Treatise

Is Individualism the Intrinsic Quality of Natural Rights?

Martin Abel

The author is a PhD candidate at the Department of Legal Theory, Charles University Faculty of Law. He holds legal degrees from the Charles University (JUDr.) and the University of Oxford (MJur). His past interest in analytical jurisprudence and constitutional interpretation (the book Meze základních práv v České republice) was recently replaced by his zeal for philosophical approaches infused with observations from intellectual history or economic anthropology. *He is grateful to Jiří Baroš, Jan Wintr, Pavel Ondřejek, and his two reviewers for their extensive comments. He also obtained generous help in the previous months from (alphabetically) Kristýna Abel Benešová, Peter Galie, Martin Hapla, Michal Šejvl and Katerzyna Žák Krzyzánková. The research that gave rise to this paper was funded by Charles University Grant Agency's project No. 304521 'Constitutional Rights: An Internal Critique'.*

Abstract

In legal theory we tend to understand human rights as inherently individualistic. In order for them to apply, it is enough that they promote individual interests, no matter the effect on common good. The individualistic conception (or the „I-conception") of rights thus accentuates the uniquely human disposition for freedom over human sociability, postulates a competitive society of atomistic individuals and prioritises the individual-to-state relationship before other forms of association. But do these features follow necessarily from the imperative to recognise fundamental moral value of each and every individual?

The author sources from the works of intellectual historians in order to analyse three historical natural rights traditions: late medieval scholasticism (Ockham), early modern scholasticism (Vitoria) and Calvinism (Althusius). All three recognised various natural rights of individuals against papal or imperial power and postulated a kind of covenant between the ruler and his subjects whose violation by the ruler possibly triggered the right to resist. At the same time, however, they grounded natural rights in Christian morality and underlined the natural human sociability and inclination to form a political community. The author puts this non-individualistic, Christian-Aristotelian account on a par with the I-conception and suggests that we should restore some of it in order to strike a balance between individualist and collectivist theories.

Keywords: natural rights, human rights, common good, individualism, communitarianism, scholasticism,

1. Reasons for Historical Approach

In his seminal book, *The Idea of Natural Rights*, Brian Tierney offers a detailed account of how the modern concept of natural rights grew over centuries from the seeds sown by medieval jurists in continental Europe.[1] These seeds were good, he asserts, because they rested on values of medieval law and Christianity. While rejecting the Marxist interpretation that natural rights arose as „an expression of the more egotistic impulses of early modern capitalism", Tierney is nonetheless critical of the endless growth of individual rights.[2] Something important had been lost over the history of natural rights. To restore the concept is the task of contemporary lawyers.

The following lines attempt to contribute to this restorative enterprise. They follow up on a number of „rescue operations" by both legal philosophers and historians in the past, to whom I am indebted.[3] Oddly, legal philosophers rarely engage with history. In fact, they seem to understand legal concepts ahistorically - a vice criticised by Michel Villey, who first took it upon himself to understand how the idea of natural rights came to be.[4] To avoid presentism, I intend to take seriously the historical background that gave rise to ideas we build our modern jurisprudence upon.[5] That being said, I think we should strive to understand natural right ancestors of human rights on their own terms, that is, not as evolutive stages of something future and perfect, but as aspects of political speech specific to time and place.[6]

Consider one specific trait of natural or human rights that has been criticised by philosophers

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[1] TIERNEY, Brian. *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law, 1150-1625*. Michigan: Eerdmans, 1997.

[2] „The multiplication of innumerable particular rights", Tierney warns, „can erode any sense of community and the common good." TIERNEY, Brian. *The Idea of Natural Rights…*, pp. 346-348.

[3] Those who warned of the untamed rights include *inter alia* GLENDON, Mary A. *Rights Talk: The Impoverishment of Political Discourse*. New York: The Free Press, 1991, O'NEILL, Orona. The Dark Side of Human Rights. *International Affairs*, 2005, Vol. 81, No. 2, pp. 427-439. More recent examples include KOSKENNIEMI, Martti. *The Politics of International Law*. Hart Publishing, 2011, ch. 5, TASIOULAS, John. Saving Human Rights from Human Rights Law. *Vanderbilt Journal of Transnational Law*, 2019, vol. 52, no. 4, pp. 1167-1207, The Inflation of Concepts. *Aeon,* published 28. 1. 2021, cited 5. 4. 2022. Available at: https://aeon.co/essays/conceptual-overreach-threatens-the-quality-of-public-reason, DOUZINAS, Costas. *The Radical Philosophy of Rights*. Routledge, 2019, ch. 1.

[4] HUTSON, James H. The Emergence of the Modern Concept of a Right in America: The Contribution of Michel Villey. *American Journal of Jurisprudence.* 1994, Vol. 39, Issue 1, p. 185. Brian Tierney adds that the diversity of opinions on human rights suggests that an historical account of the evolution of natural rights theories may help modern philosophers and political theorists address the problems they face. TIERNEY, Brian. *The Idea of Natural Rights…*, p. 2.

[5] „As we analyse and reflect on our normative concepts, it is easy to become bewitched into believing that the ways of thinking about them bequeathed to us by the mainstream of our intellectual traditions must be the ways of thinking about them." SKINNER, Quentin. *Liberty before Liberalism*. Cambridge: Cambridge University Press, 1997, p. 196.

[6] Rather than studying the „natural evolution" of rights, we are therefore led to consider „how rights have been used to make 'claims and counterclaims' in defence of some positions or interests, and against others, at different moments." See KOSKENNIEMI, Martti. Foreword. In SLOTTE, Pamela. HALME-TUOMISAARI, Miia. *Revisiting the Origins of Human Rights*, Cambridge: Cambridge University Press, 2015, p. xv.

since late 18th century: their individualistic character.[7] The object of their critique may well have been the *concept* of individual rights itself (supposing the concept too weak to merit dismissal before that time, or perhaps even denying its existence before the liberal thought), or it may have been merely an undesirable *conception* thereof. We cannot know until we understand where and how exactly the object of criticism departed from its predecessors. To suggest an answer that isolates the concept from its historical bedrock is an act of sheer folly, unless we accept the proposition that concepts have meaning (assuming they may mean anything) independent of a historical interpretive community.

I aim in this paper to demonstrate that the obsession with the individual good is not intrinsic to the concept of rights *per se*. As a proof, I will expose three pre-modern natural law traditions, which attempt, in their own ways, to liberate the individual from the clutches of the political power. In Sections 5, 7 and 7, I will consult the available scholarship to find out how these three traditions, late medieval scholasticism, early modern scholasticism, and Calvinism respectively, conceived of the position of an individual in a political community. Beforehand, I shall prepare the field and elaborate on my initial remarks on the individualistic conception of rights in Section 2 and clarify its distinguish features in Section 3. The brief Section 4 will position this paper in the academic discourse about the history of subjective *ius*.

2. The I-conception of rights

To say that human rights are individual rights is, I think, an understatement. Indeed, human rights today are subjective, universal and non-positive. They are subjective because they belong to persons, only persons may claim them. They are universal because they apply to everybody; a person possesses them, we say, simply in virtue of being human.[8] They apply regardless of where she is from, what she believes in or how she chooses to live her life. Since human laws may not abolish or disapply human rights, human rights are also non-positive. But when we say „individual rights", we think of them not merely as *pertaining to* individuals,

[7] Karl Marx insisted early on that „the bourgeois right to liberty "is not based on the association of man with man but on their separation", it is "the right of the restricted individual withdrawn into himself", of egoistic man, of the man who is separated from other men and from the community. MARX, Karl, *Zur Judenfrage.* Paris: Deutsch–Französische Jahrbücher, 1844, p. 108. Hutson asserts that the individual should not be understood as an isolated and unencumbered being, but many still conceive of individual rights as a channel of unrestrained personal ambitions and appetites. HUTSON, James H. The Emergence of the Modern Concept of a Right in America…, p. 52. For MacPherson, liberal democratic society cannot combine the moral worth of individual and the community „as long as the theory conceptualises the individual as essentially proprietor of his own person or capacities, owing nothing to society for them." MACPHERSON, Crawford B. *The Political Theory of Possessive Individualism: Hobbes to Locke*. Oxford: Clarendon Press, 1962, p. 3. There has been self-reflection among liberals, too. See SANDEL, Michael J. The Procedural Republic and the Unencumbered Self. *Political Theory*, 1984, Vol. 12, No. 1, pp. 81-96; „*Ein rein individualistisches Freiheitsverständnis, in dem andere Menschen als Gefahr für die eigene Freiheit erscheinen, wird der sozialen Wirklichkeit nicht gerecht*." SACKSOFSKY, Ute. Allgemeine Impfpflicht - ein kleiner Piks, ein großes verfassungsrechtliches Problem. *Verfassungsblog,* published 21. 1. 2022, cited 5. 2. 2022. Available at: https://verfassungsblog.de/allgemeine-impfpflicht-ein-kleiner-piks-ein-groses-verfassungsrechtliches-problem/.

