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Dominion Rights: Their Development and Meaning in the History of Human Rights

Virpi Mäkinen

Introduction

The importance of the sixteenth-century Spanish neo-Thomists has been crucial in the development of natural rights (*ius naturale*) and, later on, to the emergence of human rights in Western political theories.[1] Though there are many relevant representatives of neo-Thomist philosophy, this chapter concentrates on three eminent figures from the early centuries of the Salamanca School. Two of them belonged to the Dominican order: Francisco de Vitoria (1483–1546), founder of the Salamanca School, and his pupil, Domingo de Soto (1495–1560). The third, Luis de Molina (1535–1600), represented the Jesuit theology and, in his work *De iustitia et iure*, offered the first Jesuit theory of rights. These three Spanish theologians influenced rights discourse in at least three crucial ways. First, they reformulated the Aristotelian-Thomistic concept of *ius naturale* in light of the Gersonian-Summenhartian ideas of natural rights[2] as a theory of inalienable natural and

[1] The question of the early history and origins of the concept human rights is an ongoing debate among modern scholars. We still do not have an adequate account of the origin and early development of human rights; the content, nature and justification of human rights are also still being debated today as well. See, e.g. Frohnen, B.P. and Grasso, K.L. (eds.), *Rethinking Rights: Historical, Political, and Philosophical Perspectives*, Columbia/London, 2009; Douzinas, K., *The End of Human Rights*, Oxford, 2009; Slotte, P. and Halme-Tuomisaari, M. (eds.), *Revisiting the Origins of Human Rights*, Cambridge, 2015.

[2] By the Gersonian-Summenhartian tradition, I refer to a certain similar conceptual continuation concerning the definition of the notion of *ius* and *dominium* to be found between Jean Gerson and Conrad Summenhart. It is well known that Gerson's works served as an immediate source for Summenhart. This was due to his conscious efforts to

dominion rights in Western political thought. Second, they acted as mediators between late-medieval and pre-modern Continental political thinkers, such as Hugo Grotius (1583–1645) and Samuel Pufenford (1632–1694).[3] Third, the specific historical situations and events of their own times (such as the Conquest and the Age of Discovery) compelled them to discuss and solve such political issues as a just war, the justification for conquest and evangelisation of infidels, all of which influenced their understanding of the notion of rights.

Francisco de Vitoria discusses his theory of rights and *dominium* in *Commentary on Aquinas's Secunda secundae*, which, under the Dominican School, formed a text that functioned much as Lombard's *Sentences* did during the first Scholasticism.[4] Vitoria also

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systematise Gerson's language into a coherent whole in his main work *Septipartitum opus de contractibus pro foro conscientiae atque theologico* (1500). The most obvious similarities are based on the general definition of a right as a power or faculty to act or to do something in accordance with the right reason. Another similarity between Gerson and Summenhart is their emphasis on liberty. Thus they both treated rights in the context of moral theology and spoke about natural rights as moral rights. It should be noted, however, that Summenhart's interpretations may not always be fully in line with Gerson's own thoughts.

[3] It is important to note that, despite the fact that early modern politicians hardly ever referred to earlier studies, especially medieval authors (which they perhaps did not know or viewed as uninteresting), there are many resemblances between early modern and late-medieval ideas on rights. Modern studies focusing on the development of rights discourse from the medieval to the early modern period have shown the continuities between these two traditions. This is, however, a subject that needs to be further studied. For such studies, see, e.g. Tierney, B., *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150–1625*, Atlanta, Georgia, 1997, pp. 255–72; Brett, A., *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought*, Cambridge, 1997, pp. 122–137; Tellkamp, J.A. "*Ius est idem quod dominium*: Conrado Summenhart, Francisco de Vitoria y la conquista de América", *Veritas* 54 (2009), pp. 34–51. See also Pagden A. and Lawrance, J., "Introduction", *Francisco de Vitoria, Political Writings*, id. (trans.), Cambridge, 1991, pp. xiii–xxviii.

[4] Vitoria lectured twice on Aquinas's *Secunda secundae* and his Commentary documents the second course of lectures in the years 1534–1537. Vitoria, F. de, *De justitia*, in *Comentarios a la secunda secundae de Santo Tomás*, vol. 3, V. Beltrán de Heredia (ed.),

discusses the subject in *Relectio de Indis*.[5] Domingo de Soto deals with the doctrine of rights and dominion in *De iustitia et iure libri decem*, first published in Salamanca in 1533–1534 and re-edited in 1556–1567.[6] Likewise, Luis de Molina discusses the subject in *De iustitia et iure* (1593).[7] Despite the prior existence of a literary genre of *De iustitia et iure*, these two works were composed in different ways: whereas Soto follows Aquinas's questions *De justitia* in the *Summa theologiae*, Molina differentiates himself both from Aquinas and Soto by critisising the latter.[8]

This chapter focuses on three main themes concerning the theories of natural and dominion rights in the works of the above-mentioned theologians: (1) the definition of dominion rights and their relation to natural rights, (2) the main criteria for having dominion rights over something, and (3) the legitimation of dominion rights. The conclusion concisely summarises the importance of dominion rights in the history of human rights. Since the teaching of natural and dominion rights by these Spanish neo-scholastics cannot be fully

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Madrid, 1934. For Vitoria's theory of natural and dominion rights, see Brett, *Liberty, Right and Nature*, pp. 134–137; Tellkamp, "Ius est idem quod dominium", pp. 34–51; Añaños Meza, M.C., "La doctrina de los bienes communes de Francisco de Vitoria como fundamentación del dominio en el Nuevo Mundo", *Persona y Derecho* 68 (2013), pp. 103–137.

[5] Vitoria, F. de, *De indis et de iure belli relectiones*, E. Nys and J.P. Bate (ed. and trans.), Buffalo, 1995.

[6] Soto, D. de, *De iustitia et iure libri decem*, 5 vols., Madrid 1967 (facsimile of Salamanca, 1556). The re-edited work was largely used (reprinted twenty-seven times) during the sixteenth century throughout Europe. For Soto's theory of rights and *dominium*, see Brufau Prats, J., *El pensamiento político de Domingo de Soto y su concepción del poder*, Salamanca, 1960; Brett, *Liberty, Right and Nature*, pp. 137–64.

[7] Molina, L. de, *De iustitia et iure tractatus*, vol. I, Venice, 1611. The work consists of three volumes, which were published in 1593, 1597 and 1600. For Molina's theory of rights and *dominium*, see Tellkamp, J.A., "Rights and dominion", in M. Kaufmann and A. Aichele (eds.), *A Companion to Luis de Molina*, Leiden/Boston, 2014, pp. 125–45.

[8] See Tellkamp, "Rights and dominion", pp. 132–33.

understood without reference to their late medieval heritage, the chapter briefly reviews the history of rights in late medieval sources.

Right, Law, and Dominion in Late Medieval Sources

Modern scholars often mention two traditions when speaking about the history of rights: the Thomist-rationalist natural law tradition and the nominalist-voluntarist natural rights tradition. The former tradition has been seen as representative of the objective (also called passive) tradition of rights, while the latter has typically been viewed as representative of the subjective (also called active) tradition of rights.[9] Recent studies have maintained that the Spanish neo-Thomist teachings on rights represented a combination of both these traditions and that each individual author contributed to the subject in his own personal fashion.[10]

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[9] For more on these traditions, see Brett, *Liberty, rights and nature*, pp. 1–6; B. Tierney, "Historical Roots of Modern Rights: Before Locke and After", in Frohnen and Grasso, *Rethinking rights*, pp. 34–57; Nederman, C.J., "Rights", in J. Marenbon (ed.), *The Oxford Handbook of Medieval Philosophy*, Oxford, 2012, pp. 643–660.

