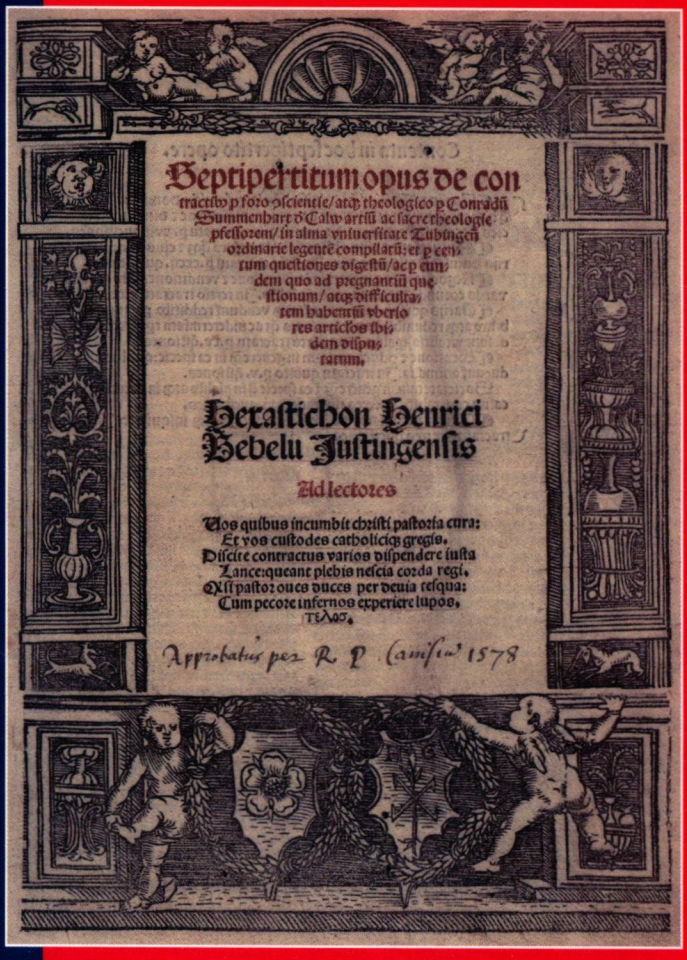
STUDIES IN MEDIEVAL AND REFORMATION TRADITIONS

Conrad Summenhart's Theory of Individual Rights



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By

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LEIDEN • BOSTON
2012

Cover illustration: Title page of the 1515 edition of Conrad Summenhart's *Septipertitum opus de contractibus pro foro conscientie atque theologico* (H. Gran, Hagenau). With permission of the Bayerische Staatsbibliothek (Munich).

This book is printed on acid-free paper.

Library of Congress Cataloging-in-Publication Data

Varkemaa, Jussi.
Conrad Summenhart's theory of individual rights / by Jussi Varkemaa.
p. cm. — (Studies in medieval and Reformation traditions,
ISSN 1573-4188 ; v. 159)
Includes bibliographical references (p.) and index.
ISBN 978-90-04-21683-9 (hardback : alk. paper)
1. Human rights—Philosophy. 2. Summenhart, Konrad, 1465–1511—Political and social views.
I. Title.

JC571.V267 2012
323.01—dc23

2011035960

ISSN 1573-4188
ISBN 978 90 04 21683 9

PRINTED BY DRUKKERIJ WILCO B.V. - AMERSFOORT, THE NETHERLANDS

Conrad Summenhart's Theory of Individual Rights

Studies in Medieval and Reformation Traditions

VOLUME 159

ACKNOWLEDGEMENTS

While conducting a study, it is always good for a scholar to be surrounded by experts. For someone, like myself, whose study cuts across the fields of medieval philosophy, theology, law and politics, the Department of Systematic Theology of the University of Helsinki has been an excellent environment. I am greatly indebted to Professor Simo Knuuttila for his advice and critical comments. I also want to thank Professor (emeritus) Heikki Kirjavainen who first encouraged me to study Conrad Summenhart's *Opus septipartitum*. The task turned out to be as rewarding as it was laborious.

