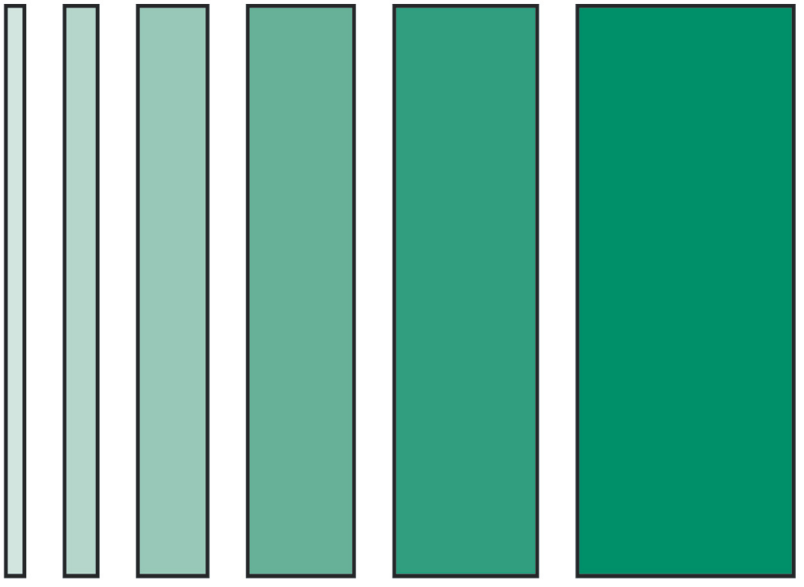

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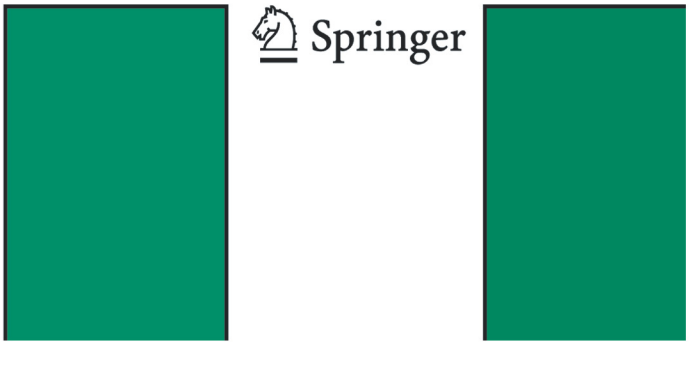
Moral Philosophy on the Threshold of Modernity

edited by
Jill Kraye
and Risto Saarinen



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was his view that factual use meant legally indifferent permission to use the necessities of life. The Franciscan use of things, the factual use, also involves a *votum*—in this case, an active act of will not to own or possess anything. The notion of *usus facti* remained almost unchanged until William of Ockham.

Turning now to the controversy between the Franciscan Order and Pope John XXII in the 1320s, we notice that the question over the use of goods without any right to them, in other words, the distinction between *usus facti* and *dominium*, became one of the most important points of contention. As a lawyer, the pope naturally focused his criticism on the terminology of property rights. He regarded the distinction between *dominium* and *usus facti* to be legally impossible in relation to consumables. He gave the same legal reasons as the secular master Gerard of Abbeville in the mid-thirteenth century, using Roman law and referring to the contract of *mutuum*, a loan for consumption. John XXII also reasoned that the substance of consumable goods deteriorated when they were consumed, so that all the profit would go to the user, not to the owner.[30]

John XXII then argued against the Franciscan case by drawing on moral statements concerning human actions. He defined *usus facti* as a bare act of using (*actus utendi*), which involved at least the right of using a thing (*ius utendi*). In his view, the Franciscans' factual use of consumables, without any kind of right over them, constituted using them up (*abusus*). The friars' way of life was thus neither just, nor based on right and, consequently, illicit. In his bull *Quia quorundam mentes*, John XXII writes that:

> It is impossible that an extrinsic human act is just if the person has no right to do it: rather, such a use is not just but necessarily unjust. Likewise, it is absurd and erroneous that an act of someone who has no right to do it is more just and more acceptable to God than [an act] of someone who has a right … .[31]

By stating that an act which involves using something without any right is not just, John XXII condemned as immoral the Franciscan way of life by means of simple and factual use. There were, however, two weak points in his reasoning. First, he moved from 'not just' to 'unjust' without realizing

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[30] John XXII (1888), pp. 85–86; (1839a), p. 1140. For Pope John XXII's criticism of Franciscan poverty, see Mäkinen (2001), pp. 163–173.

[31] John XXII (1839b), p. 1148: 'Impossibile enim est, actum humanum extrinsecum esse iustum, si exercens actum ipsum nullum ius habeat illum exercendi: immo non iustus seu iniustus necessario convincitur talis usus. Item, est absurdum et erroneum, quod actus alicuius, non habentis ius actum huiusmodi faciendi, sit iustior et Deo acceptior, quam habentis, quum concludat actum iniustum iustiorem et Deo acceptiorem existere, quam sit iustus.'

that this was a fallacy. Furthermore, he equated positive law and its rights with natural law and its rights.

William of Ockham continued the Franciscan discussion and defended their ideal of poverty in his *Opus nonaginta dierum* of c. 1332. He, too, made a distinction between *dominium* and *usus facti*; however, he explained the notions of both *usus facti* and of *ius* in a new way. According to him, factual use is the act of using some external thing, for example, an act of inhabiting a place, eating, drinking, riding, wearing clothes and the like.[32]

For Ockham, a right was a licit power of using and was distinct from the *usus facti*, which was a mere act of using (*actus utendi*), not a right. Factual use was a bare act of using an object in which the user does not attribute anything to a right or *dominium* in the act of eating, drinking or wearing.[33]

IS IT POSSIBLE FOR A HUMAN BEING TO GIVE UP ALL RIGHTS IN THIS LIFE?

In medieval society, the social and economic status of a person was determined by the privileges he or she had. Individuals who had many privileges—for example, the right to exact taxes and customs—enjoyed a higher social status than those with only a few privileges. The lowest group in the society, the poor (*miserabiles personae*), had one privilege—the right to beg. The mendicant friars were, therefore, quite soon seen as immoral people who took alms from the real poor in need.

During the secular-mendicant controversy, William of Saint-Amour discussed in particular the moral justification of poverty as practised by the mendicants. In his disputation *De quantitate eleemosynae* (1255), he questioned friar's right to mendicancy and tried to establish limits to almsgiving. He posed the question of whether it was permitted to give up all one's possessions, retaining nothing for one's own use.[34] His answer was that the act of giving up all temporal possessions, without any care for the future, exposes a person to the danger of several sins, including flattery, lying, stealing, perjury and homicide, since he was then required to beg for his sustenance.[35] William observed that one could easily avoid such sins if

[32] William of Ockham (1940), c. 2, p. 302: 'De usu facti dicunt quod usus facti est actus utendi re aliqua exteriori sicut inhabitare, comedere, bibere, equitare, vestem induere et huiusmodi.'
[33] Ibid., c. 4, pp. 335–336; William of Ockham (1963), c. 58, p. 551.
[34] William of Saint-Amour (1995), pp. 295–342.
[35] Ibid., p. 328.

one retained some temporal possessions. He thus stressed the need to keep a minimum amount of wealth in order to support oneself. According to William, mercy should be proportional to the human condition. Those with only one tunic should not be compelled to divide it with others, for then they all would be unclothed.[36] Zacchaeus, who gave half of his possessions to the poor, while retaining enough for his own sustenance (Luke 19:2–8), was for William an example of proper almsgiving.[37]

Bonaventure defended the friars' ideal of mendicancy against William of Saint-Amour's criticism by stating that there were two perfect professions of poverty: in the one, a man renounces all private and personal *dominium* over temporal goods and is sustained by things which he does not own but which are shared with a community; in the other, he renounces all *dominium* over temporal goods, both private and common, and is sustained by things which are not his but someone else's. In the latter case, his sustenance is kindly and justly provided by an outsider.[38] Bonaventure claims that those living in a situation of collective ownership have, by their own right, the power to engage in a legal action. The members of a collective can, for example, reclaim their ecclesiastical goods and be defendants in claims. These legal powers were associated with the *dominium* they had in common.[39] Because the Franciscans have renounced *dominium* (equivalent to *ius*) and, furthermore, use things as *alieni iuris*, they are not able to sue or intervene legally in relation to those things which they only consume.

Pope Nicholas III confirmed the Franciscan doctrine of poverty in his bull *Exiit qui seminat* (1279). The friars received their livelihood either from things which were freely offered, or for which they humbly begged or which were acquired by labour.[40] He developed this notion:

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[36] Ibid., p. 325–326.

