

Cardinal Franciscus Zabarella (1360–1417) as a Canonist and the crisis of his age: Schism and the Council of Constance

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The Era of the Great Western Schism (1378–1417) was an exciting time; it was a most difficult time. Certainly for anyone interested in the development of conciliar theory and in its relationship to constitutional thought, the age of the Great Western Schism and of the Council of Constance has amply deserved both adjectives: exciting and difficult. The late fourteenth and early fifteenth centuries were indeed a time of crisis for both Church and State,¹ for Europe in general,² and for the academic community which was supposed to offer advice and suggestions on how to resolve these crises.³ The theme with which we are concerned is how precisely did one part of that academic community respond to the crisis. Scholars at different times have considered other parts of that community: the theologians (D'Ailly or Gerson)

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¹ The Peasants' Rebellion in England, the Ciompi and other rebellions in Italy, the Hussite wars in Bohemia, the many upheavals and crises in government across Europe – Richard II, Charles VI, Wenceslaus, the Burgundian-Orleanist conflict – are just a few of the political problems. The recurrence of the Black Death and its consequent economic disturbances and finally the uncertainty created by the Great Western Schism itself are some indications of how tenuous was any stability in this society; see: Thomas E. Morrissey, „The Crisis of Authority at the End of the Fourteenth Century: A Canonist's Response“, *Mediaevalia* (forthcoming). The first draft of that article was presented at a Conference on Social Unrest in the Later Middle Ages at the Center for Medieval and Renaissance Studies at State University of New York at Binghamton in October, 1981; see also „After Six Hundred Years: The Great Western Schism, Conciliarism and Constance“, *Theological Studies*, 40 (1979), 495–509.

² One could add the many problems in Spain, the Turkish threat, the increasing disintegration of the Byzantine world, and finally the threats that Tamurlane posed for the Eastern European and Mediterranean areas.

³ Two recent studies show the involvement of the academic community, especially in France in these crises: R. N. Swanson, *Universities, Academics and the Great Schism* [Cambridge Studies in Medieval Life and Thought, 3rd Series, vol. 12] (Cambridge, 1979) and Howard Kaminsky, *Simon de Cramaud and the Great Schism* (New Brunswick, N.J., 1983).

and the humanists (e.g., Nicholas of Cusa) respectively.⁴ I will concentrate on the lawyer, or to be more precise, the contribution of the canonist. I would add at the outset that our dichotomy is not completely valid, for a good canonist, such as the one on whom this paper is based, Franciscus Zabarella (1360–1417), was well aware of the major currents in theology and philosophy especially as they affected his discipline, and he certainly could qualify as an early humanist on the basis of his library, his own writings and the network of humanist friends whom he cherished.⁵ Nevertheless it is in his capacity as a lawyer, his contribution as a trained legal mind and the methodology which his discipline imposed on him which we wish to treat today.

We are fortunate that there exists from Zabarella's pen a tract on the art of teaching and studying law which provides an adequate picture of what he expected from the lawyer in his society as well as what he thought should be the training a lawyer should have.⁶ As might be expected, Zabarella presumed that a good lawyer was diligent and attentive to all the details and circumstances of a question.⁷ He should use correct and precise terminology.⁸ This advice of Zabarella would be at the heart of his own protest about some of the language used in *Haec Sancta* at the Council of Constance.⁹ The good

⁴ For Gerson, see: John Morrall, *Gerson and the Great Schism* (Manchester, 1960) and Louis B. Bascoe, *Principles of Church Reform* [Studies in Medieval and Reformation Thought 7] (Leiden, 1973); for d'Ailly, see: Francis Oakley, *The Political Thought of Pierre d'Ailly. The Voluntarist Tradition* (New Haven, 1964); for Cusa, Paul E. Sigmond, *Nicholas of Cusa and Medieval Political Thought* (Cambridge, Mass., 1963), Morimichi Watanabe, *The Political Ideas of Nicholas of Cusa with Special reference to the De Concordantia Catholica* (Geneva, 1963), James E. Biechler, *The Religious Language of Nicholas of Cusa* (Missoula, Montana, 1975), and Thomas E. Morrissey, „Cardinal Zabarella and Nicholas of Cusa: From Community Authority to Consent of the Community“, *Mitteilungen und Forschungsbeiträge der Cusanus-Gesellschaft* vol. 17 (forthcoming).

⁵ Zabarella was explicit in demanding knowledge and training ranging beyond the legal field as will be indicated below. In addition to acquaintance with philosophy, theology and basic skills, he added in his own life an involvement with humanists (Salutati, Poggio, Vergerio), poets, musicians. He himself wrote several works in the humanistic mode, a *De felicitate* for example, as well as collecting for his own use various classical writings such as: a Latin translation of Homer's *Odyssey* (Venice, Biblioteca San Marco, Lat. Cl. XII, cod. 23 [= 3946]), *The Tragedies of Seneca* (Venice, Biblioteca San Marco, Lat. Cl. XII, cod. 26 [= 3906]).

