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REASON, WILL, FREEDOM: NATURAL LAW AND NATURAL RIGHTS IN
LATER SCHOLASTIC THOUGHT

PhD Thesis Abstract

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I. SUBJECT AND AIM OF THE RESEARCH

The starting point of my thesis is the assumption that among other reasons the problem of the relationship between natural law and natural rights is dividing historians of ideas and provides them with false ambiguities because the profound examination of the transitory period between the thirteenth century, commonly regarded as the golden age of scholasticism, and the seventeenth century marking the beginning of modern natural law theory (the period between St. Thomas Aquinas and Hugo Grotius) has been neglected up to the recent times; although these three and a half centuries are essential regarding the evolution of the idea of natural rights.

Accordingly, the chief aim of my research was to scrutinize in detail the natural law theories and natural rights doctrines of later Scholastic thought. This period being, however, not only for a long time neglected but also itself rather long and particularly eventful in this respect, in order not to compromise the thoroughness of the examination, I was compelled to limit if not my researches, then my thesis to three figures of Scholasticism whom I consider central. The choice of the first author, Saint Thomas Aquinas, does not deserve lengthy explanation (even if his work, strictly speaking, precedes our period), as he is commonly regarded as giving the paradigmatic formulation of medieval natural law theories; however, his conception of natural law is not complemented with a doctrine of natural rights. William Ockham's *oeuvre* comes to the fore because he is considered by certain commentators as the "father" of the concept of subjective rights, and his voluntarist theory of natural law can be interpreted as an antithesis of Aquinas's rationalist theory. Finally, at the end of the 'Second Scholasticism' and of the examined period, Francisco Suárez endeavoured a second "Thomist" synthesis, combining rationalist and voluntarist elements with a strong doctrine of natural rights.

II. RESEARCH METHOD

Contrary to former indifference, historical research in this field is definitely blossoming in the last decades. This tendency reached its peak in Brian Tierney's and Annabel Brett's overarching, thoroughly – and independently – written monographs. These works discuss the continuous medieval evolution of the idea of natural rights in details from twelfth-century canon law to the Second Scholasticism of the sixteenth and seventeenth centuries.¹ This slow, organic development of natural rights doctrines is in sharp contrast with the discontinuity and dialectic between the intellectualist and voluntarist theories of natural law.

We clearly get the impression from these scientific works that modernity inherited not only the concept of natural law but also of natural rights from scholasticism – so as to transform it into its own image. This picture fundamentally contests the very common view that the idea of natural rights is a distinctively modern phenomenon that first appeared in the seventeenth century, as a political-legal consequence of the rise of modern science and market economy and the philosophical individualism of the age.

Accordingly, the analysis and comparison of the different scholastic – objective and subjective – usages of the term '*ius*' appears to be a much more legitimate and fruitful approach than the quest for the medieval antecedents of the "modern" concept of natural rights. In this connection, I join Brett's opinion who sees her book *not* as "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 medieval and renaissance scholastic discourse."

¹ Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law, 1150–1625* (Atlanta: Scholars Press, 1997); Annabel Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge: University Press, 1997).

My research required extensive use of the original Latin texts, as well as their English translations (if available), and the consultation of the secondary sources in different modern languages, primarily English and French. This in turn necessitated intensive library work that I was able to carry out first and foremost during my two stays in Belgium, in the libraries of Facultés Universitaires Saint-Louis, Katholieke Universiteit Brussel and Katholieke Universiteit Leuven.

III. RESULTS OF THE RESEARCH

In Chapter I I examined certain aspects of Thomas Aquinas's legal philosophy. In Part 1 I presented a kind of 'conceptual algebra', describing Aquinas's different usages of the terms '*ius*' and '*dominium*' and their conceptual interrelations. Aquinas understands *ius* fundamentally and primarily as the *iustum*, i.e. right action. Secondly, he often uses *ius* to replace *lex*, which he conceives as a *rationis ordinatio*, a rational rule of human actions. The concepts of *ius* and *lex* are connected to each other in a relation of mutual causation. Thirdly, Saint Thomas sometimes uses *ius* – besides the above two objective meanings – in the subjective sense as well.

Dominium is closely connected in Aquinas with human rationality. The logically primary sense of *dominium* implies rule of reason over man's other capacities and *dominium sui* or self-mastery. The second sense of *dominium* extends this primary meaning by way of analogy to animals and material goods. Finally, Aquinas's understanding of *dominium* covers the relations of dominion or rule between man and man, too.

