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Controversiarum illustrium aliarumque usu frequentium libri tres
 (Three Books of Famous and other Controversies frequently occurring
 in Practice)

1564

Fernando VÁZQUEZ DE MENCHACA (Fernandus VASQUIUS À MENCHACA)
 (1512-1569)

There are many controversies concerning the life, works and career of Fernando Vázquez. Nowadays it is generally held that he was born in Valladolid (Spain) in 1512 and died in Sevilla (Spain) in 1569. He studied Roman law and probably canon law at Valladolid and Salamanca. He obtained his licentiate, and possibly also his doctor's degree, at the university of Salamanca around 1548. For one year he lectured on Justinian's *Institutes* at that university. He spent the rest of his career in public offices, as his father had done and likewise his brothers. He was one of the supreme judges of the Kingdom in Sevilla, and continued his career at the *Tribunal de la Contaduría mayor de Hacienda* (the highest tax authority). In 1561 he was invited by King Philip II to participate in the group of theologians and jurists who accompanied the King to the final session of the Council of Trent. The last two years of his life he was attached to the Cathedral of Sevilla as a legal adviser. Little is known of other offices, and even less is known with any certainty.

Other works of Vázquez are his *De successionum creatione, progressu et resolutione*, often published as three separate tracts and also known as *De successionibus et ultimis voluntatibus* (first edition probably Salamanca 1559, second emended edition Venice 1564), and his *Controversiarum usu frequentium libri tres* (Barcelona 1563), which by some is taken for a first edition of the *Controversiae illustres*, by others for a small extension to that work. Most authors take it for a work on its own, although it is sometimes published as *secunda pars* together with the *Controversiae illustres*.

Most scholars state that the *Controversiarum illustrium aliarumque usu frequentium libri tres* was first published in Venice in 1564 (printed by Franciscus Rampazetus). Later editions were printed in Frankfurt am Main (1572), Lyon (1595 and 1599), Geneva (1599) and Frankfurt am Main (1606). The editions 1599 and later include the *Controversiae usu frequentes* as *pars secunda*. In 1931-1934 a bilingual edition (Latin-Spanish translation by D. Fidel Rodríguez Alcalde), based on Venice 1564, was published in 4 volumes by Cuesta at Valladolid. Vázquez shows a somewhat different approach in each of the three books of the *Controversiae illustres*. Book I consists of 146 controversies in both legal theory and practice on human power over people and things, especially on the power of princes. Book II deals with *praescriptio* (prescription) in six *partes*. A link between book I and II is the transition (in either way) from the factual (*de facto*) to the sphere of law (*de iure*), from the natural state (of liberty) to the civil state (of *dominium* and *jurisdictio*). Book III deals with several other legal problems and is hardly taken into account by modern scholars.

Given his intellectual background (he frequently refers to the theologian Domingo de Soto) and given the country and the century he lived in, Vázquez belonged to the so-called School of Salamanca. He was however exceptional, as the only legist among these theologians and canonists. Apart from this, the question of whether Vázquez was a legal Humanist has been controversial. The type of the book (although the three books show different features, in its entirety the work is probably best described as belonging to the *quaestiones*-literature, also with some resemblance to Alciato's *Paradoxa*), his style of writing, his frequent references to non-legal sources from Antiquity, and his criticism on (legal) authoritative authors could be regarded as reflecting humanistic influences. However, he showed no intention to break away from the civil law tradition, and authorities such as Bartolus are not criticised for their approach as such.

The *Controversiae illustres* have attracted attention from scholars (both contemporary and modern) on a number of topics, especially on the concepts of natural law and the law of nations, on constitutional law and sovereignty (*jurisdictio*), and on *dominium* and rights. As Vázquez did not present his ideas in a coherent system, they have to be inferred from his discussions on the various controversies and legal issues. As a result, his precise views on these topics are often controversial among scholars.

