tool the Spanish monarchy used to gain control over the ecclesiastical hierarchy on the Iberian peninsula: the retention of papal letters in the Royal Council («retentio bullarum» or «retención de bulas»). From a general perspective a requirement for any norm to come into force is its publication. Consequently, inhibiting the publication of papal bulls or other letters containing decisions, dispensations etc. de facto undercuts their legal validity within the realm of the Spanish Crown. While the Royal Council decided on the «retentio bullarum», as indicated in Salgado's title, it is important to note that, again, this institution is based on the person of the king, as his council represents the king himself[40].

37. Salgado, *Tractatus de regia protectione…*, I, 1, before 1: «recursus, & Regiae protectionis extrajudicialem […] cognitionem […] reperio»; cf. Forster, 2017, pp. 54-55.
38. Salgado, *Tractatus de regia protectione…*, I, 1, praeludium V, 326, p. 47: «quia hic […] nulla datur jurisdictio, sed vis protectiva, & propulsiva, nudum auxilium & naturalis defensio, ac potestas politica, & oeconomica sina umbra, aut vestigio Jurisdictionis».
39. Alonso, 1973, pp. 91-93: «La demonstración de la extrajudicialidad […] significa para Salgado punto de apoyo, quicio y columno sobre los que descansa y se fundamenta todo el peso de esta práctica».
40. Salgado, *Tractatus de regia protectione…*, I, 1, 33, p. 56: «persona Regis, & ejus supremorum Senatorum (quorum tribunal regis personam repraesentat)»; Salgado, *Tractatus de supplicatione…*, I, 1, 103, fol. 9v refers to this passage. Cf. Czeguhn, 2020, p. 451: «As the council spoke, so spoke the king».

The practice of retaining papal letters seems to have come into existence in Spain in the late 15th century to curtail the illicit trading of indulgences, especially those that had been included in the «Bula de la Cruzada», the revenue of which pertained to the Spanish Crown[41]. Naturally, all Popes condemned this practice, which denied them the possibility of effective promulgation. The bull «In coena Domini» penalized any inhibition of the execution of papal bulls[42]. In its wording from the 17th century on, it included a clear allusion to the justification of prevention of injustice and thereby to the specific Spanish practice[43].

The Spanish Kings, confronted with a papal bull that penalized the retention of bulls, reacted as can be expected and retained said bull. In 1522, Emperor Charles V (1500-1558; King Charles I of Spain 1516-1556) prohibited the publication of «In coena Domini» published by Hadrian VI[44]. The respective bulls of 1568 (Pius V) and 1583 (Gregor XIII) were inhibited by Philipp II[45].

Furthermore, in 1525 and 1528 Charles enacted laws dealing with the retention of bulls that concerned the bestowing of certain benefices and canonries[46]. A norm enumerating the rights of the Spanish Crown on which retention of papal letters could be based was promulgated in 1543[47]. However, this was not conceived to limit the practice to those cases. *E. g.*, the decree pronouncing the excommunication of Queen Elisabeth of England was retained in 1570[48]. In 1628 Philipp IV ordered the bishops in his realm not to publish the papal decree containing the prohibition of Salgado's *Tractatus de regia protectione*[49]. Salgado himself briefly notes that «retentio bullarum» happened on a daily basis: «quotidie fit»[50]. This control of absolutist monarchs over papal communications and thereby over papal authority was not confined to Spain and France, but was practiced in virtually all European states and became known as «placet» or «exequatur»[51].

