



*Canon Law, Moral Theology and Conflict Resolution in the Early Modern Period.* Junior Research Group „Canon Law, Moral Theology and Conflict Resolution “ within the LOEWE Research Focus Extrajudicial and Judicial Conflict Resolution, Frankfurt am Main, 28.02.2013-02.03.2013.

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## **Canon Law, Moral Theology and Conflict Resolution in the Early Modern Period**

The past decade has seen an increasing interest among legal historians, jurists, philosophers, theologians and historians of economic thought in alternative modes of conflict resolution as well as in canon law and moral theology in the early modern period, e. g. in the Second Scholastics of the School of Salamanca. Therefore the Junior Research Group of the LOEWE Landes-Offensive zur Entwicklung wissenschaftlich-Äkonomischer Exzellenz, funded by the German State of Hessen. See the website of the project: <http://www.konfliktloesung.eu>. project on judicial and extrajudicial conflict resolution, supported by the Max-Planck-Institute for European Legal History (MPIeR), the University of Frankfurt and the University of Applied Sciences of Frankfurt am Main, organized this workshop at the *Goethe-Universität* in Frankfurt am Main, which is the first one of a planned series during the years in which the project will be developed. The main idea behind such a meeting was to bring together doctoral students (or recent doctors) and post-doctoral researchers from different countries and traditions working on dispute settlement in the early modern period, late scholasticism, canon law, moral theology or similar topics. Every doctoral student or young researcher presented some results of his/her recent investigations and these were discussed by a post-doctoral scholar from a methodological point of view, and should be also open to a larger discussion within the general group of participants for over 30 minutes. 17 pre-

sentations were discussed during the workshop and additionally two lectures took place.

After the first words of welcome by ALBRECHT CORDES (Frankfurt am Main), where he presented the main aims of the LOEWE project and the groups of researchers, the leader of the LOEWE Junior Research Group, WIM DECOCK (Frankfurt am Main/Leuven) gave a further explanation of the actual objectives of this workshop.

The first speaker was OSVALDO R. MOUTIN (Frankfurt am Main), who made a presentation of the state of his research, namely the Third Mexican Provincial Ecclesiastical Council (1585) as conflict resolution authority in religious and secular matters. He divided his talk in three parts, concerning firstly a summary history of the Third Mexican Council; secondly, an introduction to the various materials of the Council particularly interesting for a research like that; and, finally, a description of the central research topics he was dealing with. His well-informed presentation showed a much higher significance of the Council as a conflict resolution instance than commonly thought and its relevance for the construction of an alternative to the royal authority in the Spanish Americas to discipline societies in that part of the New World.

In the second doctoral student presentation, DANAÄ SIMMERMACHER (Halle-Wittenberg) talked about the theory of subjective right in Luis de Molina. A topic which has also been deeply studied by Francisco Carpin-

tero et al., *El derecho subjetivo en su historia*, Cádiz 2003, and more recently (but also more briefly) by Alejandro Guzmán Brito, *El derecho como facultad en la neoescolástica española del siglo XVI*, Madrid 2009. She started by clarifying the meaning of *molinism* in its historical context. Afterwards, she discussed the definition of *libertas* in Molina, and its relation with *dominium*, an issue that can be observed mainly within the sharp problem of the domination over slaves. In her view, a premise for Molina in his concept of *dominium* was thus the *free will* (*liberum arbitrium*), so that it explains why it is so necessary to analyze the central traits of *molinism* to understand Molina's definition of *ius*. Finally, she smartly connected Molina's ideas with modern scholars' theories of right as Niklas Luhmann's or Robert Alexy's.

The following presentation was carried out by CHRISTOPH HAAR (Cambridge), who develops a Ph. D. thesis on the issue of the intellectual foundations of the Jesuit Scholasticism position concerning the relationship between household, community and power. He underlined that the Jesuit theologians of the 16th and 17th centuries considered at length, on the basis of their Thomist heritage, the roles of the communities in human life. The research tries to uncover what both different narratives present in the Jesuit thought, the sociability of man in the scholastic-Aristotelian tradition and the human need and iniquity of the Christian relate, imply about the purposes of human communities. It considers the household and the relationships inside to ask whether they provide insight into this issue: how far these relationships are a matter of freely-established contracts and how they relate to the political community with its jurisdictional power. He also compares this strand of thought to another contemporary model, namely the founding narrative of the *state*, and the contrast between the scholastic idea of commutative justice and the Hobbesian contract. In the final analysis, his aim is to shed light on the role of the early-modern political community, on how it was conceptualized by Jesuit thinkers, with what justification and with what purpose in mind.