[8] GRIFFIN, James. *On Human Rights,* Oxford: Oxford University Press, 2014, p. 2.

but also as *existing from* and *for* individuals. It is both necessary and sufficient that they promote *only* individual interests.[9] Hence, we should perhaps speak of „individualistic rights", or the „individualistic conception of rights".

As always, there will be core (fairly evident) and peripheral (not so evident) cases of the individualistic conception, or *the I-conception,* as I intend to shorten it. Consider a hypothetical legal order that protects the right to conduct a business. A hotel manager refuses to accommodate a guest because of the colour of her skin. The guest sues the hotel and the court embarks on a mandatory dialectic adventure in its attempt to reconcile the manager's right to do business with the guest's right not to be discriminated against. If that is the case, the legal system's conception of a right is, I would argue, individualistic, because the court did not pause to assess whether the hotel manager's interest in refusing the guest qualifies as a right at all. In exercising his right, what sort of a legitimate interest was the hotel manager pursuing? It was sufficient that there was *some* individual interest at stake within the subject-matter of „doing business". Interests of smokers as the right to personal liberty, interests of domestic aggressors as the right to privacy, interests of thieves in not to be recorded on video *in flagranti* as the right to personal data - all of these instances and others may enjoy protection of human rights law. The instances may promote community values that cohere with human rights, but whether they do is simply not part of the legal inquiry. To this extent, we can describe such human rights as individualistic.[10]

I can think of an objection at this early stage. Lest we subscribe under moral realism and conceive of rights as independent moral objects, should we not focus on the deficiencies of us as subjects, rather than the shortcomings of the object? After all, human rights reflect our values; they are neither this nor that, *we* are.[11] There is a grain of truth to this objection and I admit to a certain degree of imagination on my part if I focus on the I-conception of rights, rather than on the *self*. My point is, however, that judicial and legislative bodies around the world habitually recognise individualistic human rights claims as if human rights existed for individualistic purposes.[12] Let the facts that erode social cohesion be explored by sociologists and anthropologists, but it is up to as lawyers and philosophers to understand how norms shape facts by their endorsing, condoning or rejecting individualistic rights claims.

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[9] So, for instance, the public interest in the thriving marketplace of ideas may add weight to the freedom of expression but few believe that the public interest grounds its validity more than the the individual good the freedom promotes.

[10] Individualism has led legal theory to conceive of human rights law as an arena of always-applicable abstract principles. These try to assert themselves in concrete cases. Their limits are seen as suspicious and artificial, rather than as inherent and organic.

[11] „The fact that egotistical people are selfish about how they use their rights does not mean that having and asserting rights is necessarily a selfish activity." CAMPBELL, Tom. *Rights: A Critical Introduction*. Routledge, 2006, p. 14.

[12] What courts say matters. Strictly speaking, I criticise the individualistic judicial practice.

3. Identifying the I-conception

So far, I have declared fidelity to historical approach and introduced the I-conception that I intend to seek in theories of the past. How can we tell, however, whether this theory or that theory uses the I-conception? After all, philosophers are interested in a wide variety of topics and utilize different kinds of language. The relationship between the individual and the group may range from the collectivist absorption of the individual in the group to the assertion of complete individual autonomy; the theories may be descriptive or prescriptive and are often a mixture of the two.[13] A linguistic analysis can hardly prove sufficient, even if the authors were explicit about the conception they use. By choosing the characteristics of the individualistic conception arbitrarily, I may also fall prey to a common scientific mistake of making conclusions based on tailor-made assumptions.

To follow the criteria used by others before me may seem reasonable, but even here we run into difficulties if we realize that labels like „liberal" or „individualistic" are value-laden and serve to express either more complimentary (the former), or more contemptuous (the latter) attitude of the speaker toward the modern conception of rights. I suppose there is no easy escaping from this hurdle and I can but acknowledge that those who use the I-conception rarely speak of individualism and those who speak of individualism may overestimate its implications in order to raise attention.

Costas Douzinas or Leo Strauss count among those who describe the I-conception. In his human rights trilogy, Costas Douzinas asserts that the subject of modern rights is the individual emancipated from social bonds and hierarchies.[14] Only men are natural, societies and governments are creations of will.[15] Statements of desire of an individual are being presented as generalizations of what is usually right to do in a particular case. The morality of rights thereby „replaces the ethics of community and is identified with individual preferences and demands."[16] Men enter civil society out of self-interest, hoping to have the peace required for developing their personal projects and not lose much of their original freedom along the way.[17] Their consent is necessary to constrain their natural unlimited freedom in whatever way.[18] Hence if civil society was a business entity, it would be a limited liability company: individuals mean to collect the benefits but deny responsibility for each other on top of their share.[19] Summarising "the egoism critique", Tom Campbell wrote that in a rights-dominated society, individuals "stand on their rights", their world is so centred around their immediate wants that they readily "disown their past, cut themselves off from their contemporaries and ignore the well-being of future generations, ultimately to their own

[13] BLACK, Antony. Society and the Individual from the Middle Ages to Rousseau: philosophy, jurisprudence and constitutional theory. *History of Political Thought*, 1980, Vol. 1, No. 2, p. 145.

[14] DOUZINAS, Costas. *The Radical Philosophy of Rights*…, p. 60.

[15] DOUZINAS, Costas. *The Radical Philosophy of Rights*…, p. 77.

[16] DOUZINAS, Costas. *The Radical Philosophy of Rights*…, p. 84.

[17] DOUZINAS, Costas. *The Radical Philosophy of Rights*…, p. 58.

[18] DOUZINAS, Costas. *The Radical Philosophy of Rights*…, p. 82.

[19] CAMPBELL, Tom. *Rights*…, p. 11.

detriment."[20] Leo Strauss also associates the I-conception with individuals whose freedom is complete independently of society.[21] Civil society is indispensable to protect individual interests, but it cannot be harmonious with natural right if individuals do not freely consent to every single limitation.[22]

We could go on but that would amount to masticating the same ideas in different words. Instead, we can distil the returning characteristics of the I-conception:

1. On the level of human psychology, the I-conception accentuates human autonomy over human sociability. Against the Aristotelian view, the I-conception assumes that men protect their freedom from others, rather than realize it in concert with them (Marx, Strauss, Douzinas).

2. On the level of political philosophy, the I-conception treats civil society as conventional or artificial, rather than natural. The I-conception is part of the liberal political theory that cannot bear heteronomous constraints on human conduct. As a result, it happens to be most compatible with contractarian positions which condition the transition from pre-political to political society by (hypothetical) individual's consent to alienate some of her rights (Strauss).

