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0521562392 - Liberty, Right and Nature: Individual Rights in Later Scholastic Thought

Annabel S. Brett

Excerpt

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This book was originally conceived as a study of the political theory of the Dominican ‘School of Salamanca’ or ‘second scholastic’: that group of sixteenth-century Spanish theologians (and, to some extent, the jurists who worked alongside them) whose works take the form of commentaries on the juridical and legal aspects of Aquinas’ *Summa theologiae*.¹ While the general outlines of their political teaching are well known as an episode in European intellectual history,² there continues to be some debate over their juridical philosophy – their philosophy of right – and over the aspects of their political philosophy which flow from that. In broad terms, the issue lies between those who hold that the School represents a return to an authentic Thomist–Aristotelian theory, depending on the notions of natural law and of right as the object of justice (‘objective right’), and those who argue that, although on the surface these Spanish neo-Thomists may appear faithful to Aristotle and Aquinas, in reality they thought of right as a faculty or liberty of the individual (‘subjective right’), and that their political theory is based on such rights and is a forerunner of Hobbes’.³

¹ The terms ‘School of Salamanca’ and ‘second scholastic’ usually apply to the entire period of sixteenth-century Spanish scholasticism, from Vitoria to Suárez. They therefore span both the early Dominican period and the later, Jesuit-dominated stage, when the movement had ceased to be centred on the University of Salamanca. However, the Jesuit continuation of work of the School is a study in its own right. In this book I concentrate on the early period from the mid-1520s to the mid-1560s, and I use the term ‘School of Salamanca’ to refer to the Dominican theologians at the College of San Estebán in Salamanca, and the jurists who worked there and were influenced by or responded to their work.

² For an excellent general analysis of the School in the context of the European debate, see Q. R. D. Skinner, *The foundations of modern political thought*, vol. II (Cambridge 1978), pp. 135–73; for their works in terms of the discovery of the New World, see the fundamental study by A. R. D. Pagden, *The fall of natural man: The American Indian and the origins of comparative ethnology* (Cambridge 1982). See also D. Ferraro, *Itinerari del volontarismo. Teologia e politica al tempo di Luis de León* (Milan 1995), esp. chapter 5 for a fresh overall account of the School’s intellectual project.

³ For the proponents of these positions, see the references below, chapter 4, nn. 2 and 3. In

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Liberty, right and nature

It soon became clear that these conflicting views were not isolated judgements but were bound in with a whole story of the genesis of the modern notion of individual rights. Any attempt to resolve the problem, and thereby to reassess the political theory of the School of Salamanca, would demand a reconsideration of that history from its foundations.

Subjective right as an element of modern linguistic usage functions in many different ways. W. N. Hohfeld famously isolated eight usages of the term 'right' as applied to the individual.⁴ Within moral-philosophical discourse, rights are generally seen either as 'liberty-rights' ('active rights'), independent licences of action, or as 'claim-rights' ('passive rights', 'rights of recipience'), which are dependent for their existence on the obligations of others.⁵ Again, the former type of rights can be seen as constituting an area wherein the individual and her choice are sovereign,⁶ but it is also possible to conceive of using a claim of this kind of right to do that which we are under obligation to do.⁷

So the language of rights today is fluid between several different senses of the term. However, the history of subjective right has not been written in a way that reflects the pluralistic nature of the

between there is a third, less fully developed, opinion which holds that, although the Spaniards did have a notion of individual rights, they understood such rights as conditioned by natural law, and their theory has therefore more of a Lockean cast. This interpretation has been put forward for the case of Suárez by James Tully, *A discourse on property: John Locke and his adversaries* (Cambridge 1980), pp. 66–8, and in *An approach to political philosophy: Locke in contexts* (Cambridge 1993), pp. 103–7. Tully does not, however, consider the earlier School of Salamanca, with which I am concerned in this study.

⁴ W. N. Hohfeld, *Fundamental legal conceptions* (New Haven 1919); and see the discussion in J. Finnis, *Natural law and natural rights* (Oxford 1980), pp. 199–201.

