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LUIS DE MOLINA ON RIGHTS AS LIMITS FOR LEGISLATION

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If someone has a right, this means normally that it is wrong to hinder her or him from acting in accordance with this right, or at least that a person or an organisation who does so, requires very compelling reasons to justify their actions. Simply having a right to do something, however, does not preclude that it is wrong for her or him to do it, e.g. gambling. Conversely, there may be cases where the right thing for one person to do, does not imply a right, and therefore it is not wrong or unjust to hinder this action. "If our army captures an enemy soldier, we might say that the right thing for him to do is to try to escape, but it would not follow that it is wrong for us to try to stop him"[1].

To have a right may mean that the government commits a breach of the law if it hinders me to act this way[2], or at least, again that this may be justified only under very extraordinary circumstances. Therefore, the individual right to resistance, to rebuff these kinds of measures, is not a new right, but rather the exercise of a right unlawfully denied. Obviously, the rights of different individuals may conflict with one another, and in this case, it is the task of a judge to balance the competing positions[3]; perhaps she will even have to make clear what the rights of those parties are[4].

While these views characterize some of the central tenets Ronald Dworkin argues for in his book *Taking Rights Seriously*, they also belong to Luis de Molina, as we shall see. A few years later Dworkin published a book entitled *Law's Empire*, and while he had

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[1] Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press, Cambridge / Mass., 1977 / 1978, p. 189.

[2] Id., ibid., p. 192.

[3] Ibid., pp. 193, 81 ff.

[4] Ibid., p. 90.

not changed his opinions, his conceptual point of departure had. Molina, on the other hand, remained true to his initial conceptual decision to use right as the pivotal concept of the first five volumes of his monumental *De iustitia et iure*. The reflections of different types of laws, on the other hand, filled the last 27 disputations of the fifth treatise, which is found in the sixth volume. In a certain sense his theory is, to use Dworkin's terminology, a more resolute "right-based-theory". It takes neither duty nor policy as the focus of its considerations – the alternatives Dworkin mentions[5]. This categorisation is justified at least as long as we proceed like Brian Tierny does in his text on Ockham[6], i.e. speaking of rights without identifying rights immediately as liberty rights.

In this treatment, we will, therefore, explore the elements of such a rights-based theory and see that Dworkin's talk of *rights as trumps* may very well apply to Molina as well. Yet, this does not mean that we should declare him to be a liberal *avant la lettre*: first, he does not accept legal equality; second, he considers freedom to be something good, but by no means an inalienable right of every human being; third, because he has rather archaic views on capital punishment.

Nevertheless investigating to which extent he accepts the inalienable rights of all men, including slaves and those who are going to become slaves, and even elucidates the legal means by which to sue for these rights, I will try to determine whether this kind of juridification implies a tendency towards legal equality and liberty. Furthermore, we may say that Molina uses some elements of the modern concept of human rights, although without combining them in the way we use them today.

But first we will have a look at the different interpretations of the term "right", which is sometimes also specified as "subjective right". This characterisation has to do with the fact that in the English translations of the continental terminology "Recht" "droit", "diritto", "derecho", "direito" –in which terminology the further specification of subjective and objective is necessary because in these languages there is no direct correspondence to the difference between "right" and "law" in English usage– was sometimes used to

[5] Ibid., p. 172.

[6] Brian Tierney, *The Idea of Natural Rights. Studies on Natural Rights, Natural Law and Church Law*, W. Eerdmans Publishing Company. Grand Rapids / Mich. – Cambridge / U.K. 1997.

emphasize the novelty of the idea of an individual right[7]. One of the reasons why I think that we find in Luis de Molina's *De Iustitia et iure* a right-based theory of the legal order, in which one effect of rights is limiting the power of state authorities, is his definition and use of the term *ius*. Although he is not using the term "subjective right", his definition comes very close to the one given by Gottlieb Achenwall, who seems to have been the first to speak of a *ius subiective sumtum* in his *Prolegomena iuris naturalis*[8].