As regards the conceptual relation of *ius* and *dominium* as the rule of reason, the rationalism of Aquinas's moral philosophy clearly manifests itself both in connection with the primary and secondary senses of *ius*. As to the conceptual relation of *ius* and *dominium* as

property, in Aquinas's view natural law professes a 'benevolent neutrality' on the question of the mode of possession of material things, and private property is not a matter of natural right but belongs to the *ius gentium*.

In Part 2 I treated the complex question as to whether Aquinas had or could have the concept of natural rights. The first level of the question is whether the fact in itself that at times Aquinas did use *ius* in a subjective sense is enough to prove that Aquinas possessed the concept of natural rights. I answered this question, together with the great majority of historians of ideas, emphatically in the negative, and found John Finnis's ambitious attempt of reinterpretation of Aquinas's treatise on right and justice, in the final analysis, unconvincing. On a second level, it is undeniable that Aquinas's ideas are not incompatible with a subjective concept of right, and that consequently the *doctor angelicus* could have complemented his natural law theory with a doctrine of natural rights. Still, he deliberately avoided to translate his conception of natural law and justice into the language of natural rights. This can be explained by the fact that there are essential elements of his system of thought, above all his consistent rationalism and Aristotelian holism, that seem to resist this translation. On the other hand, Aquinas could have significantly mitigated or eliminated the potential tension between *ius* as a subjective right and *ius* as the right action with the adoption of the canonistic doctrine of 'permissive natural law', but he did not assimilate this idea into his legal philosophy.

Chapter II was devoted to William Ockham. Part 1 examined the philosophical-theological grounds of Ockham's legal philosophy. Part 1.1 discussed the fairly problematic relationship between his philosophical and political thought. This problem can be considered as a watershed dividing the two fundamental interpretative approaches to Ockham's legal

philosophy. To answer this awkward question, first, it is evident that there is no strong break or strict discontinuity between Ockham's two intellectual periods. Secondly, already in his early philosophical and theological works Ockham sometimes related his nominalist metaphysical views to social and political phenomena. Thirdly, although Ockham rarely referred to his nominalist philosophical and theological doctrines in his political works, his metaphysical individualism, his peculiar, logician's way of thinking and some of his ethical and theological concepts are manifestly present in his political writings.

The fundamental difficulty in the interpretation of Ockham's moral philosophy, treated in Part 1.2, lies in the fact that it contains both voluntarist and rationalist elements: a divine command ethics and a non-positive moral science, which seem to be hard (if not impossible) to reconcile. On the one hand, following his own interpretation of the classical distinction between *potentia Dei absoluta* and *potentia Dei ordinata*, Ockham makes the moral order wholly contingent on God's will, and radicalizes the freedom of human will; on the other hand, he emphasizes the role of right reason which "in no case fails" and can discern *per se nota* (self-evident) moral principles. While the voluntarist elements of Ockham's moral philosophy seem to undermine the rationality and stability of natural law, a non-positive moral science appear to provide an adequate base for a natural law doctrine. Thus it is a fundamental question whether or not he is able to reconcile the voluntarist and rationalist elements of his theory. Ockham succeeds to achieve a certain unity in his "system" of ethics only by deciding all conflicts between will and reason in favour of the will: for instance, he maintains that it is always rational to obey a divine command, and affirms that human will may freely choose or reject whatever object the intellect presents to it.

In Part 2 I examined Ockham's theories of natural law and natural rights. In Part 2.1 I pointed out that as in his polemical works Ockham appears to exclude any 'operationalization' of the absolute power of God, and derives each of the three modes of

natural law he differentiates from an underlying assumption of human rationality, he is capable to give a more or less solid foundation to natural law. On the other hand, Ockham does not speak of eternal law, and equates natural law with divine law founded on the unrestricted free will of God. Furthermore, he denies that moral norms can be read off of human natural tendencies, and emphasizes that acts are good and just, or bad and unjust, not of their own nature or essence, but simply because God has prescribed or forbidden them. Taking everything into account, it can be concluded that by detaching natural law from the essence or nature of things and attaching it to divine law Ockham renders it ultimately positive. So, after all, for Ockham natural law is nothing but a particular manifestation of God's will. He seems to find a peculiar solution to reconcile divine will with human rationality: he conceives of natural law as a *tacit* or *implicit* divine command. If a natural law is not contained explicitly in the Scripture, it pertains to right reason to show us what God wills. The third mode of *ius naturale* described by Ockham is particularly important, since it constitutes a conditional, changing natural law, defines a zone of human autonomy, and it involves a tacit but significant shift of meaning from the objective to the subjective sense of *ius*.