[37] Ibid., p. 325–326. William of Saint-Amour's way of associating wealth with morality was common to theologians in the thirteenth century. But his ideas on the 'merits of wealth', in contrast to the poverty of the friars, implied a notion of the social and even individual benefit provided by wealth—a point which the humanists later took up in their support of secular values against ascetic monks and mendicant friars. For the humanists' ideas on poverty and property, see Baron (1938), pp. 1–37, and McGovern (1970, pp. 226–253. McGovern, however, did not notice that the humanists' ideas were already implicit in the anti-mendicant writings of such secular masters as William of Saint-Amour and Gerard of Abbeville in the 1250s. Aristotle's *Nicomachean Ethics* (translated by 1255) also had a certain impact on the notion of the social and political benefits provided by wealth.

[38] Bonaventure (1898), VII, 4 (VIII 273a).

[39] Ibid., X, 16 (VIII 310a).

[40] Nicholas III (1897), a. 2, p. 192: 'vel de iis quae offerentur liberaliter, vel de iis quae mendicantur humiliter, vel de iis quae conquiruntur per laboritium sustententur: qui triplex vivendi modus in Regula providetur expresse'.

> And, indeed, where these [manners of life] all fail, which is not in some way to be presumed, the way to provide by the law of heaven for the sustenance of nature in a situation of extreme necessity which is granted to all those caught in extreme necessity is not closed off to the friars, just as it is not to others, since extreme necessity is exempt from every law.[41]

The text of the bull considers the case of extreme necessity with a traditional argument already to be found in the canon law and the writings of mendicant theologians such as Bonaventure and Thomas Aquinas. The case was an interesting one since it touched on the problematic relation between the Franciscan ideal of poverty as a total renunciation of property rights and the usual teaching on natural rights at that time. Neither Bonaventure nor Nicholas III discussed or even perceived any problem with this.

The same moral justifications of the friars' mendicancy are later found in the criticisms put forward by secular theologians, especially Henry of Ghent and Godfrey of Fontaines. In quodlibetal disputations held from the 1270s to 1290s, they focused mainly on the question of whether it was possible for a human being to give up all rights in this life, as the Franciscans claimed to do. Godfrey, in several quodlibets, treats the issue as a legal one, but also uses philosophically interesting arguments—mainly influenced by the voluntarist tradition. Aristotelian ethics and the new translation of the *Politics* also exerted some influence on his ideas.[42]

In his *Quodlibet XII,* question nineteen (written in 1288), Godfrey attacks the claims which Nicholas III had made in *Exiit qui seminat*:

> From this it follows, however, that no one can in this way renounce temporal goods, since in extreme necessity anyone has the right to use temporal goods to the extent which is sufficient for his sustenance. No kind of perfection whatsoever will demand or permit someone to renounce this right and *dominium*. Thus, a person who cannot renounce the use of some thing should not [do so]. Similarly, in such a case he cannot or should not renounce the *dominium* or faculty or right of using those things.[43]

Godfrey contrasts the Franciscan ideal of poverty with the practical situation of someone who is in a state of extreme necessity, although he

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[41] Ibid., a. 2, p. 193: 'Et quidem ubi, quod non est aliquatenus praesumendum, haec cuncta deficerent, sicut nec ceteris, sic nec ipsis Fratribus, jure poli in extremae necessitatis articulo, ad providendum sustentationi naturae, via omnibus extrema necessitate detentis concessa praecluditur, cum ab omni lege extrema necessitas sit excepta.'

[42] For Godfrey of Fontaines's ideas on rights, see Mäkinen (2001), pp. 124–137.

[43] Godfrey of Fontaines (1904–37), Quodlibet XII, q. 19, p. 143: 'Ex hoc autem sequitur quod nullus potest sic renuntiare bonis temporalibus quia in extrema necessitate quilibet habeat ius utendi bonis temporalibus quantum sufficit ad eius sustentationem. Nec qualisqumque perfectio exigit vel permittit quod aliquis huic iuri et dominio renuntiet. Qui enim usui alicuius rei renuntiare non potest, nec debet; similiter etiam dominio et facultati vel iuri utendi illa re in tali casu renuntiare nec potest nec debet.'

does not mention the Franciscans by name. He argues that people have a natural right of subsistence in cases of extreme necessity and cannot give up such a right.

The principle of extreme necessity was already a standard doctrine of medieval moral theology and canon law by the end of the twelfth century.[44] According to canon lawyers, a person in extreme need—that is, someone who is facing the prospect of certain, but not necessarily immediate, death—may rightfully take another's property to sustain his or her life. Moreover, a person in such need was not guilty of theft. Earlier theologians had made similar remarks: for example, Thomas Aquinas in his *Summa theologiae*. These theologians and canon lawyers had not, however, characterized the principle of extreme need as a natural right: some spoke of it as a right, while others did not.[45]

In his *Quodlibet VIII*, question eleven, Godfrey states the idea of individual right:

> Furthermore, since by natural right each person is obliged to maintain his life, which is not possible without using external goods, each person by the law of nature has dominion and a certain right in the common exterior goods of this world which she cannot lawfully renounce.[46]

Godfrey explains here that not only the poor but also each person has an obligation towards herself, namely, for her self-preservation. Following from this obligation, everyone has *dominium* and a certain right (*quoddam ius*) in common goods which cannot be lawfully renounced.

CONCLUSION

The texts analysed here have shown that the controversies concerning Franciscan poverty stimulated the emergence of individual rights in at least two senses. First, in a legal sense, the Franciscans' lack of legal standing, the fact that they lived without any property rights, prompted a discussion which focused on the question of subjective property rights. Second, in a moral philosophical sense, the Franciscans' claim to give up all rights led to the concept of the individual, inalienable right of subsistence which belonged, not only to the poor, but to every human being when in extreme

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[44] The principle of extreme necessity was developed by canonists from the statements of the *Decretum*: D. 86 c. 21 and D. 42 c. 1. For the development of this principle, see Swanson (1997).

[45] See Tierney (1997).

[46] Godfrey of Fontaines (1904–37), Quodlibet VIII, q. 11, p. 105: 'Immo etiam propter hoc quod unusquisque tenetur iure naturae vitam suam sustentare, quod non contingit nisi de bonis exterioribus, ideo etiam iure naturae quilibet habet dominium et quoddam ius in bonis communibus exterioribus huius mundi, cui iuri etiam renuntiare non potest licite.'

need. According to Godfrey of Fontaines, no one can give up this right, even for religious reasons. This was perhaps one of the first formulations of the individual right to subsistence in the history of moral philosophy—long before Jacques Almain and John Locke. William of Ockham developed the idea further in his writings against Pope John XXII. But although Ockham played a central role in the development of individual rights, it is not wholly correct to state that he was the first medieval thinker to espouse a theory of individual rights.[47] From the viewpoint of the history of ideas, this also suggests, as contemporary historians and philosophers have argued, that the evolution of individual rights in European thought began much earlier than Ockham.

REFERENCES

Almain, Jacques (1706) *Questio in vesperiis habita*, in: Jean Gerson, *Opera omnia*, ed. E. du Pin, Antwerp, II, cols. 961–976.

—— (1997) 'Question at Vespers', transl. A. S. McGrade, in: *Cambridge Translations of Renaissance Philosophical Texts, II: Political Philosophy*, ed. J. Kraye, Cambridge: Cambridge University Press, pp. 13–35.

Baron, H. (1938) 'Franciscan Poverty and Civic Wealth as Factors in the Rise of Humanistic Thought', *Speculum* 13, pp. 1–37.

Bonaventure (1898) *Apologia pauperum*, in: idem, *Opera omnia*, Quaracchi: Collegium S. Bonaventurae, VIII, pp. 30–330.

—— (1966) *Defense of the Mendicants*, transl. J. De Vinck, in: *Works of Bonaventure,* Paterson, N.J.: St. Anthony Guild Press, IV.

Brett, A. S. (1997) *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought*, Cambridge: Cambridge University Press.

Buckland, J. A. (1966) *A Textbook of Roman Law from Augustus to Justinian*, ed. P. Stein, Cambridge: Cambridge University Press.

Burr, D. (1989) *Olivi and Franciscan Poverty: The Origins of the Usus Pauper Controversy*, Philadelphia: University of Pennsylvania Press.

Chartularium Universitatis Parisiensis (1889–97), ed. H. Denifle and E. Chatelain, Paris: Delalain, 4 vols.

Coleman, J. (1991) 'Property and poverty', in: *The Cambridge History of Medieval Political Thought c. 350–c.1450*, ed. J. H. Burns, Cambridge: Cambridge University Press, pp. 607–652.

Feenstra, R. (1971) 'Les origins du dominium utile chez les Glossateurs avec un appendice concernant l'opinion des Ultramontani', in: *Flores legum H. J. Scheltema oblati*, ed. R. Feenstra, J. H. A. Lokin & N. van der Wal, Groningen: Wolters-Noordhoff, pp. 49–93.

Francis of Assisi (1993) *Regula Bullata*, in *Die Opuscula des Hl. Franziskus von Assisi*, ed. K. Esser, Grottaferrata and Rome: Editiones Collegii S. Bonaventurae ad Claras Aquas.

[47] Cf. McGrade (1980).