⁵ See D. D. Raphael, 'Human rights', *Aristotelian Society Supplements* 39 (1965), 205–18, esp. pp. 206–7. Raphael divides subjective rights into 'rights of recipience' and 'rights of action', equating the latter with Hobbes' right to life, which is a liberty: 'the right of action itself is a liberty' (p. 210; italics in the original; see also by the same author, 'Obligations and rights in Hobbes', *Philosophy* 37 (1962), 345–52, esp. pp. 348–9).

⁶ See H. L. A. Hart, 'Are there any natural rights?', first printed in *Philosophical Review* 64 (1955), 175–91, reprinted in A. Quinton (ed.), *Political philosophy* (Oxford 1967), 53–66.

⁷ Cf. D. Lyons, 'The correlativity of rights and duties', *Nous* 4 (1970), 45–55, p. 45: 'It is generally supposed that an "active" right essentially involves an element of choice in the sense that one cannot have a right to do something without having the right to refrain ... [This is false, for] one can sometimes support one's claim of a right to do something by showing that one has a positive obligation to do it.' It might be argued that such a right is not truly subjective, since it has objective content. But the point about a right belonging to an individual is not only or necessarily that her actions are indifferent; it is also that her action can be justified in terms of herself and not merely in terms of her relations with others. Hence a right to do something to which we are obliged is a subjective right in an important sense.

present concept. The plurality of concepts of subjective right today has been recognised largely through attention to the way the term ‘right’ – as attributed to the individual – functions as an element in the languages of legal, moral and political discourse. But although historians such as Brian Tierney and James Tully are now writing the history of right as a history of language – a history of the usage of the Latin term *ius* – the subject is still largely shaped by attempts to locate an origin for the idea of subjective as opposed to objective right.

Objective right is conceived as right in the sense of the object of justice, that at which justice aims and with which it deals: the *dikaion* of Aristotle’s *Ethics*, the *ius* of classical and Byzantine Roman law.⁸ It is the just portion which is due between persons, rather than something belonging to the person herself. This objective sense of *ius* was transmitted to mediaeval discourse through the study of the Roman law and the recovery of Aristotle’s *Ethics*, the doctrines concerning justice of which were adapted by Thomas Aquinas as the basis of his analysis. Largely through the standing of Aquinas as *the* exponent of a mediaeval philosophical outlook,⁹ objective right has been taken as part of the high mediaeval achievement of synthesising classical and Christian heritages into rationalist philosophies of universal order. Hence the origin of subjective right is attributed to Thomism’s traditional opponents, the voluntarists and nominalists of the late thirteenth and fourteenth centuries who are widely portrayed as the destroyers of the Thomist synthesis, initiators of a philosophy

⁸ I follow the vast majority of commentators in understanding the Aristotelian *dikaion* in an objective sense. For the view that Aristotle sometimes understands *dikaion* in a subjective sense, see F. D. Miller, *Nature, justice and rights in Aristotle’s ‘Politics’* (Oxford 1995). Although it is widely agreed that the *ius* of Roman law is objective rather than subjective, many accept that at points the language of the Roman law hesitates on the brink of the subjective sense; for example H. Coing, ‘Zur Geschichte des Begriffs “subjektives Recht”’, in Coing, F. H. Lawson and K. Grönfors (eds.), *Das subjektives Recht und der Rechtsschutz der Persönlichkeit* (Frankfurt a. M. 1959). Others go further and assert that the Roman law can properly be said to have the concept of subjective right, e.g. G. Pugliese, ‘“Res corporales”, “res incorporales” e il problema del diritto soggettivo’, in *Studi in onore di V. Arangio-Ruiz*, vol. III (Naples 1953), 223–60. His argument depends to a large extent on the idea that a concept can be in use even if it is not elaborated as such: for a critique of this notion of an unelucidated concept of rights, see the remarks in R. Dagger, ‘Rights’, in T. Ball, J. Farr and R. Hanson (eds.), *Political innovation and conceptual change* (Cambridge 1989), 292–308, pp. 296–8.