[10] Especially concerning Vitoria, see Tierney, *The idea of natural rights*, p. 265; Deckers, D., *Gerechtigkeit und Recht: Eine historisch-kritische Untersuchung der Gerechtigkeitslehre des Francisco de Vitoria (1483–1546)*, Freiburg, 1991, pp. 191–3, 220; Brett, *Liberty, right and nature*, pp. 130–131, where she also criticises Deckers's interpretation, who sees subjective rights and ideas on modernity in Vitoria's theory. For Vitoria's rights theory as more or less subjective theory, see Tellkamp, "*Ius est idem quod dominium*"; Mäkinen, V., "Dominion Rights of the Aboriginals in Francisco de Vitoria's De indis", in J. Cunliffe and G. Erreygers (eds.), *Inherited Wealth, Justice and Equality*, London/New York, 2013, pp. 16–38. For scholars who see Vitoria more as a representative figure of a traditional Thomistic teaching of *dominium*, see Cortest, L., *The Disfigured Face: Traditional Natural Law and Its Encounter with Modernity*, New York, 2008, esp. p. 23, where he refers to Tierney's (*The idea of natural rights*) studies.

It is necessary here to discuss two significant concepts more specifically: *ius* (right) and *dominium* (dominion). The notion of *ius* had several connotations in medieval sources. A right (*ius*) was understood as something that law (*lex*) or justice (*iustitia*) granted to an individual under the objectively understood law of nature (*lex naturalis*: a right pertaining to an order that exists and is valid independently of each subject). Beginning from the ancient philosophical tradition as well as Roman legal texts, the notion of *ius* (in the meaning of law) was understood as 'what is just' (*id quod iustum est*).[11] Modern scholars have chosen to call this tradition the 'objective right' (or law) tradition. In *Summa theologiae* 2a2ae, Thomas Aquinas also provides a central definition for *ius* in accordance with its objective meaning within the context of *rectitudo*. For him, a right is any act, forbearance or other thing that is just.[12] According to Aquinas, law (*lex*) is also 'in a certain sense the rationale of right (*ius*)'.[13]

In the objective tradition, natural law (*ius naturale*) was understood as being merely preceptive because of its precepts and prohibitions. However, natural law not only regulated human affairs but also left areas open to free human choice. From the twelfth century onwards, canon lawyers and theologians began to recognise the notion of *ius naturale* as referring to a type of subjective power or ability inherent in individuals together with the tradition of permissive natural law. According to this notion, humans were

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[11] Examples of the sources representing an objective tradition include Aristotle's *Nicomachean ethics*, V.7 (1134b18–1135a14) and the Roman jurist Ulpian's (d.228) definition of justice as 'the constant and perpetual will to give each one his due', which was a common phrase among medieval jurists and theologians. See D.1.1.1opr.: "Iustitia est contans et perpetua voluntas ius suum cuique tribuere."
[12] Thomas Aquinas, *Summa theologiae*, II-II q. 57 a. 1: "Iustum dicitur aliquid, quasi habens rectitudinem iustitiae, ad quod terminatur actio iustitiae […] et hoc quidem est ius."
[13] See Thomas Aquinas, *Summa theologiae* II-II q. 57 a. 1.

understood to have the natural right to act as they saw fit, provided such actions did not exceed the range of actions permitted by law. The idea of permissive natural law called attention to the intrinsic nature of law itself and was further developed within the voluntarist tradition.[14] For example, the Franciscan theologian John Duns Scotus (d. 1308) argues that not even the Ten Commandments (i.e. precepts of natural law) impose an obligation on human beings; rather, they should be left to the liberty of the will.[15] These changes in language enabled the development of a new theory of natural rights. Together with the development of permissive natural law from the early thirteenth century onwards, some canon lawyers and theologians began to conceive of the notion of *ius* as belonging to the individual in accordance with the novel sense of right, that is, as something one has or owns (*ius suum*) and by which one can claim something as his or her right.[16] The background for such an understanding also had to do with the overall tendency towards individualisation in late medieval thought. In theology and moral philosophy, this new discourse was seen in the voluntarist psychological tradition that highlighted human will (*voluntas*) as a source of both free choice and individual agency. In particular, the Franciscan theologians of the late-thirteenth and early fourteenth centuries developed a new kind of psychology in which the soul became an important feature in determining

[14] On the idea and history of permissive natural law, see Tierney, B., *Liberty and Law: The Idea of Permissive Natural Law, 1100–1800*, Washington, D.C., 2014.
[15] Scotus, J.D., *Quaestiones in quartum librum sententiarum in Joannis Duns Scotus*, Paris, 1891, 4.15.2, (18:266). Scotus's *Commentary on the Sentences* IV.15 was a model for early Spanish neo-Thomists, especially for Vitoria. See Brett, *Liberty, right and nature*, pp. 124–125, 131, in which she focuses especially on the divisions within *dominium*.
[16] The notion *ius suum* was already known in Roman law, for example in the construction *utitur iure suo* ('uses one's right'). For the early development of individual rights from the Middle Ages to the early modern period, see Tierney, *The idea of natural rights*; Brett, *Liberty, right and nature*.

individuality and individual existence.[17] Since the Franciscans of the time saw human will as the centre of the subjective personality, this gave rise to a fundamental question: What is meant by the Latin term *ius* when it is associated with an *individual* person? The answer was to predicate *ius* upon the natural faculty (*facultas*) or power (*potestas*) belonging to each individual that causes her or him to act rightly. Among modern scholars, this new understanding of *ius* is also termed the 'subjective sense' of right. It should, however, be noted that natural rights developed alongside the 'old' natural law teachings, not totally distinct from or in opposition to them – and this development concerned the Spanish neo-Thomists as well.[18]

As Dominican theologians, Vitoria and Soto naturally operated within the Aristotelian-Thomistic tradition. However, they also used sources that belonged to the nominalist-voluntarist tradition and were thus familiar with the subjective rights theories. Their main sources that belonged to this tradition were the works of the French theologian and conciliarist Jean Gerson (1363–1429) and the German theologian Conrad Summenhart (*c.* 1450–1502). This so-called Gersonian-Summenhartian tradition of rights had its background especially in the arguments of the Franciscan theologian William of Ockham (1285–1347), who made significant modifications to the late medieval, subjectively understood notion of rights.[19] When stating that a right was a licit power of action, Ockham

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[17] See Nederman, C.J., "Individual autonomy", in R. Pasnau (ed.), *The Cambridge History of Medieval Philosophy*, vol. II, Cambridge, 2010, pp. 551–564.
[18] Tierney, *The idea of natural rights* p. 8; Brett, A., "Human rights and the Thomist tradition", in P. Slotte and M. Halme-Tuomisaari (eds.), *Revisiting the Origins of Human Rights*, Cambridge, 2015, pp. 82–101.
[19] Ockham's language of rights can be taken to represent a divide in late medieval rights discourse. See, e.g. Brett, *Liberty, right and nature*, pp. 51–62; Mäkinen, V., "Moral Psychological Aspects in William of Ockham's Ideas on Natural Rights", *American*

was emphasising moral agency in the language of rights: to have a right meant that one was an agent with a legitimate or licit sphere of action.[20] According to the definition, *potestas* refers to an innate human rational power to act in accordance with right reason (*recta ratio*). The word *licita* refers to what is permissible in accordance with right reason, that is, what is legitimate in accordance with the law.[21] Ockham's definition was important for the development of rights: from this time forward, a right was understood as a normative and natural power to do something – even toward oneself – not prohibited by law. Thus, natural rights were understood as an independent license for action, in which the individual and his or her choices were sovereign.[22]

Following Ockham, Jean Gerson defines a right (in its strictest meaning) as 'a proximate faculty or power appropriate to someone according to the dictate of right reason'.[23] For

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Catholic Philosophical Quarterly 86 (2012), pp. 507–525; Varkemaa, J., *Conrad Summenhart's Theory of Individual Rights*, Leiden/Boston, 2012. Tierney (*The idea of natural rights*, p. 118) considers Ockham's usage of 'right' as a kind of derivation from earlier literature and especially from canonist sources.

[20] William of Ockham, *Opus nonaginta dierum*, in *Guillelmus de Ockham Opera Politica*, ed. H.S. Offler, vol. 1, Manchester 1963, p. 304: "[…] Ius utendi est potestas licita utendi re extrinseca qua quis sine culpa sua et absque causa rationabili privari non debet invitus; et si privatus fuerit, privantem poterit in iudicio convenire."