Gerard of Abbeville (1938–9) 'Tractatus Gerardi de Abbatisvilla: Contra adversarium perfectionis', *Archivum Franciscanum Historicum* 31, pp. 276–329 and 32, pp. 89–200.

Godfrey of Fontaines (1904–37) *Les Quodlibets*, ed. M. DeWulf et al., Leuven: Institut supérieur de philosophie de l'universite, I–XV.

Gregory IX (1964) 'Quo elongati', ed. H. Grundmann, *Archivum Franciscanum Historicum* 54, pp. 20–25.

Grossi, P. (1987) 'Usus facti: la nozione di proprietà nella inaugurazione dell'età nuova', in *Una economica politica nel Medioevo*, ed. O. Capitani, Bologna: Pàtron Editore, pp. 1–58.

Hugh of Digne (1979) *Hugh of Digne's Rule Commentary*, ed. D. Flood, Grottaferrata and Rome: Editiones Collegii S. Bonaventurae ad Claras Aquas.

Innocent IV (1759) *Ordinem vestrum*, in: *Bullarium Franciscanum*, ed. J. Sbaralea, Santa Maria degli Angeli: Edizioni Porziuncola, I, pp. 400–402.

John XXII (1839a) *Ad conditorem canonum* II, *Extravagantes Johannis*, in *Corpus iuris canonici* II, ed. A. L. Richter, Leipzig: Tauschnitz, pp. 1139–1144.

—— (1839b) *Quia quorundam mentes*, *Extravagantes Johannis*, in *Corpus iuris canonici* II, ed. A. L. Richter, Leipzig: Tauschnitz, pp. 1144–1150.

—— (1888) *Ad conditorem canonum* I, Bullarium Franciscanum V, ed. C Eubel, Santa Maria degli Angeli: Edizioni Porziuncola, pp. 235–237.

Kaser, M. (1955–9) *Das Römische Privatrecht*, Munich: C. H. Beck, I–II.

Lambert, M. D. (1961) *Franciscan Poverty. The Doctrine of the Absolute Poverty of Christ and the Apostles in the Franciscan Order 1210–1323*, London: S.P.C.K.

Lambertini, R. (1990) *Apologia e crescita dell'identità francescana (1255–1279)*, Rome: Istituto Storico Italiano per il Medio Evo.

—— (1993) 'La scelta francescana el'università di Parigi. Il "Bettelordenstreit" fino alla "Exiit qui seminat"', *Gli studi francescani dal dopoguerra ad oggi*, ed. F. Santi, Spoleto: Centro Italiano di Studi sull'Alto Medioevo pp. 143–172.

Leff, G. (1967) *Heresy in the Later Middle Ages: The Relation of Heterodoxy to Dissent c.1250–c.1450*, New York: Manchester University Press.

Locke, John (1960) *Two Treatises of Government*, ed. P. Laslett, Cambridge: Cambridge University Press.

MacIntyre, A. (1966) *A Short History of Ethics*, London: Routledge.

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

McGovern, J. F. (1970) 'The Rise of New Economic Attitudes – Economic Humanism, Economic Nationalism – during the Later Middle Ages and the Renaissance, AD. 1250–1550', *Traditio* 26, pp. 226–253.

McGrade, A. S. (1980) 'Ockham and the Birth of Individual Rights', in: P. Linehan and B. Tierney (eds.), *Authority and Power: Studies in Medieval Law and Thought. Presented to Walter Ullman on his seventieth Birthday*, Cambridge: Cambridge University Press, pp. 149–160.

Miethke, J. (1969) *Ockhams Weg zur Sozialphilosophie*, Berlin: de Gruyter.

Nicholas III (1897) *Exiit qui seminat*, in: *Seraphicae legislationis textus originales*, Quaracchi: Collegium S. Bonaventurae, pp. 181–228.

Rashdall, H. (1936) *The Universities of Europe in the Middle Ages*, Oxford: Clarendon Press.

Swanson, S. G. (1997) 'The Medieval Foundations of John Locke's Theory of Natural Rights: Rights of Subsistence and the Principle of Extreme Necessity', *History of Political Thought* 18, pp. 399–456.

Tabarroni, A. (1990) *Paupertas Christi et Apostolorum. L'ideale francescano in discussione (1322-1324)*, Rome: Istituto Storico Italiano per il Medio Evo.

Thomas Aquinas (1888–1906) *Summa theologiae*, in: idem, *Opera omnia*, ed. Leonina, Vatican City: Vatican Polyglot Press, pp. 4–12.

Thomas, J. A. C. (1976) *Textbook of Roman Law*, Amsterdam, New York: North-Holland.

Tierney, B. (1997) *The Idea of Natural Rights, Natural Law and Church Law 1150–1625,* Atlanta: Scholars Press.

Traver, A. G. (1995) *The Identification of the 'Vita Apostolica' with a Life of Itinerant Preaching and Mendicancy: Its Origins, Adherents and Critics ca. 1055–1266*, unpublished Ph. D. dissertation, Toronto: University of Toronto.

Tuck, R. (1979) *Natural Rights Theories: Their Origin and Development*, Cambridge: Cambridge University Press.

Tully, J. (1980) *A Discourse on Property: John Locke and his Adversaries*, Cambridge: Cambridge University Press.

Weijers, O. (1995) *La 'disputatio' à la Faculté des Arts de Paris (1200–1350 environ): Esquisse d'une typologie* (Studia Artistarum 2), Turnhout: Brepols.

William of Ockham (1940) *Opus nonaginta dierum*, in: idem, *Opera politica*, ed. R. F. Bennet and J. G. Sikes, Manchester: The University Press, I, c. 1–6, pp. 287–374

—— (1963) *Opus nonaginta dierum*, in: idem, *Opera politica*, ed. J. Sikes and H. S. Offler, Manchester: The University Press, II, c. 7–124, pp. 375–858.

William of Saint-Amour (1995) *De quantitate eleemosynae*, in: 'William of Saint-Amour's Two Disputated Questions "De quantitate eleemosynae" and "De valido mendicante"', ed. A. G. Traver, *Archives d'histoire doctrinale et littéraire du moyen âge* 62, pp. 295-342.

Justification through Being: Conrad Summenhart on Natural Rights

Jussi Varkemaa
(University of Helsinki, Finland)

Conrad Summenhart (c. 1458–1502) was a German theologian whose academic career dates from the early years of the University of Tübingen, at the end of the fifteenth century.[1] Summenhart's major work was a massive thesis of casuistic moral theology: *Opus septipartitum de contractibus pro foro conscientiae et theologico*. As the title makes clear, this was a work comprised of seven treatises. The main part of the work concentrated on analysing contemporary economic transactions from the viewpoint—and with the tools—of casuistic moral theology. It began, however, with a preliminary treatise, which was intended to prepare the reader for the actual casuistic arguments of the other six treatises. This first treatise embodied Summenhart's view that before the reader was ready to enter into casuistic analysis, he needed to familiarize himself with what amounted (primarily) to a theory of subjective rights. In this way the work located individual rights at the centre of applied ethical reasoning.[2]

At the heart of Summenhart's theory was the concept of a subjective right. In this paper my intention is to shed some light on this elementary concept. Before entering into Summenhart's writings, I shall first devote some attention to the preceding medieval discourse on rights which forms the relevant background to Summenhart's theory.[3]

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[1] Summenhart (born in Calw c. 1458) studied philosophy in Heidelberg and Paris, and theology in Tübingen. In 1489 he received his degree in theology and three years later (at the latest) he was acting as *ordinarius*, occupying the chair for the *via antiqua*. Summenhart—who had also been the dean of the faculty of philosophy and was the rector of the university for four occasions—died in 1502. See Feld (1992).

[2] The *Opus septipartium* is best known for its progressive views on political economy; see Ott (1957) and Noonan (1954), pp. 233–5, 340–4. The work was first published in 1500. There were several editions during the sixteenth century, and it was also known under the titles *Septipartitum opus de contractibus* and *De contractibus licitis atque illicitis*. I have used the 1513 Hagenau edition.

[3] There are some interesting recent studies concerning medieval and early modern discussions on rights; see Brett (1997); Tierney (1997); and Mäkinen (2001). Brett and Tierney also discuss Summenhart; see Brett (1997), pp. 34–43; and Tierney (1997), pp. 242–252.

