

THE THEOLOGICAL ROOTS OF SUBJECTIVE RIGHTS:
DOMINIUM, IUS AND POTESTAS IN THE DEBATE ON THE INDIAN
QUESTION (SEC. XVI)

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“...sine dubio barbari erant
et publice et privatim
ita veri domini, sicut cristiani.”
Francisco de Vitoria

Studies of the historical reconstruction of human rights doctrines indicate a canonical genealogy that starts with the *Magna Charta Libertatum*, passes through the *Bill of Rights* of the Glorious Revolution and of the independence of the United States, and finally arrives at the *Déclaration de droit de l'homme e du citoyen* of the French revolution.¹

However, these reconstructions pass far from a decisive historical moment of this trajectory: the period of transition between an objective conception of right, typical of the major part of ancient and medieval tradition, to a subjective conception of rights, typical of Modernity: the transition from right to the rights, according to the famous book of Michel Villey.²

This change from the ancient to the modern jusnaturalism has its roots in three historical phenomena: the jurisprudence of the High Middle Ages in the twelfth and thirteenth centuries³, the positions of

¹ Tzvetan Todorov, *Nous et les autres. La réflexion française sur la diversité humaine*, Paris, 1989; Fábio Konder Comparato, *A afirmação histórica dos direitos humanos*, São Paulo 1999; José Damião de Lima Trindade, *História social dos direitos humanos*, São Paulo 2002.

² Michel Villey, *Le droit et les droits de l'homme*, Paris 1983.

³ For Brian Tierney the origins of a subjective natural rights theory must be founded not only in Ockham and in his nominalistic followers – as Villey affirms – but also and above all in the “creative jurisprudence that, in the twelfth and thirteenth centuries, established the foundations of the Western legal tradition.” Medieval canonists and lawyers are for Tierney the direct sources of Salamanca masters and of Bartolomé de Las Casas. See: Brian

Franciscan theologians in the debate on the poverty of Christ in the fourteenth and fifteenth centuries, - above all the outstanding contribution of William of Ockham and his nominalistic followers - and finally, the theologians of the Salamanca School, particularly during the debate on the New World, in the first half of the sixteenth century.⁴

This change in the conceptual history is associated with changes in social history: the emergence of a new “class” of merchants with its new guild and corporation in the medieval “Renaissance;” the debate between pope and emperor about the *plenitudo potestatis totius orbis*, and the debate over the legitimacy of the conquest of the New World. It was not a change of conceptual paradigm (that would only happen later, with Thomas Hobbes), but it was a re-interpretation of some crucial concepts of political and juridical tradition, like *jus*, *dominium*, *potestas*, *jurisdictio*, *libertas*, that assumed a new meaning, although the conceptual framework in which they were included did not change significantly.⁵

For ancient jusnaturalism, which dominated the history of the concept of natural right from Aristotle until the end of fifteenth century and after, right (*dikaion* in Greek, *ius* in Latin) is defined as an objective and just relation, based not on the will of individuals, but on what is objectively just in the relation between subjects, based on a natural and social order which governs the world and is legitimated by God; an order which the individual must respect and obey, everyone in his natural and social place. In this context, it is proper for subjects to have obligations toward society rather than rights.⁶

In the period between the Late Middle Ages and the Early Modern Age, right (*ius*) tended to be identified with dominion (*dominium*) and this, in turn, began to be defined as a faculty, capacity

Tierney, *The Idea of Natural Rights. Studies on Natural Rights, Natural Law and Church Law (1150 - 1625)*, Emory 1997, p. 97 and pp. 255-287. And also: Brian Tierney, “Aristotle and the American Indians-Again. Two Critical Discussions,” in *Cristianesimo nella Storia*, 12 (1991), pp. 295-322.

⁴ On this subject, see the classic work: Lewis Hanke, *Aristotle and the American Indians*, London-Chicago 1959.

⁵ For the change of the political paradigm see: Merio Scattola, *Dalla virtù alla scienza. La fondazione e la trasformazione della disciplina politica nell'età moderna*, Milano 2003.

⁶ Paolo Grossi, *L'ordine giuridico medievale*, Roma-Bari 1996.

(*facultas*) or power (*potestas*) of a subject over himself and his possessions⁷. In this manner, a conception started which progressively set free the individual from the subjection to a natural, objective and divine order, and granted him a special, original and peculiar power limited only by the power, equally especial and original, of the other individual under the authority of law and social contract. The transition from right (*ius*) to rights (*iura*) is beginning.⁸

This process had a decisive moment in the reflection of theologians of the Second Scholastic, especially the Salamanca School. The objective of this paper is to follow this crucial moment of transition, studying three important scholars of this period: Domingo de Soto, Francisco de Vitoria and Bartolomé de Las Casas, outstanding protagonists of the controversy of the Indies of the New World, which took place in Spain (and Latin America) in the first half of the sixteenth century.⁹

1. The Question: Are Indians Natural Slaves or Free Men?

With the discovery of Aristotle's *Politics*, in the thirteenth century, the doctrine of the "natural slavery" began to be known among medieval scholars and, in spite of the immense authority of "the Philosopher," its reception was not without problems. The doctrine had two problems for the Christian conscience: the contrast with the universal equality and the original freedom of men and peoples, and the absence of an empirical and historical reference to which this category could be applied. For these reasons, despite the innumerable trials, during the Late Middle Ages "natural slavery"

⁷ Isabel de Assis Ribeiro Oliveira, "Direito subjetivo-Base escolástica dos direitos humanos," in *Revista Brasileira de Ciências Sociais*, XIV, 41 (outubro/99) pp. 31-43.

⁸ Paolo Grossi, *Il dominio e le cose. Percezioni medievali e moderne dei diritti reali*, Milano 1992.

⁹ Giuseppe Tosi, *La teoria della schiavitù naturale nel dibattito sul Nuovo Mondo (1510-1573): "Veri domini" o "servi a natura"?*, "Divus Thomas," 33 (3/2002), pp. 11-258.

remained an empty category until the discovery of the New World, as Gianfranco Fioravanti observes.¹⁰

Only in this historical moment did the doctrine acquire its relevance in the debate about the legitimacy of the conquest of the new overseas territories. For theologians and lawyers who were looking for a legitimacy of the *datum* of the conquest (*factum quaerens jus*) it seemed plausible to identify the new peoples discovered with the Aristotelian “natural slaves.”¹¹

In fact, the Greek philosopher developed a doctrine the scope of which was the justification of the fact of legal slavery. The Aristotelian slaves were the domestic slaves and also the slaves working in forced labour (*ergastola*): they were indispensable for the maintaining of the ancient system of production, allowing the existence of a space of action for free and equal citizens (*eleutheroi kai ísoi*). At the same time, Aristotle affirmed the possibility that natural slaves were exclusively barbarians, because in these societies the place of free citizenship was very reduced or inexistent. This is the reason why there were despotic and tyrannical political systems among the barbarians, considered “against nature” (*katá phýsin*) for the Greek, but “natural” (*pará phýsin*) for the barbarian societies in which “the element of the natural command,” that is, free men, did not exist.¹² Moreover, Aristotle, in the *Nicomachean Ethics*, spoke about another class of barbarians, that is, those peoples who lived in the extreme borders of the civilized world, who practiced abnormal customs and did not live under the authority of law.¹³

Peoples of the New World apparently had these two characteristics: they were unable to govern themselves and practiced savage customs against nature. This was a strong argument against the primitive peoples discovered in the Caribbean Islands, who did not have government and whose organization and civilization were not comparable with European civilization; peoples that practiced condemnable customs like cannibalism. In this case, it was easy to

¹⁰ Gianfranco Fioravanti, “Servi, rustici, barbari: interpretazioni medievali della *Politica* aristotelica,” in *Annali della Scuola Normale*, Classe di Lettere e Filosofia, XI, 2 (1981), pp. 399-429.