I owe special thanks to Adjunct Professor Virpi Mäkinen who shares my interest in pre-modern language of individual rights. I also wish to thank Adjunct Professors Pekka Kärkkäinen, Vesa Hirvonen and Toivo Holopainen for their assistance in the details of medieval philosophy and theology. I also thank Adjunct Professor Heikki Pihlajamäki from the Department of Criminal Law, Procedural Law and General Jurisprudential Studies for his co-operation. I am grateful to Professor Helmut Feld from the Institut für Europäische Geschichte Mainz for sharing his knowledge on Summenhart's life and career. At the final stage, my study has benefited from insightful comments of Dr. Martin Stone.

I would also like to thank the anonymous reader from Brill for constructive suggestions, and the SMRT editor-in-chief for accepting my study for this series.

My study has been generously financed by the University of Helsinki, the Academy of Finland, Ella and Georg Ehrnrooth Foundation, the Finnish Cultural Foundation and the Finnish Graduate School of Theology.

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INTRODUCTION

In recent decades scholars have shown considerable and steadily increasing interest in medieval discussions of rights. This interest has largely been motivated by a search for the origin of the modern idea of individual or natural rights. Although the merits of this approach in terms of research results are undeniable, there has also been criticism to this research. The dissatisfaction has not concerned the general motivation for the research as much as the way this motivation has affected the research methodology. Often the search for the origin of modern rights has included the application of modern classifications to medieval concepts. Such an approach is problematic, even though a skillful researcher could avoid the pitfalls of anachronisms, which are ever present in historical research that focuses on the genealogy of ideas.

One problem is the plurality of notions that characterizes the modern discourse on rights. What is the modern idea of an individual right? Or more precisely put: What in the complex of ideas associated with rights should be considered the foundation of the modern view of individual or subjective rights?[1] This may not be too big a problem, however, for the search for the origin of modern rights language may help us to answer this question and thereby to contribute in an important way to the clarification of our modern concepts.

A more profound problem arises in the way the search-for-origins approach imposes a paradigm on the pre-modern discourse of rights. In its most widely manifested form, this paradigm appears in the premise that the concept of an individual right presupposes a well-articulated philosophical theory of the individual or individualistic philosophy. This presupposition characterized the thesis advanced by the modern French legal historian Michel Villey in several of his writings. For Villey, the key figure in the medieval history of right(s) was the Franciscan William Ockham (c. 1287–1347). According to Villey, when Ockham consulted the traditional language of *ius naturale*, he transformed it on the basis of his nominalistic, individualistic

[1] This question has been raised by Annabel Brett. See Brett 1997, 2.

philosophy. The concept of an individual or natural right was the outcome of this constructive reinterpretation of *ius naturale*.[2] I am referring to Villey's thesis here as an example of associating the history of rights language with the paradigm of organic growth or development toward modern individual rights.[3] This paradigm, which is concomitant with the search-for-origins approach, should be recognized and discounted. It easily leads to an analysis in which the premodern language of rights is treated literally as pre-*modern* and is not given proper treatment in its own right. This can hardly contribute to a reliable view of the history of individual rights. Furthermore, it is doubtful whether the search-for-origins approach will satisfactorily accomplish its aims. This is evidently the case if the origin turns out to be too complex to fit into the paradigm of development or even less that of organic growth or "the birth of individual rights." The results may be bewildering: we are confronted with formulations or idioms that could be classified as modern or pre-modern, but which are surrounded by other idioms seemingly inconsistent with modern ways of thinking about rights. Which should we prefer or emphasize then, the continuity or the discontinuity? This perplexing situation might generate lively academic discussion, but it could also indicate that the medieval theorizing about rights cannot be grasped with the conceptual tools derived from modern discourse.[4]

A more balanced inquiry has been suggested as a necessary substitute for the search-for-origins approach, an inquiry that 1) dissociates itself from viewing the history of rights as a gradual progress toward modern individual rights, and 2) approaches the history of rights as the history of language.[5] Here, the primary interest is on the use of

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[2] See e.g., Villey 1964. For a detailed exposition of Villey's arguments and the objections to them, see Tierney 1997, 13–34. Since its first publication in the 1960s, Villey's thesis has been highly influential and it has served one of the major catalysts for the growing interest in medieval rights discourse. Yet, Villey's interpretation has also been criticized for its constructivist approach to the language of rights as well as for placing too much stress on the unity of thought of a given author. As for Ockham, it has been pointed out that the connection between his philosophical preferences or metaphysical doctrines and his language of rights is by no means simple or well-articulated enough to support Villey's thesis.

