

The Evolution of Natural Rights, 1100–1500

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The evolution of natural, individual rights has a long tradition starting from the twelfth century. It involved lawyers, as well as philosophers and theologians. The rising voluntarist philosophy of the thirteenth century highlighted the inner workings of the individual's mind and had a certain influence on the doctrine of subjective rights. One of the most interesting issues in the evolution of natural rights is the psychological assumptions behind it. The natural instinct towards self-preservation and the ideas of self-defence and self-ownership in particular played an increasingly central role in the rights discourse from the thirteenth century onwards and remained central to later theories concerning the rights and duties of individuals and citizens up to the Enlightenment. The moral psychological basis of subjective rights became, however, politically important towards the early modern age, when the Spanish Scholastics were developing the early concepts of human rights, especially that of liberty.

Introduction

The definition of the modern concept of human rights involves at least two generally acknowledged elements. First, human rights must be human. They must be based on considerations common to all human beings; human rights must be derived from the traits that human beings possess in common. In this sense, human rights are universal. Second, human rights must be rights representing some claim or entitlement that can be asserted by the human beings in question. Without these aspects they are interests, concerns or attributes, not rights at all. As distinct from legal rights, which are created by governments and constitute law, human rights arise from the essential and non-governmental nature of human beings.¹

¹ Rubin 2003, 7–8.

The idea of claims that can be asserted by all human beings owes its origin to the doctrine of natural rights. Considering the early development of natural rights starting from the late Middle Ages, the controversial question among scholars is, whether these claims should be called rights. Edward L. Rubin argues in his article “Rethinking Human Rights” that the interplay between Christianity and feudalism led to the idea that “human beings possess natural rights in their pre-social state, rights which stem from their mere identity as human beings and not from any system of positive law.” Rubin argues that feudalism generated the idea of personal rights: claims that a person could assert or entitlements that he possessed. Christianity, on its part, contributed the idea of natural law, and also of a pre-social era of human history when legal rights did not exist and only natural law prevailed. The sources however, do not offer any evidence for Rubin’s argument.² He also disregards both the tradition of Roman law and the ancient philosophical schools that introduced natural law.³

Janet Coleman has recently argued in her article “Are there any individual rights or only duties? On the limits of obedience in the avoidance of sin according to late medieval and early modern scholars” (2006) that there is a problem inherent in the tracing of rights theories from the Middle Ages to modern times because of different medieval traditions of rights discourse; an example is the discourse of civil lawyers and that of theologians. In tracing the idea of rights, she also shows the differences between the neo-Augustinian tradition (i.e., secular university masters and Franciscans) and the Dominican traditions. By studying a cluster of texts written by scholastic theologians at the end of the thirteenth and early fourteenth centuries, Coleman argues that the Dominican tradition led more directly to talk of rights as claims in the early modern period, whereas neo-Augustinians seemed to submerge rights in previously known duties, which would come to have an influence on certain early modern theories as well.⁴

Another controversial question among scholars concerns the two ideas of natural right(s) found in late medieval scholasticism, the “objective” and “subjective” natural right(s). These two ideas are based on two senses of the Latin word *ius*: (a) an objectively understood notion of *ius* in the sense of “what is right” or “that which is just” (*id quod iustum est*); (b) a subjectively understood notion of *ius* as a legal or moral power someone has in which the term “subjective” simply refers to someone – the subject – who has the *ius*.⁵ Both Brian Tierney and Annabel Brett have shown

2 Rubin 2003, 10. Richard Tuck already presented a similar argument in his *Natural rights theories: Their origin and development* in 1979. For the criticism concerning Tuck’s thesis, see Tierney 1983, 429–441; Brett 1997, 10–11.