¹¹ G. Tosi, *La teoria della schiavitù*, op. cit., pp. 40-55.

¹² Aristotle, *Politica*, I, 2, 1252b 5-9.

¹³ Idem, *Etica Nicomachea*, VII, 1, 11145a 28-33; VII, 6, 114818-25; VII, 6 1149a 7-12.

identify them with savages, brutes, rude and mentally handicapped (*amentes*) peoples of the medieval exegesis of the *Politics* and *Nicomachean Ethics*.

More complex was the case of the great civilizations, such as the Maya, Aztec and Inca discovered later. It was impossible, in the face of these great, magnificent, and very complex civilizations, to deny that these phenomena were a clear indication of rationality (*indicium usum rationis*) and the capacity of self-government. In this case, the apologists of the conquest used as evidence the tyrannical and despotic regimes and human sacrifices, customs that justified the intervention of wiser people (*sapientiores*) to reduce them, with force if necessary, to more moderate and Christian manners, as the apologist of the conquest Juan Ginés de Sepúlveda (1490-1573) affirmed.¹⁴

Natural slave theory was accepted by important theologians like Johannes Maior, Bernardino de Meza, Matias de Paz, lawyers such as the *licenciado* Gregorio and Palacios Rúbios (the author of the famous *requerimiento*), historians like Gonzáles Fernandez de Oviedo,¹⁵ and obtained adepts within the Dominican and Franciscan missions themselves. During several years, this position was hegemonic in the *juntas* of theologians and lawyers who, from the time of Isabella de Castilla and Fernando de Aragón, deliberated on the subject. These arguments provided a theological and juridical framework for the resolutions of the *Consejo de las Índias* and *Consejo de la Corona*, which governed the whole process of conquest and colonization. A typical representative of this side of the controversy was Sepúlveda, who literally retook the Aristotelian doctrine and put it together with the doctrine of just war and its compatibility with Christendom.

The element which began a new point of view and opened the debate was the sermon, given in front of Diego de Colón and the most important colonial authorities, by the Dominican father, Antonio de Montesinos, in the name of the whole community ruled by father

¹⁴ J. Ginés de Sepúlveda, *Democrates segundo o de las justas causas de la guerra contra los indios*, ed. A. Losada, Madrid 1984 (1951), p. 22. See also: G. Tosi, *La teoria della schiavitù...*, op. cit., pp. 132-147.

¹⁵ Venancio Carro, *La teología y los teólogos-juristas españoles ante la conquista de América*, Salamanca 1951, pp. 287-292.

Pedro de Cordoba during the time of Advent of 1511 in the Hispaniola island.¹⁶

The Dominican theologians, Francisco de Vitoria (1485-1546), who was professor of *Prima Theologia* at Salamanca, the most prestigious cathedra of Spain, and Domingo de Soto (1494-1560), his collaborator, felt the moral obligation to interfere, and the questions which were debated in the *Cortes*, began to resound in the hall of most important universities of Spain, such as Salamanca and Alcalá de Henares. Information from the *Indies*, through the testimonies of the missionaries and the chronicles of *conquistadores*, were much too tragic. Vitoria knew the atrocities of the conquest very well, and this appears in his famous *Relectio de Indis*,¹⁷ Domingo de Soto talked about it in his *Relectio de Dominio*.¹⁸

A reformulation of the theoretical framework was necessary to justify the conquest: it was not enough just to apply ancient theories, as Sepúlveda did, but necessary to open new ways to resolve new problems. In 1516, while Vitoria was lecturing philosophy in Paris, the principal protagonist of the debate, the Dominican friar Bartolomé de Las Casas (1488-1566), appeared on the political scene and presented to Cardinal Cisneros his first *Memorial de Denúncias* and was nominated *Protector de los indios*. Fifty years later, in 1566, a few months before dying, Las Casas presented his last *Memorial* to the *Consejo de Indias*. During this time, except for a period of study and reflection on Hispaniola Island, his figure dominated the entire debate, and to a great extent, revived and reconditioned it.

The more time passed, the more Las Casas radicalised his position against the conquest and colonization. His doctrine is outstanding because of its pathos in defence of the Indians, the constant relation between theory and practice, but also for its theoretical originality. He was not a simple follower of the Salamanca masters, he was not only a skilful polemist, but also a jurist, a theologian, and a philosopher, who used cultural mediations with skill

¹⁶ Gustavo Gutierrez, *Alla ricerca dei poveri di Gesù Cristo. Il pensiero di Bartolomé de Las Casas*, Brescia 1995, pp. 43-44.

¹⁷ Francisco de Vitoria, *Relectio de Indis* (1538), ed. L. Pereña e J. M. Perez Prendes, Madrid, 1981: I, 1, 1, p. 13; I, 7, p. 10 (*Corpus Hispanorum de Pace*, vol. V). See also: G. Tosi, *La teoria della schiavitù...*, op. cit., pp. 78-92.

¹⁸ Domingo de Soto, *Relección de Dominio*, ed. Jaime Brufrá-Prats, Granada 1964.

and talent, and developed an important and coherent political doctrine, as more recent studies show.¹⁹

In this paper, we shall try to present the positions of the principal protagonists of the debate, which had great historical and theoretical significance for the modern history of the Occident.

2. Domingo de Soto: *Relectio de Dominio*.

The Salamanca masters introduced the question of the natural slavery of the Indians in the context of the discussion about *dominium*. The question to be answered was whether barbarians had been true owners before the arrival of Spanish people (*Utrum barbari essent veri domini ante adventum hispanorum*)²⁰; not if they had been true “men,” but true “owners.” This difference is very interesting because it shows how, in the debate, nobody seriously doubted the humanity of the Indians: the theological and juridical question was the legitimacy of their property, and not of their humanity. And this is quite obvious, because if Indians were animals without a soul, the whole evangelisation would be meaningless. The question was from the beginning political and juridical, rather than anthropological.