⁶ This tract exists only in manuscript form in three extant exemplars: München, Bayerische Staatsbibliothek, CLM, 14134, fol. 147v–152r; Tübingen, Universitätsbibliothek, Mc 58, fol. 111r–121r and Vatican City, Bibliotheca Apostolica, Vat. Lat. 2258, fol. 364v–369v.

⁷ Zabarella used such phrases as: „perseverancia, diligencia investigationis“, „diligens in videndo iura et rationes“. The reference in this case and in the next few notes are to the München codex; here to fol. 147v.

⁸ *Ibid.*, fol. 147v: „Evitet eciam omnino verborum superfluitatem“; fol. 148r: „Diligens enim sit ut congrua utatur oracione“, and „super omnia vero caveat ne verbis utatur impropriis et obscuris“.

⁹ For Zabarella's role in this matter, see: Thomas E. Morrissey, „The Decree ‚Haec Sancta‘ and Cardinal Zabarella, His Role in its Formulation and Interpretation“, *Annuario Historiae Conciliorum*, 10 (1978), 145–176.

lawyer should avoid useless detail and repetition and so he should concentrate on the basic issues and not go off on tangents or end up hopelessly tangled in unnecessary minutiae.¹⁰ As a means of attaining this ability to distinguish the important from the trite Zabarella placed great stress on the pre-legal training of the lawyer. Like many in education in the United States today he demanded that the student be grounded in the basic skills at the outset and for him this meant grammar and how to write.¹¹ He then advocated that the student study logic and rhetoric before moving on to philosophy, especially the basic principles of natural and of course moral philosophy.¹² The lawyer who would spend seven years of concentrated study of law would then have come to this discipline with a well rounded background and so would avoid mere pedantry and obscurantism in his own discipline. Zabarella went so far as to argue: how could a person really be adept in his own discipline if he were totally ignorant of others?¹³

The legal scholar whom Zabarella envisaged was to be very much a man of the world even though Zabarella also put great stress on the moral qualities he should have and his faith and piety.¹⁴ This lawyer was to be a man very much involved in the daily activities of his world and in its critical issues and questions; he was to have a passionate commitment to a cause and not stand idle in the hotly contested decisions of his day. In a word, Zabarella's lawyer was not to be an ivory tower theorist but a practitioner of law who had to face the consequences of his legal advice. It is quite clear that this picture is very much a selfportrait when we consider the questions in which Zabarella was himself involved; the dispute over the estate of Petrarch and the legality of the deposition of Wenceslaus as King of the Romans are just two samples from his *Consilia*.¹⁵ In addition Zabarella served on an embassy to Pope Boniface IX on the part of the Carrara family,¹⁶ to the royal court of France

¹⁰ München Codex, fol. 148r: „sit insuper attentissimus ut illa sola que ad intellectum legis vel canonis et glossarum sufficiant quod contra plures faciunt qui per latissimas disputationes etiam quandoque non nimium pertinentes ita se delatant ut parum in textum per totum annum possint procedere“; „per infinita vagari“.

¹¹ *Ibid.* fol. 149 r, „Admonendus est auditor ut eius prima cura sit antequam ad scientiam iuris properet ut in grammatica sit quantum expedit instructus nec scribendi sit prorsus ignarus“.

¹² *Ibid.* fol. 148 v, „Multum prodesse possunt advocatis et omnibus causidicis quamquam autem philosophia naturalis non videatur ad sapientiam iuris saltem naturalia principia non ignorasse philosophiam“, and „et si de naturali ipsam saltem moralem non negligas“.

¹³ *Ibid.* fol. 149 v, „Ut non possit quis facile in una esse perfectus si ceterarum sit omnino ignarus“.

¹⁴ *Ibid.* fol. 152 r, „Et in deo fiduciam habueris . . . dicendo singulis diebus orationes tibi notas“.

¹⁵ For Zabarella's legal advice on the Wenceslaus question, see his *Consilia* (Milan, 1515), #154, fol. 78va-vb. His ties with the Petrarch family are revealed in the dispute resolved in his *Consilium* #79:2 [in this early printed edition two *Consilia* were given the number 79], fol. 36vb-37ra.

¹⁶ Terenzio Sartore, „Un discorso inedito di Francesco Zabarella a Bonifacio IX sull' autorita del Papa“, *Rivista di storia della Chiesa in Italia* 20 (1966), 375-388.

likewise for the Carrara family when Venice threatened to engulf Padua.¹⁷ Then with the takeover by Venice and the elimination of the Carrara Family Zabarella would be deputed to fulfill on a number of occasions similar services for the Republic of Venice.¹⁸ This position of being involved and so willing to take the responsibility and to bear the consequences of one's advice and decisions were to mark Zabarella's life. He would see his election by the canons of Padua to be their bishop annulled by Pope Gregory XII because Gregory did not approve of the ideas contained in Zabarella's tract on the schism.¹⁹ Later at the Council of Constance Zabarella would break with Emperor Sigismund with whom he had previously worked closely to convoke the council because he disagreed with Sigismund's attempt to dominate at that council in 1417 on the question of the election of the new pope of unity.²⁰ This issue would be a doubly painful one for Zabarella for at the same time he would find himself at odds with his old and dear friend, Peter Paul Vergerio, who had taken a position in Sigismund's court at this time.²¹ The lawyer as Zabarella saw him was to be a passionate man and this is made clear in a few of his outbursts at the Council of Constance and earlier where his convictions drove him to exclaim against critics and opponents.²²

¹⁷ Gasparo Zonta, *Francesco Zabarella (1360–1417)*, (Padova, 1915), p. 144–149; see also Ernst Bernheim, „Eine Episode aus der venezianischen Geschichte, der Sturz des Hauses Carrara“, *Zeitschrift für Geschichte und Politik* 4 (1887), 102–123.