1. What is a Right?

There seems to be a remarkable difference concerning the interest in questions on the nature of rights between the English-speaking world and countries such as Germany, France and Italy. In Germany, for instance, one of the few outstanding scholars having dealt with the theory of rights maintained in his fundamental work on the topic in 1985 that, despite of the length and intensity of the debate, there is no agreement on the concept of (subjective) rights[9]. In the ensuing decades, a consensus regarding rights has still yet to be reached, however, there isn't an intense debate either. Most dictionaries of legal vocabulary define "right" in very broad terms as any kind of claim a natural or legal person may have referring to a legal order. A volume presenting a collection of texts on individual rights published in 2007 contains mostly translations of English or American texts[10].

And while in the Anglo-Saxon world there is no consensus either, over the past few decades at least they have been engaged in an ongoing lively debate involving very prominent figures. At the beginning of his 25 page-entry "Rights" in the *Stanford Encyclopedia of Philosophy*, Leif Wenar[11] defines rights as 'entitlements (not) to perform certain actions, or (not) to be in certain states; or entitlements that others (not) perform certain actions, or (not) be in certain states'. Just like many other scholars, such as Hillel Steiner, Peter Jones and

[7] Annabel Brett, Liberty, *Right and Nature*, Cambridge University Press, Cambridge 1997, pp. 2ff.

[8] Gottlieb Achenwall, *Prolegomena iuris naturalis*, Bossigelus, Halle [3]1767.

[9] Robert Alexy, *Theorie der Grundrechte*, Suhrkamp, Frankfurt / M. 1985, p. 159.

[10] Markus S. Stepanians (Hrsg.), *Individuelle Rechte*, Mentis, Paderborn 2007.

[11] Leif Wenar, "Rights", in: *Stanford Encyclopedia of Philosophy*, last change 2015, to be found under: plato.stanford.edu/ entries/rights/ (9/21/16).

Christopher Morris[12], Wenar uses the differentiation between the kinds of rights – between claim, privilege, power and immunity – invented or discovered, anyway presented by Wesley Hohfeld in 1913[13] as an instrument of analysis with their correlatives, namely, duty, no-claim, liability and disability. I mentioned this because there are still debates as to whether only claims are 'real rights' or whether rights should instead be understood as immunities against the assaults of legal authorities or others, some elements of both we find in Molina.

Another debate that is still carried out in the Anglo-American discourse is the one between choice or will theorists and interest theorists. It can be traced back to the German theorists of Roman Law in nineteenth century: Representatives of will theory held that a right gives a person a possibility to realize her will[14], while their opponents believed that rights have to protect a person's interests, whether she is aware of them or not[15]. Within the contemporary discussion, Joseph Raz may be seen as one of the most important defenders of interest theory, while H. L. A. Hart speaks of a person who holds a right as a "small scale sovereign". Defenders of will or choice theory like Steiner and Jones often use the third party argument, according to which the person who has the benefit of a certain action by someone does not have necessarily a right to it: If João orders a bunch of flowers for Maria in Ronaldo's shop, then Maria will benefit from this order; however, it is not she who has the right to delivery but João. The interest theorist's answer is sometimes that it would be rather strange for us to say that new born babies cannot have a right to live. Jhering makes this point with reference to children and mentally ill people, and Molina defends the right of *pueri et amentes* to possess things as well. And Hart, normally seen as one of the leading representatives of a will theory, seems

[12] Hillel Steiner, *An Essay on Rights*, Blackwell, Oxford 1994, 61nn.; Peter Jones, *Rights*, Palgrave, Houndsmills 1994, p. 69; Christopher Morris, "Some Questions about Rights", in Andrei Marmo (ed.), *The Routledge Companion to Philosophy of Law*, Routledge, London pp. 557-568.

[13] Wesley N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning", *Yale Law Journal* (November 1913), digital version under: *http://www.hiit.fi/files/ns/Herkko/ (9/21/2016)*.

[14] Bernhard Windscheid, *Lehrbuch des Pandektenrechts*, Ebner & Seubert Stuttgart, Band I, [5]1879, Buch II, Erstes Kapitel § 37, p. 92, defines right as "eine von der Rechtsordnung (Recht im objektiven Sinne, objektives Recht) verliehene Willensmacht oder Willensherrschaft konkreten Inhalts".