But what is *dominium* (property or ownership), and what is its relation to *jus*? For the traditional and “objective” conception of right, *dominium* and *jus* were two different things; the concept of *jus* was larger than the concept of *dominium*, which was only a little and marginal part of the system of right.²¹ For the theologians, *iuniores* or *moderni*, like Gerson, - inheritors of the nominalistic tradition of William of Ockham - *dominium* and *jus* were the same thing, and the concept of *dominium* acquired a new sense and a very outstanding position in the new system of right.

De Soto (1495-1560) discussed the question of *dominium* in the *Relectio de Dominio* (1535) and in his great treatise *De Iustitia et Iure*

¹⁹ Isácio Perez Fernandez, “Cronologia comparada de las intervenciones de Las Casas y Vitoria en los asuntos de América,” In *I diritti dell'uomo e la pace nel pensiero di Francisco de Vitoria e Bartolomé de Las Casas*, Milano 1988, pp. 539-568 (p. 567).

²⁰ F. de Vitoria, *Relectio de Indis*, op. cit. I, 1, 1, p. 13.

²¹ Dino Composta, “Il concetto di diritto nell'umanesimo giuridico di Francisco de Vitoria O.P.,” in *I diritti dell'uomo e la pace*, op. cit., pp. 273-291 (p. 273).

(1556)²². De Soto produced a systematic treatise on the question, that was in itself something new in relation to the traditionally relatively modest place of the question, for example in the work of Saint Thomas Aquinas.²³

Dominium, De Soto said, could be understood as a figure of private right (*dominium proprietatis*) and as a figure of public right (*dominium iurisdictionis*). De Soto dealt with the two meanings of the concept, starting with the discussion about the legitimacy of political use.²⁴

When De Soto studied this theme, the discussion about *dominium* had existed for a long time, starting during the famous controversy about the poverty of Christ and his disciples during the thirteenth and fourteenth centuries, between Pope John XXII and the Franciscans.²⁵ A large number of nominalistic theologians and lawyers took part in this debate that was part of a bigger discussion between Pope and Emperor: William of Ockham (1290-1349), Richard Fitz Ralph of Armagh, *Armacanus* (1295-1360), Pierre d'Ailly (1350-1420) and especially Jean Gerson (1362-1429), chancellor at the University of Paris, who elaborated a much discussed and influential theory about rights, property and liberty.²⁶

The Salamanca theologians wanted to restore the true Thomistic doctrine, against the nominalistic currents that were hegemonic at the University, above all in Paris, when Vitoria de Soto was studying there. Jean Gerson and his followers²⁷ maintained that *dominium* was

²² D. de Soto, "Relectio de Dominio", ed. J. Brufau Prats, in *Relectiones y Opúsculos*, Salamanca 1995, Vol I; *De Iustitia et Iure* (*De la justicia y del derecho*), 5 vol., Madrid 1967-68.

²³ P. Grossi, "La proprietà nel sistema privatistico della seconda scolastica," in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, (1/1973), pp. 119-222 (p. 125).

²⁴ D. de Soto, *De Dominio*, op. cit. § 1, p. 102; § 2, pp. 103-104; *De Iustitia et Iure*, op. cit. IV, q I, p. 278.

²⁵ Richard Tuck, *Natural Rights Theories. Their origin and development*, Cambridge 1979; see also Brian Tierney, "Ockham and the Franciscans", in *The Idea of Natural Rights*. op. cit., pp. 93-206.

²⁶ B. Tierney, "Gerson. Conciliarism, Corporatism and Individualism," in *The Idea of Natural Rights*. op. cit., pp. 206-235.

²⁷ Like the theologian, Gabriel Biel (1410-1495), the lawyer, Conrad Summenhart (1465-1511) and the Scottish theologian, John Mair (†c.1550). See: B. Tierney, Almain, Mair, Summenhart, in *The Idea of Natural Rights*, op.

the same thing as *ius*²⁸. And dominion was defined in these terms: “*Dominium* is the power (*potestas*) or the faculty (*facultas*) to take over the things that are near, to use them in a licit manner in conformity with law and rights (*iura*), instituted by reason (*rationabiliter institutas*).²⁹

De Soto did not accept the identification of *dominium* with *ius*, and suggested a more limited definition, the notion of *ius* being higher and broader (*superius et latius*) than the concept of *dominium*. In fact, a son and a slave have the right (*ius*) to be nourished by the father and the master, but still, they do not exercise a *dominium* over him.³⁰

In this way, De Soto separated himself from the (ultra)-subjectivist conception of rights that theologians and lawyers *moderni* introduced, based on the medieval jurisprudence. The *moderni*, identifying the two concepts, considered right to be like a subject's property, or appropriation of a multitude of rights (*iura*) whose only limitation was the law.³¹ De Soto, on the contrary, wanted to restore the traditional, objective conception of rights of Thomas Aquinas. He affirmed several times that: *ius idem est quod iustum*, *ius est in rebus*, *ius est obiectum iustitiae*.³² De Soto observed that, etymologically, *ius* comes from *iustum*, and that the Greek word *dikaion* signified *ius* and *iustum* indistinguishably.³³ Right (*ius*) is related to an objective order that the subjects must respect in their behaviour, guided by divine and human law, and educated to goodness through the exercise of justice,

cit., pp. 236-254. John Mair was the first theologian to use the Aristotelian natural slave theory to legitimate the Conquest of the New World in 1513. See: Venancio Carro, *La teología y los teólogos-juristas españoles ante la conquista de América*, Salamanca 1951, pp. 287-292.

²⁸ D. de Soto, *De Iustitia et Iure*, IV, I, p. 279: “Deinde aiunt (iuniores) dominium idem esse prorsus quod ius secundo modo acceptum (pro legitima potestate), qua quis fungitur in personam aliquam vel rem.”

²⁹ Idem, IV, I, p. 279: “Dominium est potestas vel facultas propinqua assumendi res aliquas in sui usum licitum secundum leges et iura rationabiliter institutas”

³⁰ Idem, IV, q I, p. 279: “Ius namque (ut supra dictum est) idem est quod iustum (uti ait lib. 5 Isid.) Est enim obiectum iustitiae: puta aequitas quam iustitia inter homines constituit: dominium autem facultas est domini (uti nomen sonat) in servos vel in res quibus suo arbitratu, ob suumque commodum utitur. Fit ergo ut ius non convertatur cum dominio, sed sit illis superius et latius patens.”

³¹ R. Tuck, *Natural Rights Theories*, op. cit., p. 46.

³² D. de Soto, *De Iustitia et Iure*, op. cit., IV, I, p.279.