[3] In Villey's view, we may even speak of the birth of individual rights in Ockham's treatment. Villey 1964, 98.

[4] Recently, this point has been made by Janet Coleman. See Coleman 2006.

[5] See Brett 1997, 7. Brett names James Tully and Brian Tierney (along with herself) as representatives of this approach. Brett 1997, 3.

language in its historical context. This approach calls for dissociation from the application of modern concepts to medieval language and also avoiding the kind of abstraction whereby the language of a given theorist is explained in light of a broader, philosophical conviction such as nominalism or voluntarism. Paradoxically or not, the outcome of this kind of historical research could be a more reliable picture of the origins of the modern concept of individual rights.

The present study focuses on reconstructing the theory of individual rights set forth by the German theologian Conrad Summenhart (c. 1458–1502) in his massive *Septipertitum opus de contractibus pro foro conscientie atque theologico* (henceforth *Opus septipartitum*).[6] The central question to be examined is: How does Summenhart understand the concept of an individual right and its immediate implications?

My basic presumption is that, in *Opus septipartitum*, Summenhart was in fact writing about individual or subjective rights. With this assumption my study takes the kind of approach in which the medieval discussion on rights is mirrored in modern ideas about individual rights. I will not, however, seek to present Summenhart as a forerunner of modern rights theories, nor will I approach his formulations with the explicit purpose of extracting expressions that could be classified as modern. I describe Summenhart's theory as a theory of individual rights with the idea that the modern reader who is acquainted with modern rights discourse will recognize the continuity and accept that Summenhart's theory could be called a theory of individual rights. Yet the modern reader should also be able to appreciate the differences that exist between the modern discourse and the discourse in which Summenhart took part with his theory.

By saying that Summenhart has a *theory* of individual rights, I refer to his use of the Latin term *ius* in a reflective way: he not only employs the term *ius*, but also explains how this term should be understood. Further, he follows the implications of this concept and makes them explicit in a way that could be characterized as theorizing on rights. He also makes considerable effort to systematize the language of rights.

The focus of my analysis will remain on Summenhart's language of rights. In order to elucidate the intellectual context of Summenhart's theory, I will examine the previous medieval discourse on individual

[6] *Opus septipartitum* is best known for its progressive views on political economy. See Ott 1957 and Noonan 1954, 233–235, 340–344; Oberman 1977, 171–175.

rights. My narrative will be partial and selective; the intention is not to deliver a comprehensive account of the late medieval rights discourse, but rather to trace one line of discussion, which I take as culminating in Summenhart's contribution. The selection of authors to be discussed is thus defined by my interest in elucidating Summenhart's theory.

My approach has a certain internalist emphasis—something that is invited by the nature of Summenhart's "speech act."[7] Summenhart's account of rights is first and foremost a theoretical enterprise. As far Summenhart's intentions can be recovered, his primary intention seems to have been to clarify a rather complex and ambiguous terminology that formed the corpus of rights language and in that way contribute to the meta-level of late medieval rights discourse. Summenhart also used his language to articulate contextual claims, and I will try to elucidate these whenever I recognize them. It can even be said that it is this connection to historical context and legal practice that makes Summenhart's work interesting; it is not just theorizing as an academic maneuver but theorizing that is relevant and serves the practice. Summenhart's explicit effort to connect his conceptual discussion to the contemporary juridical language reinforces this impression. However, to do justice to Summenhart's discussion and give a balanced account of his work, theory rather than practice must be regarded as the primary context of Summenhart's writing.