[15] Rudolf von Jhering, *Der Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Breitkopf und Härtel, Leipzig [2]1865, 3. Teil, 1. Abteilung, § 60, p. 311: Rights are "legally protected interests" ("rechtlich geschützte Interessen").

to be ready to accept a different view regarding these cases[16]. In my view, the concept of right should be understood in terms of the idea of a family resemblance between the different usages instead looking for a clear-cut definition.

There is another aspect in the contemporary discussion of rights that seems to be helpful for an adequate understanding of Molina's position: Joel Feinberg declares that insisting on claims is the essence of right and more useful than anything else when it comes to securing a person's self respect and her respect towards others[17]. It may be difficult to verify this kind of moral psychology, and in the end Feinberg doesn't rely on it either; however, it seems clear that the possibility for someone to be a bearer of rights, irrespective of the kind of rights, implies an element of recognition and approval not found in the same way in Feinberg's *Nowheresville*, namely, a world in which there are no such rights. We will see that one of Molina's merits seems to be that he accepts all human beings as such possible holders of rights.

2. Legal Theory as Doctrine of Right and Rights

Within his presentation of the different ways the term *ius* is used, Molina refers in a quite traditional manner to the "art of the good and the equal" (*ars boni et aequi*), to law as a general concept of which the law is one species and then arriving at a view of *ius* as a "faculty or empowerment a man has to something" (*pro facultate potestateve quam ad aliquid homo habet*)[18]. He continues in making the usual distinction between fields of law according their origin– whether they are divine or human, natural or posited[19].

Molina then defines *ius* in the first disputation of the second tractate, as

> "a faculty to do or have something or to maintain it or to behave in any way such that if it is hindered without legitimate reason an

[16] H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory*, Clarendon, Oxford 1982, pp. 162-194; 189.

[17] Joel Feinberg, *Rights, Justice and the Bounds of Liberty*, Princeton University Press, Princeton / NJ 1980, pp. 148, 151n.

[18] Luis de Molina, *De iustitia et iure*, ed. novissima, Moguntiae 1659, tract. I, disp. 2, n. 4.

[19] Id., ibid., tract. I, disp. 4.

injury is done to the person who has it. This way, that right, in this meaning, becomes something like a measure of injury: because as much as it is opposed and damaged without legitimate reason, injury is done to the one who has it"[20].

Saying that an injury is committed to the holder of a right if this faculty is hindered allows Molina to integrate the will of the holder into his definition as well as the holder's interests. At first glance it may seem to involve circular reasoning to explain right via the absence of injury; but upon closer inspection, it seems obvious that there is no more circularity in this than in speaking of an entitlement as Wenar does in his definition. We must, however, be clear that for Molina this entitlement or empowerment may stem from very different kinds of law, including Roman Law, Church Law, Castilian and Portuguese law, but also from other national and regional laws and even natural law[21]. Normally, the entitlements given by rights –at least according to positive kinds of law– are more or less the same. Yet, sometimes there are differences, for instance, when according to Castilian law the heir receives the *dominium* over his inheritance only via his personal acceptance, while in France and some regions of Italy this is not necessary[22].

According to this definition, a right offers some protection to its holder, and it may be seen as a trump in Dworkin's sense, because any attempt to limit it has to be adequately justified. As legitimate reasons to interfere in such a right, Molina mentions situations of emergency, but also the entitlement of state authorities to protect the sanity and morals of their subjects via the regulation of customs of food and clothing[23]. And while not every exercise of such rights, e.g. those involving habits of eating or clothing, can be interpreted acts of justice, every illegitimate limitation of a right is certainly an injury. This is even true in cases where a person does things that are not good for her.

An interesting example of this can be found in Molina fifth treatise when he deals with the effects or virtues (*virtutes*) of law ac-

[20] Ibid., II,1,1: "Est facultas aliquid faciendi, sive obtinendi, aut in eo insistendi, vel aliquo modo se habenti, cui si, sine legitima causa, contraveniatur, iniuria fit eam habenti. Quo fit, ut ius in hac acceptione sit quasi censura iniuriae; quantum enim ei, sine legitima causa contravenitur & praeiudicatur, tantum fit iniuriae".

[21] Ibid., II,2,3.

[22] Ibid., II,3,18.