[21] For more on Ockham's terminology, see Robinson, J., *William of Ockham's Early Theory of Property Rights in Context*, Leiden/Boston, 2013, esp. pp. 114–120, 161–174 and Mäkinen, "Moral Psychological Aspects on Natural Rights".

[22] For Ockham's definition of rights in general, see Tierney 1997, pp. 27–42, 93–103, 170–194; Brett, *Liberty, right and nature*, pp. 50–68; McGrade, A.S., *The Political Thought of William of Ockham: Personal and Institutional Principles*, Cambridge, 2002, pp. 173–196.

[23] Gerson, J., *De vita spirituali animae*, in P. Glorieux (ed.), *Jean Gerson: Oeuvres complètes*, vol. III, Paris 1965, lectio 3, p. 26: 'Jus est facultas seu potestas propinqua conveniens alicui secundum dictamen rectae rationis.' In *De potestate ecclesiastica* (1416–17), Gerson replaces 'the dictate of right reason' with 'the dictate of primary justice', but he deals with them synonymously: both can be assimilated into the concept of law. See Gerson, J., *De potestate ecclesiastica et de origine iuris et legum*, in *Opera omnia*, vol. 2, Antwerp, 1706 (reprint. 1987), consideratio 13, p. 250. For more on Gerson's teaching of

both authors, *recta ratio* was central in the elucidation of law, and, therefore, individual rights stemmed from the law that governs individuals.[24] This strict definition of right only concerned human beings and their moral and political practices, since 'right reason belongs only to rational creatures'.[25] Gerson also articulates a general sense of the notion of *ius*: a right is a created active power by which all creatures have the right to actualise their natural faculties of action. For example, the sun has the right to shine and birds the right to fly.[26] For him, this kind of general natural right belongs not only to rational beings but to every creature.[27]

Conrad Summenhart systematised the Ockhamist-Gersonian language of rights and, as already mentioned, it was he who introduced this language to the Spanish neo-Thomists. Summenhart describes the earlier tradition of *ius* as follows: 'In another sense "right" means the same as "power" in the sense it is taken when we speak of a father having a right over his son, a king over his subjects and men having a right in their things and possessions and sometime even in persons, as with slaves.'[28] Summenhart felt the definition does not

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rights, see J. Varkemaa, *Conrad Summenhart's Theory of Individual Rights*, pp. 44–55; Brett, *Liberty, right and nature*, pp. 76–87.

[24] Brett, *Liberty, right and nature*, p. 81.

[25] Gerson, *De vita spirituali animae*, p. 26: "Recta ratio consequenter et participative solum convenit rationalibus creaturis."

[26] According to Gerson, the origin of any faculty can be traced back to divine law. Gerson, *De vita spirituali animae*, p. 27.

[27] The roots for such an interpretation lie in the Roman jurist Ulpian's (*c*.170–228) definition of natural law as "the law which nature taught all animals". See *Institutiones* 1.2pr: "Ius naturale est quod omnia animalia docuit."

[28] Summenhart, C., *Septipertitum opus de contractibus pro foro conscientiae atque theologico*, Hagenau, 1500, q. 1, sig. A6r: "Alio modo accipitur ius ut idem est quod potestas quo modo accipitur cum dicimus patrem habere ius in filium, regem in subditos, et homines habere ius in rebus et possessionibus suis, et etiam in personalis aliquando, puta in servis…". Translation in Varkemaa, *Conrad Summenhart's Theory of Individual Rights*, p. 66. For Summenhart's theory of rights and *dominium*, see ibid. pp. 65–248.

contain any hierarchical dimensions. Therefore, a slave could also have a *potestas* right with respect to his master in the same way that his master had such a right over him. What is important for later developments is that Summenhart's theory of rights is based on liberty (*libertas*). He recognises a human being's natural right to liberty, with liberty representing freedom of action or self-mastery in human society.[29] This was a novel interpretation and one that the Spanish neo-scholastics felt the need to consider further. Summenhart also built upon Gerson's broader definition of right and extended rights to animals, which Gerson did not accept.[30]

Together with the notion of *ius*, another important concept developed with respect to rights: the notion of *dominium*. Similar to the concept of *ius, dominium* also had several connotations; for example, it could refer to a specific superiority and to property. The scholastics differentiated further between original or/and natural dominion as well as between natural and civil dominion. From the early thirteenth century onwards, jurists and theologians began to define *dominium* (in its broadest sense) as equivalent to *ius* (in its subjective meaning, as the licit power of faculty belonging to an individual in relation to

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[29] For Summenhart, liberty was 'a species of right, and a free person has this right over himself, namely, of acting as he likes … unless it be prohibited by force or law'. See Summenhart, *Opus septipartitum*, q. 1, A8v: "Similiter libertas est quedam species iuris et illud ius habet liber in seipsam scilicet agenda quod libet …nisi quod vi aut iure prohibetur." For Summenhart's idea of liberty, see Varkemaa, *Conrad Summenhart's Theory of Individual Rights*, pp. 87–90. It should, however, be noted that for Summenhart, rights are not liberties; liberty is a species of right. For more on this notion, see Brett, *Liberty, right, and nature*, pp. 34, 42.

[30] See Varkemaa, J., "Can Animals Have Rights? Conrad Summenhart and Francisco de Vitoria at the Margins of Rights Language", V. Mäkinen, J. Robinson, P. Slotte and H. Haara (eds.), *Rights at the Margins: Historical, Philosophical, and Legal Perspectives*, (Brill, 2020).

another thing or person).[31] Thus, we can speak about right-as-dominion, or dominion right. In the theology of penance, *dominium* was also used within the context of restitution as 'covering all juridical relations in which injury (violation of right) could be done to an individual'. Restitution reconstituted an individual in his/her own right; it did not pertain to something that was viewed as objectively right. This distinction is important to note for the purposes of our discussion of rights, since the Spanish neo-Thomists also discussed dominion rights within the context of restitution by inserting a subjective sense of right into Aquinas's treatment of justice. In this way, dominion rights become the objective of commutative justice.[32] Furthermore, since the context was restitution, they discussed dominion rights after the division of dominion (e.g. as property rights or jurisdictional rights).

The Definition of Dominion Rights

In his commentary on Aquinas's *Summa theologiae*, 2a2ae, question 62,[33] Francisco de Vitoria defines the notion of *ius* within the lines of Thomism and the Gersonian-Summenhartian tradition. Referring to Summenhart, Vitoria states that "a right is a power

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[31] For this development in general, see Tuck, R., *Natural Rights Theories: Their Origin and Development*, Cambridge, 1979; for its development in Thomist tradition more particularly, see Brett, "Human Rights and the Thomist tradition", pp. 82–101.

[32] Brett, "Human rights and the Thomist tradition", p. 90: "Restitution was a demand in conscience: if an individual sinned in taking something from another that was not his own, he was bound in conscience to restore it before he could receive absolution for his sin."

[33] Aquinas's *Summa theologiae* II-II questions 57–79 in on right and justice, was an important source for all the authors of the Salamanca School. Whereas the early Spanish neo-Thomists, such as Vitoria, followed the order of the questions, later authors, such as Soto, changed the order and also created new questions to be discussed. See Brett, *Liberty, right and nature*, p. 140.

or faculty pertaining to an individual according to the laws".[34] He also takes for granted Aquinas's idea of that law provides the grounds for rights and refers to the idea of permissive natural law when describing the notion of rights by stating: "[…] So we use the word when we speak for we say, "I have not a right" to do this that it is not permitted to me or again, "I have a right, that is, it is permitted".'[35]

Vitoria also distinguishes between different meanings of *dominium*: first, as certain eminence and superiority; second, as property; and third (in its most expansive mode), as equivalent to the notion of *ius*.[36] According to Vitoria, the first two modes are not equivalent to a right because the notion of rights is a broader category than dominion when understood in these ways.[37] In accordance with the most expansive mode (that is, equivalent to rights), dominion is a faculty for using (*facultas utendi*) a thing in accordance with the law.[38] What is important for our discussion of rights is that this kind of dominion belongs to all rational beings over all things for the supporting of life by natural right (*ius*

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[34] Francisco de Vitoria, *De justitia*, vol. 3, q. 62, a. 1, n. 5, p. 64: "Et ideo de diffinitione quid rei notandum est quod Conradus, qui fecit tractatum illum nobilem *De contractibus*, q. 1 ponit late diffinitionem illius nominis 'jus'. Et licet ponat dua diffinitiones, nihilominus coincidunt in unam. Dicit ergo quod jus est potestas vel facultas conveniens alicui secundum leges, id est, est facultas data, v.g. mihi a lege ad quamcumque rem opus sit." See also Summenhart, *De contractibus*, tr.1, q. 1 in principio, in which he refers to several sources, such as to Antonino and Jean Gerson. For Vitoria's teaching on rights and *dominium*, see Brett, *Liberty, right and nature*, pp. 124–137.