¹⁸ Zabarella served as negotiator or mediator for Venice in disputes between Venice and Emperor-Elect Sigismund, as well as in the controversies between Poland and Sigismund; see: *Monumenta Spectantia Historiam Slavorum Meridionalium* [edidit Academia Scientiarum et Artium Slavorum Meridionalium] vol. 5 (Zagreb, 1875), #156, p. 159–160, #174–175, p. 181–199, 199–201; vol. 9 (Zagreb, 1878), #200 p. 215–224, #231 267–269, vol. 12 (Zagreb, 1882), p. 137–138, 139–146, 146–147, 147–148, 191–192. See also, Eduoardo Piva, „Venezia e lo scisma durante il pontificato di Gregorio XII“, *Nuovo Archivio Veneto* 6 (1897), 135–158.

¹⁹ Luigi Zanutto, „Pier Paolo Vergerio Seniore e le sue aspirazione al decanato Civaldlesi“, *Nuovo Archivio Veneto* N.S. 21 (1911), p. 112 and notes 1 and 2.

²⁰ Thomas E. Morrissey, „Emperor-Elect Sigismund, Cardinal Zabarella and the Council of Constance“, *Catholic Historical Review* 59 (1983), 353–370.

²¹ Karl A. Kopp, „Petrus Paulus Vergerio der Ältere. Ein Beitrag zur Geschichte des beginnenden Humanismus“, *Historisches Jahrbuch* 18 (1897), 304.

²² When one of the procurators of the council tried to issue the coniliar decrees in the name of the council and of the emperor (therefore omitting the name of the pope) Zabarella and d'Ailly protested on March 26, 1415; this was five days after John XXIII had fled from Constance. The two cardinals objected on the grounds that for the council to do so was contrary to protocol and would violate legitimate papal rights. See: Odilo Engels, „Der Reichsgedanke auf dem Konstanzer Konzil“, *Historisches Jahrbuch* 86 (1966), 80–106, at p. 93; at the end of the process against John XXIII at Constance it is reported that Zabarella at this late date wished to speak out on behalf of John's defense (although Zabarella had been deeply involved in the process against him), but he was forced to remain silent. See Hermann von der Hardt, *Magnum oecumenicum Constantiense concilium* 7 vols. (Leipzig and Frankfurt, 1696–1742), IV:III:282 [henceforth cited as vdHardt]. In the affair of Jean Petit Zabarella declared in a general session of the council on April 30, 1416 that he and his colleagues on the commission appointed to deal with this dispute would gladly hand over the task to someone else; see Heinrich Finke, et al. eds., *Acta concilii Constantiensis* 4 vols. (Münster i.W.,

This then is the image of the late medieval canonist and we are using the words canonist and lawyer interchangeably since the legal scholar for whom Zabarella could be taken as a model had studied both laws and so his ideas could be applied in either sphere. How did such a man respond to the chief crisis of the late medieval world, the Great Western Schism? What did the canonist propose as steps toward solving this problem? What precisely was the unique contribution that the legal mind brought to this dilemma which was distinct from what the theologians and humanists offered?

R. N. Swanson has recently published a book on this crisis and in it indicated how the canonists were involved in the various attempts to end the schism, unite the Church and reform the society from the first days in which this crisis arose.²³ Certainly in 1378 and shortly thereafter the voice of Johannes de Lignano and others among the canonists were very prominent in defending the cause of one of the claimants.²⁴ But as Swanson presents the course of events it was the voices of the theologians who came to dominate the scene at least until 1403.²⁵ This has been a traditional view and in fact it was one of the interpretations of how and why the schism developed and became hardened. More than one critic saw the influence of the French and in particular of the University of Paris and its Masters of Theology as the malignant source of all the trouble.²⁶ In response to this scenario other scholars came to the rescue and defense of the French theologians and stressed their contribution to the ending of the schism.²⁷ Unfortunately both interpretations in my view underestimate the role of the Italians, in particular of the Italian canonists among whom Zabarella would stand out as a leader in the resolution of this crisis. The contrast here is rather strong for after all

1896–1928), II:280 [henceforth cited as Finke, ACC]. As early as December, 1414 he had criticized those whom he saw as extremists, both the faction controlled by John XXIII and those who would push reform at the cost of further divisions in the church; see Albert Lenne, „Der erste literarische Kampf auf dem Konstanzer Konzil im November und Dezember 1414“, *Römische Quartalschrift* 28 (1914), 3–40, 61–86. Finke, ACC, II:197 has the text of Zabarella's proposals for reform from that period.