⁹ See Brian Tierney, ‘The origins of natural rights language: Texts and contexts, 1150–1250’, *History of Political Thought* 10 (1989), 615–46, p. 616, who speaks of ‘the fallacy, widespread among modern jurists and philosophers who are not medieval specialists, that if an idea is not found in Aquinas it is not a medieval idea at all’.

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of individualism and the *esprit laïque*.¹⁰ This perspective is bound up with the traditional story of later scholasticism as a struggle between *antiqui* and *moderni*, and further with the broader story of the advent of ‘modernity’ out of the putative ‘communitarianism’ or ‘holism’ of the mediaeval Western world, with all the passions that story has inspired.¹¹

Supporting this general philosophical or ‘partisan’ history¹² – still very much alive – of subjective right, however, there are more specific arguments for the association of subjective right with the voluntarist tradition. The first focuses on the difference between objective right and subjective right in terms of their relation to the notion of law.¹³ It is argued that the point about objective right – in Aristotle, classical Roman law and Aquinas – is that it is conceptually independent of the notion of law as the rule of actions. Right is an objective thing (*res, chose*) and it has nothing to do with the possibility of actions. By contrast, subjective right as ‘une *qualité* du sujet, une de ses *facultés*, plus précisément une franchise, une liberté, une possibilité d’agir’¹⁴ is dependent on the notion of law. It is the invention of William of Ockham, who first characterised *ius* as a *potestas* (‘power’)

¹⁰ The prominent exception to this generality is the recent work of Brian Tierney, who in a series of important articles questions the whole idea that subjective right is a late mediaeval (post-Aquinas) development and refuses to subscribe to the starkly dualistic picture of ‘subjective’ opposed to ‘objective’ right. He locates the origin of the philosophical idea of natural right in a modern sense in the canonistic of the twelfth century. For discussion of this thesis, see below, esp. chapter 2, pp. 83–7.

¹¹ This traditional picture of the distinction between the middle ages and modernity is, of course, now being abandoned for a more nuanced view which sees elements of recognition of the individual within the group-oriented society of the middle ages: see the remarks by A. Black, ‘The individual and society’, in J. H. Burns (ed.), *The Cambridge history of medieval political thought, c. 350–c. 1450* (Cambridge 1988), 588–606, and his account of mediaeval ‘civil society’ in *Guilds and civil society in European political thought from the twelfth century to the present* (London 1984), pp. 32–43. The Gierkean perspective is still an important force, however, as witness for example L. Dumont, *Essays on individualism* (Chicago 1986), pp. 62–6, who argues that Ockham’s theory of individual rights is part of his refusal to recognise the universal reality of the group (p. 64, n. 7; see the discussion below, pp. 50–1).

¹² I borrow the phrase from Alasdair MacIntyre in his book, *Three rival versions of moral enquiry: Encyclopaedia, genealogy and tradition* (London 1990), p. 151. Unlike Tierney, MacIntyre wants to keep the traditional picture of subjective right originating in the fourteenth century as part of his argument for a break in Western philosophy after the death of Aquinas. I do not suggest, of course, that the present argument is not also ‘partisan’.

¹³ This is the highly influential view of the French legal historian Michel Villey. See his classic article, ‘La genèse du droit subjectif chez Guillaume d’Ockham’, *Archives de la philosophie du droit* N.S. 9 (1964), 97–127; and *Leçons d’histoire de la philosophie du droit*, 2nd edn (Paris 1962), chapter 11, section 11.

¹⁴ Villey, ‘La genèse du droit subjectif’, pp. 99–102; quotation from p. 101; italics in the original.