³³ Idem, III, I, p. 193.

that is “a virtue with foundation in the will, that, guided by law, determines what is just in things.”³⁴

But, despite this important difference with the *iuniores*, De Soto accepted the definition of *dominium* in the terms proposed by Jean Gerson, that is, as a power or faculty (*potestas vel facultas*) of a subject to hold something for personal use.³⁵

Property (*dominium*), thus, is a faculty (*facultas*) peculiar to everyone, which expresses the right (*ius*) over everything that any person can use (*usurpare*) for his comfort, and for whatever use consented to by law (*quocumque usu lege permissio*).³⁶

What is important, however, is that De Soto distinguished between *dominium* and *ius*, in contrast with the *moderni*; but in accordance to them, he identified *dominium* with *libertas*; that is, he considered property and ownership as an intrinsic and inherent characteristic of man, and a condition *sine qua non* for his freedom.³⁷ In contrast with Gerson, who admitted that animals (*bruti*) could also have a natural *dominium*, De Soto affirmed that ownership is peculiar to man, because only man has reason and liberty.³⁸ To be owner of

³⁴ Idem, *ibidem*. Richard Tuck doesn't admit a substantial agreement between the Salamanca Scholars and the *iuniores*, in spite of verbal divergences. Tuck, on the contrary, defends the thesis of the fidelity of Spanish theologians to Thomas and to the objective theory of right. Daniel Deckers criticizes this position and defends the thesis of the presence of a subjective theory of natural rights in Vitoria and De Soto works (*Dominium als natürliches subjektives Recht bei Francisco de Vitoria*). Daniel Deckers, *Gerechtigkeit und Recht. Eine historisch-kritische Untersuchung der Gerechtigkeitslehre des Francisco de Vitoria (1483-1546)*, Freiburg i. Br. 1991, pp. 147-188.

³⁵ In the *De vita Spirituali Animae*, Gerson defined rightly in this manner: “Ius est facultas seu potestas propinqua conveniens alicui secundum dictamen rectae rationis...”. See: Richard Tuck, *op. cit.*, p. 26.

³⁶ D. de Soto, *De Iustitia et Iure*, IV, I, p. 280: “Dominator ergo si, secundum artem describas, est propria cuiusque facultas et ius in rem quamlibet, quam in suum ipsius commodum usurpare potest quocumque usu lege permissio”

³⁷ While in the tradition of Roman and medieval right, the *libertates* were not properly rights, but privileges and immunities conferred and allowed by the prince, Gerson assimilates the rights to the liberty of a subject, as Richard Tuck says: “But by claiming that *ius* was *facultas*, Gerson was able to assimilate *ius* and *libertas*.” R. Tuck, *Natural Rights Theories*, *op. cit.*, p. 26.

³⁸ D. de Soto, *De Dominio*, *op. cit.*, § 12, p. 124.

oneself, of one's body, of one's goods, of one's actions is an indispensable condition for freedom. And the principal argument in favour of this thesis is that only man is created in the "image and semblance of God": *fundamentum dominii est imago Dei*.³⁹ The human *dominium* is established in analogy with the divine: only God is true *Dominus*, and every human dominion is so only by analogy with the divine.⁴⁰ In this case, De Soto followed the analogical conception of dominion that Thomas had largely consolidated.⁴¹

De Soto sustained also that the natural *dominium* began with the creation of the world (*dominium naturale coepit esse in prima creatione mundi*),⁴² and that man was the owner of his own being and of all the things created by God. The affirmation that *dominium* was a figure of natural right and not of *jus gentium* was very important to justify the legitimacy of property (*publice et privatim*) of the Indians in the New World; and Las Casas would use this argument on a very large scale in his works, as for example, in the political treatise *De Regia Potestate*.⁴³

3. Francisco de Vitoria: *Relectio de Indis*.

As we have seen, De Soto formally reasserted the traditional and Thomistic doctrine,⁴⁴ but at the same time, he accepted the definition of *iuniores* of *dominium* as such a faculty and power (*facultas et potestas*) to use a thing in conformity with the uses allowed by law. The next step, that is, the explicit identification of *dominium* with *ius* is made by Francisco de Vitoria in his *Relectio de Indis*: "Dominion is nothing else than the right to use a thing for one's utility" (*Dominium nihil aliud est quam ius utendi re in usum suum*), and, citing the definition of Summenahrt (*Conradus*), Vitoria stated: "It is clear that dominion is right" (*Patet quia dominium est ius*).⁴⁵

³⁹ Idem, § 9, p. 126.

⁴⁰ Idem, § 18, p. 134.

⁴¹ See: Jaime Brufau Prats, *La noción analógica del dominium en Santo Tomás, Francisco de Vitoria y Domingo de Soto*, in "La escuela de Salamanca ante el descubrimiento del Nuevo mundo," Salamanca 1989, pp. 11-47 (p. 13).

⁴² D. de Soto, *De Dominio*, op. cit., § 16, p. 132.

⁴³ Bartolomé de las Casas, *De Regia Potestate*, ed. Luciano Pereña, J.M. Perez-Prenda, Vidal Abril y Joaquim Azcarraga, Madrid 1984. (*CHP*. Vol VIII).

⁴⁴ Idem, p. 289.

⁴⁵ F. de Vitoria, *De Indis*, op. cit., I, I, 12, p. 26.

This appears also in the admirable pages that Vitoria devoted to the *dominium* of *amentes* and *pueri* in the first part of *Relectio*, in which Vitoria established an anthropological foundation for the whole treatise. We will summarise the principal arguments.

Vitoria affirmed that he would not speak about the definition and distinction of dominion, because he had dealt with the question fully in other places.⁴⁶ He stated also that the pretension to deny the *dominium* to barbarians could be founded upon four arguments: because they were sinners, because they were infidels, because they were idiots (*insensati*), because they were natural slaves.⁴⁷ And he denied the legitimacy of the four arguments.

Mortal sin does not impede civil and true dominion.

With regard to the first argument, that sin could lead to the loss of *dominium*,⁴⁸ Vitoria reaffirmed the traditional doctrine established by the Church in the Concilium of Constance (1414-18) against the Valdenses, John Wycliff and Richard Fitz Ralph (*Armacanus*), who affirm that, “every authority is divine, and God does not allow dominion to disobedient people and transgressors of his precepts.”⁴⁹ To demonstrate that mortal sin did not impede civil dominion and true dominion,⁵⁰ the Salamanca master used not only arguments taken from the Holy Scriptures, but also arguments of reason that were based on

⁴⁶ Particularly in his commentary on Saint Thomas *Secunda Secundae*, with reference to the *quaestio* 62, *De Justitia*. About the discussion of the theme of *dominium* and *potestas* in Vitoria: Francisco de Vitoria, “De Potestate civili,” in *Relecciones Teológicas*, Ed. T. Urdániz, Madrid 1960, pp. 150-195. See also: Ada La Macchia, “Introduzione,” in F. de Vitoria, *Relectio de Indis. La Questione degli Indios*, ed. Ada Lamacchia, Bari 1996, p. 45-87.

⁴⁷ F. de Vitoria, *De Indis*, op. cit., I, I, 1, p. 14.

⁴⁸ Idem, I, I, 2, p.14: “Quod titulus dominii est gratia et per consequens quod *peccatores*, saltem in mortali peccato existentes, nullum habent dominium in quacumque re.”