J. Kraye and R. Saarinen (eds.), Moral Philosophy on the Threshold of Modernity, 181–193.

The medieval discourse on rights was not uniform, since rights were discussed in several different contexts. Perhaps the most common practice—particularly among those theorists who had received their education in law schools—was to speak of rights within the theoretical context of justice. The standard medieval definition of justice was documented in the corpus of Roman law and dates back to the Roman lawyer Ulpian. According to this formulation, which had been widely held in ancient times, justice was seen as 'the constant and everlasting will to give everyone their right *(ius suum*)'.[4] Here, the Latin term *ius* found its meaning in the broader context of justice, in which 'right' was seen as an outcome of the act of justice. Portius Azo, who taught law at Bologna early in the thirteenth century, is a prominent example of this kind of terminological approach. In the chapter 'De iustitia et iure' of his *Summa*, Azo quoted Ulpian's definition of justice and explained that the expression *ius suum* should be understood as denoting a man's due share or desert (*hominis meritum*).[5] A man's right, his *ius suum*, consisted of what rightfully belonged to him. When we ask in this context what the term *ius* signifies, it seems clear that no single answer can be given. This is because to have *ius suum* is to have one's due share, and what this share actually is varies from one context to another. As Azo concluded: '*ius* is derived from justice and has various significations'. The content of *ius suum* might vary from legal benefits to burdens and obligations and could not conveniently be captured by a single designation.[6]

In addition to being a subject of academic debate, the terminology of rights was featured in more specific and practically oriented discussions. Claiming and defending rights was a part of medieval legal life. The middle of the thirteenth century saw the beginning of a debate which was specific in its nature, but went on to have a general influence on later discussions of rights. The target of this particular debate was the juridical definition of the ideal apostolic way of life, which had been developed within the Franciscan mendicant order. The Franciscans were not claiming rights for themselves; on the contrary, they were defending the legitimacy of renouncing all rights to material property. They saw themselves as the voluntary poor who were imitating the apostolic way of life exemplified by the earthly existence of Christ and his apostles. The statement which set the tone for this entire debate was that the Franciscans—seen both as individual brothers and as a

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[4] *Digest* 1.1.10; *Institutes* 1.1.1.

[5] Azo (1566) 'De iusticia et iure', p. 1047: 'Est autem iusticia constans et perpetua voluntas ius suum cuique tribuendi, ut ff. eo. l. iusticia. ...Vel dic, suum ius, id est hominis meritum.'

[6] Ibid., 1048: 'Ius ergo derivatur a iusticia et habet varias significationes.' In his commentary Azo identifies six (more or less) independent significations, including, e.g., right as a specific art or artefact (*ars boni et equi*), right as the law (*lex*), right as obligation (*obligatio*) and right as power (*potestas*); see ibid., pp. 1047–8.

religious order—had given up *de iure* all the things of this world but had continued—with legitimacy—to use *de facto* all those things which they needed for their daily life and profession. The status of simple users without any rights or dominion in this world was an essential part of the self-understanding of the Friars Minor; yet, at the same time, it was a juridically peculiar position, and one that was liable to provoke opposition.[7]

The debate over Franciscan poverty was significant in that it articulated a specific answer to the question: what does the Latin term *ius* signify? On the Franciscan side, the fundamental question was whether, or in what sense, material things could be used without having rights in the things (*iura in re*). This question was, naturally, dependent on another one: what is a right, that is, what do we mean by the term *ius* in the context of using material things? Early in the fourteenth century this related question was raised and given a specific answer. The Dominican master Hervaeus Natalis (d. 1323) was among the first respondents. In his anti-Franciscan tract, *De paupertate Christi et apostolorum* (c. 1322), Hervaeus stated firmly that the term *ius* meant 'nothing else but to have power in a thing by which one can licitly use a thing or alienate a thing'.[8] Although this answer was conditioned by the specific case of the Franciscans, which concerned using material things for daily needs, the actual description of a right as a licit power of acting was broad enough to outlive its original context. Long after the question of Franciscan poverty had withered away as a theme for discussion, the language associated with it continued to be used by later theorists whose interest in rights was of a more general or conceptual nature. Conrad Summenhart was one of those later theorists. We find a continuum from fourteenth-century disputants such as Hervaeus Natalis and William Ockham (c. 1285-1347), who wrote within a Franciscan

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[7] The most influential legal formulation of the Franciscan position was given in the *Apologia pauperum* of Bonaventure (1898), cap. XI, p. 312: '... intelligendum est, quod cum circa res temporales quatuor sit considerare, scilicet proprietatem, possessionem, usumfructum et simplicem usum; et primis quidem tribus vita mortalium possit carere, ultimo vero tanquam necessario egeat: nulla prorsus potest esse professio omnino temporalium rerum abdicans usum. Verum ei professioni, quae sponte devovit Christum in extrema paupertate sectari, condecens fuit universaliter rerum abdicare *dominium* arctoque rerum alienarum et sibi concessarum usu esse contentam.' For Bonaventure's view and the Franciscan poverty dispute from the 1250s through 1320s, see Mäkinen (2001). For the fourteenth-century developments in the dispute, see Hervaeus (1937–8), pp. 209–219; and Walsh (1981), pp. 349–451.

[8] Hervaeus took *ius* to be equivalent to the terms *dominium* and *proprietas* in this respect; see Natalis (1937–8), p. 235: '... sciendum quod ista nomina, *dominium*, *ius*, et *proprietas*, idem dicunt in re. Nichil enim aliud dicunt quam habere potestatem in aliqua re per quam possit licite re aliqua uti vel rem aliquam alienare, et hoc vel per donationem vel per venditionem vel per quemcumque alium modum.' For a concise overview of Hervaeus's terminology of rights, see Tierney (1997), pp. 104–108. For the context of *De paupertate Christi et apostolorum*, see Hervaeus (1999), pp. 1–19.

context, to later theorists such as Jean Gerson (1363-1429) and the Italian Dominican master Antoninus Florentinus (1389–1459), whose writings served as source material for Summenhart.[9]

During the debate over Franciscan poverty, the description of a right as a licit power of acting was adopted by both sides. Despite its wide acceptance, however, the association of right with power was not acceptable to all writers. A specific strain of criticism was introduced by the Augustinian Richard Fitzralph (c.1300-60) in the middle of the fourteenth century, at the time when the Franciscan dispute was already coming to an end. In his *De pauperie salvatoris* (c.1356), Fitzralph suggested that the connection between 'right' and 'power' was problematic, and that 'right' should instead be associated with the term 'authority'. He adduced two arguments which supported his allegation. First, the notion of a right could not be associated with power because 'right' and 'authority', according to Fitzralph, belonged solely to rational creatures, while even animals had powers or faculties. Second, the term power did not have a positive normative connotation. The point here was that power could be either licit or illicit, whereas the Latin term *ius* had been associated, throughout its history in Latin (religious) language, with justified activity.[10]

Fitzralph's main aim was to emphasize that *dominium* was a matter of authority and not a matter of power. In order to make his point clear he

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[9] The description of *ius* in Ockham (1940), chapter 2, p. 304, runs parallel to that of Hervaeus, except that Ockham—more expressly than Hervaeus—understood the term power in the sense of power-of-acting or active potency. Interestingly, Hervaeus's description of *ius* made an appearance in Antoninus Florentinus's *Summa theologica* (part III, chap. 3, sig. f4^{r}), written in 1450s. Jean Gerson followed Ockham's line of thinking in his interpretation of *ius*. For the views of Gerson and Summenhart, see below; for the views of Ockham and Antoninus, see, e.g., Brett (1997), pp. 50–68, 107–111.

[10] Fitzralph made this point in the course of justifying his own definition of *dominium originale*, man's original lordship over the rest of God's creation. He defended his decision to define *dominium originale* by using *auctoritas* instead of *potestas* as the generic term. *De pauperie salvatoris* is written in the form of a dialogue between Richard and John. Fitzralph (1890), lib. II, cap. IV, p. 338: 'Iohannes. Attendo cur verbum mortale est positum. Cur auctoritatem seu ius ponis pocius quam potestatem in hac descriptione, non video. Ricardus. Auctoritas seu *ius* soli racionali convenit creature; potestas sive facultas irracionabilibus competit ex sua institucione primaria; quoniam iuxta supra posita verba de Genese, Ut sint vobis in escam, et cunctis animantibus, animalia terre, ad confirmandum sue naturalis institucionis excursum ad consumendum res eis ad hoc ab Auctore omnium deputatis, suo naturali modo habent congenitum irreprehensibilem facultatem: preter hoc quod *ius* sive auctoritas solum esse videtur respectu illius quod non obviat racione; non ita de potestate videtur, cum sit scriptum, *Qui potuit transgredi et non est transgressus, et facere mala et non fecit*, Eccli. xxxi. 10; et Luc. xxii. 53, *Hec est hora vestra et potestas tenebrarum*: et 2 Cor. ix. 18, *Ut non abutar potestate mea in evangelio*; et *Data est ei potestas sicut habent scorpiones*, Apoc. ix. 3: et multa alia sic in sacris litteris exprimuntur. De auctoritate vero sive auctore seu iure, non recolo Scripturam affirmantem quod simpliciter nominentur sive dicantur ad malum sive in malo peccati.'

articulated the categorical difference between *auctoritas* and *potestas* in a way which made his critique effective against any attempt to define the term 'right' using the idiom power-of-acting as the generic notion. His particular dissatisfaction with the term 'power' seemed (partly at least) to lie in the fact that it was a term which characteristically belonged to descriptive language, whereas the term 'right' was a normative term. Now, if we define 'right' using the descriptive term 'power', we then need to have an explanation of how we can get from power to right, in other words, how we can get from 'is' to 'ought'. The transition is crucial when we are speaking of natural rights and powers; and this was also the context of Fitzralph's critique. To say that a right is a licit power does not explain the transition; rather, it leaves the matter untouched and unresolved.[11]