3. On the level of political sociology, the I-conception derives from preoccupations with both vertical (individual-to-state), and horizontal (individual-to-individual) power relations. This is because they are based on the assumption of a competitive society whose default relationship is one of conflict between private and public interests.[23]

These are the characteristics – the stress on man's autonomy, society as human artifact and the reconciliation of conflicts as the main political issue of the day – that have been associated – again and again – with the I-conception of rights. One of the most radical presentations of the I-conception in Western philosophy was given by Thomas Hobbes who was cited in this context by all the foregoing commentators. Hobbes presented rights as a sort of compromise agreement between self-interested individuals.[24] He famously suggested that the natural condition of men is characterised by their seeking ever more power over others[25] - to threaten them, steal from them and kill them, if necessary for their survival. In his account of the state of nature, there are no social ties, complete political equality and everyone's freedom is only limited by their physical abilities. People have natural rights,

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[20] CAMPBELL, Tom. *Rights*…, p. 12.

[21] STRAUSS, Leo. *Natural Right and History*. University of Chicago Press, 1953, p. 181. As Marx said as well, „the right of man to liberty is based not on the association of man with man, but on the separation of man from man. It is the *right* of this separation, the right of the *restricted* individual, withdrawn into himself. " MARX, Karl. *On The Jewish Question.* Deutsch-Französische Jahrbücher, 1844. Available at: https://www.marxists.org/archive/marx/works/1844/jewish-question.

[22] STRAUSS, Leo. *Natural Right and History*…, p. 118.

[23] There are no communal interests or what the Catholic scholarship calls the common good.

[24] HOBBES, Thomas. *Leviathan or the Matter, Forme, and Power of a Common-Wealth Ecclesiasticall and Civill*. London: Andrew Crooke, 1651, ch. 14. Available at: https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/hobbes/Leviathan.pdf

[25] MACPHERSON, Crawford B. *The Political Theory of Possessive Individualism…,* p. 59.

but no reciprocal natural duties against each other. This state of affairs survives the social contract, which creates political society and gives the sovereign ruler the right to obedience and obligations towards his subjects.

Hobbes' approach was radical, it is true, in its uprooting the individual from the world of ethical obligations. I leave it up to the reader to decide if this change did or did not make the individual more free. Either way, we should not delude ourselves by thinking that the liberation or emancipation of the self started with Hobbes. As we will see below, it began centuries before the dawn of Enlightenment. There were Christian natural law traditions, which emphasized the moral value of the individual and his or her innate freedom. To give them a chance, I suggest we do not look for a Hobbes before Hobbes and focus instead on the more general characteristics listed above.

If the process of individual emancipation started centuries before Hobbes, perhaps the pre-Enlightenment natural law theories were in fact all individualistic and therefore closer to the current practice than I might initially concede. At the same time, the complete opposite may be true: there is an ever present possibility that the early natural law theories just did not deviate quite enough from the ancient un-freedom in order for us to find any actual „liberty before liberalism".[26] Either way, I would feel pressed to drop the talk of I-conception, for it would have no apparent analytical use. However, if there in fact did appear in pre-Enlightenment Western philosophy a non-individualistic conception of natural rights (a "We-conception" of rights, as I call it), an interesting question starts looming out of the history: under what circumstances did we abandon it?

4. The Appearance of Subjective *Ius*

For each scholarly discipline, there is a Newton who inspires decades of commentary. For the history of natural rights, his name is Michel Villey. A French historian, Villey attacked in a group of studies in 1960s[27] the ahistorical concept of a subjective right, tracing its origins to William of Ockham in High Middle Ages. Originally, Villey thought, the Latin word for the right, *ius*, was only understood in the objective sense as „that which is right" according to justice. Justice (*iustitia*) was characterized by Ulpian in the Digest as „the continuing and lasting determination to assign everyone their own", or *ius suum*. *Ius* was a social phenomenon which must be discerned in the complex web of relationships between people.[28] It referred to the individual's fair share of society's benefits and burdens. It could easily imply disadvantage to the individual.[29] To decide according to *ius* represents a directive to the judge to always

[26] The two alternatives correspond to two narratives about human rights, which Miia Halme-Tuomisaari and Pamela Slotte found in academic literature: the „Tale of Imagined Antiquity" (slow of evolution of human rights at least from Ockham up to today) and the „Big Bang Theory" (a sudden appearance of the concept at the end of the seventeeth century). „Liberty before liberalism" is of course reference to Quentin Skinner's book that was also cited above.

[27] See the collection cited by Hutson in HUTSON, James H. The Emergence of the Modern Concept of a Right in America…, p. 189. Since I do not read French, I had to rely on summaries of Villey's work in the literature.

[28] HUTSON, James H. The Emergence of the Modern Concept of a Right in America…, p. 189.

[29] TIERNEY, Brian. *The Idea of Natural Rights*…, p. 16.

seek the just outcome to a dispute.[30]

Villey's old argument has had to face criticism on two counts. While some defended subjective *ius* in Roman law, others disputed that the inventorship belonged to William of Ockham.[31] I myself admit to some misgivings about the „no subjective *ius*" thesis, too. If contracts, wills, customs and other legal sources prescribed duties to A and to the benefit of B while B were thus justified to seek remedy upon transgressions before Roman magistrates, then it surely means B enjoyed subjective *ius*, lest we mistake our interpretive disagreements for theoretical disagreements about what grounds a right.[32] But I am equally prepared to accept that this argument simply conflates the two contemporary meanings of „a claim", substantive and procedural, and the fact that B may raise „his claim" at court and - provided he uses the correct formulae - may be proclaimed to be „in right" (a claim in judicial procedure) does not mean that B could be told to realize „his right" when he insists on A's carrying out his duty prior to the proceedings (a claim in substantive law). Be it as it may, I am satisfied with the close-to-consensual view that the Romans either did not know the concept of subjective *ius*, or at least they did not conceive of their legal order as essentially a structure of individual rights.[33] At the very least, their natural law philosophers did not talk of subjective *ius*. Their usage of legal concepts such as *ius, facultas, potestas* or *dominium* did, however, supply medieval canonists with some rich food for thought, which would ultimately be digested into the notion of subjective right.[34]

The identification of William of Ockham as the inventor of the concept proved still more contentious. Richard Tuck considered Michel Villey confused and recognized the primacy of Jean Gerson, whom Villey had dismissed as unoriginal.[35] Brian Tierney and Larry Siedentop believed both to be wrong and located the birthday of rights as far back as the 12th century in

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[30] This is in agreement with the central aim of the Roman jurisprudence, which was not to protect individual interests but rather to find the just outcomes to individual legal disputes. A just outcome may never be known prior to a dispute and must be ascertained by a judge according to the facts at issue. HUTSON, James H. The Emergence of the Modern Concept of a Right in America…, p. 190.

[31] HUTSON, James H. The Emergence of the Modern Concept of a Right in America…, p. 196. I will henceforth not deal with the immediate reactions to Villey's argument and focus instead on the more comprehensive hypotheses that built upon his work.

[32] Two disagreeing interpreters of the Roman legal practice may find out that they disagree on concepts (What grounds a right?), rather than on the correct understanding of the Roman legal practice.

[33] TIERNEY, Brian. *The Idea of Natural Rights*…, p. 18. „Consequently, although linguistic evidence is necessary, it is never going to be sufficient to establish that the classical Romans possessed the concept of a right; and the evidence of their theory suggests that they did not." TUCK, Richard. N*atural Rights Theories: Their Origin and Development*. Cambridge: Cambridge University Press, 1979, p. 13. „Villey's argument for a medieval origin of the modern subjective definition of a right has been accepted by scholars, although it received some criticism when it first appeared." HUTSON, James H. The Emergence of the Modern Concept of a Right in America…, p. 196.

[34] In fact, one might say that subjective rights are ironically nothing but the result of a complete misunderstanding of Roman jurisprudence by medieval jurists.