41. Forster, 2017, pp. 75-76; Naz, 1965, col. 11.
42. Julius II, *Consueverunt* (1511), p. 320, § 10: [Item excommunicamus] «Ac illos, qui ne literis & mandatis Apostolicae Sedis […], non habito prius eorum beneplacito, & assensu, ne pareatur […] statuere, seu mandare».
43. Paul V, *Pastoralis*, 8.4.1610, p. 395, § 14, in fine: «etiam praetextu violentiam prohibendae, vel aliarum praetensionem».
44. Aldea, 1961, p. 203. Cf. Forster, 2017, pp. 76-77.
45. Cf. Aldea, 1961, p. 204; Forster, 2017, pp. 78-79. Salgado, *Tractatus de supplicatione…*, I, 2, 162, fol. 36r explains that a «supplicatio» against «In coena Domini» was not necessary inasmuch as its chapters infringed upon the regal rights of «recursus» and «retentio bullarum», but that it was made by the Spanish kings out of caution: «Similiter igitur quamvis a capitibus eusdem *Bullae Coenae*, quatenus sub generalitate & involucro verborum tangerent recursum ad regem, & retentionem Bullarum debito modo factam, non erat necessaria supplicatio […], nihil detrahunt Regaliae, & praeheminentiae Regis nostri: nihilominus ad omnimodam securitatem, & maiorem cautelam […] ideo pro parte suae Maiestatis supplicatum fuisse ab eisdem […]».
46. *Recopilación de las leyes destos reinos* (1640), I, 3, 21 and 24.
47. *Recopilación de las leyes destos reinos* (1640), I, 3, 25; cf. Forster, 2017, p. 77.
48. Maltby, 1983, p. 195; cf. Forster, 2017, pp. 78-79 with further examples.
49. Alonso, 1973, pp. 33-34; Forster, 2017, p. 58.
50. Salgado, *Tractatus de supplicatione…*, I, 9, 13, fol. 82v.
51. Cf. Naz, 1965; Papius, 1867.

2.2.2. Salgado's argument for «retentio bullarum»

It is important to note that Salgado does not use the formal and theoretical argument formulated above. Indeed, inhibiting the promulgation of normative texts of the Holy See de facto, by force, would be an infringement of papal rights; it would be a «violentia» in itself.

In contrast, Salgado's reasoning is based on an interpretation of the office of the legislator in general and that of the pope in particular: It has to be presupposed that every legislator has rational intent, so that he wants to enact only such laws that are beneficial to those affected by it. It is sure that the pope does not want to enforce laws or anything else that is detrimental to the wellbeing of the spiritual or the secular republic[52]. Therefore, according to Salgado, the practice of «retentio bullarum» is founded on the pope's own will: Having received information about any detrimental effects of his normative actions, he will not want it to have a further effect[53]. Supplying the pope with such information about his letters and bulls and asking him to change them («supplicatio» as mentioned in the title «de supplicatione a sanctissimum a litteris et bullis apostolicis») leads to the suspension of any legal effects of his letters[54]. Correspondingly, and this is Salgado's pivotal argument, «retentio bullarum» is directed at informing the pope better, and not at limiting his power[55]. Therefore, it is not an infringement on his rights. Salgado shores up this argument by pointing to the fact that because Spain is geographically so far away from Rome and directly turning to the pope therefore would take so long, it is necessary to be able to refer to the king in such cases[56].

On the other hand, just as is the case with «recursus», «retentio bullarum» falls into the Spanish King's office to maintain peace and order and to defend his subjects as well as the Church[57] —in this case against the noxious effects of ill-in-

52. Salgado, *Tractatus de supplicatione…*, I, 2, 154-155, fol. 35v: «Cuius ratio est, quia talis praesumitur rationabilis voluntas legislatoris; nam posita aliqua iusta causa, consonum videtur, ut subditi habeant aditum ad legislatorem pro revocanda lege, & interim non obligentur illam servare, donec legislator mentem suam explicaverit […]».

53. Salgado, *Tractatus de supplicatione…*, I, 3, § unicus, 4, fol. 48r: «In hac igitur litterarum Apostolicarum retentionis cognitione numquam disceptatur, nec dubitatur de Summi Pontificis potestate (absit) sed de eius voluntate dumtaxat, cum certe sit, nolle aliquid disponere in perniciem Reipublicae spiritualis, Ecclesiasticae, aut temporalis, aequo animo permittentem suarum litterarum executionem suspendi, donec de legitima suspensionis causa […]».