[35] Vitoria, *De justitia*, q. 62, a. 1, n. 5, p. 64. Here Vitoria refers to Aquinas, *Summa theologiae* I-II q. 57, a. 1.

[36] Vitoria, *De justitia*, q. 62, a. 1, n. 6–8, pp. 66–7.

[37] Vitoria, *De justitia*, q. 62, a. 1, n. 6–7, p. 65–6.

[38] Vitoria, *De justitia*, q. 62, a. 1, n. 8, p. 67: "Tertio modo capitur dominium largius prout dicit facultatem quamdam ad utendum re aliqua secundum iura, etc., sicut diffint Conradus q. 1 *De contractibus* [tr. 1], ubi dicit quod dominium est facultas utendi re secundum jura vel leges rationabiliter institutas. Et isto modo, si sic diffiniatur large capiendo, idem erit jus et dominium." Ibid., n. 9, p. 68: "Item, patet etiam ex diffinitione dominii, quia est facultas utendi re secundum leges […]."

naturale);[39] it is a God-given right and necessary for existence, and thus it is a right inseparable from human life.[40] This dominion right could also be called a natural right of self-preservation.[41] Nevertheless, Vitoria understands dominion in its broadest sense as '*the* (unqualified) subjective right'; 'subjective right *simpliciter*'. By this he means, as Annabel Brett explains it, that 'it [*dominium* as equivalent with *ius*] belongs to everyone rather than its being one among a set of rights belonging separately to each individual'.[42]

Like Vitoria, Soto also understands rights in accordance with earlier Gersonian-Summenhartian lines of thought and with respect to the Aristotelian-Thomistic emphasis, but he still modifies and criticises such an understanding. Differing from Vitoria, Soto considers two levels of right: one that concerns all creatures and another that applies only to rational beings. The first level of right, which Soto calls primary natural right, involves the natural activity of all creatures including human beings. In this sense, natural right is a

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[39] Vitoria, *De justitia*, q. 62, a. 1, n. 12–13, p. 72–3: "Item, confirmatur ex diffinitione juris et dominii, quae est facultas utendi re; sed homo potest uti illis: ergo habet jus in illas. … Item, confirmatur hoc totum, quia hoc est per se notum, quod numquam aliquis dubitavit quin liceat hominibus uti rebus temporalibus ad sustentandum seipsos; ergo habent jus et dominium super omnes illas […]. Dico quod iure naturali, quia est per se notam et a nullo unquam dubitatem, quia nulla fuit nec est gens tam barbara quae non credat esse licitum homini uti rebus: ergo est dominus illarum. Item, de jure naturali est quod homo conservett se in esse."

[40] Vitoria, *De justitia*, q. 62, a. 1, n. 9, pp. 68: "Item, patet etiam ex diffinitione dominii, quia est facultas utendi re secundum leges, et tamen licet Deo uti rebus ut voluerit; nec potest carere illo dominio, nec potest eo privare se, ita quod nos non possumus non esse sui."

[41] However, the meaning of self-preservation is not clear in his theory of dominion. On the one hand, Vitoria differentiates human beings from animals by stating that *ius naturale* guides a human being to preserve her/his life. On the other hand, he seems to think, within the Aristotelian-Thomistic tradition, that a natural right not only concerns the necessities of self-preservation but that human beings also possess the freedom to use other creatures as they so desire.

[42] Brett, *Liberty, right and nature*, pp. 130–131.

faculty (i.e. the genus of power or potency to act) that is determined by action, that is, by a natural inclination to do something for one's own good, as dictated by natural law.[43] For Soto, this so-called primary natural right is the right of self-preservation (or conservation), which all creatures, not only rational ones (as Vitoria states), have as their very essence.

Soto also defines another level of right concerning only rational human beings, one which includes all species of *dominia*. Referring to the Thomist idea that only human beings are rational creatures with reason and freedom of the will and have dominion over their actions (i.e. primary dominion), Soto argues that human ability is *sui iuris*, that is to say, it has *dominium* over itself. From this basis stem liberty rights. The notion of primary dominion also means that a human being has the right to use other things to sustain his or her life. We will return to these two modes of dominion later on when discussing the criteria for possessing dominion rights.

For Soto, *dominium* and *ius* are not exactly the same, however. He explains the difference by saying that, a 'right is the same as the just thing' and 'it is the object of justice', 'but dominion is the faculty of a master in his slaves or in those things which he uses at his own will, and for his own conveniens'.[44] Thus, for Soto dominion does not signify any right or

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[43] Soto, *De iustitia et iure*, III, q. 1, a. 3 in corp.; Book IV, q. 1, a. 1 in corp. See also Brett, *Liberty, right and nature*, pp. 153–154, where she compares Soto's slightly different definitions of right, as stated in Book III and Book IV of *De iustitia et iure*. The main difference is this: in Book III, Soto argues that the act of self-conservation is a natural right, whereas in Book IV he states that a right is only the genus of the potency to act, not the act itself. Referring to Miguel de Palacios, Soto's pupil, who suggested that both definitions are 'right', Brett concludes that "a right *per se* (i.e. not *in re* or *in personam*) is a legitimate ability or power, faculty, for an action".

[44] Soto, D. de, *De iustitia et iure*, Book IV, q. 1, a. 1 in corp: "Ius nam idem est quod iustum. Est enim obiectum iustitiae […] dominium autem facultas est domini servos vel in

power whatsoever; it is only a species of licit subjective power. Hence, right is equivalent with dominion only in this particular and primary sense of right. Soto himself states that he is not following here the earlier tradition. He explains the difference as follows: he does not derive the notion of *facultas* from *fas* (for the meaning of right), as Gerson and his followers had; rather, he derives it from *facilitas* (in the meaning of facility).[45] For Soto, power can refer to any ability, licit or illicit, but faculty is restricted only to licit ability.

Luis de Molina was the first Jesuit to write a treatise on justice and rights. Compared to Vitoria and Soto, Molina's ideas on dominion rights put an emphasis more on human liberty. However, in *De iustitia et iure* Molina also continues in the Thomist as well as Gersonian-Summenhartian traditions. Molina defines the notion of right in several senses. In one sense, a right signifies what is licit insofar as it is consistent with right reason and law.[46] In its narrowest sense, a right then signifies justice.[47] In its broadest sense, a right has do with '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 injury is done to the person who has it'. Molina continues the definition by stating that, '[w]hen we say […] that someone has a right to something, we do not mean that anything is owed to him, but that he has a faculty to it, whose contravention would cause him injury'.[48] Molina's subjective notion of rights is

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res quibus suo arbitratu, ob suumque commodum utitur." Translation in Brett, *Liberty, right and nature*, p. 149.

[45] Soto, *De iustitia et iure*, IV, q. 1, a. 1 in corp.: "Etenim facultas non a fas, sed a facile derivatur: ut sit quasi facilitas." See also See Brett, *Liberty, right and nature*, p. 150.

[46] Molina, *De iustitia et iure*, vol. I, part 1, a. 2, col. 6a–b. For more on Molina's definition of right, see also Tellkamp, "Dominion and rights", pp. 136–7.