Vázquez represents one of the last stages in the development of the legal tradition leading to the concepts of rational natural law and of the law of nations based on human will and agreement. Although Vázquez was far from being original in that respect, in the *Controversiae illustres* he worked out with much emphasis the scheme of *ius naturale* common to men and animals, *ius gentium (naturale vel) primaevum* as natural law common to men only, and *ius gentium (positivum vel) secundarium*, consisting of rules based on human will and shared by (almost) all mankind. Because the *ius gentium secundarium* depends on human will, it is mutable. Still, there is a wide gap between his theory and the modern, rationalistic natural law tradition. First, because apart from the idea of natural law as *recta ratio*, Vázquez also held on to the idea of natural law as our natural (animalistic) condition and instinct; secondly, because his natural law as *recta ratio* was not the outcome of an active human rationality, because it consisted primarily of ideas implanted by God. With regard to these implanted ideas, Vázquez took a voluntaristic stance: if it had been God's will, He would have implanted other ideas, a different *recta ratio*. Natural law as our natural condition and instinct was far from being irrelevant in his theory, as it points to our original condition of freedom and equality, a 'Golden Age' with no masters and slaves, no *jurisdictio*, and free use of things at hand. It was a state of nature characterised by *laxitas*, a term referring to (animalistic) unboundness. Driven by their social nature, so runs Vázquez's theory, humans set up societies, at first living peacefully together, but then disturbed as a consequence of the equally human tendencies to rule and conquer. In order to secure a peaceful life, natural freedom is curtailed by artificial institutes invented by men, such as *dominium* and *jurisdictio* based on rules that have their origin in the human *ius civile*. As these rules and institutes in time became (almost) generally accepted among all people, they form the *ius gentium (positivum vel) secundarium*. As corrections of the

human natural tendency to conquer and rule over people and things, they do not reach further than securing society, which is also based on human nature. The general idea is to retain as much of the natural *libertas* as fits in society, which has now become civil, or political, by human intervention.

It is against this background that we can interpret Vázquez's ideas on the power of the princes and on individual rights. It is clearly stated and often repeated in the *Controversiae illustres* that political power only exists for the sake of the public interest, which functions as the litmus test for the legitimacy of both power in general, and specific authorities and acts of ruling. Combined with the equally often repeated equation of 'law' and 'contract', the result is a strong rejection of the idea of sovereignty as absolute power, one decade before that idea was emphatically formulated by Jean Bodin in 1576. It appears that Vázquez's theory was therefore favourably regarded by, for instance, Johannes Althusius in (the third edition, 1614, of) his *Politica methodice digesta*.

With regard to individual rights, Vázquez in his theory of *dominium* established a connection between *ius* (as a human invention, an artefact) and *libertas* (as a remnant of the natural liberty). A *dominus* has a right (*ius*) so that within the legal limits set on him and others he can perform a natural faculty (*facultas*). Specific mention should be made of things that are exempted from making the transition from the natural state of fact to the state of right (either *ius civile* or *ius gentium secundarium*), of the things, in other words, that remain outside commerce (*extra commercium*). These include the free man (*homo (liber)*), with the exception of enslavement of captives to avoid the greater evil of killing) and the free sea. It was indeed not only because he was Spanish that Vázquez was labelled the pride of Spain (*decus illud Hispaniae*) and extensively quoted by Hugo Grotius in chapter 7 of his *Mare liberum* (1609), but also because his views on the free sea supported only too well Grotius' argument.

Vázquez is often praised for (in Grotius' words) the subtlety (*subtilitas*) of his investigation of law and the (intellectual) freedom (*libertas*) of his exposition. Sometimes doubts and scepticism are added as regards the originality and the consistency of his ideas.

Online version (Frankfurt am Main 1572) in the [Digitale Sammlungen of the Bayerische Staatsbibliothek](#).

Brett, Annabel S. 1997. The language of natural liberty: Fernando Vázquez de Menchaca. In *Liberty, right and nature. Individual rights in later scholastic thought*, chap. 5. Cambridge: Cambridge University Press; Carpintero Benítez, Francisco. 1977. *Del derecho natural medieval al derecho natural moderno: Fernando Vázquez de Menchaca*. Salamanca: Universidad de Salamanca; Reibstein, Ernst. 1949. *Die Anfänge des neueren Natur- und Völkerrechts. Studien zu den "Controversiae illustres" des Fernandus Vasquius (1559)*. Bern: Haupt; Seelmann, Kurt. 1979. *Die Lehre des Fernando Vázquez de Menchaca vom Dominium*. Cologne: Heymann; Van Nifterik, Gustaaf P. 1999. *Vorst tussen volk en wet. Over volkssoevereiniteit en rechtsstatelijkheid in het werk van Fernando Vázquez de Menchaca (1512-1569)*. Deventer: Gouda Quint.

Gustaaf VAN NIFTERIK

Fig. 3.9 Title page of Fernando Vázquez de Menchaca's *Controversiarum illustrium aliarumque usu frequentium libri tres* (entry 32), printed in Frankfurt am Main in 1572, with Fama in the centre and various allegorical figures representing wisdom and power around her. © Bayerische Staatsbibliothek München, bsb00090821, urn:nbn:de:byb:12-bsb00090821-4