[23] Ibid., II,1,2.

cording to Herennius Modestinus, i.e. prescription, prohibition, permission and punishment, especially in his treatment of permission. This is, because human law contains large parts of natural law, but it adds a large part of what is only positive law of the respective state. Therefore, many times and for good reasons, state law permits things that are contrary to natural law. Molina mentions the example of public prostitution, because man's weakness means that not all kinds of fornication can be excluded and the allowance of prostitution prevents even worse forms of fornication, i.e. adultery. This permission implies that the prostitute necessarily must have a right to receive her wage. This example as well as others like the killing of an unfaithful wife and her lover by the horned husband are to be understood in terms of a prohibition on the part of public authorities to interfere, whether by hindrances or punishment, in such matters. Molina generally states that a legal permission implies a legal incapacity for state authorities and perhaps justifies legal claims of acting persons, be it towards state authorities or towards other individuals[24].

As we can see, in Molina's work we find the idea of an individual right to restrict the power of authorities in certain cases. This does not include a general human right of protection against state power, at least in the above-mentioned cases where the behaviour to be protected is contrary to natural law and only condoned in order to protect against an even greater evil. However, if we consider this together with what he says just after the passage quoted earlier, we can conclude that there must be some kind of right to the permission of things, as long as they are not contrary to natural law[25]. For example, it is not the task of the secular state to punish inner acts, because this is a matter for God, and these inner acts as such will not harm the state[26]. Since this kind of permission opens up a certain space in which the individual may act according to its preferences and, in early versions, can already be found in the texts of 12th century canonists, some authors see parallels to a choice theory of rights, to Hart's "small scale sovereign"[27]. We will explore several interesting examples for both interpretations of rights in the next section, thus confirming the idea that it is not helpful to enforce a decision between the two interpretations of rights.

[24] Ibid., V,46,26.
[25] Ibid., II,1,3.
[26] Ibid., V,46,26.
[27] Brian Tierney, *Natural rights*, 49nn.

Here, I would like to note that Molina is also aware of the case in which a person acts, in a certain sense, correctly, yet we still do not give her the right to do so. A non-Christian slave, captured as a prisoner of war in a war which is not obviously just from the part of the victor, does not commit an injury if he tries to flee. Despite this situation, we are nevertheless allowed to prevent his escape[28].

As the discussion on the rights over slaves leads to the question whether one man can be the possession of another man, we will have to look at Molina's special use of the term *dominium*, which was very central to the natural law debate on rights for five centuries.

3. The Concept of *dominium* – and the Limits of *dominium*

Molina's way to deal with this pivotal term – which primarily covers the right to use something that we already have at our disposal – aims at clarifying which are the particular rights involved and which are the limits. On the whole, it can be seen as part of a conceptual strategy. Molina follows Bartolus of Sassoferrato, defining *dominium* as "the right to completely manage a corporeal thing, unless the law forbids it"[29]. It seems better not to translate the term, because the ambivalence in its meaning between "property" and "domination" played an important role in the debates at least since the Franciscan poverty controversy in the 13th century. Annabel Brett has shown that Franciscans were able to use this to further their aims[30], but obviously Pope John XXII also made use of this confusion in arguments directed against the Franciscan position. Later authors like Molina made a distinction between the *dominium proprietatis* and the *dominium iurisdictionis*. From a political point of view, this difference is essential: Whereas a slave is the master's property, and his master has *dominium proprietatis* over him, a prince can rule his citizens only via *dominium iurisdictionis* with mutual rights and obligations.

Binding *dominium* with reference to law, be it positive or natural law, may look trivial at first glance, but it is strategic

[28] Luis de Molina, *De iustitia et iure*, II,37,10.

[29] Id, ibid., II,3,1: "ius perfecte disponendi de re corporali, nisi lege prohibitur". For a more complete discussion of Molina's view of *dominium*, see Jörg Alejandro Tellkamp, "Rights and Dominium", in Matthias Kaufmann – Alexander Aichele (eds.), *A Companion to Luis de Molina*, Brill, Leiden – Boston 2014, pp. 125-154.