⁴⁹ John Wycliff (ca. 1329-1381), *Tractatus de dominio civili*: Cap 2: “Omnis homo in peccato mortali caret quocumque dominio et usu licito operis etiam boni de genere.” Richard FitzRalph (1295-1360), *Summa Domini Armacanus in quaestionibus Armenorum*, Parisiis 1512, fol. 75, col 2.: “Infidelitatem intelligo quoniam infidelis nullum iustum dominium temporalium obtinet apud Deum unde Osee, 8, scribitur de infidelibus regibus.”

⁵⁰ F. de Vitoria, *De Indis*, op. cit. I, I, 3, p. 17.

the distinction between nature and grace established by Thomas Aquinas. Grace does not nullify, but improve nature; in the same manner, also sin offends but does not destroy nature; and considering that dominion belongs to natural right, it is not lost with mortal sin.⁵¹

This argument was very important: in the natural order of things, man is made in God's image, and that image is not lost because of sin. This signified that Indians were real owners despite their aberrant customs, which were sins against nature.⁵²

The absence of faith does not take away natural and human right.

Vitoria had no doubts in rejecting infidelity as a justification for the loss of *dominium* and, once again, cited the doctrine of Thomas verbatim: "*Item ratione S. Thomae, quia fides non tollit nec ius naturale nec humanum; sed dominia sunt vel de iure naturali vel humano, ergo non tolluntur dominia per defectum fidei.*"⁵³ And this is so true that it is not licit to withdraw from Hebrew and Muslims or other infidels their possessions, *qua* infidels: "per se loquendo, id est,

⁵¹ Idem, I, I, 3, p. 18: "Dominium fundatur in imagine Dei; sed homo est imago Dei per naturam, scilicet per potentias naturales; ergo non perditur per peccatum mortale."

⁵² Dino Composta observes about this quotation: "Mi pare estremamente interessante sottolineare questo contributo filosofico-teologico del Vitoria circa il fondamento del diritto-facoltà: il diritto-facoltà è legato alle facoltà razionali che sono immagine di Dio. Non si tratta di un ordine soprannaturale ma naturale. [...] Abbiamo qui in nuce i principi fondamentali dell'umanesimo giuridico di Vitoria che riconosce nella persona umana in quanto tale, prescindendo dalla Fede, alcuni diritti fondamentali, come segno di una partecipazione al disegno provvidenziale di Dio. Essi infatti sono legati alla intelligenza e alla volontà, sicché il loro fondamento è una "imago Dei" che non andò perduta nemmeno col peccato." D. Composta, "Il concetto di diritto nell'umanesimo giuridico di Francisco de Vitoria O.P.", in *I diritti dell'uomo e la pace...*, op. cit., pp. 273-290, (p. 289).

⁵³ F. de Vitoria, *De Indis*, op. cit. I, I, 4, p. 20 (S. Thomas, *Sum. Theol.*, II II 10, 10): "Ubi considerandum est quod dominium et praelatio introducta sunt ex iure humano: distinctio autem fidelium et infidelium ex iure divino. Ius autem divinum non tollit ius humanum, quod est ex naturali ratione. Et ideo distinctio fidelium et infidelium, secundum se considerata, non tollit dominium et praelationem infidelium supra fideles."

quia infideles sunt. Sed est furtum vel rapina, non minus quam christianis.” His conclusion is very clear:

Neither mortal sin nor the sin of infidelity discounts that barbarians are real owners in the private or public sense, nor can Christians use these arguments to justify occupying their land, as Caietanus established in a broad and elegant way.⁵⁴

But, if the arguments were already established in tradition, their application to the Indians was contrary to the common opinion that infidelity was sufficient reason for the appropriation of the new discovered lands.

And what about the mentally handicapped people?

⁵⁴ Idem, I, I, 10, p. 25: “Quod barbari nec propter peccata alia mortalia nec propter peccatum infidelitatis, non impediuntur quin sint veri domini, tam publice quam privatim, nec hoc titulo possunt a christianis occupari bona terrae illorum, ut late et eleganter deducit Caietanus.” Thomas of Vio, Cardeal of Gaeta (1469-1534), in his commentary to *Secunda Secundae*, (*quaestio* 66, art. 8) affirmed: “Quidam autem infideles nec de iure nec de facto subsunt secundum temporalem iurisdictionem principibus christianis, ut si inveniuntur pagani qui nunquam imperio romano subditi fuerunt, terras inhabitare in quibus christianum numquam fuit nomen; horum namque domini, quamvis infideles, legitimi sunt sive regali, sive politico regimine gubernentur. Nec sunt propter infidelitatem a dominio suorum privati, cum dominium sit ex iure positivo, et infidelitas ex divino iure, quod non tollit ius positivum [...]. Contra hos nullus Rex, nullus Imperator, nec Ecclesia Romana potest movere bellum ad occupandas terras eorum aut subiicendum eos temporaliter: quia nulla subest causa iusti belli cum Iesus Christus, *Rex Regum, cui data est omnis potestas in coelo et in terra* (Apoc., XVII, 14; XIX, 16, et Mat., XXVIII, 18) miserit ad capiendam possessionem mundi *non milites armatae militiae, sed sanctos praedicatores, sicut oves inter lupos* (Math., X, 16; Luc., X, 3). [...] Unde gravissime peccaremus si fidem Christi Iesu per hanc viam ampliare contenderemus: nec essemus legitimi domini illorum, sed magna latrocinia committeremus et teneremur ad restitutionem, utpote *iniuste debellatores aut occupatores*. Mittendi essent ad hos *praedicatores* boni viri, qui *verbo et exemplo* converterent eos ad Deum: et *non* qui eos opprimant, spolient, scandalizent, subiiciant, *et* duplo gehennae filios faciant, *more phariseorum* (Mt., XXVI, 16).” See: Venancio Carro, *La Teologia y los Teólogos-juristas*, op. cit., p. 299. This intervention of one of the most important theologians and ecclesiastic authorities of his time, is a very important support for the thesis of Salamanca masters and of Las Casas.

The third argument was the definition of Indians as *insensati et amentes*. Vitoria denied *in limine* – like De Soto – the theses that irrational beings could be holders of property, because *strictu senso* they could not have rights, therefore they had not *dominium*: “It is clear that dominion is right, as Conrado also said. But irrational beings cannot have rights, *ergo* they also cannot have dominion. Furthermore, they cannot suffer injustice, *ergo* they have no right.”⁵⁵ And this was considered to be so true that it was considered licit to hunt and kill them for sustenance or leisure, as affirmed Aristotle in the first book of the *Politics*, when he wrote that the act of hunting was just and natural.⁵⁶

Another characteristic unique to human beings is the dominion over his acts. Citing Saint Thomas, Vitoria affirms that: “Only a rational creature has dominion over his acts, because someone is responsible for his acts when he can choose one thing or another.” *Dominium* was associated with freedom of choice and considered typical of a rational creature.⁵⁷ But what about the children that have not yet the complete use of reason? Children could suffer offences and abuses (*pati iniurias*) and so they possess human rights.⁵⁸ This

⁵⁵ F. de Vitoria, *De Indis*, op. cit., I, I, 12, p. 26: “Patet, quia dominium est ius, ut fatetur etiam Conradus. Sed creaturae irrationales non possunt habere ius. Ergo nec dominium. Probatur minor, quia non possunt pati iniuriam: ergo non habent ius.”