How can we get from 'is' to 'ought'? I may have a power to do many things; but when do I have a right to do them? What justifies the power-of-acting? It is interesting to approach Summenhart's theory of rights with this question in mind for two reasons. First, his interest in rights was of a conceptual nature, which increased the generality of his conclusions. Second, his writing on natural rights articulated an explanation of this sort of transition from power to right. His explanation was not entirely original, however. His rationale was firmly and openly based on Jean Gerson's writings on the subject. Broadly speaking, it can be said that Summenhart developed his theory of rights using language which had formerly been employed by Gerson.[12]

Summenhart's concept of a subjective right was based on two parallel descriptions of *ius* which had been formulated by Gerson during his literary career. In his major work *De potestate ecclesiastica*, written during the heyday of conciliarism in 1417, Gerson explained the signification of the term *ius* by means of two related notions. First, right signified a faculty or power of acting. Secondly, this power was said to fall to the right-holder

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[11] The bottom line in Fitzralph's critique was his emphasis on the categorical difference between authority and power. To his mind, the term 'power' did not connote the authoritative status of righteous rationality, which was the essence of *dominium*. Thus, using 'power' as the generic term for *dominium* would not have illustrated the hierarchical structure, that is, it would not have encapsulated the categorical difference between men and animals: men are superior rational beings who have *dominium*; animals are inferior beings who are under their *dominium*. For Fitzralph's doctrine of dominion, see Betts (1969), 160-175.

[12] Summenhart's dependence on Gerson's terminology is apparent in the *Opus septipartitum* and has been generally recognized in the scholarly literature. Only recently, however, have the differences between these two writers been noted. Summenhart used Gerson's terminology in an independent way and on occasion arrived at conclusions which would not have been accepted by Gerson. See Brett (1997), pp. 35–36; and Tierney (1997), pp. 242–252.

according to the dictate of primary justice.[13] This description was a slight modification of a previous account of *ius* which Gerson had introduced nearly two decades before, in his early theological work *De vita spirituali animae*. There, the description was similar to the one found in *De potestate ecclesiastica*, with one exception: instead of associating rights with justice, Gerson referred to the dictate of right reason as the origin of rights. Accordingly, he described *ius* as a faculty or power which falls to the right-holder according to the dictate of right reason.[14]

There is an apparent connection between Gerson's description of *ius* and the prevailing medieval conception of justice.[15] In *De potestate ecclesiastica*, he made an explicit connection between rights and justice by quoting Ulpian's definition of justice in order to explain that the origin of rights is found in God's divine justice: 'Indeed, it is God alone who by continuous and lasting will to gives every single creature what is his.'[16] Unlike the lawyer Azo and like-minded writers, however, Gerson had no intention of assimilating man's *ius* with his just and due share. His point was rather to introduce an important specification: the term *ius* signifies specifically a faculty or power of acting; it does not signify, e.g., 'the

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[13] Gerson (1706a), consid. 13, p. 250: 'Ius vero sic describitur. Ius est potestas, seu facultas propinqua conveniens alicui secundum dictamen primae justitiae.' He used the term proximate (*propinqua*) to differentiate rights from mere reactive potencies. A right is an active potency, a power to exercise actions; ibid: 'Proinde dictum est in descriptione Iuris, quod est facultas propinqua etc. propter illa que in potentia obedientiali convenire possunt cuilibet creature, quod posse dicere possumus, vel obedientiale, vel logicale, secundum quale non dicitur proprie res habere Ius vel Legem …'

[14] Gerson (1706b), lectio 3, p. 26: 'Jus est facultas seu potestas propinqua conveniens alicui secundum dictamen rectae rationis ...' In the *Opus septipartitum* Summenhart introduced one description after the other and explained that they were equivalent; Summenhart (1513), Tract. 1, q. 1, sig. A6^{r}: 'Ius est potestas vel facultas propinqua conveniens alicui secundum dictamen prime iusticie. Et iterum. Ius est potestas vel facultas propinqua conveniens alicui secundum dictamen recte rationis.' Ibid., sig. A6^{v}: 'Quarta suppositio, secunda descriptio redit in idem cum prima. Nam in secunda descriptione, tres prime clausule sunt omnino eedem in utraque. Sed et quarta clausula licet secundum vocem aliter ponatur in prima et secunda tamen in re est eadem utrobique, quod sic probatur. Recta ratio accipitur vel pro ea recta ratione que primo originaliter et essentialiter est recta, et tunc idem est quod prima iusticia, et sic ille clausule omnino equivalent in prima et secunda descriptionibus, aut recta ratio accipitur generaliter ad rationem rectam sive illa sit recta ratio essentialiter qualis est in solo deo, sive participative qualis reperitur in creaturis rationalibus. Et tunc illa clausula secunde descriptionis iterum redit in idem cum clausula prime, quia omne dictamen illius rationis recte que est participative recta ratio, reducitur ad rationem rectam que est essentialiter recta ratio, et per consequens reducitur ad primam iusticiam.'

[15] See above p. 184.

[16] Gerson (1706a), consid. 13, p. 250: 'Describitur itaque Justitia, quae est perpetua & constans voluntas, jus suum unicuique tribuens. Haec autem descriptio competit principaliter Justitiae divinae in ordine ad suas creaturas. Deus nempe solus est, qui voluntate perpetua & constanti dat unicuique rei quod suum est; suum, inquam, non ex debito rigoris, sed ex liberalissima & dignissima donatione Creatoris.'

penalty of the damned' or 'the punishments of the sinful' or any other possible things which are, by justice, due to man.[17]

With his description of *ius* Gerson placed himself among those theorists who thought that the term could be used to signify the legitimate or licit power of acting. The dictate of right reason had a normative function and was there to separate rights from illicit powers. It is worth noting, however, that *De vita spirituali animae* is a theological work, and in Gerson's theological language the dictate of right reason was given a metaphysical interpretation and was thought to be something more than a mere normative code. It is this interpretation of right reason which provided the explanation needed for the transition from power to right in the context of natural rights.[18]

When Gerson came to explain (in *De vita spirituali animae*) what he meant by the notion of right reason in this context, he made two specifications. He pointed out that if we speak of the essential right reason or the origin of right reason, it is something which we can find only in God, because God's right reason is the essential right reason: the origin of all right reason can be found in God's reason and will.[19] If we find right reason some place outside of God, then it is somehow a consequence of God's activity. This was the idea underlying the next specification which Gerson wanted to make. He said that 'right reason belongs appropriately and by participation only to rational creatures'.[20] Here, we have the idea of rational creatures participating in God's eternal law of reason which had been implanted in medieval thought by Thomas Aquinas. In Gerson's account, the idea of participation was accompanied by the notion that man's right reason was a consequence of God's reasoning. Without God's activity there would be no rational activity in the world. This was a thought which Gerson wanted to follow to its logical conclusion. His point was that without God's activity, without the dictate of his reason and will, there would be no activity in the world, or rather, there would be nothing at all.[21]

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[17] Gerson (1706b), lectio 3, p. 26: 'Ponitur in descriptione facultas seu potestas, quoniam multa conveniunt secundum dictamen rectae rationis aliquibus quae non dicuntur jura eorum, ut poena damnatorum, ut punitiones vitiosorum, non enim dicimus aliquem jus habere ad ejus nocumentum ...'

[18] The continuity in regard to understanding the term *ius* indicates that Gerson's approach to rights was not guided by a specific practical problem, but rather his interest was of a theoretical or conceptual nature. He was speaking of the concept of a subjective right.

[19] Gerson (1706b), lectio 3, p. 26: 'Recta ratio & dictamen suum, est primo originaliter & essentialiter in Deo ...'

[20] Ibid., lectio 3, p. 26: 'Recta ratio consequenter & participative solum convenit rationalibus creaturis.'

[21] Ibid., lectio 3, p. 27: 'Propterea non absurde concedi posset nihil alicui competere nisi Jure divino, quemadmodum nulla est facultas aut potestas propinqua conveniens alicui absque dictamine recto divinae rationis …'

Thus, as the final point in his analysis of right reason as the origin of rights, Gerson came to the conclusion that all creatures have rights in so far as they have faculties and being. It is being which justifies power, not being as such, but being as a consequence of the dictate of God's reason and will.[22]

Gerson's language of rights was egalitarian in a relevant sense. Although he had no intention of treating all creatures as equals—in regard to their being—his theory of basing rights on the state of having existence meant that all creatures who have faculties and powers could be credited with having rights.[23] In the *Opus septipartitum* Summenhart adopted this basic position from Gerson. This is most explicitly illustrated in a paragraph concerning the general right to exist, as well as other rights based on this fundamental one:

> From the very fact that God has communicated this gift, that is, existence, to a being, such a being has the right to resist those who want to take the gift away from it. Similarly, the right of animals to take in nourishment in order to preserve their existence is based on the same gift. In this way, the wolf has the right and *dominium* to attack other animals, and birds have the right to collect grain and seeds and such like for their sustenance. In this way, they have right to nest in our gardens: because God gave them potency to engender fledglings and to nourish them, he therefore also gave them the right to the instruments by means of which they can do it properly, and this right is based on a natural gift communicated to them by God.[24]

From the natural ability to do something follows the natural right to do it. This would be a straight deduction from 'is' to 'ought' were there not a hidden premise included: all factual abilities are *prima facie* righteous because they are gifts from God.