[47] Molina, *De iustitia et iure*, vol. I, part 1, a. 2, col. 6b: "Ius autem est dictum, quia justum est"; Ibid., col. 5d: "Animadvertendum est, vocabulum, ius, aequivocum esse."

[48] Molina, *De iustitia et iure*, vol. I, part. 2 (disp. 1.1): "Nec video posse ius in ea acceptione commodius definiri quam si dicamus. Est facultas aliquid faciendi, sive

based on his understanding of the right of a natural (or legal) person. He even states that a slave can have *ius qua homo*, but he also asserts the right to enslave another human being.[49]

In contrast to most of his predecessors as well as to Soto, Molina does not treat *dominium* as a species of the genus of right. Thus, for him dominion is a necessary, but not a sufficient, condition for the justification of rights.[50] Molina does not treat the relationship between dominion and right as equivalent, because if the relationship is taken to be formally and essentially equivalent, then metaphysical terminology cannot be translated into the language of morality without a loss of meaning.[51] As with previous thinkers, Molina too gives several meanings for the notion of dominion: it can refer to both property and political power and is a matter of voluntary consent with both of them.[52]

Criteria for Possessing Dominion Rights

The questions – to whom do dominion rights belong and on what basis – came to have important practical consequences after the discovery of the New World, especially

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obtinendi, aut in ei insistendi, vel aliquo alio modo se habenti, cui si, sine legitima causa contraveniatur, iniuria fit eam habenti." For more on Molina's definition of rights, see Tellkamp, "Dominion and rights", p. 115; Kaufmann, M., "Subjektive Rechte als Grenzen der Rechtssetzung bei Luis de Molina", in K. Bunge et al. (eds.), *Kontroversen um das Recht: Beiträge zur Rechtsbegründung von Vitoria bis Suárez*, Stuttgart/Bad-Cannstadtt, 2013, pp. 291–311; Stefan Schweighöfer, "Luis de Molinas Theorie der Gerechtigkeit und ihre Auswirkungen auf das Recht", ibid.

[49] See Aichele, A. and Kaufmann, M., "Introduction", in id. (eds.), *A Companion to Luis de Molina*, Leiden/Boston, 2014, pp. xxx–xxxiii.

[50] Molina, *De iustitia et iure*, vol. I, part 2, a. 3, col. 31b: "In ea pro genere ponitur ius, quod dominium et pleraque alia iura complectitur." See also Aichele and Kaufmann, "Introduction", p. xxxiii; Tellkamp, "Dominion and rights", p. 139.

[51] For more on this notion, see Tellkamp, "Dominion and rights", p. 140.

[52] Aichele and Kaufmann, "Introduction", p. xxxiii.

concerning questions about whether or not to recognise the rights of the Native Americans and how best to legitimise colonisation. Already previously, the long period of the crusades, from the twelfth century to the end of the thirteenth century, had raised discussions about whether to recognise the rights of infidels. Theologians like Giles of Rome (1243–1316) and Richard Fitzralph (1300–1360) had argued for grace-founded dominion and claimed that infidels and sinners could have no rightful dominion; therefore, they could not be bearers of rights. When responding to these questions and concerns, the Spanish neo-Thomists developed the idea of dominion rights under the law of nations (*ius gentium*).

According to Vitoria, Soto and Molina, dominion both as the proper faculty and right of a person involves human rationality and agency. Only human beings are rational creatures, because they are created in the image of God (*imago Dei*) within the naturally given properties of the intellect and free will. Thus, only human beings have proper faculties to relate corporeal and incorporeal things.[53] In addition (in Vitoria's wording), dominion gives people the ability 'to argue and give reasons, express claims regarding the exterior things as long as they do not contradict natural or positive laws'.[54] Molina puts it as follows: freedom of the will is also the necessary precondition for dominion because 'it enables significant use of praise and blame applying to human actions'.[55]

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[53] Soto, *De iustitia et iure*, Book IV, q. 1, a. 1: 'Solis illis qui intellectu et libero arbitrio vigent, conuenit dominandi ratio: illisquem adeom solis habere rerum dominium.'
[54] Vitoria, *De indis*, I, 6, p. 225: "Sed homo est imago Dei per naturam, scilicet per potentiam rationales".
[55] See, e.g. Molina, *De iustitia et iure*, col. 84a: "Per suum arbitrium dominium habent suorum actuum, dum pro suo arbitratu eos eliciunt, eisque utuntur: sic etiam per idem arbitrium capacia sunt dominii aliarum rerum, quatenus eo ipso, quod illarum sunt domini, eis tanquam suis uti possunt pro arbitrator: dominium namque ad usum, liberamque

Following Aquinas, all of the above Spanish neo-Thomists understand primary or internal dominion as an ability to direct one's own actions toward an end in accordance with the Aristotelian idea of teleology and natural inclination within the universe. Hence, dominion can be understood as referring to the self-mastery that all human beings have over their own actions (*dominium suorum actuum*) and over themselves (*dominium sui*).[56] This idea forms the basis for human freedom: only human beings act voluntarily, whereas other animals act out of necessity.[57] But what is important for our purposes, and where the Spanish authors differ from Aquinas, is that they integrate dominion rights with the subjective process of human action. For Aquinas, the issue was not a question of right.[58]

It should also be noted that Molina (as well as Vitoria and Soto) believes that God exercises proper dominion over the body and that the existence of human beings is the ultimate *dominus* of all created things.[59] Therefore, a human being should not be allowed to destroy his or her body, for example by committing suicide.[60] Nevertheless, for him a human being maintains a certain dominion in the sense of having liberty over his or her body and life. Following Summenhart, Molina states that interfering with someone's physical integrity can only be justified when such an action does not contradict the norms of right reason and

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dispositionem rei, cuius quis est dominus ordinatur." For Molina's teaching on liberty, see Tellkamp, "Dominion and rights", pp. 142–143.

[56] Soto, *De iustitia et iure*, Book IV, q. 1, a. 1.

[57] Brett, *Liberty, right and nature*, p. 129

[58] Ibid.

[59] See, e.g. Molina, *De iustitia et iure*, vol. 4, part III, a. 1, col. 510a: "Homo non est dominus propriae vitae, ac membrorum, sicut est dominus pecuniae, et caeterorum bonorum exteriorum, quae ad ipsam spectant, ac possidet." See also Tellkamp, "Rights and dominion", p. 146.

[60] Molina, *De iustitia et iure*, vol. 4, part. III, a. 1, col.51c.

when there is just cause for it.[61] Thus, one question concerning liberty widely debated among Spanish neo-Thomists was that of slavery: Is it legitimate for human beings to establish the relationship of *dominium proprietatis* over one another? The scholars refer both to the Aristotelian idea of natural slaves[62] and to sources that disagreed with this idea, such as the content of natural law defined by Gratian in the *Decretum*: "Natural law is the common law to all peoples, in that it is everywhere held by instinct of nature, not by any enactment: as, for instance, […] the one liberty of all."[63] Whereas Aristotle's notion was taken as an argument for slavery, natural law excludes the idea of subjection. As his main reference, Molina, who discusses slavery at length, focuses on the law of nations (*ius gentium*), according to which slavery 'has been introduced against nature'.[64] Despite the fact that every human being is essentially free and that natural freedom excludes unjust subjection, Molina argues in favour of slavery by referring to certain objective and empirical differences among people, such as social status. As with proprietary rights in general, slavery originated as well in the individual legislation of the various nations. As we will see later on, *ius gentium* was viewed as being related merely to positive law rather than to natural law. For Molina, it is, however, necessary that slavery be based on positive law, since natural law is too flexible to allow for culturally different forms of *dominium proprietatis*, a category to which slavery belonged.[65]

