MORAL SELF-OWNERSHIP AND IUS POSSESSIONIS IN SCHOLASTICS

Rudolf Schüßler (University of Bayreuth, Germany)

In recent years various attempts have been made to trace the origins of modern subjective rights back to scholastic sources. Medieval law, the dispute about Franciscan poverty, scholastic nominalism, and medieval conciliarism have been thoroughly scrutinised in this context. The contribution of early modern casuistry to the emergence of modern ideas of subjective rights, however, has not received much attention. This is unfortunate, because casuistry has something to offer to the history of subjective rights. Rights were not only postulated in connection with legal claims in public courts, but also in the court of conscience (forum conscientiae). An important strand of Catholic casuistry assumed that in the absence of firmly recognisable moral restrictions an individual has a liberty right (ius libertatis) or possessive right (ius possessionis) to morally unrestricted agency. The notion of possession relates this set of ideas to the rise of modern liberalism. We should, therefore, include casuistical doctrines in our accounts of the early history of subjective rights and liberalism. The rise of possessive rights in the court of conscience will then appear as a

1 See Brett 1997; Coleman 1988; Mäkinen 2001; Tierney 1997; Tuck 1979.
2 I will mainly refer to casuistry instead of more generally to moral theology because the doctrine we will discuss was designed to be applied by casuists, although it was a creation of theologians who often did not teach casuistry themselves. (It should be noted that different chairs of theology, casuistry and moral philosophy sometimes existed at early modern universities or colleges).
A striking example of the gradual appearance of subjective notions of rights in the scholastic tradition. An unambiguous statement of a universal moral *ius possessionis* was only made at the beginning of the seventeenth century – before Hobbes and Locke, but late in the scholastic tradition. It can be shown, however, how this right evolved step by step from medieval origins. Neither did it embrace all aspects of modern subjective rights all at once nor gain universal validity suddenly and through a single revolutionary event.

By elucidating these issues, the present paper will follow a trail which was marked some time ago by Edoardo Ruffini Avondo’s article “Il possesso nella teologia morale post-tridentina”. Ruffini Avondo, however, investigated the role of the concept of possession in Catholic casuistry without establishing parallels with modern liberalism. Moreover, he focused on developments after the Council of Trent up to the nineteenth century, whereas the present inquiry is mainly concerned with developments from the thirteenth to the seventeenth centuries. I have also tried to reduce overlap with Ruffini Avondo by highlighting aspects of possession in the court of conscience which do not appear in his account (e.g., Soto’s contribution, the Molinist connection). Because of this focus, cross connections with debates about Franciscan poverty, nominalism or conciliarism will be neglected. Such ties may well have existed, but they cannot be investigated here.

The present inquiry will start with some conceptual groundwork on the idea of moral self-ownership – in contrast to political (sec. 1). The medieval rule “in equal crimes or cases the position of the possessor is stronger” (the *possidentis* principle) will then be introduced (sec. 2). By the sixteenth century this rule had found a wide range of application from marriage to the theory of just wars and the justification of slavery. The next section (3) will show how the *possidentis* principle was innovatively applied to vows (i.e., promises to God) by the eminent Spanish theologian Domingo de Soto. Soto cleared the ground for the principle’s career as a general rule of moral decision-making under uncertainty in scholastic probabilism, a doctrine invented by Bartolomé de Medina in 1577 (sec. 4). Probabilism’s principle of possession was soon used to advance a *ius possessionis* or *ius libertatis* of free agency within the boundaries of doubt-free moral laws (sec. 5). The last section (6) summarises the paper and points out how scholastic natural law theories could become compatible with new individualistic trends of thought by opening up for quite radical innovations in the domain of moral uncertainty while modifying their traditional framework much more conservatively under conditions of certainty.