3 See also van Duffel 2004, 137–138.

4 Coleman 2006, 3. Coleman’s argument seems to be based more on doctrinal than textual basis.

5 See also Brett 1997, 1–4; MacGrade 2006, 63–64.

that the emergence of natural rights involved a complex series of developments in which both objectively and subjectively understood notions of *ius* played a role.⁶

Most scholars considering medieval rights discourse would agree that the natural rights theories were first developed somewhere between the twelfth and the fifteenth centuries. However, there still exist scholars who will place the first natural rights theories anywhere between Plato and the Stoics.⁷ Recent studies have shown that the most important historical events in the early development of individual rights were: first, the revival of legal studies, both in civil and canon law, in Western Europe beginning from the twelfth century;⁸ second, the emerging ideas on voluntarism in nominalistic philosophy and the rationalistic ideas on natural rights theories; third, the Franciscan poverty controversies from the 1250s to the 1340s; and fourth, the development of *ius commune* and its significance in defining the rights of property, self-defence, non-Christians, marriage and procedure as being rooted in natural and inalienable, not positive, law.⁹

Concerning the last notion, perhaps of most significance was the impact of the European encounter with America and the writings of sixteenth and seventeenth century Spanish scholastics on the growth of natural rights theories. According to Tierney and Brett, the “School of Salamanca” represents the final phase of the medieval tradition of natural rights thought. Human rights became the focus of the writings of the Spanish scholastics because of the practical questions sent to them by the missionaries in the New World: the humanity of the Native Americans and their right to elect or reject the missionaries’ offering of Christianity. The Spanish scholastics defended the rights of the Indians and justified it with the novel ideas of natural liberty.

The main aim of this paper is to consider those historical, legal and moral philosophical steps leading to the emergence of natural rights, i.e., to the subjectively understood notion of *ius*. Since the period under discussion is very long, it is possible to give only a general overview of the subject.

The Decretists and the Development of Rights

According to John Finnis, the transition from Thomas Aquinas’s (1225–1274) *ius*, defined as “that which is *ius* in a given situation”, to that of Francesco Suárez’s definition (1548–1617) as “something beneficial – a power – which a person has”

6 See Brett 1997; Tierney 1997.

7 See e.g., Miller 1995; Vlastos 1995, 104–125; Mitsis 1999, 153–177.

8 See Berman 1983; Pennington 1993; Prodi 2000.

9 There has, however, been much discussion on ways in which the idea of individual rights found a home in ancient thought. See e.g., Aubunque 1995, 17–28; Miller 1995.

was a kind of watershed.¹⁰ Suarez's innovation redefined the concept of rights as a *potestas* or *libertas* possessed by an individual, a quality that characterises one's being. There is, however, many scholars that defined *ius* as *potestas* or *libertas* before Suárez, and already before Aquinas.

In his article "Origins of Natural Rights Language: Texts and Contexts, 1150–1250" (1989), Brian Tierney argues that "the decretists put forward a subjective definition of a natural right in terms of faculty, ability, or power of individual persons associated with reason and moral discernment."¹¹ According to Tierney, this canonistic teaching on natural rights influenced both later philosophical and juridical discussions on rights. Tierney based his argument, on the one hand, on his study of the twofold textual material of the decretists: (1) their definitions of *ius naturale* in Gratian's *Decretum* (c. 1140) and (2) their analyses of the example of the poor in extreme necessity using the canon law principles concerned. On the other hand, Tierney has also studied late medieval and early modern rights discourse and shown the decretists' influence on it.

Tierney has especially analysed Gratian's definition of *ius naturale* as "the law common to all peoples, in that it is everywhere held by instinct of nature, not by any enactment", and how the twelfth-century decretists redefined it.¹² The definition, however, is not Gratian's own; he took it from Isidor of Seville's *Etymologiae*.¹³ The *Decretum* also contains other definitions of *ius naturale*, but according to Tierney, the reference to instinctual behaviour was, the most influential definition for the rights discourse.

Another influential definition of *ius naturale* was presented by Rufinus (d. 1192) in his *Summa Decretorum* (c. 1157–59). Rufinus defined *ius naturale* as "a certain force instilled in every human creature by nature to do good and avoid the opposite."¹⁴ Rufinus does not refer to any earlier source, but there is a certain parallelism with Cicero's *innata vis*.¹⁵ According to some Stoics, as well as Cicero, the human being contained a force through which one could discern *ius naturale*, understood as the objective natural law that pervaded the whole universe. Since

¹⁰ Finnis 1980, 207.

¹¹ Decretists are canon lawyers who commented on Gratian's *Decretum*.

¹² D. 1, c. 7: "Ius naturale est commune omnium nationum eo quod ubique instinctu naturae non constitutione aliqua habetur..."