54. Cf. note 52; Salgado, *Tractatus de supplicatione…*, I, 2, 162, fol. 36r: «[…] supplicationem de iure Canonico operare effectum suspensivum […]».

55. Cf. note 53.

56. Salgado, *Tractatus de supplicatione…*, I, 1, § unicus (fols. 16r-21r), starting with arguments concerning «recursus» at nr. 2 (fol. 17r), the specific argument concerning «supplicatio» at nr. 29 (fol. 18v).

57. Salgado, *Tractatus de supplicatione…*, I, 1, 152-153 (fols. 12v-13r), and I, 8, 10-11, fol. 76v; Salgado here argues that the case of gaining a papal privilege by misinforming him («surreptio») does not qualify for «retentio», as it does not concern the common good: «[…] firmiter tenendum est, & nervose defendendum, simplicem surreptionem litterarum Apostolicarum, nullatenus esse fundamentum habile ad earum retentionem in Senatu decernendam […], nisi concurrat aut inde inferatur damnum publicae utilitati, & aliqua ex causis relatis superius, *capit. 3.* & sequentibus, ex quibus inferri possit turbatio Reipublicae

formed bulls of the pope. This office is innate to the king; he could not relinquish it even if he wished to[58]. Again, the practice of retaining papal bulls is extra-judicial. It is a fulfillment of his royal office to protect the Church and his subjects, which neither needs judicial competence nor exercises it[59]. One consequence of this is that the king can transfer this assignment, especially to the Royal council[60].

The council had to examine if an «iusta causa» for retaining a papal letter, bull etc. existed. If this was the case, it decided that it would be retained and that the party that had turned to the king would make «supplicatio» to the pope[61]. To do this in fact, however, was left to the party itself —that certainly had no interest in it, as now the papal letter had no legal effect. By this mechanism, the theoretically temporal suspension («retentio[ne] interim», as mentioned in Salgado's title) of papal letters actually had an indefinite effect[62].

3. Salgado's authority

Salgado's life shows a letrado in the service of the Spanish Crown, successful in his personal career as well with his legal teachings concerning Spanish regalism. He by far was not the first one to deal with those important institutions; quite to the contrary, he reused arguments already laid down by Jerónimo de Ceballos (1560-

spiritualis, Ecclesiasticae aut temporalis, quo solo unico fundamento haec retentionis cognitio, & facultas defertur Principi supraemo Ecclesiae, & Regni protector […]»; cf. also I, 9, 13, fols. 82v-83r: «Senatum Supremum posse […] hac uti regalia in omnibus casibus […] in quibus militat ratio publicae utilitatis, & turbationis pacis, ac per consequens tollendae violentiae, nam cum haec sit principalis nervus, unicum fulcrum, & solidum fundamentum […] huiusmodi recursus retentionis […] ne pax publica, statusque Regni tranquilus turbetur, & ne commune bonum detrimentum patiatur, Princeps tamquam suae commandatae Reipublicae protectori, ac status Ecclesiastici, necnon Reipublicae spiritualis, ad eiusque officium proprie pertineat Regium salus populi, quies, & tranquilitas publica […]».

58. Salgado, *Tractatus de supplicatione…*, I, 1, 109-110, fol. 10r: «In hae quae Regaliae, non fiunt concessibiles […], quod Regalias, quae competunt Regi, in signum supremae iurisdictionis, ut ad ipsum […] recurratur, Princeps a se abdicare non potest […] Regem non posse sibi auferre supremam Regaliam recurrendi ad eum, nisi Sedi Regiae renuntiaret».

59. Salgado, *Tractatus de supplicatione…*, I, 1, 152-153, fols. 12v-13r: «[…] quamvis cognitione egeat Princeps regulariter ad tolendam vim, & praestandam tutelam; nichilominus iurisdictione non egeat, nec requiritur […] quod cui commendata, data & attributa est protectio Ecclesiae, vel personae, sola defensio extraiudicialis, non tamen iurisdictio in eo data est […]».