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of the individual subject, and it is associated with his inability to think of the juridical order in terms other than that of the individual, her actions and the law which commands them.¹⁵

Relatedly it is argued that it is the conception of law in the voluntarist tradition which is required to ground a subjective understanding of right.¹⁶ Voluntarists understand law as the will of the legislator, laid upon individuals who are free or have liberties in so far as they are not commanded by such a legislative will – ultimately, that of God. The freedom of the individual apart from the law, a conceivably absolute latitude of action, is the individual's subjective right. If, by contrast, the individual is understood to be directed towards certain actions of her nature as such, as on a rationalist conception of law, then there is no such subjective latitude of action which could constitute subjective right. Connectedly, just as in the voluntarist tradition it is the supremacy of the will over the intellect which ensures the freedom of God, so in human beings too, it is the exercise of their will which makes them free. Rights as faculties of the individual serve this freedom and its expression.

In a rather different vein, but again connectedly, a third argument for the origins of subjective right focuses not on the question of law but on the notion of *property*, and depends on that element of the modern language of rights which sees right as the property of the individual, and likewise property as the paradigmatic right.¹⁷ Subjective right is that domain of individual sovereignty wherein the individual's will is her right. The origins of this notion are said to be found in the equivalence of *dominium* and *ius* in early Franciscan poverty tracts and in subsequent late mediaeval literature. Here it is understood to be linked with the subjectivity of early Franciscan philosophy, which posits a radical disjunction between the individual

¹⁵ See further below, chapter 3.

¹⁶ See M. Bastit, *La naissance de la loi moderne. La pensée de la loi de saint Thomas à Suárez* (Paris 1990), p. 21. See also the important work of Noel Malcolm, 'Thomas Hobbes and voluntarist theology', unpublished Ph.D dissertation, Cambridge 1983, Pt. II, pp. 139ff. I do not wish to question the thesis that Hobbes' understanding of law owes much to voluntarist theology. But I shall develop the suggestion (below, chapter 6) that it is renaissance Roman law, rather than the theological voluntarist tradition, which provides the fundamentals of Hobbes' notion of right.

¹⁷ This is the argument of Paolo Grossi in his two fundamental articles, '*Usus facti*. La nozione di proprietà nell'inaugurazione dell'età nuova', *Quaderni fiorentini* 1 (1972), 287–355, and 'La proprietà nel sistema privatistico della seconda scolastica', in Grossi (ed.), *La seconda scolastica nella formazione del diritto privato moderno. Incontro di studi* (Milan 1973), 117–222. To some extent it is also the thesis of Richard Tuck, *Natural rights theories: Their origin and development* (Cambridge 1979), chapters 1 and 2. See below, chapter 1.

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subject and the world of things, and contrasts with the philosophy of Aquinas wherein the individual is *inquadrato nell'universo*,¹⁸ embedded in a universal order.

These arguments differ from each other at important points. But together they form an impressive consensus: subjective right, in its true or at least most significant sense, is the corollary of a voluntarist theology which conceives it as that area, defined by the law, in which the individual may act at will, as free and sovereign proprietor. From its origins in Franciscan discourse, this conception of right is said to be developed in the writings of Fitzralph, Wyclif, Gerson and Summenhart, and to be expressed definitively by Hobbes as the heir of this theological tradition. It is in terms of this concept that members of the early School of Salamanca, both theologians and jurists, are analysed as either positing a theory of individual rights or not.

However, although this general theory concerning subjective right and its origin may be convincing in the abstract, in practice it faces several difficulties. If we are not looking for the origin of an idea, but enquiring after the specific languages of right available in late mediaeval discourse, then we must translate the above argument into terms of vocabulary. Here it becomes the thesis that the language of *ius* as *facultas* or *potestas*, or the language of *ius* as *dominium*, signifies a notion of right as indifferent liberty or sovereignty. The problem then is that this does not fit the texts to which it is supposed to apply.