¹³ Tierney 1997, 59. See Isidor of Seville, *Etymologiae* V, iv, 1–2 (PL 82, 199).

¹⁴ Rufinus, *Die Summa Decretorum des Magistres Rufinus*, ed. H. Singer, Paderborn 1902, 6–7, cited in Tierney 1997, 62.

¹⁵ See Cicero, *De inventione*, Book II. See also Tierney 1989, 63.

the Stoics understood *ius naturale* merely in terms of cosmic determinism, their reflection on the concept never led to a doctrine of natural rights.¹⁶

Other similar definitions of *ius naturale* given by Tierney are that of Simon of Bisignano, who defines the natural *ius* as “a force of the mind the superior part of the soul, namely reason which is called *synderesis*” and that of Sicardus, who states that “*ius* is called natural --- from human nature, that is a certain force or power naturally instilled in man.”¹⁷

However, more important for Tierney in these definitions is that the decretists understood the term *ius* as a faculty (*facultas*) or a power (*potestas*). It is in this idea that he finds the emergence of an individual, subjective understanding of *ius*.¹⁸ For Tierney, the definitions of the decretists are similar to that of Jean Gerson, who defined *ius* as “a faculty or power in accordance with right reason” associated with free choice and *synderesis*.¹⁹

All the above mentioned definitions, however, refer to the basis of moral conscience, not to natural rights. The concept of *ius naturale* is also called *synderesis*, a Greek term referring to the superior part (often reason) of *conscientia*. Tierney has also noticed this and points out that “we ought to say that moral precepts are effects of natural *ius* or that they derive from natural *ius* rather than that they are natural *ius*.”²⁰

It seems, however, that Tierney has overestimated the subjectivity of these definitions since they merely describe the moral consciousness in terms of natural law. It should be noted that the decretists also use the notion of *ius naturale* as a synonym of *lex naturalis*. Also, as Tierney points out: “The everyday use of *ius* to mean a right, a rightful power, infected the language of the canonists when they came to write of *ius naturale*. They occasionally gave a Stoic interpretation of the term as meaning a force pervading the whole cosmos; usually they included Gratian’s view that *ius naturale* was a code of moral law revealed through scripture and also accessible to reason; but often they added a subjective definition of the term that was not evidently present in Gratian’s texts at all.”²¹

16 Tierney 1997, 62–63, 65.

17 Op.cit., 63–64.

18 Op.cit., esp. 64.

19 Op.cit., 53, 67. See also Jean Gerson, *De vita spirituali animae*, ed. P. Glorieux, in Jean Gerson: *Oeuvres complètes*, 10 vols., Paris 1961–1973, 3, 141: “Jus est facultas seu potestas propinqua conveniens alicui secundum dictamen rectae rationis.”

20 Tierney 1989.

21 Op.cit., 62.

Of more interest, in terms of the emergence of individual rights, is the textual material of twelfth- and thirteenth-century decretists that deals with the situation of a person in extreme need. In that situation the decretists referred to the principle of extreme necessity, which is found in the *Ordinary Gloss* to the *Decretum* (D. 5 c. 26). It states that when a person is starving, necessity excuses theft.²²

Alanus, a decretist around 1200, wrote about a poor person in extreme need who takes another's goods in order to save his own life. According to Alanus he did not steal because what he took was really his own *iure naturali*. A contemporary decretist, Laurentius, wrote that the person in need could declare his right for himself. He stated that when the poor man took what he needed, it was "as if he used his own right and his own thing."²³ Finally, Hostiensis included the definition in his *Lectura* on the *Decretals*, stating that "one who suffers the need of hunger seems to use his right rather than to plan a theft."²⁴ Hostiensis's *Lectura* was widely read and cited. As Tierney maintains, it was a natural right that was being discussed.²⁵

As early as the late Middle Ages, both civil and canon lawyers put increasing emphasis on the rights and responsibilities of the individual. In medieval criminal proceedings (*ordo iudiciarius*), for instance, the right to defend oneself emerged in twelfth-century canon law as a natural right.²⁶ The thirteenth-century decretists systematically formulated the presumption of innocence as a subjective right.²⁷ It has been stated that Roman law did not include the notion of individual rights. There has, however, been much discussion about whether or not they had a theory of natural rights.²⁸

Voluntarist Tradition and Natural Rights

Many scholars have stated that the so-called voluntarist conception of the will (*voluntas*) as a source of both free choice and an individual act was important for the development of human psychology and behaviour, as well as for the emergence of individual rights.²⁹ Recent studies have shown that the idea of individuality started

²² Tierney 1997; Swanson 1997; Mäkinen 2001.