²³ R. N. Swanson, *Universities, Academics and the Great Schism*, p. 24–25; Swanson discusses the canonists Baldus de Ubaldis on these two pages and Johannes de Legnano and others, on p. 25–26. See also Franz Bliemetzrieder, *Literarische Polemik zu Beginn des großen abendländischen Schismas* (Vienna, 1910) and Walter Ullmann, *Origins of the Great Schism* (London, 1948), p. 143–160.

²⁴ Swanson, *Universities, Academics and the Great Schism*, p. 24–25; Ullmann, *Origins of the Great Schism*, p. 147–148.

²⁵ Swanson, *Universities, Academics and the Great Schism*, p. 1–3; Swanson sees the main debates on the schism in the period after 1398 as taking place in France, i.e., at the University of Paris among the theologians and political figures there, and for Swanson all else appears as peripheral, p. 138–139.

²⁶ „Let this much be granted: had not France upheld Clement, the rebellious party [the Avignon obedience of Clement VII] would have had little appearance of solidity.“ Louis Salembier, *The Great Schism of the West* [translated by M.D.] (London, 1907), p. 66.

²⁷ Swanson, *Universities, Academics and the Great Schism*, p. 205, p. 14; Howard Kaminsky, *Simon de Cramaud and the Great Schism, passim*.

Paris was not a center for canon law but for theology while Italy and especially Bologna and Padua were noted for their legal scholarship. The contribution of canonists such as Peter de Ancharano, Antonio de Butrio and Zabarella to the ending of the schism has to be properly assessed. Ancharano has recently been the subject of a doctoral dissertation at Cornell University by John Sawicki,²⁸ and it is clear that he made a major contribution at the Council of Pisa at which he acted as official spokesman for the council in rebutting the attacks on its authority that emanated from the circles of the Roman claimant, Pope Gregory XII and his chief supporter, Ruprecht of the Rhine Palatinate and King of the Romans.²⁹

Zabarella's work was twofold. First, prior to the Council of Pisa from 1403 to 1408 in three stages he worked out his ideas on the origins of the council's authority. In his tract *De scismate* he constructed a theory on the legitimacy of a council and its authority to act for the *status ecclesiae*. The importance of this theory was that it grounded the authority of the council in the traditional law and beliefs of the Church while at the same time bypassing the dispute whether the right to summon the council was a special prerogative of the papacy. Since Zabarella's theory grounded the council's authority in its very nature as a representation of the whole Church, this authority was no longer derived from its convocation by the pope but from its character as representative.³⁰ In this way also Zabarella avoided the appeal to *epieikeia*, the principle which saw the situation of his day as an emergency in which the traditional law did not apply.³¹ The last thing that Zabarella wanted was to create a situation in which the council would come into existence as an institution outside of the law and not bound by it. The whole point of his argument that the individual pope might have to submit to resignation or deposition was that the pope too was subject to the law of the

²⁸ John Joseph Sawicki, *The Ecclesiological and Political Thought of Petrus de Ancharano 1330 (?)–1416* (Unpublished Doctoral Dissertation, Cornell University, Ithaca, New York, 1977).

²⁹ *Deutsche Reichstagakten unter König Ruprecht. 3. Abt. 1406–1410* [ed. Julius Weizsäcker] (Gotha, 1888), VI: 521–557; see also Rudolf Koetzschke, *Ruprecht von der Pfalz und das Konzil zu Pisa* (Inaugural Dissertation . . . , Universität Leipzig; Jena, 1889), esp. 74–75. Before this official response of the council was ready and issued, two brief responses were put out. One of these appears to be anonymous; however, Weizsäcker in publishing them, p. 518–521, stated that one tract was found in three manuscripts and that one of these (from the Strasbourg State Library) referred to the author as „Franciscum doctorem Paduanum“. This seems very likely to refer to Franciscus Zabarella who supported the Council of Pisa as has been seen and who was closely associated with Ancharano.

³⁰ *De scismate*, (Venice, 1502), fol. 117vb: „Regimen universalis ecclesie vacante papatu penes ipsam ecclesiam universalem que representatur per concilium generale“. This edition of Zabarella's tract *De scismate* is found as an appendix to his Commentary on the Gregorian decretals at I.6.6.

³¹ Ullmann, *Origins of the Great Schism*, p. 180–182, 199.

common good.³² He had written quite sternly against those who wanted to exempt the papacy from law and to absolutize it.³³ It would hardly do to remove one claimant to absolutism and then create a new one.

