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A Step towards a Theory of Human Rights

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mo, o viés reducionista do nacionalismo e a unilateralidade do imperialismo e da maneira de fazer histórias pós-coloniais, além de questionar indiretamente o anacronismo com uma ponderação da própria reflexão intelectual sobre o mundo global no passado, contestando visões orientalistas que pregavam que na Ásia a complexidade do mundo antes do colonialismo moderno nunca foi considerada. Assim, com esta obra, damos um passo adiante na compreensão de como os impérios só podem ser entendidos na sua interação com outros espaços e seus vários sujeitos.

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Tilman Repgen

A Step towards a Theory of Human Rights*

Danaë Simmermacher's philosophical doctoral thesis, presented in Halle in 2015, is a very thorough and valuable work. Simmermacher knows her main source, Luis de Molina's (1535–1600) great treatise *De Iustitiae et Iure*, extremely well. She was involved in its partial translation, also prepared in Halle and published in 2019.[1]

The title of her work, »Eigentum als ein subjektives Recht« is programmatic, as Simmermacher translates *dominium* in Molina's work as »property« and ascribes to it as *ius* the quality of a »subjective right«. Both these interpretations are supported by the source but nevertheless debatable. According to Simmermacher, Molina made a fundamental contribution to seeing the individual as the bearer of individual rights, even if he did not – or at least not consistently – associate this with the idea of equality in the quality of »legal capacity« (dogmatically speaking). Simmermacher therefore does not want to classify this form of subjective rights as at the same time »human rights«.

Thus Simmermacher is prompted to begin by defining the term »subjective right« for her purposes. This is particularly important in interdisciplinary discourse. The distinction between the terms »subjective right« and »human right« is very welcome. All human rights are indeed subjective rights, but this does not apply *vice versa*. Contrary to Simmermacher's view, however, the reason for the distinction between the two terms is not the inalienability of human rights. There exist, for example, highly personal subjective rights that are inalienable without being based on human rights, such as membership in a cooperative.

Methodologically, it is correct to start with an attempt to clarify the term from the perspective of modern research, as Simmermacher does, because the term itself is foreign to Molina. Molina speaks simply of *ius*. However, Simmermacher does not take the more obvious route of referring to legal dogmatics. Instead, she seeks to approach the topic via the history of concepts of *subjektives Recht* (in Chapter 2). This question has been much studied. Given Simmermacher's main research focus, it would not be reasonable to expect her to have conducted her own analysis of the concept's development on the basis of primary sources. In consequence, however, she is confronted with the contradictory findings of the scholarly literature, which can hardly be satisfactorily resolved without recourse to the sources. This part of her work therefore does not make an original contribution. The problem of the whole discussion is that the scholars often do not take the systematic function of the jurisprudential term »subjective right« into account. It refers to the bearer of the right, namely a person, and characterizes this right insofar as it is due to this person with a protective and exclusive

* Danaë Simmermacher, Eigentum als ein subjektives Recht bei Luis de Molina (1535–1600): Dominium und Sklaverei in De Iustitia et Iure (Veröffentlichungen des Grabmann-Institutes zur Erforschung der mittelalterlichen Theologie und Philosophie 63), Berlin/Boston: De Gruyter 2018, 234 p., ISBN 978-3-11-055102-0

1 Luis de Molina, De iustitia et iure. Über Gerechtigkeit und Recht. Teil I und Teil II, ed. by Matthias Kaufmann, Danaë Simmermacher, transl. Matthias Kaufmann et al., Stuttgart 2019.

function, i.e. the holder of the right in principle can keep others away from this legal position. Moreover, the *terminus technicus* says nothing about the origin of the right, i. e. whether the subjective right is based on human rights (and thus overpositive) or on a contractual agreement, or is assigned by the legislator. It would be good if the interdisciplinary discourse were to consider this point of view when using the term »subjective right«.

The main part of Simmermacher's study begins with Chapter 3, in which she undertakes an analysis of Molina's understanding of *ius* and *dominium* in Molina. In contrast to medieval commentators, Molina sees *dominium* as something that precedes *ius. Dominium* is therefore not simply a certain manifestation of a subjective right, but only from *dominium* do various rights emerge. The exercise of these rights is restricted by the common good. Rulers have the *dominium iurisdictionis* over their subjects, but no right of disposal over their goods. Simmermacher rightly states that the freedom of the subjects is thus legally safeguarded.