²³ Cited in Tierney 1997, 73.

²⁴ Hostiensis, *Lectura in V libros Decretalium* (Venice 1581) ad X.5.18.3: "Unde potius videtur is qui necessitatem patitur uti iure suo quam furti consilium inire." Cited in Tierney 1997, 73, n. 101.

²⁵ Op.cit., 73.

²⁶ Pennington 1998, 9–47; Mäkinen & Pihlajamäki 2005, 525–542.

²⁷ Schulz 2002, 193–218.

²⁸ See e.g., Zuckert 1989, 70–85.

²⁹ Grossi 1987; Tierney 1997; Brett 1997; Mäkinen 2001; McGrade 2006.

to develop during the late thirteenth-century discussion on the distinction between body and soul and how this distinction influenced the process of individuality.

Scholastics traditionally thought that the deepest essential nature of a human being was based on corporality. In accordance with the Aristotelian idea, they believed that the body was more important than the soul in determining the identity of a human being. The common opinion was that without the soul the body could not be alive and without a body the soul could not have its own existence. According to Thomas Aquinas, a human being was a corporal being because his substantial form, i.e. the soul, could not be perfect without a body. In this sense, human beings differed from angels, which were purely immaterial beings. Thus angels could not have a mode of individuality.

The Franciscan philosophers of *via moderna* posed a question contrary to this traditional scholastic philosophy. They wondered whether the immaterial soul and individuality could coexist. They thought that it could be. For them the soul became an important feature in determining individuality and individual existence.

This new idea changed the whole discussion. Furthermore, the Franciscan philosophers also criticized the Thomist-rationalist theory of acts as being opposed to the empirical notions of human behaviour. According to the Franciscans, it was more than usual that a human being failed to do something by voluntary act and not by weakness of the will.³⁰ According to John Duns Scotus (c.1265–1308), the will acts freely because it can will or not will, and there is no other efficient reason for its willing than the individual will itself. The willing act presupposes information given by the intellect, but unlike the intellect, the will has power to determine itself and thus also to express its own individual essence. The will also chooses each goal afresh in each individual act.³¹

For Scotus, the individual will did not have the moral right to freely express its individual essence, since moral law restricts freedom of the will. William of Ockham (1285–1347) later developed this idea in his theory of ethics, which saw moral values as based on obligations founded on divine command, limited only by the bounds of logical possibility and known by each individual in his conscience.³²

The philosophical discussions of the role of the soul, an individual's moral responsibility and freedom of the will also influenced the doctrine of individual natural rights. Since the Franciscans saw the will as the center of the subjective

³⁰ See Saarinen 1994.

³¹ Stadter 1971; Bonansea 1965.

³² See also Holopainen 1991.

personality, they also understood the notion of right merely as a faculty of an individual belonging to the person himself.³³

Nevertheless, the late medieval achievement of rights was a melding of the classical and Christian heritage into both the rationalist and voluntarist philosophies rather than simply a phenomenon of the voluntarist tradition.³⁴

Franciscan Poverty Controversies and the Development of Individual Rights

The long-lasting controversies over Franciscan poverty from the 1250s to 1340s aroused many questions considering the rights discourse. The Franciscans' idea of poverty without any property rights or legal standing prompted the question of the individual's right to property and subsistence;³⁵ the controversies give us a broader perspective on how the terminology of natural rights developed in the late thirteenth and early fourteenth centuries. The poverty controversies were not one, coherent conflict, but a long-lasting multifaceted one which is normally divided into three parts: (1) the secular-mendicant controversy lasting from the 1250s to the 1270s;³⁶ (2) the *usus pauper* controversy around the 1270s to the 1290s,³⁷ and (3) the controversy between Pope John XXII and the Franciscan Order from the 1320s to the 1340s.³⁸ The common element in all of these controversies was the discussion of the legal basis of absolute poverty as a renunciation of all kinds of rights.