The second area in which Zabarella made a major contribution was in the application of this theory to practical problems of the day to day activities at the Council of Constance. His defense of the right of the Council of Pisa to assemble had been cited by that council in its own apologia.³⁴ With regard to the Council of Constance from the very outset he was intimately linked with its assembling since he worked as the papal envoy to King Sigismund to arrange its convocation.³⁵ At Constance he labored for three years to ensure that in this very trying time the resolution of the crisis was one that would stand up in court, i.e., that it would be „properly and legally“ done as his own words put it.³⁶ This was especially true in relation to the decree *Haec Sancta* as I have argued elsewhere,³⁷ but on a number of other instances Zabarella labored to make sure that no rash and unreasonable action was taken; the council should take care that it act prudently, without undue haste on serious matters and their words should be carefully chosen and exactly used. Thus on December 7, 1414 he proposed some cautionary words lest the council rush in with sanctions against those who might be opposed to what it was doing or even worst lest the council tie its own hands with an inflexible

³² In his *De Scismate*, fol. 119vb, Zabarella argued that the pope must in this crisis cooperate for the good of the church and his resistance to the efforts at unity would undermine the church. If the papal claimants (Gregory XII and Benedict XIII) tried to renege on their promises (to meet, to resign, etc.), then they were not to be obeyed as they threatened the common good of the whole church; *ibid.*, fol. 120rb. Earlier he had written in his commentary on the Gregorian Decretals that anyone in a position of authority who found himself inadequate to the task should resign; that this principle applied to the pope, and that it was not just a question of resignation, for if he were unwilling, he could be deposed; *Comm. ad X*, I.9.10., fol. 218rb.

³³ *De Scismate*, fol. 119vb: „quia male considerata sunt per multos assentatores qui volentes placere pontificibus per multa retro tempora usque ad hodierna suaserunt eis ut omnia poterent et sic quod facerent quidquid liberet, quasi omnia etiam illicita et sic plus quam Deus“.

³⁴ Johannes Vincke, *Schriftstücke zum Pisaner Konzil. Ein Kampf um die öffentliche Meinung* (Bonn, 1942), p. 136: „Idem tenet Franciscus de Zabarellis in suo consilio seu tractatu de modo uniendi ecclesiam“.

³⁵ Morrissey, „Emperor-Elect Sigismund, Cardinal Zabarella and the Council of Constance“, p. 355, 359. See also: Vatican City, Bibliotheca Apostolica, Fondo Vaticano Latino, Cod. 4178, fol. 1r-2r (Bull of John XXIII to Zabarella); Cod. 4942, fol. 7r-v (letter of John XXIII to Zabarella and Cardinal Challant) and fol. 90r-91r (letter of John XXIII to Zabarella).

³⁶ Johannes D. Mansi, ed. *Sacrorum conciliorum nova et amplissima collectio* (Florence and Venice, 1757–1798; new ed. Paris and Leipzig, 1898–1927), vol. 27:581, „si recte et rite gesta fuerint“. [emphasis mine].

³⁷ Morrissey „The Decree ‚Haec Sancta‘ and Cardinal Zabarella“, p. 153–156, 169–172.

posture on some issues.³⁸ Zabarella explained that it was precisely because of the fear that Pope John XXIII had that the other papal claimants would not come to a council which he had convoked that Sigismund had been induced to summon them to this council.³⁹ During those early months of the council and later even more so, Zabarella had to do a constant balancing act as both a member of the papal curia and of its circle of critics. He had been appointed a cardinal by that Pope John XXIII whom the council would depose because of his actions in fleeing from Constance and for his generally disreputable character. Zabarella was from the academic world as a former professor of law, an advisor to the Venetian government and a noted conciliarist and advocate of reform. How was he to balance all of these conflicting claims and interests? Zabarella in order to work for union and reform had to be accepted and trusted by the various interest groups in the council and at the same time he intended to make sure that nothing was sacrificed which he considered essential to the good order of the Church.

Thus Zabarella would devote his considerable legal talents to the council's efforts and machinery to remove Pope John XXIII from office but he also strove to forestall the public humiliation for the papacy that he knew would be the inevitable result; he tried to persuade the pope to resign before he was expelled.⁴⁰ On the commission that would draw up the articles and charges against John XXIII Zabarella served as one of the two cardinal members.⁴¹

³⁸ Zabarella wanted the council to make it clear to the two papal claimants (Gregory XII and Benedict XIII) that their condemnation issued at the Council of Pisa would not be withdrawn and so the situation would never again be favorable to their interests but he also wanted to allow flexibility for the council to work out whatever accommodation might buy peace and unity in the church. At the same time, however, that he supported the action taken at Pisa, he opposed those at Constance who saw the sole purpose of Constance as a reiteration of the condemnations issued at Pisa. Zabarella stressed that the council was also to provide for reform of the church in head and members as its task. For Zabarella's intervention, see: Finke, *ACC*, II:197. Both Pierre d'Ailly and Zabarella urged that the council proceed gently and not close off the possibilities of cooperation from the other two obediences; see: Konradin Zähringen, *Das Kardinalkollegium auf dem Konstanzer Konzil bis zur Absetzung Papst Johannes XXIII*. (Münster, 1935), p. 62. For a discussion of Zabarella's policy, see Lenne, „Der erste literarische Kampf auf dem Konstanzer Konzil im November und Dezember 1414“, p. 28–29.

³⁹ On February 16, 1415 Zabarella had addressed a public session of the council and at this time put forward his defense of what John XXIII had done for the convocation of the council. In particular he pointed out that although the other two papal claimants stood condemned by the Council of Pisa and therefore had no right to be summoned, still for the sake of peace and unity John had induced Emperero-Elect Sigismund to invite Gregory and Benedict to the council since he (John) knew that they would very likely not respond favorably to any summons from his side; see: A. Knoepfler, „Ein Tagebuchfragment über das Konstanzer Konzil“, *Historisches Jahrbuch* 11 (1890), 267–283, at p. 270.