TOBIAS SCHAFFNER (Cambridge) delivered a presentation concerning his Ph. D. on Francisco Suárez and Hugo Grotius, and their significance for contemporary legal philosophy. He developed different aspects of the significance of *early modern* philosophers, e. g. the value objectivism and history, and the theory of natural law. In his view, it is possible for research like this to limit itself only to one aspect of the interactions between values and past and present solutions of the Thomist-

Aristotelian tradition, e. g. the just war. He then proposed a wide set of questions concerning the *principia* of morality and the role of natural law theory in such a context for these authors, particularly Francisco Suárez.

The two following talks came from young doctorate candidates of the very Junior Research Group in the MPIeR. In the first one, RAFAEL VAN DAMME (Frankfurt am Main) focused his investigation on connecting historical evolutions in the sphere of law, morality and conflict resolution to the secularization debate going on in philosophy of religion. The aim is to use mainly the theories of the French philosopher René Girard (1923-) to explain and to put into perspective historical data from the legal and moral theological traditions. Girard sees the end of religion in the disruption of scapegoating mechanisms and the increasing ability to recognize and protect scapegoats. Primitive religion's narrative was told from the perspective of the persecutors. Christianity, however, is told from the viewpoint of a scapegoat and dismantles scapegoatism. Open for investigation is the question whether our legal sources reflect such a changing mindset. The speaker dealt with the understanding of Girard's theory of *Strafe für fremde Schuld* according to the criticism of Harald Maihold. The main idea of this theory is that substitutive punishment is anchored in the perception of sacrificial logic, but it is progressively expelled from the idea of punishment itself, e.g. in the modern penal law, and there it could be possible to discover the influence of the rejection of the Gospels to such a conception.

Then JASMIN HAUCK (Frankfurt am Main) talked about the performance of the Vatican Penitentiary (*Sacra Poenitentiaria Apostolica*) as a kind of supreme court in Latin Christianity for questions of grace in the Late Middle Ages and Early Modern Times. Precisely, this paper was related to the issue of the marriage conflicts as an example of its proceedings as a delegated jurisdiction, which acted as a communication instrument between the Roman centre and the church periphery. The investigation is namely focused on the consideration of the legal basis for the decisions in a field encumbered with tensions between semi-codified law, doctrinal discourses and local customs.

The rest of the first day of the workshop was devoted to a vivid discussion with the author PAOLO PRODI (Bologna) about his famous work *Una storia della giustizia* (*A Theory of Justice*) (Bologna, 2000).

The second day was initiated by DAVID HARBECKE (Frankfurt am Main), who introduced his Ph. D. project

on the role of moral theology in the emergence of the Court of Chancery in England. Consequently, he gave a description of the judicial landscape in England at the beginning of the Modern Ages. Special consideration was awarded to the Court of the Chancery, its emergence, and of the influence that Roman-canon Law and other legal sources had on the legal procedure of the Chancery, even though the speaker showed a moderate scepticism concerning the possibility to determine some traces of Roman-canon law influence on the substantive law of the Chancery. The speaker proved that references to religious issues were very common and showed a level of language quite wider than the more technical one of the *common law*.

The following presentation was held by PAOLO ASTORRI (Rome), whose topic was the influence of the Protestant theology on the development of modern contract doctrine. Namely, he focused his attention on the doctrine of *nudum pactum* by Matthaeus Wesenbeck (1531-1586). This seems to be a good representation of the relationship between law and theology in the Modern Ages that leads to the development of modern contract doctrine. Wesenbeck founded the possibility to exercise an action *ex pacto nudo* (against the Roman law principle) on the consideration of the break of the *pactum* (despite it being *nudum*) as a sin, a fact contrary to God's will. In these ideas, Wesenbeck could have been influenced, according to the speaker's opinion, by the Spanish scholastic Fortunato Garc a. Notwithstanding, the Catholic theology saw this problem in a very different way since the canon law rule seemed to cling more to the traditional perspective.

EMANUEL VAN DONGEN (Maastricht) presented his study on the defence of contributory negligence in medieval canon law and in conflict resolution in Italy in the Early Modern period. He asserted that the way in which canonists dealt with the issue of contributory negligence was very different from Medieval Roman legal scholarship. A different way of dealing with contributory negligence arose in that time: by means of the concept of *culpa admixta* a legal qualification was given to the act of the injured party in situations in which a hurtful action by a wrongdoer was mixed with a fault of the injured party. Van Dongen analyzed the way the Italian jurists in the early modern time dealt with the issue of contributory negligence of the injured party, and especially whether they did continue to apply the medieval doctrine of *culpa compensatio* as studied.