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[22] Ibid., lectio 3, p. 26: 'Dicamus igitur, quod omne ens positivum quantum habet de entitate & ex consequenti de bonitate, tantumdem habet de Jure sic generaliter definito. In hunc modum coelum jus habet ad influendum, sol ad illuminandum, ignis ad calefaciendum, hirundo ad nidificandum, immo & quaelibet creatura in omni eo quod bene agere naturali potest facultate ...'

[23] Gerson's inclination towards hierarchical (pseudo-Dionysian) metaphysics has been generally recognized. See, e.g., Pascoe (1973), pp. 17–48. The main point of interest is that Gerson's concept of a subjective right does not imply any hierarchy or superior position. He took an explicit stand against those writers, e.g. Fitzralph, who defined *ius* by means of the idea of hierarchical status or authority.

[24] Summenhart (1513), Tract. 1, q. 4, sig. C4^{r}: ' ... ius repellendi corruptorem sue existentie convenit unicuique rei ratione naturalis doni, scilicet ratione existentie, eoipso enim quod deus alicui rei communicavit hoc donum scilicet existentiam habet talis res ius resistendi eis que ei illud donum auferre vellent. Similiter in eodem dono fundatur animalibus ius accipiendi alimenta quibus conservetur existentia, hoc modo lupus habet ius et dominium invadendi alia animalia, et aves habent ius colligendi grana vel semina et consimilia quibus sustentantur, hoc modo habent ius nidificandi in arboribus nostis, quia deus eis dedit potentiam generandi pullos et eos educandi, igitur etiam dedit eis ius in mediis quibus hoc commode facerent, et illud dominium fundatur in dono naturali eis communicato per deum.'

Summenhart's contribution to the basic theory suggested by Gerson arose from the way he explicitly carried forward this reasoning when discussing man's natural rights in contemporary civil society. The unspoken starting point of Summenhart's analysis was that man differs from animals in that he can not only participate in right reason but also act against its dictates. This means that when the principle of justification through being is applied to man's natural faculties, it must be conditional. The power to act against normative right reason is not a right. The ultimate point, however, is that in this sense the dictate of right reason (understood as the normative code) is not needed to justify man's powers. These have a *prima facie* justification through being. Normative right reason is needed only to exclude illicit powers from the sphere of man's natural rights. This point is significant in principle because it suggests a liberty-based approach to rights in which it is possible to start from the idea that man has a natural right to act as he pleases, although he does not have the right to act against the dictates of right reason.[25]

In the *Opus septipartitum* Summenhart articulated his liberty-based approach using contemporary juridical language. This was important for him because, after all, in this work he was dealing with economic relations which were largely defined by the positive law of society. The rich inheritance of Roman jurisprudence, documented in the Iustinian codification, provided him with a definition which completely suited his purposes. The particular definition was a description of liberty (*libertas*) originally composed by the Roman lawyer Florentinus in the second century AD. According to Summenhart:

> *libertas* is a species of right, and a free person has this right with respect to himself, namely, [the right] of acting as he likes. Whence, that right is defined in *Institutes, de iure personarum*, § 1, as one's natural faculty to do as one wants, unless it is prohibited by force or law.[26]

It is striking how well Florentinus's definition matched Summenhart's Gersonian approach. For Summenhart, who thought of rights as faculties, the definition spoke of the natural right to do everything one was able to do

[25] In recent discussions of Summenhart's work, scholars have not fully understood the centrality of liberty in his theory of rights. Cf. Tuck (1979), pp. 25–28; and Brett (1997), pp. 42–43.

[26] Summenhart (1513), Tract. 1, q. 1, A8^{v}: '… libertas est quedam species iuris et illud ius habet liber in seipsem scilicet agendi quod libet. Unde diffinitur ius in institutis de iure personarum, § 1. Est naturalis facultas eius quod cuique facere libet nisi quod vi aut iure prohibetur.' Summenhart's view is that the term *ius* can be used in two ways. It can mean subjective right or it can mean law. In the definition of *libertas*, *ius* is taken to mean law.

provided it was not against the law of reason. From his point of view, rights were powers or faculties and not liberties; but liberty was a natural right.[27]

Summenhart followed his introduction of the right of liberty by a section in which he applied the principle to practical problems. In Florentinus's definition man's liberty was conceived in a negative way, inasmuch as liberty had no defined content, and only its borderlines were marked. This formal nature of liberty had implications for the relevance of *libertas* to civil society. In principle, the positive laws of human society could heavily circumscribe individual freedom without actually conflicting with the principle of *libertas*. Clearly aware of this, Summenhart went on to put forward a specific argument concerning man's natural right of liberty in contemporary society and economic life.[28]

Taking advantage of the close conceptual relation between liberty and *dominium*, Summenhart went on to argue that man's liberty in contemporary society was extensive enough to justify the conclusion that he is *dominus* of his own person: that man is his own master. Summenhart's account made it clear that in the legal framework of the discussion this was not merely an innocent claim. He reviewed arguments—based on principles extracted from the text of the Iustinian codification—which did not credit a free man with the status of being master of himself.[29] Summenhart's claim was considered in certain quarters to be problematic because of its emphasis on self-ownership, implied by the idea of *dominium* of one's own person. This association between self-mastery and self-ownership was due to the juridical way of speaking, which was dominated by the text of the Iustinian codification. In Roman law, the idea of *dominium* over a person referred to the context of slavery, in which—as in the context of property in general—the term *dominium*

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[27] Summenhart's interpretation of *libertas* as a natural right was original. Commonly, in medieval legal discourse *libertas* had been taken to have a twofold content, comprising both factual and juridical features. For the lawyers' interpretations of *libertas*, see Weigand (1967), pp. 64–78.

[28] The particular occasion was in question 74, which concerned the so-called personal *census* (also known as *rentes*) issue. The issue was whether it was licit for a person to bind himself (in exchange for money) to the use of another by way of establishing a right of *redditus* in relation to his own person and transferring this right to another. Summenhart (1513), Tract. 4, q. 74, sig. B2^{r}: 'Utrum liceat alicui homini singulari et etiam communitati hominum, in se vel sua persona constituere alteri redditum alicuius rei utilis.' The sale of *redditus in persona* seemed in practice to count as a loan at interest, which put the contract under the shadow of moral suspicion. See Munro (2003), 518-524; Noonan (1957), 154-164. The question of the legality of *redditus in persona* had been a common theme in the so-called *De contractibus* literature. Unlike, e.g., Henricus de Hassia (1325–1397) or Henricus Totting de Oyta (1330–1396), however, Summenhart made an explicit connection between *libertas* and *dominium* and approached the case *redditus in persona* as an opportunity to analyse and define the limits of the natural right of liberty in civil society.

[29] For detailed exposition of these arguments, see Varkemaa (1999).

carried a connotation of ownership. It was the master (*dominus*) who had *dominium* over his slaves. Slaves were their master's persons and property, and he could sell them at his own discretion, which was the action that most openly demonstrated the right of *dominus*. Were the free man the master of himself, he should be able to act in a corresponding way. [30]

Summenhart's defence of the individual's self-mastery led him to take a positive stand on the voluntary enslavement of a free person.[31] His method was to counter juristic criticism in a manner which demonstrated the validity of his own position. The corpus of Roman law regulated slavery extensively and also included statements concerning the possibility of purchasing a free man. These specific regulations provided a possible link to Summenhart's view, because they explicitly declared that an adult free man could not be the object of valid purchase. Within the legal framework of discussion, this could be interpreted as circumscribing individual freedom of action. Invoking the law, it could be claimed that a free man is not *dominus* of his own person because of his inability to sell himself into slavery.[32]

In dealing with the juristic opposition, Summenhart referred to the view of an anonymous lawyer, according to which the legitimate sphere of individual action was defined and dictated by the law of the commonwealth.[33] Summenhart refuted this view in favour of a more liberty-based approach. He made explicit use of Florentinus's definition of liberty and built his argument on the elementary idea of man's self-mastery, which was limited only by prohibitions.[34] According to Summenhart, the

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[30] As far as Summenhart's view is concerned, we are justified in speaking of self-ownership. It is worth noting, however, that it is self-mastery which is primary in his argumentation and that he is induced to speak of self-ownership primarily because of the juridical context in which he was speaking. For slavery in Roman law, see, e.g., Watson (1987).