[35] TUCK, Richard. N*atural Rights Theories*…, p. 23. Tuck's conclusion was of course highly influenced by his decision to only look for what he calls „active rights" and so his disagreement with Villey is mainly methodological.

the canonist writings.[36] I cannot presume to arbiter among the scholars here, nor do I think it important. My emphasis is on natural rights only and these require subjective rights to be supplied with a political philosophy that puts natural law constraints on political power.[37] In Hohfeldian terms, to have *facultas* against the institution signified having immunity from its power, and this was exactly Ockham's objective. It was this localization of rights as powers in every Christian that led Villey to spot in Ockham's work the Copernican moment in jurisprudence.[38] And whether the movement started with Ockham or not, it is clear enough that natural rights had their origins in the the medieval scholasticism.[39]

5. Individualism of rights in medieval scholasticism (Ockham and Gerson)

The rights theory of **William of Ockham** (1285-1347) can be properly understood in the context of nominalism – the philosophical systém he invented. Ockham's nominalism rejected the universal categories of Aristotelianism and asserted that reality could only be found in individual elements. Where the reality is formed by individual elements, all that can be known about such reality must be known to man through his senses. According to this philosophical system, universal essences (like whiteness or humanity) are nothing more than concepts in the mind and they are formed empirically.[40]

Also freedom is not projected on us from the outside, but rather created by us. In Ockham's view, we experience it. Our experience tells us that we sometimes will things that go against the dictate of reason. It is up to us if we obey reason, or not. If it was not up to us, we would not have free will and we could not be responsible for our actions, nor could we

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[36] By the 13th century, canonists even created legal procedure for making enforceable the claim of a poor man who in extreme need takes something from its owner. SIEDENTOP, Larry. *Inventing the Individual: The Origins of Western Liberalism*. London: Allen Lane, 2014, p. 248.

[37] Wait a minute here, why only on political power? Do our natural rights not give rise to natural law obligations of others, too? Possibly yes, but we must be very careful here. We will see in the next sections that prior to the Enlightenment, philosophers seeking to liberate the individuals tried to demonstrate the existence of natural rights vis-à-vis the Church, the Crown, the Empire, not other individuals. Does it amount to omission on their part? The answer depends on our understanding of the concept. Natural lawyers prior to the Enlightenment were simply not interested in horizontal relations; they opposed absolute *power* above all.

[38] HUTSON, James H. The Emergence of the Modern Concept of a Right in America…, p. 192.

[39] Brian Tierney mentions some scattered references prior to Ockham's emphasis on natural rights. For instance, the civilian jurist Odofredus wrote that the emperor could not arbitrarily deprive subjects of their property "because natural rights are immutable". TIERNEY, Brian. *The Idea of Natural Rights*…, p. 193. Some intellectual historians conclude that before the High Middle Ages, there was in fact no 'individual' to whom rights could belong. SIEDENTOP, Larry. *Inventing the Individual*…. Siedentop's claim that Christianity in fact invented the individual sits well with Patrick Deneen's conclusion that the whole of liberalism was made possible by the change of focus from pagan rituals to individual relationship with God. DENEEN, Patrick. *Why Liberalism Failed*. London: Yale University Press, 2019.

[40] HUTSON, James H. The Emergence of the Modern Concept of a Right in America…, p. 192, POKORNÝ, Petr. Rané křesťanství. In MÜLLER, Ivan. HEROLD, Vilém. HAVLÍČEK, Aleš. *Politické myšlení pozdního středověku a reformace: Dějiny politického myšlení II/2*. Praha: Oikoymenh, 2012, p. 38.

be praised for our good deeds. A man cannot act rightly unless he wills to do so. Likewise, as individuals we can act in accordance with the compact with God, or reject it.[41] An individual has *facultas* (or power) to direct his mind in either direction. As Ockham says: „To deny every agent this equal or contrary power is to destroy every praise and blame, every council and deliberation, every freedom of the will. Indeed, without it, the will would not make a human being free any more than appetite does an ass."[42]

Aristotle, too, was interested in human agency but his reliance on the universal categories prevented him, for the better or worse, from putting our volition on central stage. As Villey points out, an individual's *facultas*, power, or quality to direct his mind in a particular direction was drawn for Ockham from the individual's being, from his nature. It is a power that is naturally inherent in him. It is his God-given right. „The difference between classical or objective natural right and the new subject right was stark," says James Hutson, „the former was the share of some external object; the latter was power inherent in an individual."[43] According to Villey, this was a turning point, for never before was right conceptualized as power. „The Romans naturally knew the idea of powers of the individual, but without giving to these powers a juridical quality, without calling powers rights."[44]

When discussing the limits of imperial and papal authority, Ockham was concerned primarily with an individual's good and his rights. „In both spiritual and the temporal spheres of human life," Coleman says, „the individual must be considered first as to his rights, capacities and liberties. From an analysis of the individual, Ockham proceeds to speak of collections of individuals as social groups." He wrote that people have the God-given right to choose their own ruler[45] by conferring on him the law-making power that is limited by the rights of his subjects.[46] The power so conferred cannot be absolute because „the people itself did not possess such a power over its own individual members."[47] The pope's authority, while founded in a different way, was similarly conditioned on his respect for evangelical liberty of the Christians. This relates directly to what Janet Coleman called „the individualization of the location of *potestas*"[48] According to McGrade, it was the ambition of the 14th century scholarship represented by Godefroid of Fontaines, John of Paris, as well as William of Ockham to equate corporations with *corpora* comprising them, rather than as autonomous entities which bestow freedoms upon individuals through their participation.[49] Ockham's objective was to demonstrate that individuals have powers of various kinds before

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[41] POKORNÝ, Petr. Rané křesťanství…, p. 39-40.

[42] GÁL, Gedeon et al. William of Ockham, 1967-1988. *Opera philosophica et theologica*. Gedeon Gál. St. Bonaventure, N. Y.: The Franciscan Institute, pp. 319-321 as cited in KAYE, Sharon. William of Ockham (Occam, c. 1280—c. 1349). *Internet Encyclopedia of Philosophy*. Available at: https://iep.utm.edu/ockham/.

[43] HUTSON, James H. The Emergence of the Modern Concept of a Right in America…, p. 192.

[44] HUTSON, James H. The Emergence of the Modern Concept of a Right in America…, p. 192.

[45] TIERNEY, Brian. *The Idea of Natural Rights*…, p. 176.

[46] TIERNEY, Brian. *The Idea of Natural Rights*…, p. 183.

[47] TIERNEY, Brian. *The Idea of Natural Rights*…, p. 184.

[48] COLEMAN, Janet. Dominium in Thirteenth and Fourteenth Century Political Thought and its Seventeenth-Century Heirs: John of Paris and Locke. *Political Studies*, 1985, Vol. 33, No. 1, p. 94.

[49] COLEMAN, Janet. Dominium in Thirteenth and Fourteenth Century Political Thought…, p. 94.

anyone or any political structure or arrangement gives it to them.[50] The Church adjudicating on property rights of its members? On whose authority!?

Decades later, Jean Gerson (1363-1429) defines individual rights in continuation with Ockham's own definition, as an immediate faculty or power pertaining to anyone according to the dictate of right reason.[51] Unlike Ockham or Marsilius of Padua (and later on Vitoria and Suárez), Gerson did not offer this definition of *ius* alongside its alternative definitions as a rule or as the object of justice (Ockham wrote of three types of natural right).[52] Gerson argued that *ius* was enjoyed by both rational and irrational creatures by virtue of the fact that they had being and goodness from God. However, as Tierney expounded in his book, Gerson thought that humans enjoyed natural rights in a different way from the rest of created beings because, unlike them, humans are able to participate on divine reason. As rational beings, they can discern universal principles of good, and, from those, derive more particular rules of conduct.[53] As rational beings, men do not need the Church to „hold their hands", as it were, on their path to renew themselves. Individual humans have the power, the right, to strive for perfection of their souls in accordance with reason.[54] To pursue freely "the spiritual life of the soul," each individual needed to be endowed with certain inalienable rights.[55]

Both Ockham and Gerson understood human individuals as essentially free, rational, responsible for their own actions and for their own relationship with God. In fact, Ockham believed individual conscience - formed by sincere faith and rational thought - to be the highest authority on Earth, trumping even the temporal and the ecclesiastical power, which can never superpose themselves over free and rational beings. It would mean violating man's God-given liberty and rendering the power illegitimate, i. e. without authority.[56] Perhaps this is what prompted De Lagarde's belief that Ockham introduced „an individualist microbe" into medieval thought; he found in Ockham's thought „a zone of human autonomy" where, because nothing was prohibited, all was licit, and where human freedom could be exercised without restraint.[57] Was Ockham's radical thinking individualistic?