One of the clearest signs of this is the fact that for almost all of the voluntarist authors generally cited in the story of subjective right, *ius* as a faculty, power or dominion is predicable of animals and even of inanimate entities, which by the same authors are consistently denied liberty. This feature has tended either to go unremarked or to have been dismissed, but its prominence suggests that it was not as irrelevant as historians have implied. Moreover, rights as *potestates* or *facultates* of an individual entity – including man – can be seen by these authors as operating in accordance with the law, not as being a liberty granted by the law. In the unique instance – that of Conrad Summenhart – in which the vocabulary of *ius* is associated with the liberty of man left over by the ten commandments, this is for

¹⁸ The phrase is Grossi's in '*Usus facti*'.

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Summenhart not the nature of right in general, but a very specific type of right. Hence it is not straightforwardly the case that the appearance of *ius* characterised as a *facultas* or *potestas*, or as *dominium*, implies the concept of rights outlined in the arguments above, nor can we necessarily talk in terms of a language of right as indifferent liberty in the late mediaeval period. A different approach is needed.

This book, therefore, is not an attempt to find the origin for the, or any, modern concept of subjective right. What I try to do instead is to recover the variety of the senses of the term *ius* as employed to signify a quality or property of the individual subject in late mediaeval and renaissance scholastic discourse. The reassessment of *ius* in a subjective sense entails that its relation with the notion of objective right be reconsidered: I therefore attempt to assess the precise understanding of objective right held by authors of this period. To escape the grip of the philosophical history of subjective right sketched earlier, I try to get behind the categories of voluntarist, nominalist, realist and the like, which have too often shaded over into explanatory factors, and concentrate instead on the nature of the literature in which *ius* is used in a subjective sense, taking into account the constraints of genre within scholastic literary production.¹⁹

The first three chapters of this book are therefore devoted to the period between c. 1250 and c. 1525. The argument proceeds roughly chronologically, with departures from this basic scheme where considerations of genre override those of temporal proximity. In chapter 1, I examine the equation between *dominium* and right, trying to pin down the sense of this equivalence in its various contexts in late mediaeval literature. Chapter 2 considers fourteenth-century developments, from Ockham through to Gerson, in connecting nature, natural agency and right. Here *ius* in a subjective sense is incorporated into a universe governed by natural law, sometimes

¹⁹ My concern is therefore primarily with identifying the different languages (idioms or rhetorics) of rights within late mediaeval and renaissance discourse, i.e. with that side of intellectual history wherein the historian tends to become an ‘archaeologist’, revealing and tracing buried seams of language. For archaeology in this sense, see J. G. A. Pocock, ‘The concept of a language and the *métier d'historien*: Some considerations on practice’, in A. Pagden (ed.), *The languages of political theory in early modern Europe* (Cambridge 1987), 19–28. In so far as I have charted developments or mutations within these languages, my focus has been on the intellectual context which provided the immediate orientation for the authors involved. I have not discussed in detail wider issues of political, social and economic milieu. My concern has been rather with the relations between texts, with exposing the ways in which, and the extent to which, these books ‘speak of other books’, and in so doing lay down their distinctive ‘ways of speaking’.

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with explicitly Thomist references. I suggest that this understanding of subjective right is profoundly distinct from that considered in chapter 1. In chapter 3 I trace the development of the notion of objective right in mediaeval discourse, charting in particular the changes within the Thomist position which bring early sixteenth-century Thomist authors close to a Gersonian position on rights such as that held by Jacques Almain.

With this background in place, in chapters 4 and 5 I come to consider the early School of Salamanca. I argue that once we are in a position to appreciate the different notions of subjective right current in late mediaeval and renaissance scholasticism, the picture with regard to these authors becomes more nuanced and at the same time clearer. I suggest that Vitoria, still working basically within a late mediaeval framework of understanding inherited from his days at the University of Paris, hesitates between two late mediaeval senses of subjective right in two different works. I then contend that the work of his pupil Soto constitutes an attempt to reconcile these two senses as part of a larger political project to harmonise the demands of the organic natural commonwealth with those of individual liberty.