[30] Annabel Brett, *Liberty, Right and Nature*, 12nn.

insofar as it limits the power to dispose over things, e.g. the *ius destruendi* of the owner, which Molina accepts to a certain extent for physical things[31], as well as the right to alienate them[32]. Therefore, individual capabilities to legal actions are also limited by the rights of others. Molina does not completely share Bartolus' view on *dominium*, because for him it is not a species of right, but rather a legal position connected to a bundle of rights[33]. The formula of a bundle of rights can also be found, interestingly enough, in Robert Alexy's description of subjective rights[34].

As we just mentioned, the laws by which the *dominium* is limited may be quite different. Because God is the creator and master of everything, including life and integrity of persons, every human dominion is subordinated to his dominion over the universe. This includes limitations of the rights of persons over their lives and their integrity, of which they are custodians (custodes) but not masters, and of the rights of rulers over their subordinates, even if they have a *dominium proprietatis* over them: A master must not kill or mutilate his slave and must not prevent him from marrying[35]. Such measures would represent an injury to the slave, and according to the definition provided above even a slave obviously has the right to life and to the integrity of his body.

According to natural law, men are the masters of all the things under the sky, including light. But for this kind of *dominium*, it is enough for man to use them as he wills in the way nature provided us with them and in a way that is neither in opposition to human nor divine law[36]. Accordingly, not only the lives of human beings under someone's rule are excluded from destruction, but also everything that is relevant to the maintenance of others and of all the life in the universe such that its destruction would cause damage to them, like the destruction of natural species. Noah, for instance, had the opportunity to inflict such damage, but he did not have the right to do so[37]. While this view might possess

[31] Luis de Molina, *De iustitia et iure*, III,1,1.

[32] Id., ibid., II,2,16.

[33] Ibid., II,3,5.

[34] Robert Alexy, *Theorie der Grundrechte*, p. 224.

[35] Luis de Molina, *De iustitia et iure*, II,18,5-7.

[36] Id., ibid., II,18,13: "ad dominium satis est facultas pro arbitratu eis utendi ad usus, ad quos natura contulit nobis res & ad usus, qui lege divina vel humana non sunt prohibiti".

[37] Ibid.

an "ecological" aura today, it is meant as a limit for the right of destruction (*ius destruendi*) normally connected to *dominium* and is generally accepted by Molina when it comes to corporeal things[38]. Those who destroy things of this kind, which are in their property, act amorally, but they do not breach natural law. Within the fields just mentioned, however, the rights of the proprietary fall under serious limitations, partially by natural law, partially by divine positive law[39]. His definition of *dominium* allows Molina, therefore, to apply the concept in a univocal manner within a relatively wide range of situations, while submitting dominion over certain kinds of property to severe restrictions by natural and positive law. The reasons for such restrictions are the rights of others which are or which might be violated. This becomes especially relevant when it comes to the legal treatment of slaves.

This means that neither the State nor its sovereigns, the princes, possess *dominium* over the external goods of their subjects and *a forteriori* over their life and limbs. Molina repeatedly affirms not only that he has demonstrated this point on several occasions, but also that it has been shown to be the case by others as well as that it is plain to see that it is confirmed by experience[40]. In this context he again explains in the initial part of the third treatise that man is not entitled to kill or mutilate himself because his body does not belong to him but to God, even though it has to be mentioned that a mutual relationship with God is not possible because man is not able to give Him anything that could be considered adequate. And it is in this sense that such violations of privileges that belong to God go beyond injustice because there is no way for them to be compensated[41].

Nevertheless, man has been given life and a body to enjoy them and to use his limbs in various functions. As long as he respects the limitations just mentioned, he may do with his body whatever he wants, and anyone who hinders him in doing so does injustice to him in much the same sense as someone who wants to mutilate or kill him[42]. Since man is inserted as custodian of his own life and body, it is neither permissible to amputate one of his limbs for medical reasons if he resists nor force him into some other medical treatment. The situation is different if parents or a tutor have to

[38] Ibid., III,1,1.
[39] Ibid., I,2,1.
[40] Ibid., II,25; III,1,8.
[41] Ibid., III,1,1.
[42] Ibid., III,1,4.

take care of him, or if he has to obey a prelate who makes the decisions concerning his flourishing and well-being[43]. In such cases the right to protection of the relevant person's interest is pivotal. Though it is clearly anachronistic to speak of autonomy in this context, it is remarkable the extent to which Molina insists on the will of the involved persons and where he sets the limits. Because human beings possess the various faculties over which they may dispose freely as they see fit, they can lend the use of these to someone else or furnish their body to matrimonial use within marriage[44].