Conrad Summenhart was a German theologian whose academic career culminated with a professorship in theology at the University of Tübingen. Summenhart was born in 1458 at Calw, which was a Swabian town in the northern part of the Black Forest. He began his studies in Heidelberg in 1472, receiving his *baccalaureus artium* degree the following year. Summenhart continued his studies in Paris and was conferred the degree of *magister artium* in April 1478. Later that year he returned to his home district and became a master in the faculty of arts at the University of Tübingen, which had been founded only the year before. In 1483 Summenhart was again appointed as regent master in the faculty of arts, which indicates that he must have temporarily left Tübingen. This time, he returned to Tübingen for good. The next

[7] I will not, however, approach the notion of an individual right as an "unit idea" or otherwise try to "get behind the back of language." For different approaches within the discipline of intellectual history, see e.g. Kelley 2005, Clark 2004, 138–145; Tully 1988.

year Summenhart was elected the rector of the University and was re-elected three times (in 1491, 1496/7, and 1500).[8]

In January 1484 Summenhart began studying in the faculty of theology as *baccalaureus*, first in Bible reading and then, in 1485, in commenting upon the *Sentences* of Peter Lombard. His departure from the faculty of arts was not abrupt, however. During the academic year of 1487–88 he was still acting as the dean of the faculty of arts. Summenhart did not receive his degree in theology until October 1489, as the degree could not be granted to a candidatae under thirty years of age. At the beginning of his second rectorate, in May 1491, he finally joined Gabriel Biel as a professor in theology at the university. While Biel held the chair of the *via moderna*, Summenhart became the *ordinarius* of the *via antiqua*, which in Tübingen was oriented toward Scotist thinking.[9] Summenhart's professorship lasted a decade. In 1501 Tübingen was infected by the plague, an event that ultimately seems to have led to the end of Summenhart's career. Summenhart evacuated to the Schuttern Abbey in Lahr, where he died on October 20, 1502.[10]

The published works of Summenhart neatly profile his interests as a theorist. Summenhart had long-term working experience at the faculty of arts and was well acquainted with natural philosophy. In this field, his contribution was the *Summa naturalis* or *Commentaria in summam physice Alberti Magni* (published posthumously in 1507). His major interest, however, was in the questions of practical morality that had relevance in the fields of (canon) law and theology. In this area Summenhart was a self-conscious theologian who did not avoid confrontation with contemporary lawyers. In 1493 he wrote his *Tractatulus exhortatorius ad attendendum super decem defectibus virorum monasticorum* (published in 1498), which criticized the contemporary monastic way of life with its orientation both mundane and luxurious.[11] This work showed Summenhart's sympathies to ecclesiastical reform, which also appear in his critical theses on tithes, the *Tractatulus bipartitus de decimis* (1497). Summenhart argued that the

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[8] Feld 1992, 86.

[9] Oberman 1977, 34–35. Summenhart was educated in the circles of *via antiqua*. He began his studies in Heidelberg, which was a center of *via antiqua*, and continued them in Paris at a time when nominalist teaching was banned by Louis XI.

[10] Feld 1992, 87.

[11] The exact target of Summenhart's criticism was the Benedictine abbey at Hirshau. Summenhart's tract contributed to the pre-Reformation debate on the integrity of religious life. See Feld 1990, 99–104.

practice of tithing, as pursued in the late medieval church, was not based on divine law, but instead on man-made canon law. In stressing that church legislation as human law has its own territory that should not be overstepped Summenhart was very much the heir of Jean Gerson (1363–1429), of whom he thought highly. Like Gerson, Summenhart was concerned with liberating the area of conscience from the ever-multiplying regulations of canon law. He also wanted to defend the leading role of theology in moral matters.[12] These emphases were manifested in Summenhart's main work, a massive thesis of casuistic moral theology: *Septipertitum opus de contractibus pro foro conscientie atque theologico.* The work was first published in 1500, two years before Summenhart's untimely death and was reprinted four times during the sixteenth century.[13]