Brian Tierney glosses over De Lagarde's accusation by emphasising that Ockham's „defense of rights was always balanced by a concern for the common good or common utility"[58] by which he means to say that for Ockham respecting rights is tantamount to serving the community as a whole, rather than pursing private advantage. Ockham thought that „the pope's authority extended to everything necessary to uphold the faith and the common good

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[50] COLEMAN, Janet. Dominium in Thirteenth and Fourteenth Century Political Thought…, p. 94.

[51] TIERNEY, Brian. *The Idea of Natural Rights*…, p. 210.

[52] PAPPIN, Gladen J. Rights, Moral Theology and Politics in Jean Gerson. *History of Political Thought.* 2015, Vol. 36, No. 2, p. 241.

[53] TIERNEY, Brian. *The Idea of Natural Rights*…, p. 228.

[54] TIERNEY, Brian. *The Idea of Natural Rights*…, p. 288.

[55] TIERNEY, Brian. *The Idea of Natural Rights*…, pp. 233-235.

[56] POKORNÝ, Petr. Rané křesťanství…, p. 54.

[57] TIERNEY, Brian. *The Idea of Natural Rights*…, p. 196.

[58] TIERNEY, Brian. *The Idea of Natural Rights*…, p. 189.

„saving the rights and liberties of others granted to them by God and nature.'"[59] And since the pope can sometimes interfere with natural rights to defend the church against some extreme peril, it seems to Tierney that, „for Ockham, common utility prevailed over private rights in the last resort."[60] The talk of natural rights making concessions to common utility does not sound uncommon to modern ears. Perhaps for this reason we should proceed with caution. Could it be that William of Ockham succeeded in rendering the individual so independent as to almost make him isolated, protected by the wall of his natural rights? Tierney did not say enough to defuse De Lagarde's accusation.

We can learn more in A. S. McGrade's monograph dedicated to Ockham's political thought. McGrade reiterated Ockham's major concern for the individual who was a master of his own actions and life.[61] At the same time, he thinks we should not overlook the continuing ideal of communal wholeness, which in Ockham's reformist thought translated into „a corporatism of human solidarity"; a person may be bound by some substantial moral obligations to the community and may even be asked to offer her possessions for the use by those in extreme need.[62] While reducing corporations into a group of individuals with one index finger, Ockham bound the individuals by social responsibility with the other. He thus attempted to shift „the center of gravity in human affairs from institutional structures to the broader context of a community of free individuals."[63]

I believe we can make the same deduction from Ockham's discussion of the formation of collective opinions, which bears witness either to a high degree of solidarity in Ockham's society or to his naïveté about it. If Coleman's interpretation of Ockham, that „any whole is the summation of its individual parts, willing what is for the public good", is right, then we are not witnessing the same kind of collective will-formation that we see in Lockean philosophy. For Ockham, the unity of the body of individuals is achieved by their reasoning to the same conclusions about the common utility.[64] Ockham may have written instead about collective interest, a summation of private interests, as others did after him, interest qua stake. But he wrote about opinions, about individual wills directed towards the common good. The individual parts are „willing what is for the public good", not their own individual good, their own interests.[65] It is not that the public interest is all

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[59] TIERNEY, Brian. *The Idea of Natural Rights*…, p. 191.

[60] TIERNEY, Brian. *The Idea of Natural Rights*…, p. 191.

[61] MCGRADE, Arthur S. *The Political Thought of William Ockham: Personal and Institutional Principles*. Cambridge: Cambridge University Press, 2002, p. 221.

[62] MCGRADE, Arthur S. *The Political Thought of William Ockham…,* p. 222.

[63] MCGRADE, Arthur S. *The Political Thought of William Ockham…,* p. 225.

[64] COLEMAN, Janet. Ockham's Right Reason and the Genesis of the Political as 'Absolutist'. *History of Political Thought*. 1999, Vol. 20, No. 1, p. 49. I always enjoy discovering the echoes of Ockham's reasoning in contemporary writings. MACINTYRE, Alasdair. *After Virtue: A Study in Moral Theory*. University of Notre Dame Press, 1981, p. 72.

[65] A 21st century reader who finds this image naïve may be reminded of Brian Tierney's proposition: „If we want to understand origins of a doctrine of natural rights, we must learn to understand a medieval religious tradition and a medieval society where the values of individualism and of community were equally cherished." TIERNEY, Brian. *The Idea of Natural Rights*…, p. 235.

individual interests taken together and weighed against one another; it is the amalgamy of all the different opinions about what constituted common good, what is beneficial for the community. „The communal or political life is therefore made up of interactions between individual persons of the community, all willing, by right reason, the same common good," Coleman concludes.[66]

Similarly Jean Gerson, despite his focus on the individual, did not equate rights with what benefits the right-bearer. He thought that every *facultas* inhering in the individual corresponds to something *ius* by the dictate of right reason.[67] Rights do not stand on their own and the science of theology must decide „all lower rights according to the order and end of charity and unity."[68] In this moral world, the purpose of law cannot be the protection of personal liberty from regulation, as we see in Hobbes later.[69] In line with the Aristotelian thought, Gerson believed that men can only lead fulfilled lives within a community.

6. Individualism of rights in late scholasticism (School of Salamanca)

In early 16th century, Ockham and Gerson's ideas were still circulating in the University of Paris. When discussing conciliarism and the limits of papal authority, late medieval scholastics (Almain, Mair and Summenhart) put to use ideas used by older generations of church reformers. They were in turn widely read by the second scholasticism, concentrated around the School of Salamanca. Its long introduction is mandatory because - though few students will recognize the names De Soto or Suárez more readily than the names of Hobbes and Locke[70] - their writings on natural law enjoyed admiration (and their universities the influx of eager students) all over Europe.[71] They imposed themselves with particular force in Germany and Netherlands.[72]

The School of Salamanca refers here to the school of thought concentrated around the University of Salamanca during the golden age of the Iberian peninsula. Rooted in the intellectual work of Francisco de Vitoria (1483–1546), the school was formed by theologians such as Bartolomé de las Casas (1484-1566) and Domingo de Soto (1494–1560) and latter jesuits like Luis de Molina (1535–1600) and Francisco Suárez (1548–1617). The theologians

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[66] COLEMAN, Janet. Dominium in Thirteenth and Fourteenth Century Political Thought…, p. 49-50.

[67] PAPPIN, Gladen J. Rights, Moral Theology and Politics in Jean Gerson…, p. 248.

[68] PAPPIN, Gladen J. Rights, Moral Theology and Politics in Jean Gerson…, p. 261.

[69] PAPPIN, Gladen J. Rights, Moral Theology and Politics in Jean Gerson…, p. 250.

[70] For the reasons of language, too, no doubt.

[71] Some of them could already spread their work thanks to the invention of the printing press. Note that the increase in administration in 16th century Spain opened new positions for educated individuals. Education was increasingly regarded as a means of upward social mobility and so universities grew in importance. ALVES, Andres A. MOREIRA, José. *The Salamanca School*. Bloomsbury, 2009, p. 4. Hutson certainly overstates a little when he asserts: „the influence of the Spain's thinkers matched the power of her kings." HUTSON, James H. The Emergence of the Modern Concept of a Right in America…, p. 193.