⁵⁶ Aristotle, *Politica*, I, 8 1256b 15-30.

⁵⁷ F. de Vitoria, *De Indis*, op. cit., I, I, 12, p. 26. S. Thomas I, II, q. 82: “Quod sumus domini nostrorum actuum secundum quod possumus hoc vel illud eligere.”

⁵⁸ Idem, I, I, 13, p. 29. “Pueri ante usum rationis possunt esse domini. Hoc patet quia possunt pati iniuriam; ergo habent ius rerum; ergo est illis dominium, quod nihil aliud est quam ius.” In these pages, Vitoria often identifies *dominium* with *ius*. A few paragraphs before he says “Dominium nihil aliud est quam ius utendi re in usum suum” (p. 26); and repeats the definition of Summenahrt (*Conradus*): “Patet quia dominium est ius.” While De Soto, maintains a distinction between the two concepts, this distinction seems to disappear entirely in Vitoria. This is a confirmation that in the *De Indis*, Vitoria passes from an objective to a subjective conception of natural rights. A lot of scholars are in agreement with this interpretation. Ada La Macchia, *Le relectiones di Francisco de Vitoria*, op. cit., pp. 94-95. For the presence of “*dominium* als natürliches subjectives Recht bei Francisco de Vitoria,” and “*dominium* als ius im sinn einer *facultas utendi re*” see also Daniel Deckers,

argument was corroborated by the fact of being created in the image of God: “We stated that the foundation of dominion was the image of God, which is present also in the children, but not in the irrational creatures, because children are not as the animals, that are *propter aliud*, but they are *propter se*”⁵⁹

But if children potentially have the use of reason, what about the *amentes*, that is, people with mental diseases who have not the hope to use reason in future? Can they also be considered subjects of *dominium*? The answer is remarkable:

But, what about the idiots? I say the perpetual idiots who have not any hope, today and in the future, of being to use reason? Yes, they can be owners (*domini*), because they can suffer injustice, so they have right (*ius*).⁶⁰

It was really an astonishing reply that was not conceivable in the classic Aristotelic conception of man as a social and rational being,⁶¹ but only in the typically Christian conception of man like

Gerechtigkeit und Recht, op. cit. pp. 153-188. Composta, *Il concetto di diritto...* op. cit., p. 288; Paulo Grossi, *La proprietà nel sistema privatistico della seconda scolastica*, op. cit., pp. 123; and finally B. Tierney, “Aristotle and the American Indians”, in *The Idea of natural rights*, op. cit., pp. 255-287.

⁵⁹ F. de Vitoria, *De Indis*, op. cit., I, I, 13, p. 28: “Item diximus quod fundamentum dominii est imago Dei, qui adhuc est in pueris. Nec est idem de creatura irrationali, quia puer non est propter alium, sed propter se, sicut est brutum..”

⁶⁰ Idem, I, I, 14, p. 28: “Dico de perpetuo amentibus, quod nec habent nec est spes quod sint habituri usum rationis. Et sit: videtur adhuc quod possint esse domini, quia possunt pati iniuriam, ergo habent ius.” Vitoria recognizes to the *amentes* the natural *dominium* and left to the lawyers the question if this natural dominium can be also a positive dominium: “sed hoc remitto ad iureconsultos utrum possint habere dominium civile.”

⁶¹ As Armido Rizzi observes: “Questo punto capitale della natura/ragione umana come *imago Dei* e quindi fondamento del *dominium* viene fatto valere contro quella che possiamo chiamare l’incipiente tradizione “protestante.” Ma esso rappresenta anche (e soprattutto) un correttivo sostanziale nei confronti della concezione aristotelica della natura umana: se la sua base ontologica è l’*imago Dei*, l’attualità del suo esercizio diventa secondaria rispetto a questo fondamento assoluto. L’idea del bambino come “propter se” e non “propter alium,” e dell’idiotia che “potest pati iniuriam, ergo habet ius” ha come sfondo una concezione della persona e della sua dignità che va ben oltre il concetto

imago Dei and who, for this reason, could ever be offended in his human dignity (*pati iniuriam*).⁶² Also the *amens* could be offended in his dignity because he was *propter se*.

However, Vitoria affirmed that barbarians were not idiots, because their degree of civilization was a clear symptom of the use of rationality (*indicium usum rationis*).⁶³ In fact, we found in their culture some of the characteristics that were indispensable for life according to Aristotle: the existence of cities, families, political authorities and judges, laws, industries, commerce, and religion. These phenomena were a clear indication that they had no difficulty in distinguishing those things that are evident also for other men; and this was a sign that God and nature were not missing in what is necessary for the major part of the species. Rationality is a typical characteristic of man, and any power that is not transformed into an act is useless

aristotelico di natura umana”. A. Rizzi, “America Latina: 1492-1992. Quattro voci del 1500”, in *Il futuro dell’uomo*, XIX (1992) n. 2, p. 14.

⁶² About the *pati iniuriam* (*hoc patet, quia possunt pati iniuriam; ergo habent ius rerum; ergo est illis dominium, quod nihil aliud est quam ius*), we can see not only a juridical definition, but also a reference to the sufferance, injustices, massacres that offend the life. In a famous letter to father Arcos, Vitoria says: “En verdad, si los indios no son hombres, sino monas, *non sunt capaces iniuriae*. Pero si son hombres y prójimos, *et quod ipse prae se ferunt*, vasallos del emperador, *non video quomodo*, excusar a estos conquistadores de última impiedad y tiranía, ni sé que tan grande servicio hagan a su magestad de echarle a perder sus vassallos.” “Carta de F. de Vitoria al P. Arcos,” in F. de Vitoria, *De Indis*, op. cit., p. 138.

⁶³ F. de Vitoria, *De Indis*, op. cit., I, I 15, p. 30: “Probatur, quia secundum rei veritatem non sunt amentes, sed habent pro suo modo usum rationis. Patet, quia habent ordinem aliquem in suis rebus, postquam habent civitates quae ordine constant, et habent matrimonia distincta, magistratus, dominos, leges, opificia, commutationes, quae omnia requirunt usum rationis; item religionis speciem. Item non errant in rebus, quae aliis sunt evidentes, quod est indicium usus rationis. Item Deus et natura non deficiunt in necessariis pro magna parte speciei. Praecipuum autem in homine est ratio, et frustra est potentia, quae non reducitur ad actum. Item fuissent sine culpa sua tot millibus annorum extra statum salutis, cum essent nati in peccato et non haberent baptismum nec usum rationis ad quaerendum necessaria ad salutem. Unde quod videantur tam insensati et hebetes, puto maxima ex parte venire ex mala et barbara educatione, cum etiam apud nos videamus multos rusticorum parum differentes a brutis animantibus.”

and futile (*frustra*).⁶⁴ Therefore, it would be something very absurd if the barbarians were supposed not to have the use of reason, which is a condition for salvation, having had no hope for salvation for thousands of years through no fault of their own, because they had been born in sin, and had not been baptised.⁶⁵ The idea of the perfection of nature, created by God, was a principle of the ancient and medieval system of natural law, and this idea could not admit that a whole people were destitute of reason, a characteristic indispensable for the species. The fact of the existence of idiots and stupid persons is due to bad and barbarian education, and not to their natural incapacity. As for the rest, also among Christian peoples, there are men of the countryside that are not so different from brute animals.