The subject matter of *Opus septipartitum* consists of analyses of contractual situations that are related to economic transactions. In Summenhart's time, as today, this was a subject that was fundamentally defined by lawyers. The characteristics of Summenhart's approach are given in the title of his book. He reviews contractual cases, not as they appear in the courts of law, whether civil or canon, but as they appear in the court of conscience and from the viewpoint of theology. *Opus septipartitum* had a practical incentive: instruction in how to conduct business with a good conscience. *Opus septipartitum* is not, however, a popular manual for the businessman or for the priest in daily confessional work. Instead it is clearly written for an academic audience.[14]

Opus septipartitum consists of seven parts or treatises comprising a total of one hundred questions. There is an individual treatise on

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[12] Oberman consideres Summenhart as a representative of what he calls the "first Tübingen school": "This was an academic tradition characterized by groundbreaking scholarly activity between the fronts of theology and law where Gabriel Biel and especially Conrad Summenhart addressed fiery issues of social ethics that alternately smouldered and flamed during the entire sixteenth century." Oberman 1981, 61. For an interpretation of this school, see Oberman 1977, 77–78, 146–156, 159–163.

[13] In 1513 and 1515 by the original publisher, Heinrich Gran in Hagenau, and in 1580 by two Venetian publishers. I have used the original 1500 edition by H. Gran. For an introduction to Summenhart's works, see Feld 1992. On Summenhart's career, see Haller 1927, 172–187.

[14] *Opus septipartitum* can be placed in "the literature on contracts and cases of conscience." See Brett 1997, 23, 34; Trusen 1990. The bulk of the work consists of detailed casuistic analyses in which Summenhart utilizes scholastic methodology with results that are often as exhausting as they are exhaustive.

loans (*mutuum*), on the contract of sale (*emptio et venditio*), a specific case of the sale of *census* or *redditus*, partnership (*societas*), lease (*locatio et conductio*), and exchange (*cambio*). The work begins, however, with a preliminary treatise, which is meant to prepare the reader for the actual casuistic working of the other six treatises. This preliminary material includes a fully developed theory of individual rights. Summenhart thereby placed individual rights at the center of applied ethical reasoning.

Summenhart's discussion of rights in *Opus septipartitum* has been acknowledged in modern scholarship, although no monographs have been devoted to his language of rights.[15] Several scholars have noted Summenhart's influence on the sixteenth-century Spanish scholastics and have reviewed his language of rights from this perspective. Paolo Grossi referred to Summenhart's language in his article "La proprietà nel sistema privatistico della seconda scolastica" (1973). In general, Grossi emphasized the fundamental importance of medieval voluntarist theology of fourteenth-century Franciscan scholasticism. According to Grossi, the individualism embedded in the voluntarist theology made it plausible to think of dominion and rights in terms of the liberty or freedom of the individual.[16] Grossi took this as a transformation of the medieval language of rights that was fundamental enough to explain Summenhart's language of rights as well. Grossi paid special attention to Summenhart's definition of dominion in terms of faculty. According to Grossi, in defining dominion as a faculty Summenhart took faculty to mean the power of the subject, not in the sense of pure potentiality, but in the sense that denoted the liberty of the individual.[17]

Kurt Seelmann also viewed Summenhart as a source for sixteenth-century Spanish scholastics in his *Die Lehre des Fernando Vazquez de Menchaca vom Dominium* (1979). Seelmann questioned the validity of Grossi's interpretation of the all-embracing influence of Franciscan voluntarism for medieval rights discourse. Seelmann took Grossi's approach as representative of *geistesgeschichtliche* construction, in which the semantic connections between the usage of a term in different

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[15] The only general monograph on Summenhart is Franz Linsemann's *Konrad Summenhart. Ein Culturbild aus den Anfängen der Universität Tübingen* (1877).

[16] Grossi 1973, 134–135. Grossi's views also emerge in his article "Usus facti. La nozione di proprietà nella inaugurazione dell'età nuova" (1987). See Grossi 1987, 1–58.