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[61] Molina, *De iustitia et iure*, vol. 4, part III, a. 1, col.512d.
[62] See Aristotle's *Politica*, 1254b16–21.
[63] D. 1, c. 7, "Ius naturale est commune omnium nationum eo quod ubique instinctu naturae non constitutione aliqua habetur, […] omnium una libertas."
[64] Molina, *De iustitia et iure*, vol. I, part. II, a. 4, col. 12a: "Iure naturali omnes homines nascituros fuisse liberos […]. Etiam additur his iuribus, servitutem esse contra naturam de iure gentium introductam." Soto also argues for slavery and refers both to natural law and to the law of nations. See Soto, *De iustitia et iure*, book. IV, q. 2, a. 2, concl.
[65] Molina, *De iustitia et iure*, vol. 1, part. II, a. 4, col 11b: "Iure naturali omnes homines nascituros fuisse liberos. […] Etiam additur his iuribus servitutem esse contra naturam de

Natural Dominion and Self-Preservation

Vitoria and Soto believe that dominion over external things follows from primary dominion (that is, the right of self-preservation). Aquinas calls this kind of dominion *dominium naturale*, which he understands as the power to use (*potest uti*) exterior goods for the sustenance of life. In Aquinas's view, natural dominion does not give any *prima facie* rights over things.[66] Unlike Aquinas, Gerson believes that natural dominion is a certain right closely related to self-preservation.[67] For him, this kind of natural dominion is common to all people, and it includes the power over creation (the birds, the air) as well as the power for liberty. After the fall, Gerson argues, natural dominion was not totally destroyed since, if man had lost all of his/her God-given natural rights through sin, he/she would simply have been annihilated.[68] He refers to natural dominion as self-preservation, 'a right to nourish the body' (*ius nutruendi corpus*), and he maintains that natural rights to

iure gentium introductam." For more on Molina's ideas of slavery, see Tellkamp, "Rights and dominion", pp. 145–146; M. Kaufmann, "Slavery".

[66] See Aquinas, *Summa theologiae* II-II q. 66, a. 1 c..

[67] Jean Gerson, *De vita spirituali animae*, lectio 3, p. 145: "Erit igitur naturale dominium donum Dei quo creature jus habet immediate a Deo assumere res alias inferiores in sui usum et conservationem […]. Hoc modo habuit Adam dominium super volucres coeli et pisces maris […]. Ad hoc dominium spectare postest dominium libertatis […]". The idea of self-preservation as a natural, inalienable right had already been discussed by Henry of Ghent and Godfrey of Fontaines in their *Quodlibet* disputations in the 1280s. See Mäkinen, V., *Property Rights in the Late Medieval Discussion on Franciscan Poverty*, Leuven, 2001, pp. 105–139. The Spanish neo-Thomists were also familiar with the discussion.

[68] Gerson, J., *De vita spirituali animae, lectio* 3, pp. 146–150, where he also states that no one is such a sinner as to have no dominion that can be called natural.

subsistence are inalienable and necessary for the existence of human beings.[69] Vitoria, Soto and Molina all follow this teaching, with some modifications.

From the internal and end-driven necessity of dominion as self-preservation follows the idea that human beings subsequently have dominion over all other created things. However, Vitoria does not term this dominion *dominium naturale*. He argues as follows: 'whatsoever a human being was then *dominus* of all things in the law of nature, because whosoever could use any object he liked and even abuse it according to one's pleasure, as long as he liked and even abuse it according to his or her pleasure, as long as he did not harm other human beings or oneself.'[70] Vitoria understands this kind of dominion as the natural right to use external things in order to preserve one's existence.[71] Soto also speaks of the natural right of preservation along the same lines: each human being has the right to safeguard his or her own existence and thus to pursue his/her proper good, thereby conforming to the eternal law of God.[72] He also refers to the natural dominion that human beings have not only over the fruits of the earth, but also over all other things existing under 'the vault of heaven'.[73] Molina argues that natural dominion is only for the sake of use, and that such use

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[69] Gerson, J., *De vita spirituali animae*, lectio 3, p. 156: "…Dicimus titulum naturalem ad quem consequitur jus nutriendi corpus sic quod in ejus necessitate omnia sibi sint ad hoc communia."
[70] Vitoria, *De justitia*, q. 62, a. 1, n. 16: "Quilibet homo erat dominus omnium tunc in lege naturali, quia quincunque posset uti qualibet re et etiam abuti pro libito suo, dummodo non noceret aliis hominibus vel sibi."
[71] See Brett, *Liberty, right and nature,* p. 130.
[72] Soto, *De iustitia et iure*, Book I, q. 4, a. 2 in corp.: "Mox quia primum naturalium bonorum est esse, inde statim cadit particularius aliud principium, quod est, Esse proprium cuique conservandum est. Omnia enim appetunt se conservare."
[73] Soto, *De iustitia et iure*, Book IV, q. 1, a. 1 in corp.: "Homo dominium habet naturale, non solum in omnes terrae fructus, verum etiam quodam pacto in elementa coelestesque orbes."

is only possible for creatures who can recognise an end for that use. Only rational beings are conscious of an end as an end, and thus able to have dominion.[74]

Concerning the definition of rationality, Vitoria points out that one does not have to use his or her reason actively in order to be a rational being.[75] Thus, he maintains that a child or a madman can also have dominion. Furthermore, a child can also have dominion because it does not exist for another's use, like animals, only for its own sake – which is important in order to become a rights-bearing person.[76] Molina also maintains that dominion can be possessed either in a passive or an active manner, and that infants as passive rational beings can have dominion, but that animals cannot.

One important reason given for the fact that only human beings can possess dominion rights is that they can be victims of an injury (*iniuria*). The notion of *iniuria* does not refer to physical injury, but rather to injury in the moral sense of being 'wronged'. According to Vitoria, any attempt to deprive a human being of his natural rights constitutes an injury. Animals cannot suffer injury since not only do they lack rights, but they also are passive objects in 'the realm of justice'.[77] Following the Thomist interpretation of the natural law principle, '[e]ach must preserve its proper being. For all things desire to preserve

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[74] Molina, *De iustitia et iure*, IV, q. 1, a. 1. See also Tellkamp, "Rights and dominion", p. 134.
[75] See Vitoria, *De indis*, 1.23, p. 231, where he also refers to Aristotle's words that 'nature makes nothing incomplete and nothing in vain'. See Aristotle, *Politica* 1253a8.
[76] See Vitoria, *De indis*, 1.21, p. 231.
[77] Vitoria, *De indis*, 1.20, p. 230, where he also states that "to deprive a wolf or a lion of its prey is no injury against the beast in question, any more than to shut out the sun's light by drawing the blinds is an injustice against the sun". According to Vitoria, it is also lawful to kill animals with impunity, even for pleasure. See also Varkemaa 2020.

themselves', Vitoria maintains that wild animals cannot have dominion over their own bodies and that, therefore, they cannot have rights over other things either. Consequently, human beings can kill animals; in doing so, they do not cause any injury to animals, but only to the animal's possessor.[78]

Soto also clarifies that wild animals cannot have dominion since they cannot suffer injury and are not capable of seeking justice or happiness.[79] However, as we have already seen, Summenhart understands dominion (in its most expansive form) within the context of animals and other created things as well. Thus, following the Summenhartian line of thought on the 'metaphorical language of right', Soto states that animals also have rights but that they are not equal to a human being's rights.[80] In *On divine foreknowledge*, Molina also argues that animals possess a trace of freedom, which, according to him, constitutes '[an] innate trace of dominion over their own actions'. Since in the Thomist tradition, to have dominion over one's own actions involved free will, it seems that Molina is arguing against the traditional understanding that animals are merely the objects of dominion rather than subjects of dominion.[81] In his later work, *De iustitia et iure*, Molina, however, uses this

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[78] See Brett, "Human rights", p. 40.
[79] Soto, *De iustitia et iure*, Book IV, q. 1, a. 1: "[…] Brutae autem animantes uti neutiquam possunt: ergo nequem nullum habere dominium. Brute autem animam nequem iustitiae capaces sunt, nequem iniuriae, nequem quam non cognoscunt felicitates […]. Cuius ratio est, quod cum non sint libera, non sunt sui iuris." Vitoria argues similarly in *De indis*, 1.4, pp. 247–8.
[80] Soto, *De iustitia et iure*, IV, q. 1, a. 1, ad. 1. For Soto's position on animals, see Brett, *Liberty, right and nature*, p. 159. It should be noted that the Spanish scholastics (like Soto) misread Summenhart, so that Gerson would have dominion within the context of animals.
[81] For more on this notion and Molina's position on animals in *dominium*, see Brett, "Human rights", p. 46–7, where she also states that, "Instead of animal agency functioning as the antithesis of human agency, as it does for the Thomists, animal agency itself becomes a case of the para-human".

same example as an argument for the opposite viewpoint: irrational animals cannot have dominion over another thing.[82]

Dominion Rights and the Law of Nations

One main and important difference between late-medieval scholastic and Spanish neo-scholastic rights discourse is the centrality of the notion of *ius gentium*, the law of nations, in the discourse of the Spanish authors. In this notion, modern scholars have seen the historical roots of international law covering relations between sovereign states.[83] This also has crucial consequences with respect to the development of human rights.