In Part 2.2 I discussed Ockham's doctrine of natural rights. Ockham cannot be regarded as the "father" of the theory of subjective right, since the association of *ius* and *potestas* first occurred long before Ockham, in twelfth-century canonistic discourse, and appeared later in the Franciscan literature on evangelical poverty, too. On the other hand, it is a significant change that in the *venerabilis inceptor's* legal philosophy we can find but two meanings of *ius*. For Ockham *ius* can have either the objective meaning of prescriptive law or the subjective meaning of a licit power; the classical Aristotelian-Thomist concept of *ius* as right action thus vanishes.

Although the *doctor plus quam subtilis* cannot be considered “revolutionary” in a semantic sense, he proves to be an innovator in other ways. First, he is innovative in distinguishing carefully between *ius naturale* and *ius positivum* in the subjective sense. Secondly, Ockham raises for the first time the problem of the alienability of natural rights, which will later become of great importance for the natural rights theorists of the seventeenth century. He finds only one inalienable natural right, the right to sustain life (through the natural right of using). Thirdly, no one before Ockham places the right to institute a ruler in the context of natural rights. Fourthly, Ockham is the first in Western political thought to conceive of natural rights as limits to both temporal and spiritual power. Finally, it is a fact of paramount importance that Ockham transposed the concept of subjective rights from technical juristic discourse to the heart of philosophical-theological debates. Ockham lays particular stress on two natural rights, the right to appropriate things and the right to elect a ruler.

Ockham’s concern for natural rights seems undoubtedly to be a reflection of his nominalist logic and ontology. His voluntarism is also present in his rights doctrine: the institution of both private property and government is commanded or sanctioned by divine will and effectuated by human will. But perhaps the most striking affinity between the *venerabilis inceptor*’s natural rights theory and his philosophy is his endeavour, both in the field of politics and ethics, to compensate or counterbalance the omnipotence of God with human freedom and autonomy.

In Chapter III I scrutinized Francisco Suarez’s legal philosophy. Part 1 discussed Suárez’s general concept of law (1.1) and his conceptions of eternal law (1.2) and natural law (1.3-5). The most substantial difference between Aquinas’s and Suárez’s general definition of law is

that the Jesuit theologian replaces the Thomist notions of *regula* and *mensura* by the term *praeceptum*, and conceives of law not as a “rational ordination”, but as an obligatory command of a superior imposed on a subject. On the other hand, although both Aquinas and Suárez have a reasonably balanced view of the relationship of reason and will in law, while for Aquinas law is essentially a product of reason, for Suárez it is above all the act of will that makes law ‘law’ in the proper sense.

Suárez has some serious difficulties (viz. the problem of promulgation and the problem of divine freedom) to insert eternal law into his system of laws. Suárez holds with Aquinas that divine wisdom is eternal in God, but his voluntaristic concept of law excludes that the eternal reason of God has the nature of law. Therefore he substantially reinterprets the Thomist conception of eternal law: while for Aquinas eternal law is God’s eternal reason directing God’s will, in Suárez it becomes a manifestation of divine free will, not bound by the judgment of divine reason. In order to sustain the legal character of *lex aeterna*, Suárez has to give up promulgation as a conceptual element of law in the case of eternal law.

Suárez conceives of natural law, just like Aquinas, as the participation of eternal law in rational beings. He seeks a Thomist or rather Suárezian *via media* between the (extreme) intellectualist and voluntarist conceptions of natural law. In his view, intellectualism denies the prescriptive and hence legal character of natural law, whereas voluntarism precludes its “naturalness”, for it bases natural law on arbitrary divine fiat. Suárez suggests that natural law is a *lex indicativa* and a *lex praeceptiva* at the same time, inasmuch as it “does not merely indicate what is evil, ... but is also a manifestation of the divine will prohibiting that act or object.” The *doctor eximius* takes great care to embed his voluntarist concept of law into an objectivist, rationalist framework based on a metaphysical view of human nature. He follows Thomas Aquinas in linking natural law to the order of natural inclinations and the teleology of human nature. Consequently, he asserts that God cannot but forbid what is intrinsically evil

and against natural reason. From the perspective of divine freedom, while eternal law and creation are absolutely free acts of God, all His subsequent acts, including the precepts of natural law, are only relatively free, being bound in consequence of them.