[72] Villey as quoted in HUTSON, James H. The Emergence of the Modern Concept of a Right in America…, p. 193.

were expected to address not only the long-standing questions (such as conciliarism, free will, usury etc.), but also a myriad of novel ones.[73] Consider the context. During Siglo de Oro (1492-1659), Iberian peninsula enjoyed a long period of peace and relative prosperity. The formation of absolute monarchies in Europe had begun. The muslims and Jews had to flee or be killed while slaves, gold and precious artefacts kept pouring in from the New World (later on actually not to the advantage of the heavily indebted Castillian Kingdom).[74] The Spanish conquest sparked the important debate about moral subjectivity of the barbarians. As for the spiritual power, the Reformation replaced schism as the main issue of the Church. Indeed, Spanish Dominicans had to spill a lot of ink on Lutheran and Calvinist heresy. Interestingly, their strong protest against the divine right of kings and especially Henry VIII with his own Church turned into the defence of the popular origin of political power (the power is derived from the people, they have the right to take it back) echoed in the contractarian tradition.

Francisco de Vitoria taught his students that man alone among creatures is an intellectual and, therefore, moral agent.[75] His ability to will in this or that direction according to his own vision of a good life[76] makes him, on the one hand, fundamentally free, and, on the other hand, liable for his own actions.[77] Since men were created in the image of God, they are masters of themselves and cannot be coerced in their beliefs.[78] Vitoria readily defended individual rights derivable from natural law that were threatened in his time, like parental right not to have one's child baptized.[79] At the same time, however, he agreed with Aristotle on the existence of natural slavery.[80] Against Francisco de Vitoria and Juan de Sepúlveda, who maintained that the Indians were a degraded people, naturally made for slavery, Bartolomé de las Casas (who lived and worked among the Indians for twenty years) argued for the natural liberty (slavery being an accidental human artefact) of the Indians, described by Las Casas as people with „excellent, subtle, and very capable minds" who surpassed even the ancient Greeks and Romans in the use of natural reason.[81] For Las Casas, humans are defined exclusively by their rationality, and so any rational peoples are humans, created by the single

[73] Sometimes called „Second Scholastics", they differed from their medieval predecessors in their readiness to mobilize widespread knowledge of philosophy and theology to solve actual (and not imagined) social and ethical problems of the time. „Applied scholasticism", we can say, like today's think-tanks. For more context, see the introduction to *The Salamanca School* (cited above).

[74] GALEANO, Eduardo. *Open Veins of Latin America.* Monthly Review Press, 1997.

[75] BAIN, William. Saving the Innocent, Then and Now: Vitoria, Dominion and World Order. *History of Political Thought*. 2013, Vol. 34, No. 4, p. 598.

[76] Alves and Moreira recount how Vitoria explicitly objects to local lords enacting limitations on the people's liberty to hunt wild animals even if it is claimed that the limitations are in the interest of the subjects (e.g. by helping them not to waste their time), because he regards the general preservation of liberty as taking precedence over the private good in a setting such as this one. ALVES, Andres A. MOREIRA, José. *The Salamanca School*…, p. 42.

[77] BAIN, William. Saving the Innocent..., p. 597. We can see very similar reasoning already in Ockham's defence of nominalism.

[78] BAIN, William. Saving the Innocent…, p. 602.

[79] ALVES, Andre A. MOREIRA, José. *The Salamanca School*…, p. 46.

[80] BAIN, William. Saving the Innocent…, p. 601.

[81] TIERNEY, Brian. *The Idea of Natural Rights*…, p. 273.

God, the brothers of Christians in Europe and elsewhere.[82] Francisco Suárez believed that men can learn what is right by nature if they consult their conscience. He who is led by this natural law is - as we would say - autonomous.[83] Suárez places individual liberty on the scale of man's intellect: humans are as free as much they listen to the „right reason" (the old idea of *recta ratio*) and take responsibility for their mistakes. Perhaps Suárez was convinced (although I found no support for this contention) that men are not born free - they actually choose to be free with the power of their intellect. Contrary to the Lockean view, individuals are not contracting parties of *pactum societatis* because for Suárez „the force of natural law alone is… not in individuals."[84]

Alves and Moreira agree that „the late scholastics strongly asserted that the original condition[85] of individuals was one of natural liberty, independence and equality in the sense that no man was presumed to hold political power over another."[86] But what of individual *rights*? It may be objected that the ideal of personal autonomy tells us nothing about man's legal status as a rights-holder. To complete the picture, we must consider the argument of self-defence. Possibly the strongest case of the first rights theorists was related to the right to self-preservation.[87] Given that man's body and soul is in God's hands, it is a sin to take one's own life. Helpfully, God saw it fit to equip humans with the instinct of self-preservation. No one can be presumed to act contrary to this instinct, including prisoners on death row who attempt to escape.[88] This is in accordance with the older and more coarse version of natural law that permitted the instinctive behaviour (e.g. self-defence) and forbade the opposite (e.g. homosexuality). To dispute the right to self-preservation was unimaginable for any scholar who wanted to be taken seriously. No king has the right to kill or torture or dispossess his subjects, no subjects are obligated to tolerate it. Members of the School of Salamanca reasoned even further. Human beings unlike any other creatures were created in the image of God, with the ability to will and act rationally. Hence they are masters of themselves.

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[82] TIERNEY, Brian. *The Idea of Natural Rights*…, p. 273.

[83] IZBICKI, Thomas. KAUFMANN, Matthias. School of Salamanca. *Stanford Encyclopedia of Philosophy*, Cited 5. 4. 2022. Available at: https://plato.stanford.edu/entries/school-salamanca.

[84] WARD, Lee. *The Politics of Liberty in England and Revolutionary America*. New York: Cambridge University Press, 2004, p. 43.

[85] Note that members of the School of Salamanca technically did not postulate any „state of nature". Since men are naturally social and political creatures (per Aristotle), there never was any pre-political condition. There only had to be transferral of power to the political authority (*pactum societatis*). The state of nature in Christian theology was distinguished from the state of grace, rather than the civil society. Divine grace, not the right kind of human government, was needed for remedying the deficiencies of the state of nature. STRAUSS, Leo. *Natural Right and History*…, p. 184. The „original condition" here refers to universal *polis,* the *civitas maxima,* before it was divided into nations and altered by human laws, in a similar manner to pre-Hobbesian ancient English constitution, and in principle similar to Kelsen's Grundnorm, which had a normative power although it never had been conventionally accepted. For Vitoria, see HIDALGO, Adolf S. Vitoria y Suárez: El Derecho Internacional en el Tránsito a la Modernida. *Anales de la Cátedra Francisco Suárez*, 2017, Vol. 51, pp.163-182.

[86] ALVES, Andres A. MOREIRA, José. *The Salamanca School…,* p. 41.

[87] John Locke was witty enough to develop it into the doctrine of workmanship that stands behind the justification of property rights.

[88] AMEZÚA, Luis C. Derecho de evasión y principio de humanidad: Notas de Francisco Suárez sobre la obligación penal y la fuga de presos. *Anuario de Filosofía del Derecho*, 2015, Vol. 31, p. 105.

Self-preservation is not only instinctive, it is an exercise of man's natural dominion over his life. Such reasoning is grounded „in the affirmation of a sphere of individual liberty and autonomy that was independent and above the legitimacy of positive law and the political power of rulers."[89] This is in my opinion an important milestone in the quest for individual liberation: the right to self-preservation that is no longer derived from the act of creation, but from man's mastery over himself.[90]

Much more could be said about the relationship between self-mastery and natural rights.[91] Let us add one more fact pointed out by William Bain. For the father of the tradition, Vitoria, even self-mastery, the basis of man's freedom, requires living in a society. After all, the ability to will rationally will atrophy quickly without the traffic of human relations; „for there is little point in developing habits of conduct when extreme isolation averts the possibility of giving or receiving injury."[92] In the 17th century, Suárez recalls the Aristotelian observation that men naturally and rightly crave to live in a community.[93] Since men are naturally social and political creatures, there never was any pre-political condition. Families, clans or tribes are associations men naturally find themselves in as long as they interact. It is this structurally differentiated political community, and not individual agents, who may see it fit to transfer some of its powers to the state authority.[94]

I consider demonstrated that the members of this tradition showed genuine concern for natural rights of the individual (Christian or non-Christian, in fact), much as they did not always put them in the center of scholarly attention. Individual rights, however, are simply *inseparable* from a proper understanding of the common good and as such the two cannot conflict.[95] Just what the „proper" understanding of the common good amounted to was naturally open to debate then as it is open today. For example, Höpfl mentions „survival of the polity, peace, and justice" as uncontested components among those scholars.[96] Similarly, Howell A. Lloyd identified „peace, avoidance of discord, promotion of ‚concord and unity' within the commonwealth as a whole."[97] Perhaps today we could deliberate on the meanings of these components and include still others. The bottomline is that for late scholastics

[89] ALVES, Andres A. MOREIRA, José. *The Salamanca School…,* p. 43.