The notion of *ius gentium* was adapted for medieval and early modern usage from ancient legal and philosophical thought, where it was seen as one source of law in relation to natural law and civil law. The interpretation of *ius gentium* varied especially in Roman legal sources. The two notions, *ius naturale* and *ius gentium*, were often used synonymously, as in the following sentence: 'natural law is called the law of nations'.[84]

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[82] Molina, *De iustitia et iure*, trac. 2, disp. 3, n. 6. See also Brett, *Liberty, right and nature*, p. 47; Tellkamp, "Rights and dominion", p. 134.

[83] See, e.g. Brown Scott, J., *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations*, Oxford, 1934. More recent studies have refined Brown Scott's study by maintaining that the *ius gentium* was closely related to the institution of property and contracts. See Koskenniemi, M., "Empire and International Law: The Real Spanish Contibution", *University of Toronto Law Journal* 61 (2011), pp. 1–36; Pagden, A., *The Burdens of Empire: 1539 to the Present*, Cambridge, 2015; Decock, W., *Theologians and Contact Law: The Moral Transformation of the Ius Commune (ca. 1500–1650)*, Leiden/Boston, 2013.

[84] See *Institutiones* 2.1.1.; 2.1.11. For the interpretation of *ius gentium* by ancient and medieval authors, see also Tierney, *The idea of natural rights*, pp. 136–137. For the notion of *ius gentium* in Spanish neo-scholasticism, see Brett, A., *Changes of State: Nature and the Limits of the City in Early Modern Natural Law*, Princeton/Oxford, 2011, pp. 75–89.

Sometimes *ius gentium* was understood as an independent classification of law alongside natural law and civil law, as in the following citation from the *Digesta*: "Natural law is what nature has taught all animals, for this law is proper not only to the human race but to all animals […] what natural reason has established among all peoples […] is called the law of nations."[85] In this system, civil law concerns the law proper with respect to a particular people. There are also texts that distinguish the natural law from the law of nations: "By natural law all men were born free […] but slavery came in from the law of nations."[86] (We have already seen that Molina refers to this text when arguing for slavery.)

Because of the different variations in the meaning of *ius gentium*, the notion was not clear enough for Vitoria. He refers to it less often than Molina, for example. However, it seems that for Vitoria, the law of nations pertains more to custom and therefore to positive law than to natural law. This is because the rules under the law of nations were often based on 'pacts and agreements' and on universal custom (examples of such notions under the law of nations are private property and the right to travel and trade). Since the law of nations also consists of rules to which all nations adhere and which have a certain moral foundation, Vitoria considers it to be based more or less directly on natural law. In his lectures, *De postestate civile*, he describes *ius gentium* as a set of precepts enacted by the power of 'the whole world, which is in a sense a commonwealth'.[87] Nevertheless, Vitoria does not explicitly differentiate between *ius naturale* and *ius gentium* and, as Martti Koskenniemi

[85] *Digesta* 1.1.1.3.
[86] *Institutiones* 1.5pr.
[87] Vitoria, F. de, *Relectio de potestate civili*, in T. Urdanoz (ed.), *Obras de Francisco de Vitoria*, Madrid 1960, 3.4.

describes it, he 'is frustratingly unclear about its legal nature'.[88] However, Vitoria's manner of using the law of nations in the case of Indians is clear enough: he argues that their case should be discussed according to a law that governs everyone (i.e. all humans whether they are Christians or infidels) and is universally applicable.[89] He often refers to the law of nations as such a law.

Molina uses the notion of *ius gentium* more precisely than does Vitoria, and the notion has an important place in his theory of rights. According to Molina, *ius gentium* can be distinguished from natural law since 'it does not consist of precepts and prohibitions but only certain concessions or powers or permissions to do or not do something not only with impunity but also justly and honourably'. Thus, there is a close relationship between justice and the law of nations. Both concern that part of the rational agent which allows for a natural distinction between what is good and just. In other words, Molina refers here to the *conscientia* as the law imprinted on the 'hearts' of rational human beings. For him, conscience is connected with the right will (*rectitude voluntatis*) done for its own sake.[90] The definitions of *ius gentium* is developed further by later neo-Thomists, such as Fernando Vázquez de Menchaca (1512–1569). Dominion rights were seen as part of the law of nations (in its secondary meaning) and thus regulated by right.[91]

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[88] Koskenniemi, M., "Colonization of the 'indies': The Origin of International Law?", in Y. Gamarra (ed.), *La idea de la América en el pensamiento ius internacionalista del siglo XXI*, Zaragoza, 2010, p. 50.
[89] See Vitoria, *De indis*, ed. Urdanoz, p. 222.
[90] Molina, *De iustitia et iure*, vol. 1, part I, a. 1, col. 4d. For Molina's definition and use of the notion of *ius gentium*, see Tellkamp, "Rights and dominion", p. 135; Brett, *Changes of state*, pp. 77, 84–86.
[91] For more on this idea, see Brett, *Liberty, right and nature*, pp. 165–204.

Conclusion: Dominion Rights in the Development of Human Rights

In their theories of natural and dominion rights, Francisco de Vitoria, Domingo de Soto and Luis de Molina continued the subjective rights discourse that they had inherited from late-medieval Gersonian-Summenhartian tradition within the philosophical school of Thomistic natural law. Despite the fact that they had slightly different interpretations of right and dominion, in general they understood *ius* as a legitimate subjective activity for doing something that was connected to *dominium* and *libertas*. They assigned different meanings to the notion of *dominium*. For all of them, though, *dominium* in its strictest sense referred to a certain superiority (i.e. *dominium iurisdictionis*) and to property (i.e. *dominium proprietatis*). For Vitoria and Soto, in its broadest sense, dominion was equivalent to right. In contrast, Molina did not equate dominion with right at all. Each of these theologians understood dominion rights as features of human nature, and only rational human beings with an intellect and free will could, strictly speaking, possess dominion rights. According to them, only rational beings were both aware of having rights and morally capable of using them. Dominion rights were thus moral rights and not conventional rights, such as legal or political rights.

All of the studied authors connected dominion rights to human liberty by maintaining the Thomistic idea of primary dominion, which every human being has over her/his own body and limbs, life and actions – and is thus *sui iuris* and capable of bearing rights. However, strictly speaking they thought that God is the ultimate *dominus* of all creatures; therefore, altering the integrity of one's own body in any way or committing suicide were prohibited.

Both violate a sense of justice with respect to oneself and God. Despite the fact that every human being has dominion over his/her own life and body, Molina in particular found justification for exercising dominion over other human beings, i.e. for slavery. He based his argument on the law of nation (*ius gentium*), which he treated as positive law, as well as on empirical differences, such as social status. Vitoria, for his part, referred to *ius gentium*, the law of nations that governs all humans (whether they were Christians or infidels) when defending the natural and dominion rights of Indians against the Spanish *conquistadores*.

Nevertheless, it should be noted that dominion rights were not human rights in a modern sense: their theoretical conceptualisation as well as the moral and political imagination behind them were very different from ours. However, without the development of natural and dominion rights by late-medieval and Spanish neo-Thomists scholastics we could not have human rights. This is the meaning of dominion rights in the history of human rights.