His conclusion was very clear: Vitoria affirmed, without any doubts, the full humanity, and the public and private full dominion of Indians peoples, in a sentence that is very important and famous:

Our conclusion is that, without doubt, these barbarians are true owners, from a public and private point of view, the same as Christians; and that it was not just to deprive them of their political authorities or their private possessions, as if they were not real owners.⁶⁶

The *dominium* of man over himself, other irrational beings and his property was ontologically founded on the biblical principle of man being created “in the image and semblance of God.” The presence of the image of God in man is attested by his rationality and

⁶⁴ This *frustra* concern the scholastic Aristotelian sentence: *natura nihil frustra facit*. See *Politica*, I 1, 1253 a 9; and also: *De Part. Animal.* 691b 4; *De Gen. An.*: 736b 30; 741b 5.; 744a 37.

⁶⁵ Armido Rizzi observes: “C’era una zona d’ombra nel disegno di Dio: come mai egli aveva permesso o voluto che tutta una parte del mondo restasse per millenni all’oscuro della sua salvezza, e ne fosse perciò esclusa? Questa domanda sul passato, carica di stupore teologico e destinata a restare senza risposta, non inclinava la certezza sul presente: la scoperta era il segno indiscutibile della missione che Dio affidava alla Chiesa, e in essa particolarmente alla Spagna, di portare l’annuncio evangelico ai nuovi popoli.” A. Rizzi, *Coscienza Cristiana e Nuovo Mondo*, Fiesole 1992, p. 28.

⁶⁶ F. de Vitoria, *De Indis*, op. cit., I, I, 16, p. 30: “Restat ergo ex omnibus dictis quod sine dubio barbari erant et publice et privatim ita veri domini, sicut christiani; nec hoc titulo potuerunt spoliari aut principes aut privati rebus suis, quod non esset veri domini.”

sociability, as intrinsic and natural human characteristics, because he is not someone else's tool, but an end to himself: and this is human freedom.

Different from Aristotle, but using his categories, the Salamanca masters expanded this principle to all humanity using the principle of the perfection of nature: nature cannot produce an entire people in whom human rationality has not been developed. This happened only in a very few cases, which are *monstrous* phenomena, in contrast with the normal and regular laws of nature: and they are the natural slaves about which Aristotle speaks in *Nichomachean Ethics*.⁶⁷

Also for Las Casas every man was a reflection of the image of God, and for this reason, there could not exist a “natural” distinction between freemen and slaves, but “all mankind is one” (*la humanidad es una*)⁶⁸. Vitoria said that the idiots (*amentes*) could also suffer injustice (*pati iniurias*), and Las Casas said the same thing about barbarians: Christ spilt his blood also for them⁶⁹.

The Aristotelian conception of fixed and naturalistic differences between men was incompatible with the Christian tradition of a good and providential God. Christian universalism could not live together with theories of permanent superiority of peoples and civilizations. Even Sepúlveda, who is considered a proto-racist thinker, was obliged to modify the Aristotelian theory to justifying the “educational” action of wiser men (*sapientiores*) and admitted that the *homunculi* could also become men.⁷⁰

4. Bartolomé de las Casas: *De Regia Potestate*

The discussion came back to the starting point: natural slave was again an “empty category” that theologians and lawyers had

⁶⁷ B. de las Casas, *Apologia*, ed. Angel Losada, in *Obras Completas*, vol. 9, Madrid 1988.

⁶⁸ Lewis Hanke, *All Mankind is One. A study of the Disputation Between Bartolomé de las Casas and Juan Ginés de Sepúlveda in 1550 on the Intellectual and Religious Capacity of the American Indians*, De Kalb, Illinois 1974.

⁶⁹ For the four types of barbarians described by Las Casas in his *Apologia*, see G. Tosi, *La teoria della schività...*, op. cit., pp. 168-178.

⁷⁰ G. Gliozzi, *Adamo e il nuovo mondo. La nascita dell'antropologia come ideologia coloniale: dalle genealogie bibliche alle idee razziali (1500-1700)*, Firenze 1977, p. 279.

“filled” too quickly with the barbarians of the New World. But if the Indians of the New World were not natural slaves, were they really complete men?

Vitoria was hesitant on this question. He affirmed that *barbari* are without a doubt public and private true owners, the same as Christians, and that it was not allowed to deprive them of their possessions; but in the last part of *De Indis*, he said that if they, *ut dicitur* were not so different from *amentes* and were not able to govern themselves, they needed the tutorship of wiser people. This tutorship was like the protection of a father toward his children and not like the domination of a lord over his slaves, and it did not justify their submission and privation of their properties; therefore, this position was a transgression as regards the recognition of the Indians full capacity of self-government⁷¹. The theses of the Salamanca masters were different from the theses of Sepúlveda, but in some crucial regard, were very close to him.

The attitude of Las Casas was very different. He had no doubts about the full humanity of the Indian populations. The image of Indians, both of the most complex civilizations and of the most primitive peoples, was always very positive, and some commentators considered Las Casas a *Rousseau avant la lettre*, and the first creator of the *bon sauvage* myth.⁷²

Las Casas was not afraid to offend his citizens by saying that the real barbarians were the Spanish people, who behaved worst than wild animals.⁷³ He affirmed that, if Indians were truly owners, like Christians (*veri domini sicut christiani*), then they were, like Christians, free vassals of the Emperor, and had the right to be treated in the same manner. He affirmed that their enslavement (the *repartimiento* and the *encomienda*), was not justified, as it would also be not justified if the Spanish vassals of His Majesty were treated in the same manner. On the contrary, it was necessary to restore their legitimate political authority, return their possessions, which had been unjustly removed, and punish those who had practiced these atrocities and injustices. The only legitimate domination arose from the

⁷¹ F. de Vitoria, *De Indis*, op. cit., I, 3, 17, p. 97.

⁷² B. de las Casas, *Brevísima relación de la destrucción de las Indias*, ed. Ramón Hernández, Madrid 1992, p. 34 (Obras Completas Vol. 10).

⁷³ Idem, pp. 30-31.

voluntary or free submission of these nations to the Emperor's authority, who can claim in exchange what he claims from the other vassals: the payment of taxes. Las Casas was the only person who assumed the principle of reciprocity to the utmost consequences.