[90] Let us also not forget about Gerson's belief that the sun has a *right* to shine and wind has a *right* to blow because he conceived of subjective us as *facultas* in accordance with the dictates of right reason where right reason (*ratio recta*) represents the natural order of things, including animals or celestial objects. Vitoria and his followers „humanized" Gerson's subjective *ius* when they redefined it as a human capacity.

[91] For Luis de Molina, man's dominion over his own liberty means that he can alienate it for any kind of return - and I do not mean to touch upon the huge debate over voluntary slavery here.

[92] BAIN, William. Saving the Innocent…, p. 603.

[93] LLOYD, Howell A. Constitutionalism. In BURNS, James. H. GOLDIE, M. *The Cambridge History of Political Thought, 1450–1700*. Cambridge: Cambridge University Press, 2008, p. 294.

[94] SKINNER, Quentin, *Liberty before Liberalism*…, p. 155, OAKLEY, Francis. Christian obedience and authority, 1520–1550. In BURNS, James. H. GOLDIE, M. *The Cambridge History of Political Thought, 1450–1700*. Cambridge: Cambridge University Press, 2008, p. 159.

[95] ALVES, Andres A. MOREIRA, José. *The Salamanca School…,* p. 44.

[96] HÖPFL, Harro. *Jesuit Political Thought: The Society of Jesus and the State, c. 1540–1630*. Cambridge: Cambridge University Press, 2004, p. 285.

[97] LLOYD, Howell A. Constitutionalism…, p. 264.

natural rights cannot stand on their own as individualistic claims. They belong to everyone as members of political communities (even in primitive nations) and they apply as long as they remain coherent with the common good, which is the proper end of a political society.[98] In this moral world, the subjective ius is the apportioned piece of objective ius: of property, peace and other common goods according to objective ius. Whenever the private utility and the common good cannot coexist, the subject will never be *in ius*.[99]

7. Individualism of rights in Calvinist tradition

Meanwhile, further north, some theologians could not care less for ancient scripts treasured in the monasteries, nor for the competitions in logics and dialectics that surrounded them. The spiritual leaders of the Protestant Reformation—Martin Luther in Germany, Richard Hooker in England, John Calvin in French Switzerland - insisted that the Church had more pressing matters to resolve: its loss of sight of the core articles of Christian faith.

Like William of Ockham, Calvinists stressed the role of individual conscience in the economy of salvation.[100] As Althusius wrote: "The natural law imparts to all men a freedom of the soul or mind (libertas animi) […] This is an unfettered power to want and to choose…to evaluate, to desire, and to make choices," which cannot "be hindered by a command or order, by fear or compulsion."[101] Calvin insisted on the liberty of conscience as a necessary condition for obeying the Decalogue.[102] This means that our spiritual liberty has instrumental value: we obtain it in order to obey God.[103] Our spiritual liberty translates into the freedom from the state's religious oppression. The Bible makes it clear that God alone can command the conscience, so, for the magistrate or anyone else to invade the sanctuary of conscience is to impugn the sovereignty of God.[104] Nothing that God requires in the Decalogue may the magistrate forbid; nothing that God forbids in the Decalogue may the magistrate require.[105] Whereas John Witte hints at the possibly universal notion of natural rights, since some Calvinists preached „toleration of Protestants, Jews, Catholics, and even peaceable "atheists" and "heretics" in the community,"[106] the readiness of early modern Protestants to tolerate Jewish or Muslim practices can hardly be underestimated.

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[98] LLOYD, Howell A. Constitutionalism…, p. 262-264.

[99] LLOYD, Howell A. Constitutionalism…, p. 296.

[100] WITTE, John. *The Reformation of Rights: Law, Religion and Human Rights in Early Modern Calvinism*. Cambridge: Cambridge University Press, 2007, p. 77.

[101] WITTE, John. *The Reformation of Rights…*, p. 77.

[102] WITTE, John. *The Reformation of Rights…*, p. 47, RYAN, Alan. *The Making of Modern Liberalism*. Princeton: Princeton University Press, 2012, p. 31.

[103] WITTE, John. *The Reformation of Rights…*, p. 62.

[104] WITTE, John. Calvinist Contributions to Freedom in Early Modern Europe. In SHAH, Timothy S. HERTZKE, Allen D. *Christianity and Freedom: Volume 1: Historical Perspectives*. Cambridge: Cambridge University Press, 2016, p.17.

[105] WITTE, John. Calvinist Contributions to Freedom in Early Modern Europe…, p. 24.

[106] WITTE, John. Calvinist Contributions to Freedom in Early Modern Europe…, p. 17.

When magistrates respect our religious liberty, we are free to show love and obedience to God by carrying out commandments stated in the Scripture. For instance, we are free to marry and observe Sabbath. We can also choose not to kill, not to steal, not to swear false oaths, dishonour our parents etc. By prescribing a different conduct, the state violates natural rights of its subjects. In effect, Decalogue was treated as a modern bill of rights.

The list of rights Calvinists were able to produce by reading Decalogue and other parts of the Scripture was unprecedentedly long (albeit normally scattered throughout their work). John Calvin referenced „the right to enjoy and use what one possesses," „the right to compensation for work," „the right to inhabit," or „the right to adoption".[107] Theodore Beza advocated rights to religion, life, property, marriage, parentage, and reputation.[108] Apart from „the natural freedom of the heart, soul and mind,"[109] Johannes Althusius insisted on „the right to natural life" and „bodily liberty and protection", „the right to purity and chastity", „the right to property", „to the fruits of his labours" and „to goods that he uses and enjoys", „the right to a good reputation", „the right to a family" and many more which cannot be listed here.[110]

As for Calvin himself, there is admittedly a profound and painfully bitter disjunction between the subject's rights and autonomy. Almost as soon as Calvin took up his office in Geneva in 1537, he started to implement the theocratic vision of the city that he proposed in his *Institutio Christianae Religionis* (1536). By inspiring fear in the inhabitants of Geneva, Calvin (with Theodore Beza as his student) was able to control law-making, the executive, commerce and other aspects of public and private life and see to it that it corresponds to his personal reading of the Scripture. Those who complied got to „enjoy" their rights, whereas those who deviated from it were persecuted. The old tyranny of popes and emperors was replaced by a new kind of tyranny from the Protestant pulpit.[111]

Calvin's theocratic experiment in Geneva should keep us alert to the practical implications of Calvinist natural law but I do not think it means we should abandon it. Let us remember that none of the traditions analysed here will satisfy the modern ideas of freedom and autonomy. John Locke, the celebrated father of classical liberalism and a Calvinist reader himself, too, ultimately defended only a selective kind of toleration, a selective kind of liberty, whilst invocating natural rights. It is sufficient that there was a group (e.g. men of property or Calvinist Christians) who enjoyed natural rights superior to positive law. By way of another innovation, latter Calvinists were contractualists who defended the right to resist. Goodman, Beza and Althusius all agreed on the existence of a covenant between rulers and their subjects, whose foundation is the divine and natural law and which guaranteed natural rights.[112] Should subjects transgress on their contractual duties, rulers are right to persecute and punish them, but should the rulers abuse their powers, their subjects have a right to

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[107] WITTE, John. *The Reformation of Rights…*, p. 57.

[108] WITTE, John. *The Reformation of Rights…*, pp. 128ff.

[109] WITTE, John. *The Reformation of Rights…*, p. 171.

[110] WITTE, John. *The Reformation of Rights…*, pp. 170-181.