It is especially in the realm of *dominium*, which seems at first glance so unlimited and uncontrollable, that the limits of domination and the limits for lawful action at the individual and public levels are given by the rights of those who are submitted to these activities. This holds also for slaves, because the right of the master over his slave is limited insofar as the master commits an injustice to the slave, for example, if he takes his life, damages his limbs or his health, which of course belong to his life. He is even less so master over the slave's salvation[45], and he can be sued at the town prefect if he treats him cruelly[46]. Moreover, if a female slave is abused by her master, the bishop can manumit her[47]. Since according to his definition, "right [...] becomes [...] a measure of injury: because as much as it is opposed and damaged without legitimate reason, injury is done to the one who has it". We may inversely conclude that if injury is done to a slave as the result of a certain form of treatment, then this is a violation of his right.

But individual rights also comprise a limit for competences of authorities, as it was pointed out earlier. Again and again, Molina insists that there is an essential difference between how God rules the world, without having any obligations towards it, and the power of human kings, which is in no way unlimited[48]. He considers monar-

[43] Ibid., III,1,10.

[44] Ibid., III,1,5. It is interesting to see the similarities and differences to Kant's definition of marriage in the *Metaphysics of Morals – Doctrine of Right*, § 24.

[45] Luis de Molina, *De iustitia et iure*, II,38,2: "Licet autem ius dominorum in servos tam late pateat, non tamen se extendit ad eorum vitam, cuius dominium sibi soli Deus reservavit, atque adeo neque ad membra & salutem mancipii, quae quasi partes quaedam vitae illius sunt, a quibus vita ipsa pendet; & multo minus se extendit ad salutem illius spiritualem".

[46] Id., ibid., II,38,3.

[47] Ibid., II,39.

[48] Ibid., V,46.5; V,46,12.

chy to be the best form of a State because it is more successful than the other forms in keeping the peace and maintaining tranquility[49]. Yet he makes it clear that citizens have a right to resistance as soon as the king tries to exercise any kind of power not conceded to him by the people[50]: The extension of the ruler's power is something that has to be negotiated. The king may use the power that was conferred to him by the people and the political community, for instance, via customary law. A prince intending to act unjustly may even be killed in individual self-defence or even in defence of the State[51].

There are a number of hints in previous text that Molina's theory of rights shows a number of similarities to later liberal positions, and not only because some libertarians and representatives of the Austrian School of National Economy explicitly make reference to him. Now it seems quite trivial that a 16th century Jesuit cannot be a liberal in the modern sense, and we will confirm this by looking at a few different arguments. Nevertheless, there are also elements in this theory that would be described as liberal today, and generally speaking his tendency to subject the things under discussion to the logic of legal argument that exerted a certain pressure in this direction and had visible effects decades and even centuries later.

Typically, liberalism–in many of its guises–represents a rejection of "unnecessary" cruel punishment, of any kind of arbitrary exercise of power; furthermore, it propagates the idea that all men are *prima facie* equal, which implies the postulation of equality before the law, the view that liberties should not be limited without necessity and, in the end, the idea that liberty is an inalienable human right.

With respect to punishment Molina emphasizes several times the principle *nulla poena sine lege*, i.e. the rejection of arbitrariness[52], yet he insists, contrary to the Waldensians, that the State is permitted to kill malefactors[53] and, contrary to John Duns Scotus, that it may do so without God's dispense even for minor offences such as theft or adultery[54]. He justifies this with a reference to Divus Thomas and to a rather bloodcurdling version of the organism-metaphor for human society[55]. Contrary to Kant, however,

[49] Ibid., II,23,14.
[50] Ibid., II,23,10.
[51] Ibid., III,1,6.
[52] Ibid., III,39,2; III,21.
[53] Ibid., III,5,1.
[54] Ibid., III,5,2.
[55] Ibid., III,5,3.

he does not insist that anyone who has committed murder must die; instead, he also accepts deportation, exile or even a forfeiture, if it is very high and connected with other forms of punishment[56].