Suárez differentiates two distinct kinds of natural law, preceptive and permissive. The latter comprises certain recommendations of nature, which are as valid as the commands or prohibitions of preceptive natural law, yet are not absolutely binding. The three most important of these recommendations are community of goods, liberty and democracy. Unlike preceptive natural law, permissive natural law can change, and its institutions may licitly be modified or abolished by human agency.

Part 2 scrutinized Suárez's doctrine of natural rights. In Part 2.1 I compared Suárez's different usages of *ius* and examined their interrelations. Suárez first distinguishes between two etymological explanations of the word *ius*. According to the first etymology, *ius* is the same as *lex*, and the second etymological explanation equates *ius* with the just thing itself (*ipsum iustum*). Then he redescribes the Aristotelian-Thomist concept of objective right in terms of subjective rights. In Michel Villey's interpretation, Suárez knows only two meanings of *ius*: *ius* as law and *ius* as a moral faculty. However, I found more convincing the interpretation that by defining *ius* as a moral faculty Suárez intended to complement rather than to replace Aquinas's objective concept of *ius*. For Suárez, there is an organic relation between *ius* as a moral faculty and the two other – objective – meanings of *ius*. What one has a right to is due to him according to the principles of justice, and law is the basis and measure not only of moral rectitude but also of rights. Suárez attaches natural rights to natural law in at least three ways. First, permissive natural law plays a primordial role in their grounding, thus creating an area of free choice and autonomy. Secondly, the commands and prohibitions of preceptive natural law set limits to natural rights and ensure their lawful exercise. Thirdly, the same law protects natural rights against violation by others.

In Part 2.2 I discussed property and the natural right of using. Suárez follows Aquinas in asserting that natural law leaves the decision about the mode of possession of material things to human will and rationality. Although private property is not prescribed by natural law, once the division of things has been made, it forbids theft. Notwithstanding, the natural law precept protecting the natural right of using remains valid.

Part 2.3 treated liberty and the origins of the state. Just like Ockham, Suárez argues that the explanation of liberty must be sought in the will alone, but unlike him he is very far from thinking that the will can will virtually anything. He considers liberty as signifying freedom from external domination a natural property of man, but not an inalienable right: since man is the owner of his liberty, he can alienate it. According to Suárez, the freedom of the community is analogous to individual freedom in the sense that it can also be licitly alienated. This problem leads us to the question of the origins of the state. Suárez gives an Aristotelian explanation of the coming into being of the state, but combined with the elements of will and consent.

In Part 2.4 I analysed Suárez's theory of resistance and adduced some arguments against an absolutist interpretation of his political philosophy. The Spanish Jesuit counterbalances the natural law obligation of obedience to the ruler with the inalienable right of self-preservation and self-defence, which he calls "the greatest right". He grounds the right to depose a tyrannical ruler both on the community's inherent right of self-defence and on the contract of government between king and kingdom.

As concerns the prospects of utilization of the research results, first, it can be argued on an abstract level that a historical survey of the evolution of an idea may always contribute to a

better understanding of the idea itself; in this case, to a perhaps more nuanced understanding of the concepts of natural law and natural rights – or simply law and rights in general. Secondly, if this contribution proves valuable, then, on a more concrete level, the same findings could, under certain conditions, indirectly enter the contemporary interdisciplinary discourse on (human) rights, reaching the realms, e.g., of constitutional law, international law, or moral and political philosophy. Thirdly, on a pragmatic level, the results of this research can be used in university teaching, can be elaborated in conference papers, scientific articles, and so on.

IV. LIST OF THE PUBLICATIONS RELATED TO THE SUBJECT

Szilárd Tattay, 'Frivaldszky János: Természetjog. Eszmetörténet' [Book Review on János Frivaldszky's *Natural Law: History of the Idea*], *Vigilia* 67 (2002) 8, 636-37.

Szilárd Tattay, 'Natural Law and Natural Rights in Ockham's Legal Philosophy', in István H. Szilágyi and Máté Paksy (eds.), *Ius unum, lex multiplex. Liber amicorum studia Z. Péteri dedicata: Studies in Comparative Law, Theory of the State and Legal Philosophy* (Budapest: Szent István Társulat, 2005) [Philosophiae iuris – Bibliotheca iuridica: Libri amicorum 13], 539-56.