Afterwards an erudite presentation was given by

MARKUS M. TOTZEK (Heidelberg), who talked about the importance of the Bible in the political thought of the early modern time (viz. 1550-1700), namely of the *Politia Biblica*. He described the expansion of the Bible in the Protestant countries and its political significance. The directions, which can be found in the Bible for political needs in the modern time, are namely the political implications of the Old Testament and Jewish thought in general, where some kind of idealization of the *Respublica Haebreorum* can be traced. He proposed a review of the literature being concerned with the *Politia Biblica*, and its connections with Roman law and legal humanism, as can be seen in the work of F. Ragleau and P. Cunaeus.

STEFAN SCHWEIGH FER (Frankfurt am Main) again pointed out problems of late Catholic Scholasticism. He spoke about a difficult and very often discussed issue, namely the intellectual foundations of the capacity to oblige the law (*lex*) in the work of Francisco Su rez. By contrasting several opinions of modern authors about the main texts of Su rez on the topic, he presented himself as an author who is situated halfway between the intellectualism of Thomas of Aquinas, who considered the practical reason as the instance which recognizes the natural law and gives it legal force, and the subjectivism of Duns Scotus, who always saw law as an imperative rule. The real question to be solved by Su rez is whether the law, being actually an imperative, can be seen as well a derivative product of reason (*ordinatio rationis*).

After this session, the second day finished with an evening lecture by PAOLO PRODI (Bologna), who spoke about sin and crime in moral theology after the Council of Trento, and insisted on his well-known theories about the consequences of the secularization causing the emergence of a new globalizing power which has erased the old dualism between secular and religious power typical for the Modern Ages, which is, in Prodi's opinion, a major risk for our conception of liberty and democracy.

The last day began with the paper of TYLER LANGE (Berkeley), whose aim was to analyze how excommunication for debt was used by the ecclesiastical courts to encourage or to hold up the economic activity. He concentrated his research on documents in French archives, precisely Northern France, above all Paris, Ruen and Montivilliers between 1300 and 1600. The main reason to do this is that the practices appearing in France quickly spread out through the rest of Europe. In a highly informed and exciting presentation, he also showed a very detailed map of frequency of excommunications in the considered region and the proportion between judicial

expenditures and revenues in the ecclesiastical courts.

After a short discussion with the audience, the following presentation by MASSIMILIANO TRAVERSINO (London) was concerned with the meaning of *âpotentia Deiâ* in Law and Theology in the Early Modern ages. He pointed out that, even though canonists were the first jurists to develop a legal foundation for the political power and its exercise at the time of the emergence of the Modern state, they could not find a real isomorphism between the political power of the secular princes and that of the Pope, and neither could the theologians. They had to invent the difference between *potestas Dei absoluta* and *ordinata* in order to give some kind of explanation for the phenomenon of the new secular power and they made productive use of the legal tradition to deal with the problem of an intellectual reconstruction of the dialectics of pontifical and temporal power in the modern age.

Then KERSTIN HITZBLECK (Bern) presented her *Habilitationsschrift*. She started with an argument that occurred between the great canonist *Abbas Siculus* or *Panormitanus* (*Nikolaus de Tedeschis*) and the Crown of Aragón, a story which let her analyse the effects of the notion of *âconscientiaâ* in the political field at the end of the Middle Ages. She presented a short history of the notion of conscience up to the Middle Ages and then made an anthropological and sociological analysis (on the basis of Luhmann, Kittsteiner) of its relation to human behaviour in its social, religious and communicative aspects. The case of Panormitanus is a good exemplification, in her view, of the emergence of that notion in a precise historical context, a quite illuminating example of the contemporary discussions between conciliarists and papists, and between the supporters of the king's sovereignty and the defenders of a limitation of his power.

Afterwards MARCIN BUKALA (Cracow) presented his proposal to make a critical edition of the treatise *Contra malos divites et usurarios* (Cracow, 1512), a book written by the Polish political writer Stanisław Zaborowski (born ca. 1470-1477), which, according to the speaker's view, sheds interesting light on the content of the Polish Synodal Statutes of the year 1512. The relevance of the treatise, however, actually lies in the fact that it is a good example of how the ethical-economic solutions of canonists and theologians, in which the problem of usury played a major role, were discussed in the context of political reform projects.

Finally, the last part of this last session was devoted to the field of Spanish Late Scholasticism. It was initiated

by the presentation of ERIK DE BOM (Leuven), introducing a new research project concerning the foundations of sovereignty and *dominium* in the thought of the School of Salamanca. He explained that his research is aimed at two main targets: to make a historical investigation and to make a contribution to present political and philosophical debates. He pointed out that the first problem to be solved was the absence of a precise vocabulary. But, anyway, in his opinion, by rediscovering these authors' doctrines, it is possible to make a substantial contribution to the present problem of globalization of the political and legal sphere.