In Chapter 4, Simmermacher connects these insights to the metaphysics of will as discussed in Molina's *Concordia*. This is a valuable way of highlighting the preconditions of subjective law in terms of action theory: reason and free will. According to Molina, both are required in order to be an owner of *ius* and to exercise *dominium*. Here the influence of John Duns Scotus on Molina's theory of action as developed in his *Concordia* becomes apparent. Duns Scotus saw will as radically free, directed at a goal but not determined by it. Reason, then, does not command will. This is also how Molina sees it. He regards the predisposition to freedom of will as an essential characteristic of man, and thus also attributes it to children and the intellectually disabled. He therefore also understands these persons as *domini*, too. Simmermacher sees in this an important difference to Vitoria, which she, however, immediately proceeds to qualify with reference to Vitoria, *De Indis* I 1 n. 13. In this passage, Vitoria assigns *dominium* to children, though he reserves judgment regarding the *amentes* (n. 14). In truth, in the Vitoria passage, the *imago Dei* doctrine leads to the acceptance of legal capacity even for those who cannot (yet) use their reason, so that Molina and Vitoria in the end come to quite similar conclusions. For Simmermacher, Molina combines the teachings of Thomas Aquinas and Duns Scotus to arrive at a »moderately voluntaristic« position. Incidentally, this brings him rather close to the views adopted by his contemporary and fellow Jesuit, Francisco Suárez. For Molina, reason and freedom of will are necessary prerequisites for legal capacity. *Dominium* is dependent on them, and only from the *dominium* does the subjective right (*ius*) emerge. It is sufficient that someone »in himself and his nature« is inclined to reason and freedom of will, which thus also applies to children and *amentes* (*De iustitia et iure* II 18, 138). Simmermacher thinks that when Molina talks of such persons' *dominium*, he considers it as »metaphysically« but not »practically« correct (159). However, in view of the possibility of representation in the exercise of rights, this differentiation seems somewhat artificial.

Simmermacher rightly believes that the answer to the question of the preconditions for the legal capacity of the individual hinges on the classification of Molina's legal doctrine in comparison to the modern concept of human rights. The latter defines human rights as those rights that a person possesses solely on the basis of his or her membership of the human species. By the way, it should be noted that the author equates the term »fundamental rights« with human rights, which is not entirely true from a legal dogmatic point of view, since there are fundamental rights which are not due to being human but, for example, to being the citizen of a certain state. Simmermacher argues that Molina does not achieve a concept similar to that of human rights, because legal capacity presupposes reciprocity of rights and obligations, but children and *amentes* cannot be subject to obligations. In Simmermacher's view, they can therefore »not be regarded as legal entities in actu, since as passive legal entities they cannot participate in reciprocity among legal entities« (159, similar also 169). This is not convincing for two reasons. Firstly, Simmermacher does not derive the thesis of unconditional reciprocity of rights and duties from its source, but rather approaches Molina with a conception that makes sense from today's perspective. Although this is methodologically admissible, it would first have been necessary to examine whether this thesis is also mandatory for the modern concept of human rights. Instead, Simmermacher systematically constructs the thesis mentioned from a summary of her view of subjective law, according to which subjective rights can only exist within the objective legal order, as Simmermacher explains. There they impose neces-

sary restrictions with respect to the rights of other subjects. That may be legally correct, but it is not clear whether Molina's text has this clarity. After all, it is true that Molina considers it inadmissible to exercise *dominium* to the detriment of others, as he explains with reference to the situation of Noah in the Ark (*De iustitia et iure* II 18, 141).

Secondly, and more importantly, it is not clear why children and the intellectually disabled could not also be represented in the fulfilment of duties, as has been the practice of civil law since time immemorial. However, in that case the situation presents itself rather differently to Simmermacher's point of view, because the (constructed) objection that children and *amentes* are not liable due to their actual lack of reason and freedom of will is dropped.

If we look at it this way, Molina's theory of law differs from modern concepts of human rights in only one point, but one of the greatest significance: Molina considers man as *dominus suorum actuum*, who thus can also dispose of his own freedom – at least in an situation of extreme hardship for the purpose of self-preservation (*De iustitia et iure* II, 33, 242). Only in this way is Molina able to arrive at a contradiction-free justification of slavery, which in his case starts from the thesis that the slave is saved by the purchase from otherwise certain death (whether due to unjust persecution or extreme hardship). At the same time, Molina sharply criticized the practice of the Portuguese trade with African slaves. According to Molina, the responsibility for the legality of the slave trade, or more precisely for the legality of the transaction between the slave and the slave trader, lies with political government, which can influence the framework conditions to a certain extent. Legitimate reasons for the transfer of the *dominium* over a slave are, according to Molina, imprisonment in a just war, criminal punishment, selling oneself into slavery and being born a slave. Nevertheless, for Molina the slave is not without rights, but retains certain legal claims (based on subjective rights), namely from the contract of enslavement, from donations, from the criminal behaviour of the master towards the slave, or from his own winnings through gambling or trade. All this Simmermacher establishes in her thorough discussion in chapter 5. She concludes that Molina granted the slave a legal status between subject and object. In addition, slaves are entitled to protection from injustice. This applies even if the slave cannot assert this legal claim him- or herself, but needs a representative. Simmermacher speaks of a »basic structure« (*Rohbau*) of a theory of human rights in Molina's thought. Indeed, the legal doctrine of Molina represents a step towards a theory of human rights. That is no small feat.

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Manuel Bastias Saavedra

The Many Histories of World Society*

For anyone who still held doubts, the Covid-19 pandemic that began in the last days of 2019 has certainly confirmed that we live in a highly interconnected world society. Perhaps unlike any other event in a generation, the pandemic and its effects have not left any corner of the globe untouched, as poignantly illustrated by the cases of infection reaching even the secluded communities that live deep within the Amazon rainforest. It has become evident that decisions made on one side of the planet can have almost instant consequences on the other. Such a level of interpenetration has certainly been accelerated in recent decades by the internet, the ubiquity of long-distance travel,

* Giuseppe Marcocci, Indios, chinos, falsarios. Las historias del mundo en el Renacimiento, Madrid: Alianza Editorial 2019, 345 p., ISBN 978-84-9181-519-8