Szilárd Tattay, 'Legal Semiotics and Natural Law: Are They Irreconcilable?', *Jogelméleti Szemle* [Journal of Legal Theory] 7 (2006) 2: http://jesz.ajk.elte.hu/2006_2.html (former version: 'Are Legal Semiotics and Natural Law Irreconcilable?', in Petre Mares and Jean-Pierre Clero (eds.), *La notion de justice aujourd'hui: Séminaire international* [November 2005, Târgoviște] (Târgoviște: Valahia University Press, 2005), 98-107.

Michel Villey (author) – Szilárd Tattay (translator), 'A klasszikus természetjog egy történész szemével' [Classical Natural Law Through the Eyes of a Historian], in János Frivaldszky (ed.), *Természetjog. Szöveggyűjtemény* [Natural Law: Essays], second, revised and expanded edition (Budapest: Szent István Társulat, 2006) [Philosophiae iuris], 197-209.

Máté Paksy – Péter Takács – Szilárd Tattay, 'Hit, értelem, közjó. A keresztény politikai bölcsélet főbb jellemzői' [Faith, Reason, Common Good: Main Characteristics of Christian Political Philosophy], in Péter Takács (ed.), *Államelmélet I. A modern állam elméletének előzményei és történeti alapvonalai* [Theory of the State 1: Antecedents and Historical Outlines of the Theory of the Modern State] (Budapest: Szent István Társulat, 2007), Part 1, Chapter 2, 53-109.

Szilárd Tattay, 'Ius and Dominium in Thomas Aquinas', in Péter Cserne, István H. Szilágyi, Miklós Könczöl, Máté Paksy, Péter Takács and Szilárd Tattay (eds.), *Theatrum Legale Mundi. Symbola Cs. Varga Oblata* (Budapest: Szent István Társulat, 2007) [Philosophiae iuris – Bibliotheca iuridica: Libri amicorum 24], 539-51.

Szilárd Tattay, 'A rózsá neve: Ockham. Nominalizmus és természetjog Eco regényében' [The Name of the Rose: Ockham. Nominalism and Natural Law in Eco's Novel], *Iustum Aequum Salutare* 3 (2007) 2, 111-18.

Szilárd Tattay, 'Medieval Antecedents of Thomas Hobbes's Natural Rights Theory', in Marcin Pieniążek (ed.), *The 23rd IVR Congress "Law and Legal Cultures in the 21st Century: Diversity and Unity". Special Workshop "Students and Young Researchers"* (Krakow: Andrzej Frycz Modrzewski Krakow University, 2009), 143-58.

Szilárd Tattay: 'Természetjog és természetes jogok viszonya az eszmetörténetben' [The Relationship of Natural Law and Natural Rights in the History of Ideas], in Krisztina Ficsor, Tamás Györfi and Miklós Szabó (eds.), *Jogosultságok – Elmélet és gyakorlat. A Miskolci Egyetem és a Miskolci Akadémiai Bizottság által 2008. december 5-én és 6-án rendezett konferencia anyaga* [Rights – Theory and Practice. Papers Presented at the Conference Organised by Miskolc University and Academic Committee of Miskolc on 5-6 December 2008] (Miskolc: Bibo, 2009), 129-37.

Szilárd Tattay, 'The Subjective Concept of Right in Francisco Suárez', in Péter Cserne and Miklós Könczöl (eds.), *Legal and Political Theory in the Post-National Age: Selected Papers Presented at the Second Central and Eastern European Forum for Legal, Political and Social Theorists (Budapest, 21-22 May 2010)* [Central and Eastern European Forum for Legal, Political, and Social Theory Yearbook, Volume 1, ed. by Jürgen Busch, Péter Cserne, Michael Hein, Miodrag Jovanovic and Marta Soniewicka] (Frankfurt am Main: Peter Lang, 2011), 7-17.

Szilárd Tattay, 'Are There any Natural Rights in Aquinas?', in *Central and Eastern European Forum for Legal, Political, and Social Theory Yearbook, Volume 2*, ed. by Jürgen Busch, Péter Cserne, Michael Hein, Miodrag Jovanovic and Marta Soniewicka (Frankfurt am Main, Peter Lang, 2012, forthcoming).

Szilárd Tattay, 'Múlt és jövő között. Szabadság, állam és ellenállás Francisco Suárez politikai filozófiájában' [Between Past and Future: Freedom, State and Resistance in the Political Philosophy of Francisco Suárez], *Pro publico bono* (forthcoming).

Szilárd Tattay, 'The Harvest of Medieval Legal Philosophy: The Natural Law Theory of Francisco Suárez', in Máté Paksy (ed.), *European Law and Legal Philosophy* (forthcoming).