60. Salgado, *Tractatus de supplicatione…*, I, 8, 22-23, fol. 78r: «Ex qua doctrina recte infertur, quod Senatus Regius in examinatione causae tangentis publicam utilitatem, & damnum Reipublicae Ecclestiasticae, spiritualis, aut temporalis ad effectum supplicandi ad Sedem Apostolicam, iurisdictione non eget […], sed extraiudicialem cognitionem, informationem, & indagationem ad fideliter certiorem reddendum summum Ecclesiae pastoris super damnis, & inconvenientiis, quibus afligi potest Respublica haec […], quia tunc de mero facto tractatur, quod non tangit intus Bulllarum valorem, sed de quodam eccidenti externo […]»; cf. also I, 16, 17-20, fols. 133v-134r with an argument taken from canon law.

61. Salgado quotes the operative provisions in *Tractatus de supplicatione…*, I, 16, 58, fol. 136r: «*Retienense estas Bullas en el Consejo, para que no se use dellas, y la parte de N.* (petentis retentionem) *suplique dellas ante su Santidad*». Cf. Forster, 2017, pp. 88-89.

62. Forster, 2017, p. 89.

1644)[63]. Nevertheless, compared with earlier works, especially those of Ceballos, Salgado's tracts on the privileges of the Spanish Crown had the advantage of being systematic, complete and balanced[64].

This led to him being used extensively by the jurists defending Spanish «regalismo» and its practice by absolutist kings, but also by theorists outside Spain or France that tried to loosen the catholic hierarchy in their nation from the control of the pope. This especially concerns Zeger-Bernard van Espen (1646-1728) and Johann Nikolaus von Hontheim (1701-1790), the latter better known by his pen name Febronius[65]. Under the name of «Febronianism», arguments originally marshaled by Salgado were used in the 18th century with the aim of establishing a German national church[66]. At the turn of the 19th century, after the end of the Holy Roman Empire and the secularization of the ecclesiastical principalities, the same legal institutions were used by the Bavarian monarchy to submit the catholic hierarchy in their territory[67]. Within the context of the «Kulturkampf», Prussia in 1873 enacted a law[68] that established a special royal court (§ 32) to which clerics could appeal in the case of ecclesiastical disciplinary measures that did not conform to the requirements set out in the same law (§ 10), especially that such measures could be enacted by German ecclesiastical authorities only (§ 1) —that is to say, not by the Holy See. In this perspective, Francisco Salgado de Somoza, a Spanish letrado born in the last decade of the 16th century, exerted his authority unto the end of the 19th century.

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63. Forster, 2017, pp. 55-57, 63; Alonso, 1973, pp. 161-173.
64. Forster, 2017, pp. 56, 63.
65. Both take their arguments directly from Salgado's works, cf. Forster, 2017, 96.
66. Feine, 1964, pp. 568-573; cf. the title of Müller, *Febronius der Neue*… (1838), that refers to this epoch.
67. Concerning Bavaria at the beginning of the 19th century, Huber, 1957, pp. 320-321: «In Einklang mit der damals herrschenden Staatsrechtslehre, Kirchenrechtslehre und politischen Publizistik […] setzte Montgelas die Verschärfung des Placet und des Recursus ab abusu, die Aufhebung der geistlichen Gerichtsbarkeit und der Steuerfreiheit des Klerus, die staatliche Ernennung der Bischöfe und Geistlichen, die Säkularistation des Kirchenguts und die Verstaatlichung des Unterrichtswesens durch. […] Das Religionsedikt von 1809 schließlich führte in Bayern […] die volle Unterordnung der Kirche unter den Staat in äußeren wie gemischten Angelegenheiten durch. Es krönte damit das von Montgelas erstrebte territorialistische Staatskirchenrecht».
68. Gesetz über die kirchliche Disziplinargewalt und die Errichtung des Königlichen Gerichtshofes für kirchliche Angelegenheiten, 12.5.1873, Gesetz-Sammlung für die Königlichen Preußischen Staaten, 1873, pp. 198-204; cf. Link, 2004, col. 138.

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