[17] Grossi 1973, 201.

contexts or by different writers were assumed rather than carefully studied. In his own work, Seelmann set out to study these semantic connections by identifying the sources on which Vázquez and other Spanish scholastics relied in their interpretations.[18] This perspective defined his approach to Summenhart. He did not seek to present a general interpretation of Summenhart's language of rights, but focused on certain formulations that could have influenced Vázquez's language.

In his *Natural Rights Theories* (1979), Richard Tuck discussed Summenhart's formulations as a part of a development that led to early modern natural rights theories. Although Tuck did not provide any detailed analysis of Summenhart's language, Tuck valued the German as an important figure in the formation of the so-called "first rights theory."[19] Tuck emphasized the importance of the equivalence of right and dominion that was part of Summenhart's language. According to Tuck, Summenhart's equivalence of a right with dominion indicated "an active rights theory, in which to have any kind of right was to be a *dominus*, to have sovereignty over that bit of one's world."[20] Tuck's interpretation, which makes use of the modern distinction between active and passive rights, has been criticized by later interpreters. Annabel Brett and Brian Tierney have pointed out that Tuck, like Grossi, failed to recognize the way that Summenhart specified the terms 'dominion' and 'faculty' in order to achieve an equivalence between a right and dominion or a right and faculty. Tierney has further pointed out that the modern distinction between active and passive rights does not fit the medieval discourse on rights.[21]

Brett's *Liberty, Right, and Nature* (1997) and Tierney's *The Idea of Natural Rights* (1997) contain the most detailed analyses of Summenhart's language of rights currently available. In both studies there is a separate chapter dedicated to analyzing Summenhart's *Opus septipartitum*.[22] As to the basic approach, there are some important similarities between the two studies. Both Tierney and Brett focused on the language and took a negative stand vis-à-vis abstract generalizations and the application of modern classifications of medieval texts. Yet Tierney also sympathized with the inquiry into the geneal-

[18] Seelmann 1979, 7–13.
[19] See Tuck 1979, 5–31.
[20] Tuck 1979, 28.
[21] Brett 1997, 38; Tierney 1983.
[22] See Brett 1997, 34–43, and Tierney 1997, 242–252.

ogy of ideas and even made an effort to point out the medieval roots of modern concepts.[23] By contrast, Brett explicitly dissociated herself from the approach by which medieval discussions were reviewed for the purpose of identifying the origins of the modern concept of individual rights. She defined her approach as an effort "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 discourse."[24] Brett paid special attention to the genres of scholastic literary production. According to her, the literary genre imposed restrictions or constraints on the writer's terminology. From this viewpoint, Brett took the medieval discussions on rights as genre-dependent in a relevant way. She placed Summenhart's *Opus septipartitum* in "the literature on contracts and cases of conscience" and maintained that the basic semantics of Summenhart's language was derived from that literary genre.[25] Although Brett's claim of the constraining influence of the literary genre might seem plausible in the abstract, in practice it faces problems. In particular, Summenhart's language was highly dependent on Jean Gerson's and Antoninus of Florence's language of rights, which are representatives of two other literary genres in Brett's classification. As far as Summenhart is concerned then, this emphasis on the separation of literary genres blurs the semantic connections that are elementary for understanding Summenhart's language of rights.

While Brett's discussion of Summenhart was confined to the basic concept of an individual right, Tierney discussed Summenhart's account of the species of dominion. Unfortunately, Tierney's interpretation remains unsatisfactory, because he failed to recognize Summenhart's conscious effort to systematize Gerson's language of rights, which was the basic rationale for his conceptual work.[26] As far as Summenhart's basic concept of an individual right is concerned, Tierney's and Brett's conceptual analyses were for the most part accurate, and can also be read as mutually complementary. Yet it should be noted that neither Brett nor Tierney managed to grasp fully the fundamental role that

[23] In this respect, Tierney emphasizes the relevance of the language developed by the twelfth-century canon lawyers. See Tierney 1997, 43–77.
[24] Brett 1997, 7.
[25] See Brett 1997, 7, 25–26, 34, 38.
[26] See Tierney 1997, 250–251.