In trying to solve the Friars' debate about the real meaning of poverty, the popes and Franciscans themselves defined the rule of poverty ("Let the Friars appropriate nothing for themselves, neither a house, nor a place, nor anything else") by using legal terminology. The compromise, crafted by the minister general of the Order, Bonaventure, and Pope Nicholas III in 1279, was that the Franciscans could not exercise property rights over material objects, but could make use of them for their own sustenance. Thus the most significant issues of the Franciscan poverty

33 Tuck 1979, 25–28; Grossi 1987, 1–58. For the criticism of Grossi's and Tuck's studies, see Brett 1997, 5, 10–11 and Tierney 1997, 429–441.

34 Brett 1997.

35 For a history of these controversies, see Lambert 1961; Leff 1968.

36 The collection of primary sources for the conflict is *Chartularium universitatis parisiensis*, eds. H. Denifle and E. Chatelain, 4 vols., Delalain, Paris 1889–1897. The conflict has been studied quite extensively; see e.g., Rashdall 1936, 344–397; Lambert 1961; Lambertini 1993, 143–172; Traver 1996, 105–271. For the controversy and its importance for the discussion on natural and legal rights, see Leff 1968, 255–270; Mäkinen 2001, 21–94.

37 Lambert 1961; Burr 1989.

38 Mäkinen 2001, 145–206; Nold 2004.

controversies for our subject was the Order's claim that its members were able to live not only without property rights, but also without any rights in general.

The Friars' absence of legal standing raised a discussion concerning the terminology of property and natural rights. On the one hand, the debates around such legal terms focused on a sharp conceptual analysis of the definition of *usus*, the use of temporal goods. On the other hand, the controversies involved the meaning of *dominium* and other terms concerning property rights over things (such as *proprietas*, *possessio*, *ususfructus*, and *ius utendi*).³⁹

Perhaps the most influential issues were discussed during the aftermath of the *usus pauper* controversy. The problems raised by the issue of Franciscan poverty without any property rights were treated in several quodlibetal disputations in the Faculty of Theology at the University of Paris at the end of the thirteenth century. Two figures involved were secular theologians: Henry of Ghent and Godfrey of Fontaines.⁴⁰ These two theologians demonstrated in their quodlibetal disputations how the juridical basis of Franciscan poverty attracted attention in the discussion of natural rights – and that the Franciscans' claim to live without any modes of rights was an absurd idea.

Henry of Ghent, for instance, posed in his *Quodlibet IX* the question (q. 26) "whether one condemned to death can licitly flee" (c. 1289). Henry treated the question by distinguishing between the rights of the judge and the rights of the condemned person in the body of the criminal. The judge has the power (*potestas*) of capturing, holding, and executing the condemned person, whereas the criminal has the power of using his body so as to preserve his life as long as he does not injure another.⁴¹ Henry's conclusion in his *Quodlibet IX*, question twenty-six, was that the criminal had a right to preserve his life and acquire the necessities of life that override the right of the judge to imprison and kill the condemned. The right to preserve one's life is greater because everyone (including the judge in this case) is compelled by the necessity.⁴² In this particular question, Henry explicitly stated that self-preservation was a natural right but only in the case of extreme necessity.⁴³

Later in the same question he asserted that the condemned also had a property right (*proprietas*) over his own body, whereas the judge had only the right to use

39 Mäkinen 2001.

40 Op.cit., 105–139.

41 Henry of Ghent, *Quodlibet IX*, 307.

42 Op.cit., 308.

43 Tierney 1997; Mäkinen 2001. Cf. Coleman, who claims that Henry is speaking about obligations. Coleman 2006, 13–19.

(*ius utendi*) the criminal's body (which gave him the power to capture, imprison, and kill the condemned). Moreover, Henry stated that the condemned should preserve one's life without injuring another.⁴⁴ In this regard Henry also emphasized an individual's subjective right. His way of using *proprietas* strictly understood as a property right rather than any broader notion of *dominium* stresses his individualistic treatment of the notion of right in question twenty-six.⁴⁵