If we look at the criteria of equality and liberty, we first have to see that Molina explicitly rejects equality before the law, saying that the social position is relevant for the evaluation of a crime; therefore, the guilt increases or decreases in relation to it[57]. But if we look more closely at this passage and how he tries to differentiate between justified and unjustified slavery, we arrive at something along the lines of being treated as an equal: all relevant aspects are taken into consideration, even if there are differences concerning the view of what is relevant.

4. Concluding Remarks

Concerning liberty, Molina accepts the view that by mere nature *in statu innocentiae* all men are free; this means, he does not accept the Aristotelian thesis, defended in the 16th century by Juan Ginès de Sepúlveda and others, that there are slaves by nature. Those who are not intelligent enough to manage their own lives have to be led, but to their own advantage and not exclusively to the advantage of their master. But under certain circumstances the introduction of slavery by the law of nations was justified. Legitimate titles included both being taken prisoner in a war that was just from the winning side and selling oneself into servitude because man has *dominium* over his own freedom. While selling oneself without urgent necessity is a sin, worse than selling one's property or honour, the contract is nevertheless valid[58]. In 16th and 17th century some authors held the position—later taken up by Locke, for instance—that an individual's liberty is God's property, therefore,

[56] Ibid., III,22,4.

[57] Ibid., I,13,2: "eo quod ex qualitate personae offensae et offendentis accrescat aut decrescat culpa".

[58] Molina *De iustitia et iure*, Disp. 33, col. 162: "Tertius titulus est emptio et venditio. Ponendum in primis est, hominem, sicut non solum externorum suroum bonorum, sed etiam proprii honoris & famae est dominus [...] sic etiam dominum esse suae libertatis, atque adeo stando, in solo iure naturali; posse eam alienare, seque in servitudinem redigere [...]. Si tamen quis suae libertatis prodigus esset, absque rationabili causa se servituti subiiciens, non minus imo magis peccaret, quam si non solum pecuniarum sed etiam honoris et famae [...] esset prodigus".

cannot be validly sold by the individual. But, on the other hand, the philosopher and jurist Heineccius, from Halle, still accepted Molina's titles of enslavement in his natural law theory stemming from 1738. It is Rousseau who states that we do not have the right to give up legal responsibility via self-enslavement, insisting that liberty is an unalienable right[59].

Obviously, there are many reasons why it is not helpful to speak of Molina as a liberal *avant la lettre*. Nevertheless, the way he explains how legal permissions form a hindrance for interventions by authorities (even in the case of prostitution), how the distinction between *dominium proprietatis* and *dominium iurisdictionis* limits the power of kings, and how he concedes the right to life and to physical integrity to slaves and even speaks of their *ius qua homo* –although not in our sense of human rights– shows how he comes close to the modern concepts of right. The role of slaves is of special importance, for Molina gives the first comprehensive account of the theory and practice of the modern slave trade as well as a detailed argument regarding the situations in which it is not justified. His arguments are used by the *Consejo de las Indias* for the justification of slavery as well as by some authors who are critics of it, e.g. Diego de Avendaño.

RESUMEN

El concepto de derecho de Luis de Molina muestra semejanzas con aspectos del pensamiento de R. Dworkin. En general, el discurso moderno es útil para realizar un análisis adecuado de la teoría legal basada en derechos de Molina, la cual, a su vez, se revela como moderna. Por ello algunos elementos del debate presente sobre derechos, por ejemplo entre teóricos de la elección y teóricos del interés, son discutidos con referencia a Molina demostrando de qué modo él hace uso del *ius* en el sentido de derecho como base de su teoría legal. Un papel central se otorga al concepto de *dominium*, que ayuda a clarificar qué derechos pueden tener los seres humanos y dónde están sus límites. Al mismo tiempo, la manera como Molina usa ese término también limita el poder de las autoridades humanas sobre individuos, sin reivindicar un derecho humano a la libertad inalienable: la libertad de una persona pertenece a su *dominium*, por lo tanto ella puede venderse a sí misma como esclava en ciertas circunstancias.

[59] J.-J. Rousseau, *Contrat Social* (1762), Gallimard, Paris 1964, I, 4.