Bibliography

Primary Sources

Aristotle, *Ethica Nicomachea*, ed. I. Bywater, Oxford, 1894.

Aristotle, *Politica*, ed. W.D. Ross, Oxford, 1957.

Aquinas, Thomas, *Summa theologiae*, ed. altera romana (Leonine), Rome, 1894.

Gerson, J., *De vita spirituali animae*, ed. P. Glorieux, *Jean Gerson: Oeuvres completes* (vol. 3), Paris, 1965.

Gerson, J., *De potestate ecclesiastica et de origine iuris et legum*, ed. Ellies Du Pin, *Opera omnia* (vol. 2), Antwerp, 1706 (reprint. Frankfurt, 1987).

Molina, L. de, *De iustitia et iure tractatus* (vol. 1), Venice, 1611.

Ockham, W. of, *Opus nonaginta dierum*, ed. H.S. Offler, *Guillelmi de Ockham: Opera Politica* (vol. 1), Manchester, 1963.

Scotus, J. Duns, *Quaestiones in quartum librum sententiarum in Joannis Duns Scotus…opera omnia*, Paris, 1891.

Soto, D. de, *De iustitia et iure libri decem* (5 vols.), Madrid, 1967 (facsimile of Salamanca 1556).

Summenhart, C., *Septipertitum opus de contractibus pro foro conscientiae atque theologico*, Hagenau, 1500.

Vitoria, F. de, *De Justitia (qq. 57-66)*, ed. V. Beltrán de Heredia, *Comentarios a la Secunda secundae de Santo Tomás*, vol. 3, Salamanca, 1934.

Vitoria, F. de, *De indis et de iure belli relectiones*, ed. E. Nys, transl. J.P. Bate, Buffalo, 1995.

Vitoria, F. de, *Relectio de potestate civili*, ed. T. Urdanoz, *Obras de Francisco de Vitoria*, Madrid, 1960.

Secondary Sources

Aichele, A. and Kaufmann, M., "Introduction", in id, (eds.), *A Companion to Luis de Molina*, Leiden/Boston, 2014.

Añaños Meza, M.C., “La doctrina de los bienes communes de Francisco de Vitoria como fundamentación del dominio en el Nuevo Mundo”, *Persona y Derecho* 68 (2013), pp. 103–137.

Brett, A.B., “Human rights and the Thomist tradition”, in P. Slotte & M. Halme-Tuomisaari (eds.), *Revisiting the Origins of Human Rights*, Cambridge, 2016, pp. 82–101.

Brett, A.B., “Luis de Molina on law and power”, in Aichele, A. and Kaufmann, M. (eds.), *A Companion to Luis de Molina*, Leiden/Boston, 2014, pp. 155-181.

Brett, A.B., *Changes of State: Nature and the Limits of the City in Early Modern Natural Law*, Princeton/Oxford, 2011.

Brett, A.B., *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought*, Cambridge, 1997.

Cortest, L., *The Disfigured Face: Traditional Natural Law and Its Encounter with Modernity*, New York, 2008.

Deckers, D., *Gerechtigkeit und Recht: Eine historisch-kritische Untersuchung der Gerechtiskeitslehre des Francisco de Vitoria (1483–1546)*, Freiburg, 1991.

Decock, W., *Theologians and Contact Law: The Moral Transformation of the Ius Commune (ca. 1500–1650)*, Leiden/Boston, 2013.

Douzinas, K., *The End of Human Rights*, Oxford, 2009.

Frohnen, B.P. and Grasso, K.L. (eds.), *Rethinking Rights: Historical, Political, and Philosophical Perspectives*, London, 2009.

Haakonssen, K. (ed.), *A Culture of Rights: The Bill of Rights in Philosophy, Politics and Law in 1791 and 1991*, Cambridge, 1996.

Kaufmann, M., “Subjektive Rechte als Grenzen der Rechtssetzung bei Luis de Molina”, in K. Bunge et al. (eds.), *Kontroversen um das Recht: Beiträge zur Rechtsbegründung von Vitoria bis Suárez,* Stuttgart/Bad-Cannstadtt 2013, pp. 291–311.

Kaufmann, M., “Slavery between law, morality and economy”, in A. Aichele and M. Kaufmann (eds.), *A Companion to Luis de Molina*, Leiden/Boston, 2014, pp. 183-225.

Koskenniemi, M., “Colonization of the ”indies”: The origin of international law?”, in Y. Gamarra (ed.), *La idea de la América en el pensamiento ius internacionalista del siglo XXI*, Zaragoza, 2010, pp. 43–63.

Koskenniemi, M., “Empire and International Law: The Real Spanish Contibution”, *University of Toronto Law Journal* 61 (2011), pp. 1–36

McGrade, A.S., *The Political Thought of William of Ockham: Personal and Institutional Principles*, Cambridge, 2002.

Mäkinen, V., “Dominion rights of the aboriginals in Francisco de Vitoria’s *De indis*”, in J. Cunliffe and G. Erreygers (eds.), *Inherited Wealth, Justice and Equality*, London/New York, 2013, pp. 16–38.

Mäkinen, V., “Moral Psychological Aspects in William of Ockham’s Theory of Natural Rights”, *American Catholic Philosophical Quarterly* 86 (2012), pp. 507–525.

Mäkinen, V., *Property Rights in the Late Medieval Discussion on Franciscan Poverty*, Leuven, 2001.

Nederman, C.J., “Individual autonomy”, in R. Pasnau (ed.), *The Cambridge History of Medieval Philosophy* (vol. 2), Cambridge, 2010, pp. 551–64.

Nederman, C.J., “Rights”, in J. Marenbon (ed.), *The Oxford Handbook of Medieval Philosophy,* Oxford, 2012, pp. 643–660.

Pagden, A., *The Burdens of Empire: 1539 to the Present*, Cambridge, 2015.

Brufau Prats J., *El pensamento politico de Domingo de Soto y su concepción del poder*, Salamanca, 1960.

Robinson, J., *William of Ockham's Early Theory of Property Rights in Context*, Leiden/Boston, 2013.

Rothbard, M.N., *Economic Thought Before Adam Smith: An Austrian Perspective on the History of Economic Thought*, vol. 1, Auburn, 2006.

Schweighöfer, S., "Luis de Molinas Theorie der Gerechtigkeit und ihre Auswirkungen auf das Recht", in K. Bunge, et al. (eds.), *Kontroversen um das Recht: Beiträge zur Rechtsbegründung von Vitoria bis Suárez*, Stuttgart/Bad-Cannstatt, 2013, pp. 311-339.

Scott, J.B., *The Spanish Origins of International Law: Francisco de Vitoria and His Law of Nations*, Oxford, 1934.

Tellkamp, J.A., "Rights and dominion", in M. Kaufmann and A. Aichele (eds.), *A Companion to Luis de Molina*, Leiden/Boston, 2014, pp. 125–145.

Tellkamp, J.A., "Ius est idem quod dominium: Conrado Summenhart, Francisco de Vitoria y la conquista de América", *Veritas* 54 (2009), pp. 34–51.

Tierney, B., *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150–1625*, Atlanta, 1997.

Tierney, B., "Historical Roots of Modern Rights: Before Locke and After", in Frohnen, B.P. and Grasso, K.L. (eds.), *Rethinking Rights: Historical, Political, and Philosophical Perspectives*, London, 2009, pp. 34–57.

Tierney, B., *Liberty and Law: The Idea of Permissive Natural Law, 1100–1800*, Washington, D.C., 2014.

Tuck, R., *Natural Rights Theories: Their Origin and Development*, Cambridge, 1979.

Varkemaa, J., *Conrad Summenhart's Theory of Individual Rights*, Leiden/Boston 2012.

Varkemaa, J., “Can Animals Have Rights? Conrad Summenhart and Francisco de Vitoria at the Margins of Rights Language”, in V. Mäkinen, J. Robinson, P. Slotte and H. Haara (eds.), *Rights at the Margins: Historical, Philosophical, and Legal Perspectives*, Leiden 2020, 153–170.

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