[31] Summenhart (1513), Tract. 4, q. 74, sig. B2^{v}: 'Septimo, servitus est quedam magna obligatio, capiendo servitutem pro aliquo quod est in ipsa re vel persona que dicitur servire (quod dico propter aliam acceptionem servitutis scilicet pro iure ut patuit questione lxxii). Modo persona libera potest fieri servilis, et hoc dupliciter scilicet invita et etiam volens …'

[32] Ibid., sig. B3^{v}: 'Quarto, quia lege civili prohibetur liber homo vendi et stipulari, quia liber homo non est in commercio nostro. Unde in lectio, si in emptione, § liberum, Digesta, de contrahenda emptione, dicitur, liberum hominem scientes emere non possumus, ergo non potest in commercium adduci, lectio, liber homo, lectio inter stipulantem, § sacram, de verborum obligationibus. § 1.' See *Digest* 18.1.34; 45.1.83; 45.1.118.

[33] Summenhart (1513), Tract. 4, q. 74, sig. B4^{r}: 'Ad tertium dicit quidam iurista quod talis venditio sustinetur virtute legis, que lex est domina membrorum humanorum, et sic vult dicere, quod talis non posset se vendere, nisi accedente auctoritate legis autorizanti, sicut in simili aliquis non potest per pactum se obligare ad carcerem, quia non est dominus membrorum suorum, potest tamen obligari ex forma statuti, quia edictum a republica que est domina membrorum humanorum.'

[34] Ibid., sig. B5^{r}: 'Ad confirmationem dicendum quod non videtur cur liber homo non possit se obligare ad perpetuo famulandum alicui vel locare perpetuo operas suas alicui sicut potest et ad tempus, loquendo de posse primo modo, id est quod liceat sibi sic se obligare, si enim

regulations in the *Digest* specifically declared that the sale of a free man is invalid as a contract and would not give rise to civil obligations and actions. But although these regulations clearly inhibited a free man from selling himself, they were not direct prohibitions.[35] And because these regulations did not in any way prohibit a free man, they did not affect his self-mastery. Since there was no law explicitly forbidding a man from selling himself into slavery, it could plausibly be maintained that man's natural right of liberty in civil society was extensive enough to justify the conclusion that he was *dominus* of his own person.[36]

Together with recognizing Summenhart's merits in conceptualizing the idea of natural rights, it is noteworthy that the case described above remained the unique instance in *Opus septiparitum*, in which Summenhart appealed to the priciple of *libertas* in his moral reasoning. The casuistic moral theological analysis of Summenhart's style was by no means saturated with the principle of *libertas*. Nevertheless, Summenhart's arguments for individual liberty were indeed significant enough to succeed in making a fresh approach to theological ethics in the late medieval moral milieu. Summenhart's reasoning suggested, in particular, that when we are evaluating morally controversial questions we may start our inquiry from the position that man has the right to act as he pleases, so long as he does not act against the dictates of right reason. This was a liberty-based approach to morality, and one that also recognized the limits of man's liberty, and took them seriously.

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liber est facultatem habet facere quicquid libet nisi vi aut iure prohibeatur ut patet ex diffinitione libertatis, modo illud non prohibetur iure divino vel naturali, ut patet nec etiam humano.'

[35] Ibid., sig. B4^{v}: '… quia talia iura que hoc videntur prohibere, solum videntur disponere super invaliditate contractus, non autem super prohibitione contractus unde disponunt quod ex illo contractu non oriatur obligatio civilis que pariat actionem, unde emptor non est obligatus venditori civiliter nec etiam venditor emptori saltem scienti, sed non prohibent venditori venditionem.'

[36] Summenhart thought that a free man was not prohibited from selling himself into slavery by either divine law or natural law. As far as natural justice was concerned, he rested on the Aristotelian principle: there is no injustice willingly (*volenti non sit iniuria*). As far as divine justice was concerned, he rested on the theological authority of John Duns Scotus, referring to two passages in his commentary on the *Sentences* and interpreting them as emphasizing man's freedom of action within the limits defined by the Ten Commandments. Ibid., Tract. 4, q. 74, sig. B4^{r}: '... et Scotus in IIII dis. 26, q. 1, invalidando quandam rationem cuiusdam doctoris qua volebet probare quod mutuam translationem corporum que sit in contractu matrimoniali, congruum fuit a deo approbari, eo quod corpora illa sunt dei, et sic non deberent contrahentes ea sic transferre sine approbatione domini dicit, quod licet homo ex creatione teneatur deo in omnibus que potest, tamen deus non tantum exigit ab homine, immo dimittit eum libertati sue solummodo ut servet precepta decalogi. Et idem dicit dis. xv. q. I, quod aliquis potest se in servum vendere, licet de hoc non inveniatur specialis approbatio divina, hec ille.'

REFERENCES

Antoninus Florentinus (1480) *Summa Theologica, Pars 3*, Venice: Leonhard Wild.

Azo, Portius (1566) *Summa super novem libris Codicis et quatuor Institutionum*, Venice.

Betts, R. R. (1969) "Richard fitzRalph, Archbishop of Armagh, and the Doctrine of Dominion", in: idem, *Essays in Czech History*. London: The Athlone Press, 160-175.

Bonaventure (1898) *Apologia Pauperum*, in: idem, *Opera omnia*, Quaracchi: Collegium S. Bonaventurae, V. 8, pp. 233–330.

Brett, Annabel (1997) *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought*, Cambridge: Cambridge University Press.

Feld, Helmut (1992) 'Konrad Summenhart. Theologe der Kirchlichen Reform vor der Reformation', *Rottengurger Jahrbuch für Kirchengeschichte* 11, pp. 85–116.

Fitzralph, Richard (1890) *De pauperie salvatoris I-IV*, in Johannes Wycliffe, *De dominio divino*, ed. R. L. Poole, London: Trübner & Co, Appendix, pp. 257–476.

Gerson, Jean (1706a) *De potestate ecclesiastica & de origine iuris et legum*, in: idem, *Opera omnia*, ed. L. E. du Pin, Antwerp (repr. Hildesheim: G. Olms Verlag, 1987), II, pp. 225-260.

—— (1706b) *De vita spirituali animae*, in: idem, *Opera omnia*, ed. L. E. du Pin, Antwerp (repr. Hildesheim: G. Olms Verlag, 1987), III, pp. 5–72.

Hervaeus Natalis (1937–8) 'De paupertate Christi et apostolorum', ed. J. G. Sikes, *Archives d'histoire doctrinale et littéraire du moyen âge*, 12–13, pp. 209–297.

—— (1999) *The Poverty of Christ and the Apostles*, transl. J. D. Jones, Toronto: Pontifical Institute of Mediaeval Studies.

Mäkinen, Virpi (2001) *Property Rights in the Late Medieval Discussion on Franciscan Poverty*, Leuven: Peeters.

Munro, John (2003) 'The Medieval Origins of the Financial Revolution: Usury, Rentes, and Negotiability', *The International History Review* 25, 505–562.

Noonan, John T. (1957) *The Scholastic Analysis of Usury*, Cambridge, Mass.: Harvard University Press.

Ockham, William (1940) *Opus Nonaginta dierum, cap 1-6*, in: idem, *Opera politica*, ed. R. F. Bennett and J. G. Sikes, Manchester: The University Press, I, pp. 287–374.

Ott, Heinrich (1966) 'Zur Wirtschaftsethik des Konrad Summenhart', *Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte*, 53, pp. 1–27.

Pascoe, Louis B. (1973) *Jean Gerson: Principles of Church Reform*, Leiden: E. J. Brill.

Summenhart, Conrad (1513) *Opus septipartitum de contractibus pro foro conscientiae et theologico*, Hagenau: H. Gran.

Tierney, Brian (1997) *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625*, Atlanta: Scholars Press.

Tuck, Richard (1979) *Natural Rights Theories: Their Origin and Development*, Cambridge: Cambridge University Press.

Varkemaa, Jussi (1999) "Utrum homo sit dominus personae suae? The question of individual liberty as an example of the confrontation of canon law and moral theology in Summenhart's *Opus septipartitum*", in: *Nordic Perspectives on Medieval Canon Law*, ed. M. Korpiola, Helsinki: Matthias Calonius Society, 51–62.

Walsh, Katherine (1981) *A Fourteenth-Century Scholar and Primate: Richard Fitzralph in Oxford, Avignon and Armagh*, Oxford: Clarendon Press.

Watson, Alan (1987) *Roman slave law*, Baltimore: The Johns Hopkins University Press,

Weigand, Rudolf (1967) *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus*, Munich: M. Hueber.

