CHAPTER 6

The Impact of Ancient Legal and Philosophical Ideas on the Late Medieval Rights Discourse

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1 Introduction

The question of when and where the rights doctrine originated is still controversial among modern scholars. To find its roots, do we search among the Greek philosophers (in the Stoics, Plato, Aristotle) or Roman legal tradition and Cicero, among the twelfth- and thirteenth-century canon and civil lawyers, in the voluntarist tradition of the fourteenth century, in the sixteenth- and seventeenth-century political thought of the Spanish neo-Scholastics, or in the seventeenth-century political thought of Protestants such as Hugo Grotius, Thomas Hobbes, Samuel Pufendorf, and John Locke? I argue that natural rights emerged in medieval rights discourse. But this begs underlying questions about whether the emergence of natural rights can be understood as a continuation or a revival of an earlier tradition (e.g. what is the relation between objectively and subjectively understood natural right(s) traditions?). Another question which is related to the previous one is whether there is a single unbroken rights tradition or are there separate traditions.

Concerning the first question—the relationship between natural law and natural rights doctrines—some scholars distinguish sharply between them, and regard them as incompatible,\(^1\) whereas others see the idea of natural rights merely as a supplement to natural law, or even as a different way to express what is already implied by natural law.\(^2\) With regard to the second question—whether there is a single unbroken rights tradition or separate traditions—some modern scholars see only one tradition. This grounds rights in Christian anthropology and maintains that human beings are rational God-created individuals worthy of humane treatment.\(^3\) Others maintain two separate and parallel natural rights traditions, with radically different conceptions of humankind, society, and the state: one based on Christian anthropology and another on Enlightenment anthropology.

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\(^1\) See Strauss 1965; MacPherson 1962. Recently, a similar argument has been made by Samuel Moyn (2010).

\(^2\) See Maritain 1945; Finnis 1980; Tierney 1997.

\(^3\) See e.g. Tierney 1995: 252.
The latter tradition “posited a natural state of antagonism among individuals and a natural right to self-preservation from which other rights emerged.”4 Scholars in this tradition also consider that the earliest roots are seen in seventeenth-century thinkers, especially in the writings of Thomas Hobbes and John Locke, who broke decisively with the previous tradition.5

If we agree that natural rights “were not an invention of modern, liberal, political philosophy (Locke) and practice (the American and French Revolutions) but of medieval philosophy, theology and law” this poses “a serious challenge to the conceit of many scholars that ‘rights talk’ arose as one of the seventeenth-century innovations associated with modernity and/or capitalism”6 but the ways in which natural, individual rights are discussed today is the outcome of a long legacy of theorising going back to the high Middle Ages, we have to ask, as Cary J. Nederman puts it, “whether, moreover, the way(s) in which medieval and early modern thinkers conceived of rights has any significant relation to more recent ideas of rights.”7

Discussions concerning the meaning, differentiation, and development of “a right” in the history of political thought and among modern scholars show that we are dealing with an elusive concept.8 The lack of precise definitions seems to be one of the most confusing elements in many modern studies concerning the ultimate origins of rights.9

A common opinion among modern scholars studying the emergence of rights is that the earliest notions of subjectively understood rights go at the earliest back to the legal and moral philosophical sources of the twelfth and thirteenth century.10 Therefore, many scholars have stated that William of Ockham (c. 1285–1347/8) was one of the earliest to offer a full-fledged natural rights theory.11 It consisted of two elements: the treatment of property rights and

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6 Nederman 2012: 649.
7 Nederman 2012: 643.
8 See Martin 1993: 1. The lack of clarity in the use of the term “right” concerns also modern studies. See e.g. Rawls 1971; Finnis 1980; Waldron 1984.
9 John Lamont has interestingly described how Michel Villey’s ideas on objective rights and subjective rights have created several misinterpretations. See Lamont 2009: 169–239. Moreover, in modern discussion, there is no consensus how a right is defined and theoretically grounded. See also the previous note.