A more accurate picture of Soto's doctrine of subjective right enables us to reassess the work of his contemporary, the jurist Fernando Vázquez. Vázquez is usually seen as holding the voluntarist notion of subjective right, either together with his theologian contemporaries or in opposition to them, depending on the perspective of the historian. But the reassessment of the late mediaeval language of subjective right permits us to understand that Vázquez's theory of rights not only bears no simple relation of either opposition or identity to those of Vitoria and Soto, but also cannot be assimilated to any of the theological traditions of right developed during the course of the later middle ages. Vázquez's work, combating (as we shall see) the specifically political use of the notion of right by Soto, employs a sense of right based on legal rather than theological sources, which constitutes a radical alternative to those of the theologians.

This is the end of the story about the early School of Salamanca. But by this point enough has been said to make it a story not just about sixteenth-century scholasticism, but about the whole trajectory from the Franciscans to Hobbes. A final chapter therefore considers the effect of placing Hobbes' notion of natural right as liberty not

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within a theological discourse, but within the legal tradition originating with Fernando Vázquez.

This study is therefore a history of the early language of rights. But political theorists today are still grappling with the heritage of that language: still at odds over what rights imply and what they do not, and over the political significance of appealing to them. Much of the present debate presupposes, in one form or another, the particular philosophical or partisan history outlined above. To appreciate some of the complexities of early rights language may help to provide a new perspective on some of the difficulties it encounters.

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I

*Right and liberty: the equivalence of
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In the history of subjective right, a great amount of importance has in recent years been attached to certain texts and bodies of texts which posit an equivalence between the Latin terms *dominium* and *ius*. First of all it is said that in this equivalence we have the ‘origin’ of the modern subjective right in its most radical (and therefore strongest and most significant) form, in which it is preeminently associated with liberty, with property and with a certain idea of sovereignty.¹ Secondly, this conclusion is extended to the discussions of *ius* in a whole range of *moderni* who are thought to be part of the same theological current. It has resulted from this that almost all late mediaeval authors – such as Ockham and Gerson – who treat *ius* subjectively are assimilated to the tradition which equates *ius* with *dominium*.²

¹ So, for example, Richard Tuck in *Natural rights theories*, esp. chapter 1. Tuck uses the distinction between ‘active rights’ and ‘passive rights’, and sees the equivalence of *dominium* and *ius* in mediaeval texts as signalling an ‘active rights’ theory, a theory of rights as liberties and sovereignties, which is also a strong theory of rights as property. For problems with this view, see B. Tierney, ‘Tuck on rights: Some medieval problems’, *History of Political Thought* 4 (1983), 429–41, p. 431. The same sort of point is made in a slightly different way by Paolo Grossi in his two articles ‘*Usus facti*’ and ‘Proprietà’. Grossi sees in the equivalence of *dominium* and *ius* in the Franciscan texts of the thirteenth-century poverty controversy the articulation of a distinctive notion, based in a voluntarist theology of the supremacy of the will, of subjective personality and subjective liberty distinguished from the objective external world by its relation of *dominium* over it. Grossi argues that in this voluntaristic notion of *dominium-ius* as a ‘strumento potestativo della libertà del singolo’ (‘Proprietà’, p. 124), ‘l’interscambiabilità tra libertà e proprietà, leit motiv di tutte le correnti individualistiche dell’età moderna, è qui già pienamente posta’ (‘Proprietà’, p. 135). I cannot agree with Grossi’s extension of his conclusions, but the following account of Franciscan theology owes a great deal to his sensitive and convincing analysis of these texts.

² Thus for both Tuck and Grossi, subjective right as dominative sovereignty constitutes, as Grossi puts it, ‘uno strumento interpretativo ricorrente nelle mani degli *homines novi* della speculazione post-medievale da Occam a Fitzralph, da Wycliff a Gerson’ (‘*Usus facti*’, p. 313). This view is widely accepted, for example by James Burns in a recent article ‘Scholasticism: Survival and revival’, in Burns (ed.), *The Cambridge history of political thought, 1450–1700* (Cambridge 1991), 132–55, p. 141, who speaks of a “‘Gersonian” position’ on subjective right (i.e. that right and *dominium* are equivalent).