⁴⁰ Heinrich Finke, *Bilder vom Konstanzer Konzil* [Neujahrsblätter der Badischen historischen Kommission, N.F.6] (Heidelberg, 1903), p. 50.

⁴¹ Finke, *ACC*, II:29; Mansi, 27:609.

He travelled around South Germany on another mission to locate the elusive pope and seek his abdication.⁴² In the end John tried to get Zabarella and two other cardinals to act as his procurators and defense team at the council but Zabarella's colleague, Cardinal Guillaume Fillastre put their refusal very elegantly: „It is difficult to take up a defense against the whole world“.⁴³ Still in the final process in which judgment was given against John, Zabarella made sure that the voice of justice was heard and that mere accusation and unfounded report were not taken as proof of guilt.⁴⁴ Even more, sinner though he may have been, John was given full credit for what he had accomplished on the positive side of the scale.⁴⁵ Perhaps one of his commendations of the pope is a damning with faint praise: „As far as temporal affairs went he (John) was of more use than harm“.⁴⁶ The scandal to the Church and his simony would be enough to condemn John but not the other charges which were not established.⁴⁷ Zabarella then was able to persuade John to accept the verdict of the council in advance of the final decision of deposition on May 29, 1415,⁴⁸ and so in this way Zabarella obviated the danger that John or one of the other papal claimants might claim that they had been under duress and so their resignations invalidated.⁴⁹ One should recall that this charge had been made at the outset of the schism by the cardinals and so it is understandable that a good lawyer did not want to repeat that situation and all of the problems it had created.

In the trial of Benedict XIII Zabarella's careful language is again found. For Benedict was charged with the fact that: „On many occasions it had become public knowledge that he was a supporter of the schism and so was

⁴² Zähringer, *Das Kardinalkollegium auf dem Konstanzer Konzil*, p. 92–93. For these journeys the diary of the other cardinal on this commission, Guillaume Fillastre, provides an eyewitness account of the trip and the adventures they met up with; see: Finke, ACC II:29–33.

⁴³ vdHardt, IV:167: „grave est procuratorem esse contra totum mundum“.

⁴⁴ Finke, ACC III:20 gives an example of the way Zabarella would correct a report or statement so as to give full benefit of the law and contrasted the phrasing used by d'Ailly and that of Zabarella. Other instances of such care are found in Finke, ACC, III:158, 167, 168, 171, 183, 191, 193.

⁴⁵ Finke, ACC, IV:817–820, esp. 818: „immo credit quod Bononiensis plura habuerint lucra quam damna per eum“.

⁴⁶ *Ibid.*, VI:818, „quod quantum ad temporalia fuit magis utilis quam dampnosus“.

⁴⁷ *Ibid.*, VI:819.

⁴⁸ vdHardt, IV:III:282. Zabarella had been sent on May 14, 1415 as a member of the commission to obtain John's agreement; see Louise R. Loomis, ed. and trans., *The Council of Constance* (New York, 1961), p. 245. John accepted the decree of deposition on May 31, 1415; see Eustace J. Kitts, *Pope John the Twenty-Third and Master John Hus of Bohemia* (London, 1910), p. 358–359.

⁴⁹ Loomis, *The Council of Constance*, p. 81–82 n. 5, notes by John Mundy and Kennerley Moody. These two editors stress this concern but it must be added that even though Zabarella worked very hard for voluntary compliance on the part of those involved, still in his schema of conciliarist theory, if the pope(s) persisted in action that was divisive and so destructive of the state of the church, then the pope(s) moved from schism into heresy and so the general council could take authoritative action in this matter.

notorious and suspected of heresy".⁵⁰ Each of these terms that were employed had a technical sense and an exact reference in establishing the case against the absent pontiff. It was not a question of the animosity against Benedict which certainly existed at the council for such emotion was hardly valid in a court of law but rather Zabarella was again ensuring that all was done legally and properly. There were to be no drumhead courts that might later raise questions and doubts.

Even in the unfortunate case of John Hus with which Zabarella was involved even before the council,⁵¹ the deft hand of the careful but also kind lawyer is found to some degree. We do not have time here to untangle the web of disputes that led Hus to his tragic end at the stake in Constance. Certainly the disputes between Germans and Czechs at the University of Prague, between defenders of the Roman line of papal claimants and the Pisan popes, between King Wenceslaus and the archbishop of Prague, between the reformers and the vested interests, between the adherents of the *via antiqua* and the *moderni* in the philosophical schools all were hopelessly jumbled together in the process that caused Hus's fate in addition to the various political interests that were involved. In 1411 Zabarella had quashed an original verdict against Hus by Cardinal Odo de Colonna; he had set a new date for a trial and admitted the legal defense on Hus's behalf. But the case was then taken out of Zabarella's hands and so it came to Constance. Zabarella's exact role at Constance in this long and complicated case is mostly unknown as few documents giving us this kind of information have survived. There certainly was a basic difference in their concept of the Church. Hus was above all the theologian, preacher and popularizer; Zabarella was the lawyer who in this case as always was concerned about due process in the trial that was taking place.⁵² The friend and admirer of Hus, Peter of Mladonovice, noted that quite often Zabarella directed the notary to record the answers of Hus in the interrogation so that a careful record would be had and the words of Hus on the point at issue be known.⁵³ The problem was that in this clash at Constance full benefit of the law (which was Zabarella's intent) was not enough.⁵⁴

⁵⁰ vdHardt, IV:IX:981; the words were those of Zabarella in his report.