Ethics in Luther's Theology: The Three Orders

Risto Saarinen
(University of Helsinki, Finland)

> 'What is important for my purpose is this positive side, the affirmation that the fullness of Christian life was to be found within the activities of this life, in one's calling and in marriage and the family. The entire modern development of the affirmation of ordinary life was, I believe, foreshadowed and initiated, in all its facets, in the spirituality of the Reformers.'
>
> (Charles Taylor, *Sources of the Self*, Cambridge: Cambridge University Press 1989, p. 218)

The Lutheran Reformation had an ambivalent attitude towards medieval traditions of moral and political thought. Although Luther was very critical of Aristotle's ethics, the *Nicomachean Ethics* continued to be used as a standard textbook in Lutheran universities. The Reformers abolished Roman Catholic canon law, but the new ecclesiastical laws of Lutheran churches borrowed an astonishing amount of material from canon law sources. The medieval political doctrine of 'two swords' was replaced by Luther's view of 'two kingdoms', an idea which in many ways was not so different from it.[1]

In this paper I shall deal with Luther's ethics in its relationship to medieval tradition. I shall not, however, relate this discussion to actual legislation or politics. Instead, I shall focus on Luther's view of the household and politics as the two 'orders' within which discussion of human agency and ethics is meaningful. This view, I shall argue, differs from the way in which human agency is understood within the third 'order', the church. Luther employs many medieval traditions; but he uses them eclectically, adapting them to his own theological purposes. Therefore, we should not speak of Luther's ethics as an autonomous discipline, but rather of ethics within Luther's theology.

[1] For all of these, see Witte (2002). Althaus (1965) has long remained a standard work on Luther's ethics; for new studies, see the bibliographies in Lohse (1996); Strohm (1996) and Witte (2002).

J. Kraye and R. Saarinen (eds.), Moral Philosophy on the Threshold of Modernity, 195–215.

THE DIVISION OF ETHICS: THREE HIERARCHIES OR ORDERS

The notion of 'three hierarchies' or 'three estates' was as important as the 'two kingdoms' doctrine for early Lutheran legislation and politics.[2] If we look at Luther in particular, the three estates play a very prominent role. In his *Confession* of 1528, a short outline of his theological doctrine, the three 'holy orders'—ministry, marriage and political leadership—are established in God's word as structures for ruling creation. They are 'instituted' (*eingesetzt*) by God and have thus become an established structure (*Stifft*) of reality.[3] This work had an important influence on the basic Lutheran confessional text, the *Augsburg Confession* of 1530.[4]

The three orders are not limited to the office of ruling, but are normally referred to as the basic institutions of the church (*ecclesia*), the household (*oeconomia*) and the state (*politia*). This tripartite division is traditional and can be found, for instance, in medieval catechistical literature. Luther sometimes refers to the orders as three 'hierarchies'. The word 'hierarchy' is associated with angels, and Luther indeed thinks that it is the particular task of angels to safeguard the existing hierarchies of the created world. The angels are God's helpers in sustaining the cosmic order and the worldly institutions which have been established by God.[5]

Since the three orders represent basic structures of creation, some Luther scholars have claimed that the tripartite division is even more fundamental for his ethics than the familiar idea of 'two kingdoms'.[6] It should be noted, however, that although the orders of the household and the state seem to be equivalent to the 'worldly kingdom' and the church to the spiritual kingdom, this is not always the case and might be misleading.[7]

Luther, in fact, employs a variety of expressions: order (*Ordnung*, *ordo*, *ordinatio*), hierarchy (*hierarchia*), establishment (*Stifft*), right (*Recht*), estate (*Stand*), order of life or form of life (*genus vitae*).[8] The notion of estate in this context is deceptive, because an individual belongs to all three orders at the same time. The orders are not meant to distinguish between different groups within a society, but instead to depict three

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[2] Witte (2002) goes into the reception history of this doctrine within Lutheranism.
[3] *WA* 36, p. 504, 30–p. 505, 10. Another prominent place where Luther mentions the three orders is the end of *Von den Konziliis und* Kirchen: *WA* 50, 652–3.
[4] Especially *CA* 27–8. See Maurer (1979), pp. 100–4.
[5] Maurer (1979), p. 101 and Plathow (1994), esp. pp. 52–7. Cf. Lohse (1996), pp. 342–4.
[6] Maurer (1979), esp. pp. 100–4; Bayer (1995), p. 121.
[7] Bayer (1995), pp. 120–3. In *WA* 50, p. 652, 23–4, only the polis ('die Stad') is the 'weltlich regiment'.
[8] *Recht*: *WA* 50, p. 652, 28–9. *Genus vitae*: *WA* 43, p. 21, 3; p. 198, 30; *WA* 40/1, p. 544, 24. For other expressions, cf. below and Maurer (1979), esp. pp. 100–4 and 124–43.

different areas of life within which the same individual is active. Since the three estates reflect the divine order established by God at the creation, they are natural orders. At the same time they are specifically Christian hierarchies.[9]

Luther defines the range covered by each of the three hierarchies as follows:

> The first government is that of the home, from which the people come. The second is that of the state, that is, the country, the people, princes and lords, which we call the temporal government. These two governments embrace everything: children, property, money, animals and so on. The home must produce, whereas the city must guard, protect and defend. Then follows the third, God's own home and city, that is, the Church, which must obtain people from the home and protection and defence from the state. These are the three hierarchies ordained by God ... the three high divine governments, the three divine, natural and temporal laws of God.[10]

In this outline family and state clearly belong together as productive and protective basic elements of society. The family is in some sense more fundamental than the state; and Luther probably did not think of the state as a 'creation order', but only as an 'emergency order' which became necessary after original sin.[11] This need not be a very original theological idea, since Aristotle says at the beginning of his *Oeconomics* (1343[a]14–16) that 'oeconomics is prior in origin to politics; for its function is prior, since a household is part of a city'.

It is also notable that the church is not seen in this outline as something in opposition to culture but rather is understood as the third created order. While all three orders are fundamentally theological, they are also fundamentally natural in the sense that they pertain to external, visible reality and provide moral guidance for our earthly life.

It is also obvious that the doctrine of three orders is influenced by the tripartite division of medieval Aristotelian ethics. Medieval commentators on Aristotle understood his *Nicomachean Ethics* as individual ethics, whereas his *Politics* and *Oeconomics* provided a medieval social ethic. Luther's teacher in Erfurt, Bartholomäus Arnoldi of Usingen, concludes that moral philosophy consists firstly of individual ethics (*ethica monastica*) taught in the *Nicomachean Ethics*, secondly of political ethics

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[9] Schwarz (1978), pp. 18–19.

[10] *WA* 50, p. 652, 12–18, 33–4. Translation from Witte (2002), p. 93 (who, however, cites the wrong page numbers).

[11] E.g., *WA* 40/3, p. 220, 13: 'Oeconomia enim fons est Reipublicae.' *WA* XLII, p. 79, 5–8. 'Post Ecclesiam etiam Oeconomia constituitur, cum Adae additur socia Heua. ... Politia autem ante peccatum nulla fuit.' Bayer (1995), pp. 119–22.

(*ethica politica*) taught in *Politics* and thirdly of household ethics (*ethica oeconomica*) taught in Aristotle's *Oeconomics*.[12]

Luther thus replaced *ethica monastica* with the ecclesial order. One is tempted to think that his general dislike of Aristotle's ethics prompted him to replace it with a truly theological ordering of life. Consequently, the ecclesial order in Luther's doctrine is not concerned with individual ethics but rather with the adequate ordering of church life. In this way, he replaced traditional individual ethics with something which goes beyond ethics. This is not, however, the whole picture. We shall see below how Luther, in some central passages, relates the ecclesial order to the actions and works of individual people in the church, in other words, to a sort of ecclesial ethic. So, when he discusses the church as one of the three orders, he does not have a comprehensive ecclesiology in mind; instead, he is thinking of that *genus vitae* which pertains to the external practice of piety and to the doing of good works in the church.[13]

Yet another link which connects the ecclesial order to Aristotelian individual ethics has been discerned in the medieval view that ethics provides a person with self-knowledge, *cognitio sui*. Reinhard Schwarz has argued that the Lutheran notion of faith as *cognitio Dei* can perhaps be interpreted as a counterpart of this individual knowledge. Aristotle's view of prudence (*phronesis*) as the virtue of good moral judgement is relevant here. Ethics is not a theoretical science (*scientia*), since, for Aristotle, science pertains to immutable and universal truths. Prudence as an ethical virtue is an individual person's ability or skill to apply knowledge in a variety of practical situations. Medieval commentators on the *Nicomachean Ethics* therefore speak of prudence as practice-related knowledge (*cognitio*). The life of faith in the Lutheran church is, likewise, often characterized in terms of freedom and astuteness rather than immutability. Christian service devotes attention to manifold needs and varying circumstances in a way which resembles Aristotelian prudence.[14] I shall return below to Luther's view of prudence.

THE THREE ORDERS AS *ORDINATIONES DEI*

Up to now I have simply reported the current state of scholarship with regard to the three orders or hierarchies. I think, however, that one very important perspective has been neglected by previous scholars: the late medieval notion of *ordinatio Dei*, a topic which for the most part has been

[12] Schwarz (1978), pp. 21–2. For the tripartite division of ethics, see also Kraye (1988).
[13] Cf. *WA* 43, p. 198 (quoted below).
[14] So Schwarz (1978), pp. 32–4.