[111] ZWEIG, Stefan. *The Right to Heresy: Castellio against Calvin*. New York: The Viking Press, 1936.

[112] WITTE, John. Calvinist Contributions to Freedom in Early Modern Europe…, pp. 12-15.

resist.[113]

Was Calvinist conception of a right individualistic? The sheer focus on a number of individual rights and the political covenant certainly points in that direction. John Witte, who served as my principal source of knowledge about the tradition, says very little on the topic. Mark Valeri describes Calvin's effort to promote Christian virtues in the context of economic freedom.[114] While attentive to the potential of commerce to foster social harmony and civility, which might be translated into the natural right to contract and trade freely, Calvin - as a member of Genevian tribunal - gave effect to the stipulations in the Scripture that forbade deceit and usury (Exodus 22:25).

Nico Vorster's analysis shows the strong presence of dependence, mutuality and sharing in Althusius' political work, too. Althusius proposed the so-called „symbiotic political theory." It starts again with the Christian-Aristotelian observation that God has created all human beings as moral, loving, communicative, and social beings, whose lives are most completely fulfilled through symbiotic relationships with others in which they can appropriately share the things they value.[115] This poses moral constraints on how natural rights may be exercised. „Human beings are not born to themselves; their country and friends have the right to claim a share in their lives."[116] Right to property, for instance, is guaranteed to everyone, but one ought to bring useful and necessary goods to social life for the common benefit of all symbiotes,[117] rather than exclude others from using all his goods. Calvin as well preached against practices that misused one's neighbour as an object of gain, such as the practice of hoarding grain for profit.[118]

Free choice of vocation is a right, too, but the right should be executed in a manner that mirrors abilities and talents received from God[119] and aims at contributing community through useful occupational outputs.[120] „A human being who is not willing to share his gifts and services with the commonwealth has no value for society."[121] This is basically just reiteration of Calvin's ideas decades earlier, „that people were to select their vocation or trade not for its potential profitability but for its usefulness to the community. To illustrate, those who were able-bodied but relied solely on lending money for profit, who ran taverns that catered to profligate wine bibbers, or who inherited benefices and took fees from the operation of Catholic institutions, had chosen their callings selfishly and poorly. One should

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[113] WITTE, John. Calvinist Contributions to Freedom in Early Modern Europe…, p. 13.

[114] VALERI, Mark. Religion, Discipline, and the Economy in Calvin's Geneva. *The Sixteenth Century Journal.* 1997, Vol. 28, No. 1.

[115] WITTE, John. *The Reformation of Rights*, pp. 182, 206, LLOYD, Howell A. Constitutionalism…, p. 288.

[116] VORSTER, Nico. Symbiotic Anthropology and Politics in a Postmodern Age: Rethinking the Political Philosophy of Johannes Althusius (1557-1638). *Renaissance and Reformation / Renaissance et Réforme*. 2015, Vol. 38, No. 2, p. 33.

[117] VORSTER, Nico. Symbiotic Anthropology…, p. 36.

[118] VALERI, Mark. Religion, Discipline, and the Economy in Calvin's Geneva…, p. 138.

[119] VORSTER, Nico. Symbiotic Anthropology…, p. 34.

[120] VORSTER, Nico. Symbiotic Anthropology…, p. 36.

[121] VORSTER, Nico. Symbiotic Anthropology…, p. 33.

always choose a vocation that "serves his neighbours," so "that the exercise of his art and his trade" profits all the "members of the body."[122] In summary, the Scripture both assigns rights and advises on how they should be exercised.

As for the social contract, Calvinists did not argue, like Spanish scholastics did, that it was entered into by the „mystical body" of all subjects and the ruler, but neither did they postulate the kind of Hobbesian/Lockean agreement that created the state from atomised individuals. Man's natural state is political, there is no state of nature and hence no need to form a civil society. But within civil society - Beza argued as one of the first - people have the right to elect rulers. Once elected, rulers, their subjects and God as the third party and judge dispose of certain rights and duties. A more complete covenantal theory was later developed by Althusius. According to him, each person consents to join various associations to realize his full capacities and obtain the things necessary for natural, civil, and moral life.[123] States then develop gradually from families to tribes to cities to provinces to nations to empires. „Each new layer of political sovereignty is formed by covenants sworn before God by representatives of the smaller units, and these covenants eventually become the written constitutions of the polity."[124] In other words, Althusius viewed political community as a federation of smaller associations - families, guilds, townships - bound above all by natural law.[125] Rather than being simply a concomitant social phenomenon unrelated to the constitutive relationship between the individual and the state, each demands loyalty from the individual who participates in it.

All in all, it appears to me that the Calvinist ideas on human nature, state and society are missing the characteristic traits of the individualistic conception of rights described above.

Conclusion

I analysed doctrines defended by several natural law thinkers pertaining to late medieval scholasticism, early modern scholasticism, and Calvinism, in search for an individualist conception of rights. I declare that it was not my intention to conflate their highly diverse theories into one and I am fully aware of the amount of space a careful analysis of but one of them would require. Nonetheless, I conclude that on a sufficiently abstract level, they shared the same approach to natural rights, one that could be called „Christian-Aristotelian". From William of Ockham in early fourteenth century to Johannes Althusius in early seventeeth century, Christian thinkers defended rational man's innate freedom from absolute and arbitrary power. In Hohfeldian terms, they thought of it as a „immunity" whose violation by those in power amounted to wronging either man, or God, or both.

Man's propensity for freedom could only be fully realized in a political community. Man is

[122] VALERI, Mark. Religion, Discipline, and the Economy in Calvin's Geneva…, pp. 136-137.

[123] WITTE, John. *The Reformation of Rights…*, p. 183.

[124] WITTE, John. Calvinist Contributions to Freedom in Early Modern Europe…, p. 16, LLOYD, Howell A. Constitutionalism…, p. 289.

[125] LLOYD, Howell A. Constitutionalism…, p. 290.

both inclined (natural law) and ordained (divine law) to live in a community interwoven with fundamental social ties: family, friendship, neighbourliness and so on. If superheroes use their powers for bad ends, they may become villains, yet still retain their powers. But this is exactly what Christian traditions tried to avoid when they called subjective *ius* „a power in accordance with the dictates of right reason." Natural rights empower someone as long as one's position remains in accordance with natural law. For centuries, „rights had been anchored in and derived from the natural law of God's universe."[126] So the exercise of one's liberty in defiance of communal values has no normative force. For this reason, if we travelled back to late medieval or early modern period, we could engage the philosophers in a discussion about the possible conflict between an individual interest (to hoard grain for winter) and collective interest (to have enough grain for communal poultry), but we would lose them if we juxtaposed „natural rights versus common good". Note that I am not defending the Christian conception of the good life. But whether one considers these Christian „seeds" as good (like Brian Tierney) or not, one must arrive at the inescapable conclusion that - on the conceptual level at least - there was „liberty before liberalism",[127] natural rights conceptions before individualistic natural rights conceptions.

I can see how some readers might be utterly unpersuaded, repelled even, by what they deem a feeble attempt to find liberal achievements of freedom and autonomy in old religious doctrines penetrated by moral absolutism and collectivism, invasions to privacy and social control of personal discipline based on ideological grounds. I assure these readers that I want to revive this kind of law and society no more than them. Each political community will find itself somewhere along the line between unrestrained individualism and over-constraining collectivism. Many would place liberalism closer to the former edge, with its hard fought values of dignity, personal autonomy and ideological neutrality. Ridding ourselves of the I-conception of rights may draw us nearer the collectivist side of the scale and leave us balancing between the individual and the collective, at a point we may call communitarian.

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[126] GALIE, Peter J. BOPST, Christopher. KIRSCHNER, Bethany. *Bills of Rights Before the Bills of Rights: Early State Constitutions and the American Tradition of Rights, 1776-1790*. Palgrave Macmillan, 2020, pp. 36-37.

[127] SKINNER, Quentin, *Liberty before Liberalism*…, supported by WITTE, John. *The Reformation of Rights*…, p. 23.