⁵¹ The dispute between Archbishop Zbynek of Prague and John Hus had gone on to the papal curia. The archbishop had excommunicated Hus and in August 1410 his verdict had been supported by Cardinal Odo de Colonna who cited Hus to appear before him at Bologna, rejected all interventions on the part of those supporting Hus, and on Hus' failure to appear in person to answer the citation renewed the condemnation and excommunicated him as contumacious on February 11, 1411. A few months later, however, the pope appointed a further commission of four cardinals headed by Zabarella which on July 11, 1411 declared that this decision had been „unjust and precipitous“. Unfortunately the case was soon transferred to yet another cardinal, „who chose to take no action in the matter and refused to receive Hus's representatives“. Matthew Spinka, *John Hus at the Council of Constance*, (New York, 1965), p. 38–39.

⁵² Spinka, *John Hus at the Council of Constance*, p. 170, 180.

⁵³ Spinka, *John Hus at the Council of Constance*, p. 197.

⁵⁴ Henry Charles Lea, *A History of the Inquisition in the Middle ages* 3 vols. (New York, 1888), II:488.

To the very end, as he had promised, Zabarella endeavored to achieve a compromise solution, a statement which Hus could accept and which would have avoided the head on collision which appeared inevitable.⁵⁵ His efforts, however, were in vain, even his last minute intervention on the night before Hus was to be executed.⁵⁶ A similar pattern is evident in Zabarella's relationship with Jerome of Prague, a disciple of Hus, who shared his fate at Constance. Zabarella and Pierre D'Ailly resigned from the conciliar commission at one point in protest at the way the council was handling the case.⁵⁷ But once again Zabarella's attempts to save the man failed and Jerome was also executed in spite of all that Zabarella tried to do for him.⁵⁸

This list of cases in which Zabarella functioned as the leading advocate of proper legal procedure and of careful and thoughtful action could be extended. He served on the commission appointed to deal with the case of Jean Petit and the theory of tyrannicide,⁵⁹ a political hot potato if there ever was one at this general council. In the disputes Zabarella made his opinion very clear that if there were any complaints about his actions and his impartiality he would consider it a favor to be excused from the case. Unfortunately for him he had to stay with the case.⁶⁰ Zabarella was aware of the political importance of many of the theological and disciplinary decisions that they were taking at the council. His prudential judgment was vindicated on more than one occasion, not least in the dispute between the Kingdom of Poland and the Teutonic Knights which became known as the Falkenberg affair.⁶¹ Zabarella did not live to see the verdict on this question issued by the commission of which he had been a member. While he was alive he had made a number of suggestions for the proper formulation of this verdict. The basic difference between his phraseology and that of his colleagues had been that the words „heresy and savoring of heresy“ had been generously sprinkled

⁵⁵ Matthew Spinka, *John Hus: A Biography* (Princeton, 1968), p. 273; vdHardt, IV:IV:326, 329.

⁵⁶ Franciscus Palacky, ed., *Documenta Magistri Johannis Hus. Vitam Doctrinam Causam in Constantiensi Concilio Actam et de Religione in Bohemia annis 1403–1414 Motas* (Prague, 1869), p. 309.

⁵⁷ Lea, *History of the Inquisition*, II:500–501, 504; vdHardt, IV:VIII:766–767, III:IV:60.

⁵⁸ Spinka, *John Hus: A Biography*, p. 296.

⁵⁹ Finke, ACC, IV:243, n. 1.

⁶⁰ Finke, ACC, II:280.

⁶¹ In May of 1415 Emperor-Elect Sigismund had appointed Zabarella to the commission that was to deal with this dispute, Finke, ACC, II:241. One of Zabarella's problems was that several of the leading spokesmen of the Polish cause were former students of his: Paulus Vladimiri (rector of the University at Cracow) and Andreas Lascaris (bishop-elect of Posen; see: Stanislaus F. Belch, *Paulus Vladimiri and His Doctrine Concerning International Law and Politics* 2 vols. (The Hague, 1965), p. 1003–1007; also Paul W. Knoll, „The University of Cracow in the Conciliar Movement“, in *Rebirth, Reform and Resilience. Universities in Transition 1300–1700*, eds. James M. Kittelson and Pamela J. Transue (Columbus, Ohio, 1984), p. 190–212.

about in their original report.⁶² Zabarella did not like such words with their technical implications bandied about so freely and so urged their deletion.⁶³ Significantly when the commission appointed by Pope Martin V issued their verdict in January 1424, the final version condemned Falkenberg's treatise as erroneous but the word heresy was conspicuously absent,⁶⁴ and so Zabarella's judgment was vindicated.⁶⁵

The story of Zabarella's role in the movement for reform at the council is another aspect of how carefully he worked.⁶⁶ His basic idea was the intelligent judgment that any reform to be successful must change both men and institutions. Thus he spent his entire adult life urging that restrictions be placed upon authority, that some controls be placed on the ever increasing centralization that was occurring in the Church,⁶⁷ that it be clearly recognized and stated that all authority was limited.⁶⁸ But he also was urging that good men be appointed to church office, that men live up to their calling and that men in authority in the Church set an example for others in the way they lived and how they conducted themselves.⁶⁹ It was fitting that this strong

⁶² Belch, *Paulus Vladimiri*, p. 718; Finke, *ACC*, IV:412.