Godfrey of Fontaines also used the principle of extreme need when criticizing the Franciscan ideal of poverty. By opposing the Franciscans' renunciation of all rights, Godfrey asserted in his *Quodlibet* V (written in 1288) that in extreme need everyone, including the Franciscans, should have a duty towards self-preservation, which he described as an inalienable, natural right of subsistence.⁴⁶

The last controversy around Franciscan poverty was between Pope John XXII and the Franciscan Order. The most influential friars in this debate were Bonagratia of Bergamo, the procurator of the Order,⁴⁷ and the leading nominalist philosopher, William of Ockham. In opposition to the Franciscan ideal, Pope John XXII argued that property rights were natural to human beings. He even stated that property rights were established by God and exercised by Adam in the pre-social condition before the fall. Consequently, the Pope condemned the Order and their doctrine of poverty a heretical.

William of Ockham's contribution to the controversy was important – both to the Order itself and to the emergence of subjective rights. Whereas the earlier Franciscans before Ockham spoke about objectively understood natural law, Ockham spoke of subjective rights, claiming that natural rights could not be renounced. In fact, Ockham was forced to develop the Franciscan ideas on poverty in the area of moral philosophy, since his opponent, Pope John XXII, turned the argument against the Franciscan ideals to the analysis of human acts. Ockham defined a right as a form of active power by a moral agency. Human beings had what he called "power-rights".⁴⁸

44 Henry of Ghent, *Quodlibet* IX, 309.

45 So also Tierney 1997, 86–87.

46 Mäkinen 2001, 124–137; Mäkinen 2006, 47–49.

47 More on Bonagratia of Bergamo, see Wittneben 2003.

48 For Ockham's contribution to natural rights, see McGrade 2006, 63–94.

Rationalistic Ideas on Natural Rights Theories

Annabel Brett has argued in her study *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (1997) that in order to understand the development of individual rights we especially need to look at the ways in which the Latin language of *ius* functioned in a wide range of philosophical contexts. In her study, she has also noted that voluntarist ideas were perhaps more influential in the early history of individual rights, but that the rationalistic ideas of Thomism illuminated the later development of rights discourse, especially among the Spanish scholastics of the sixteenth and seventeenth centuries.

Within the Thomist-rationalist tradition of natural law the notion of *ius* was mainly seen as an objectively given order of nature, and natural right was defined as a just portion which is due between people rather than something characteristic of the person himself. This objectively understood sense of right was transmitted to medieval discussion through the study of Roman law and the recovery of Aristotelian *Ethics* and *Politics*, for instance, in the texts of Thomas Aquinas.

The mode of the definition of a subjective right, as a power of action under law and related to obligation and necessity, was a significant aspect in the development of natural rights within the rationalistic tradition.⁴⁹ Thus, unlike some researchers have stated, an objective right in later medieval scholasticism cannot be seen as a direct “opposite” of a subjective right.⁵⁰ This is evident especially within the texts of Spanish Scholasticism (a broad intellectual movement of the revival of Thomistic philosophy) and its implications on natural rights through the School of Salamanca. The most important representatives of the Spanish scholastics of the School of Salamanca are Francisco de Vitoria (1483–1546), Domingo de Soto (1495–1560) and Juan Luis Vives (1492–1540); the representatives of neo-Scholasticism are Fernando Vázquez de Menchaca (1512–1569) and Francesco Suárez (1548–1617).

The importance of the Spanish scholastics for the emergence of Western rights theories is at least twofold. First, they focused especially on human rights, pointing out the free choice of the individual and his autonomy or “self-mastery”. In this sense, their thought represented the arguments of the classical liberal tradition of individual rights.⁵¹ Second, they had a great impact on the early-modern figures of natural rights, such as Hugo Grotius, Thomas Hobbes, John Locke and Samuel Pufendorf.⁵²

49 Brett 1997, 124.

50 Op.cit.

51 For the Spanish scholastics and their influence on the development of the natural rights tradition, see Tierney 1997; Brett 1997; Tierney 2006.