This thought was directly connected with the last presentation held by ANDREAS WAGNER (Hamburg/Frankfurt am Main), who talked about the question of Early Modern institutions of plural law. He presented a methodological approach to the meaning of a political theology in the early modern ages, but also a projection to our present circumstances of a globalization of economic and political power and the need of a global legal history to cope with this phenomenon from a historical point of view. His idea is to analyse the phenomenology of legal institutions from a dynamic perspective and in the global context. As an example of this plan, he presented the concept of *respublica totius orbis* in Francisco de Vitoria: Vitoria's conclusions about political power are extended to the global sphere through the notion of *âius gentiumâ*. The attempt to find a legal basis for that new *ius gentium* provides us with a meaningful example of an institution of the Early Modern plural law.

After some questions to these last speakers, Albrecht Cordes made some conclusive reflections, where he remarked on the interdisciplinary and multilingual character of the meeting, which is a good example of overcoming national, linguistic, chronological and thematic frontiers.

It can also be said that the workshop neatly showed the relevance of the studies on the history of legal and political thought for contemporary debates: on the one hand, some presentations underlined how moral theology reflections offer some fruitful points to the analysis of present economic and political topics and interesting proposals for an alternative way of solving conflicts; on the other hand, some other papers presented numerous ideas on how the legal and political thought of the Early Modern period in the sphere of canon law and moral theology could provide solutions for some of the recent challenges of our present globalized world. Besides these intellectual achievements, the workshop showed some-

thing else, namely the extraordinary vitality of this type of studies (not as old-fashioned as many scholars used to think) in the present time and the high quality of many young legal scholars in very different contexts and traditions.

### Conference Overview:

#### Session I

Albrecht Cordes (Frankfurt am Main): Welcome address

Oswaldo R. Moutin (Frankfurt am Main): Das Dritte Mexikanische Provinzialkonzil (1585) als Konfliktlösungsinstanz in religiösen und säkularen Fragen

Comment: Francisco J. Andrés Santos (Valladolid)

Dana Simmermacher (Halle-Wittenberg): Luis de Molina (1535-1600) Lehre vom subjektiven Recht und dominium unter besonderer Berücksichtigung des Eigentums an Sklaven

Comment: Christiane Birr (Frankfurt am Main)

Christoph Haar (Cambridge): Household, Community and Power in Jesuit Political Thought

Tobias Schaffner (Cambridge): Francisco Suárez and Hugo Grotius. Two Late Scholastic natural law theorists and their significance for contemporary legal philosophy

Comment: Andreas Wagner (Hamburg/Frankfurt am Main)

Rafael van Damme (Frankfurt am Main): Kanonistik, Moraltheologie und Konfliktlösung in der Frühen Neuzeit: philosophische Perspektiven

Comment: Harald Maihold (Regensburg)

Jasmin Hauk (Frankfurt am Main): Die Ehegerichtsbarkeit der Päpste in partibus im europäischen Vergleich

Comment: Benedetta Albani (Frankfurt am Main)

Discussion with Paolo Prodi (Bologna) on his book: Eine Geschichte der Gerechtigkeit

#### Session II

David Harbecke (Frankfurt am Main): Die Rolle

der Moraltheologie bei der Entstehung des englischen Equity-Rechts

Comment: James Mearns (Leuven)

Paolo Astorri (Rome): The Influence of Protestant Theology on the Development of Modern Contract Doctrine

Emanuel van Dongen (Maastricht): The Defense of Contributory in Medieval Canon Law and in Conflict Resolution in Italy in the Early Modern Time

Comment: Wim Decock (Frankfurt am Main/Leuven)

Markus M. Totzeck (Heidelberg): Politia Biblica â Wie Gelehrte in der Frühen Neuzeit (ca. 1550-1700) Gemeinwesen auf Grundlage der Bibel entwarfen

Comment: Wim Decock (Frankfurt am Main/Leuven)

Stefan Schweighofer (Frankfurt am Main): Die Begründung der normativen Kraft bei Francisco Suárez

Comment: Kirstin Bunge (Hamburg)

Lecture by Paolo Prodi (Bologna): Sünde und Verbrechen in der Moraltheologie nach dem Trienter Konzil

#### Session III

Tyler Lange (Berkeley): Excommunication for Debt in Late Medieval and Early Modern France

Massimiliano Traversino (London): The Question of the *âPotentia Dei Absolutaâ* in Law and Theology: The Early Modern Age

Kerstin Hitzbleck (Bern): Wenn Panormitanus weint. Überlegungen zum Gewissen als handlungsleitende Instanz im Spätmittelalter

Marcin Bukala (Cracow): *Contra malos divites et usurarios* by Stanislaw Zaborowski. The Problem of Usury and Renaissance Thought

Erik De Bom (Leuven): The Spanish scholastics on sovereignty

Andreas Wagner (Hamburg/Frankfurt am Main): Early modern institution of plural law

Conclusion: Albrecht Cordes (Frankfurt am Main)

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