⁶³ Finke, *ACC*, IV:413.

⁶⁴ Belch, *Paulus Vladimiri*, p. 725–726.

⁶⁵ Bernhard Bess, „Johannes Falkenberg, O.P., und der preußisch-polnische Streit vor dem Konstanzer Konzil“, *Zeitschrift für Kirchengeschichte* 16 (1896), 385–464, at p. 460–461.

⁶⁶ As early as December 7, 1414 Zabarella had placed before the council proposals for reform, see: Mansi, 27:543–544, one part of which was to reduce the size of the papal curia and limit its excessive centralizing tendencies; see: George C. Powers, *Nationalism at the Council of Constance* (Washington, D.C., 1927), p. 48–49. On July 24, 1415 Zabarella had spoken to the council on the joint goal of reform and reunion, see: Finke, *ACC*, II:252, 253–255.

⁶⁷ Zabarella's attack on this trend is most clearly expressed in his *De scismate* (Venice, 1502), fol. 119vb.

⁶⁸ Zabarella, *Comm. ad X*, III.35.6., fol. 208v. He carefully noted the difference between unrestrained power (*potestas absoluta*) and limited power (*potestas ordinata*). On matters of mere positive law he would allow considerable discretion and flexibility on the part of those in authority, e.g., the pope but not in matters of natural law or what would affect the whole state of the church, e.g., faith.

⁶⁹ In December 1414 Zabarella had put forward reform proposals; see Finke, *ACC*, II:197. He had joined with the other cardinals in further reform suggestions, Mansi, 27:543–544. Specifically this latter statement had been quite clear: „It was impossible if the leaders were negligent for others to be observant of their duties and obligations“. This was in full accord with what Zabarella had written much earlier that the condition of the whole church was based on the reputation of its leader and that as the bishop was, so would the subjects be; see: *Comm. ad X*, V.I.18., fol. 35b, „quod propter infamiam solius prelati inquiritur de statu totius ecclesiae, tales enim presumuntur subdites, qualis est prelatus“. The general tenor of these reform proposals was discussed by Wilhelm Bernhardt, *Der Einfluß des Cardinal-Collegs auf die Verhandlungen des Constanzer Konzils* (Dissertation, Leipzig, n.d., most likely 1877), p. 7. One very practical effect of this reform movement is found in the actions of a man who clashed on other issues with Zabarella, d'Ailly and the other cardinals at the Council of Constance on several occasions. However, when John Maurotius, the Patriarch of Antioch, wrote back to the archbishop of Narbonne for whom he served as delegate and vicar, he explained at one

champion of the cause of union through all these turbulent years was chosen several times to give the sermon when acts of union were being celebrated at the council, e.g., with Aragon or Castile.⁷⁰ It is also not surprising that in one of these sermons Zabarella chose as his topic the theme that their own moral failings were the causes of the disunity that had prevailed.⁷¹ He saw only too clearly how the two cries of union and reform were so intimately linked.

What then was the contribution and achievement of Zabarella, the canonist and lawyer in that turbulent era? I think that it is quite evident that a good part of the success which the Council of Constance did achieve was due to the precise qualities which he offered: careful preparation, attention to detail and to the implications of actions, words and decisions. Over and again he was able to draw the inferences that were needed to get where the council wanted to go. He would tie the strings together that others might have left dangling. As a legal advisor it was his duty and gift to make sure that they knew what they were doing and saying and also that, insofar as it lay within his power, to ensure that they did it right. But equally important he did not allow the squabbings and petty disputes to lead them astray into endless meanderings among the minutiae of their daily activities, for he could always come back to the big picture which was all important: union and reform. Great canonist that he was, he stood out both as a practitioner and as a theorist who knew the constitutional implications of what he was proposing as well as the practical means of obtaining what was desired. What more could be asked of a legal advisor at any time or in any other place?

point that he had been forced to alienate certain articles which had been intended for church services. Since he was concerned about the legitimacy of such actions, he had turned to the best legal counsel he could get and so had consulted Cardinal Zabarella; on this see: Finke, *ACC*, II:766–770; the letter is on p. 768 and dated March 7, 1417.

⁷⁰ On this see: Thomas E. Morrissey, „The Call for Unity at the Council of Constance: Sermons and addresses of Cardinal Zabarella (1415–1417)“, *Church History* 53 (1984), 307–318.

⁷¹ The text of this sermon was printed by Zonta, *Franciscus Zabarella*, p. 160–163.