52 See Tierney 2006.

Scholars, however, are not in agreement as to whether the Spanish scholastics contributed to the development of subjective rights within the nominalist-voluntaristic ideas of subjectivism, or within the objective theory of rights representing the true Aristotelian concepts of Thomas Aquinas.⁵³ The question arose because Spanish scholastics usually used Aquinas's texts, in which the idea of natural, individual rights was totally missing, and interpreted them in accordance with the natural rights tradition. Francisco Vitoria and Francesco Suárez, for instance, wanted to show how an originally juridical tradition of rights, as transmitted by theologians like William of Ockham and Jean Gerson, could be harmonized with a Thomist doctrine of natural law.⁵⁴

One example of a scholar between two traditions is Francisco de Vitoria, who derived his doctrine of subjective rights from Thomas Aquinas, Jean Gerson and the legal tradition. In his *Relectio de homicidio* (On Homicide), Vitoria dealt mainly with the problem of suicide but he also spoke about individual's duty to self-preservation as a right. Interestingly, he treated the problem of suicide by distinguishing, on the one hand, between God's right and a person's own right in regard to his life and, on the other hand, between the possession of a right and the manner of its exercise as follows:

Although --- one is not the master of his or her body or his or her life as one is of other things, nevertheless one does have something of mastery and right in his own life, so that if anyone harms one's body he or she not only does an injury to God, who is the supreme lord of life, but also to the individual person oneself.⁵⁵

Vitoria used property rights terminology here but made a significant distinction between a right a person has in oneself and a right a person has to a thing. For Vitoria, the right of a person in oneself was in "the zone of human autonomy, an area of licit behaviour, where a person could act as he or she chose",⁵⁶ whereas the right to a thing was restricted by other persons and the law of property.⁵⁷

Vitoria also dealt with the common argument about a person in a state of extreme necessity. He stated along traditional lines that if two men were in a state of extreme need, one could give up his bread to save the life of another. According to him, one could even sacrifice his or her life to save an enemy. Further, if a person was attacked by a robber, he could certainly kill his assailant in self-defence, but

53 Brett 1997, 123–124.

54 Tierney 1997, 302.

55 Vitoria, *De homicide*, 24. Translation in Tierney 1997 with modifications.

56 Tierney 1997.

57 For more on Vitoria's ideas on rights, see Tierney 1997, 256–301.

he would act more perfectly if he yielded his own life rather than send the thief to eternal damnation. Vitoria, thus, maintained that in many cases a person could licitly preserve his own life and yet was not bound to do so.⁵⁸ Here a right, including the right of self-defence, conferred a certain freedom of choice on the right-holder.⁵⁹

Francisco Suárez, an important figure of the “second scholasticism” of Salamanca, rejected the idea of *ius* as an objective state of affairs and argued for an individualistic idea of right.⁶⁰ In his *De Legibus*, Suárez gave several definitions of *ius*. According to the strict signification, the notion of *ius* was for Suárez “a certain moral faculty (*facultas*) that everyone has either regarding one’s own thing or something due to him or her. Therefore, the owner of a thing is said to have a right in the thing (*ius in re*) and a workman is said to have a right to his wage (*ius ad rem*)...”⁶¹

Conclusion

The late medieval rights discourse developed the theoretical and conceptual foundations for a rights theory rather than a theory of rights as such.⁶² It seems that rights were not fully incorporated and elaborated as theories of individual rights either, until the works of the early modern scholars. It also seems evident that medieval voluntarist theories of human nature had an important influence on rights discourse and political thought. Thirteenth- and fourteenth-century voluntarist ideas about the human being as an active and rights-bearing individual had important consequences not only in moral philosophy but also in other fields of thought. The philosophical discussion, of both the individual’s moral responsibility and rights concerning oneself and one’s actions, further informed the individualization of criminal law, the law of evidence, the theory of property rights and the theory of social contract.

58 Vitoria, *On homicide*, a. 8, 179.

59 Tierney 1997; Brett 1997.

60 Suárez has, however, been called a voluntarist and a rationalist, an organicist and an individualist, an absolutist and a constitutionalist. See e.g., Wilenius 1963, 108.

61 *De Legibus*, 1.2.4, 24, citing *Summa theologiae* 2a 2ae, q. 57, 1. Translation in Tierney 1997, 303. For Suárez’s definition of the different meanings of *ius*, see Tierney 1997, 302–303.

62 Cf. Tierney 1997.

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