In his more scholastic and systematic treatise, *De Regia Potestate*, Las Casas developed a political thought that justified the original freedom of the Indians. At the beginning of the treatise, Las Casas affirmed the original liberty of individuals and peoples, goods and things and the non-existence of slavery:⁷⁴

Considering that all men are equal (*pari*) by nature, God did not make anybody a slave of another man, but conferred to everybody an equal liberty. The reason is that rational nature, by itself (*quantum est de se*), is not ordered to any other being as to its end, for example as one man to another man. In fact, freedom is an inherent right of human beings necessarily and *per se* from the beginning of rational nature, and so for natural right, as is affirmed in the *Decretum Gratiani*: there is only one freedom for all (*omnium una libertas*).⁷⁵

⁷⁴ B. de las Casas, *De Regia Potestate*, op. cit. p. 16: "A principio generis humanis omnis homo, et omnis terra, et omnis res, de iure naturali et gentium primaevo fuit libera et allodialis, id est, franca, nullio subiecta servituti."

⁷⁵ Idem, p. 17: "Et quidem, quantum ad homines, probatur quoniam ab origine naturae rationalis liberi nascebantur, ut. 1. *Manumissiones*, *De iust. et iur.* Quia in natura pari Deus non facit unum alterius servum, sed par omnibus concessit arbitrium. Cuius ratio est secundum Thomam (*II Sententiarum*, dist. 44. Quaest. 1, art. 3) , quia natura rationalis, quantum est de se, non ordinatur ut ad finem ad alium, ut homo ad hominem. Nam libertas est ius insitum hominibus de necessitate et per se ab exordio rationalis naturae, et sic de iure naturali, ut prima distinctio, can. *Ius naturale*, ibi: *Omnium una libertas*." The quotation of Thomas is: "Sed creatura rationalis, quantum est de se, non ordinatur ut ad finem ad aliam (...) quod natura omnes homines aequales in libertate fecit, non autem in perfectionibus naturalibus (...). Unus enim homo ex natura sua non ordinatur ad alterum sicut finem. S. Thomas, *Commentarium in lib. II Sententiarum*, dist. 44. quaest. 1, art. 3. N. 5". The quotation of *Decretum Gratiani* is: "Ius naturale est commune omnium nationum, eo quod ubique instinctu naturae, non constitutione aliqua habetur, ut viri et foeminae coniunctio, liberorum successio et educatio, communis omnium possessio et omnium una libertas, acquisitio eorum, quae coelo, terra marique capiuntur." *Decretum Gratiani* I, 1, 7.

In this way slavery is not part of the natural right, but is only an “accidental phenomenon imposed on men by chance and fate;” all men and all goods were originally free by natural right; and this is the reason that “among the *infidels* there is also legitimate public and private property,” as Vitoria and De Soto said.

The other principle is a distinction between dominion and jurisdiction⁷⁶. The kings and princes did not have the possession of persons and goods of their vassals, but only jurisdiction, which was something totally different from property because it did not involve ownership but only government and administration. Las Casas recognized the reality of a sphere of action that was withdrawn from political power, that is, the sphere of original freedom and property of subjects over themselves and their possessions: a “private” sphere which the prince could not invade, but only respect and protect.

Las Casas used the distinction between *dominium* and *iurisdictio* – which he took from the Salamanca masters – to make a radical condemnation of all forms of Indian slavery, above all the *encomienda*. The king could not give anything that was not his own, but that was, for natural right, the property of the individual and of the people⁷⁷.

The third principle was a form of the principle of “popular sovereignty.” Las Casas said that, when people elected a king, they did not lose their freedom (*populus eligendo regem libertatem non amisit*⁷⁸) because the power (*potestas*) of government proceeded directly from the people, who is its efficient cause; and the king needed the consent of all the people when he dealt with matters of general benefit.⁷⁹ The origin of political power was identified by Las Casas as existing by popular consent:

⁷⁶ Idem, p. 23.: “Imperator et rex non est dominus super rebus singulorum, sed tantum quoad iurisdictionem.”

⁷⁷ G. Tosi, *Il de Regia Potestate di Bartolomé de Las Casas*, “Atti e memorie dell’Accademia Galileiana di Scienze, Lettere e Arti, Padova”, CXI, (1998-99), p. 25-50.

⁷⁸ B. de las Casas, *De Regia Potestate*. op. cit., II, IV, p. 33: “Populus, eligendo regem, libertatem non amisit.”

⁷⁹ Idem, p. 17.

No submission, servitude, or charge was ever imposed without the voluntary consent of the people who must suffer these charges. It is possible to demonstrate that from the beginning the same people determined (*constituit*) their submission together with the prince. At the beginning, all things and all people were free; for this reason, if anything were imposed against the will of the people or of the private owner (*dominus*), it would be violence because it would hinder the people in using the freedom that belongs to them by natural right.⁸⁰

The power (*imperium*) to rule proceeds directly from the people that are the efficient and final cause of kings and princes and of all rulers who have a legitimate beginning. So kings and princes can impose on the people only those taxes and servitudes accepted by their free and common consent.⁸¹

But even if the thesis was based on medieval jurisprudence and ancient juridical treatises that affirmed the original and natural character of the people who proceeded, and that it was the source of regal power,⁸² its language and use was really new and astonishing: really Las Casas does seem to be a *Rousseau avant la lettre*. But, the scholastic language, above all of Las Casas, was only apparently the same as that of modern jusnaturalists, since the conceptuality was very different. In Vitoria and Las Casas a “naturalistic” and a

⁸⁰ Idem, IV, 1., p. 33: “Nulla subiectio, nulla servitus, nullum onus unquam impositum fuit, nisi populus qui subiturus illa onera erat, impositioni eiusmodi voluntariae consentiret. Immo principio idem populus ea constituit cum ipso principe, probatur. Ab initio omnis res, omnis populus fuit liber; si contra populi vel privati dominii alicuius rei voluntatem imponerentur, forent absque dubio violenta, et sic prohiberetur populus uti sua libertate, quae de iure naturali competabat..”

⁸¹ Idem, IV, 3., p. 34. “Unde imperium immediate processit a populo, et populus fuit causa effectiva regum seu principum aut quorumcumque magistratum, si iustum habuerunt, ingressum (93 dist., cap. *legimus*). Ergo si populus fuit causa effectiva seu efficiens, et finalis regnum et principum, ut a populo per liberam electionem originem duxerunt, non potuerunt imponere populo a principio nisi tributa et servitia quae ipso populo grata essent, et quorum impositioni libenter populus consensisset.” Quotation is from *Digesto* I, 2,2,8 e 9.

⁸² Idem, IV, 4, p. 35: “Antequam fuissent reges et magistratus, omnia bona praedicta totius communitatis erant, et ad ipsam iure naturae pertinebant (*Institutiones, De rerum divisione*). Populus prior fuit natura et tempore ipsis regibus. Sed populus tenebatur exhibere de publico aliqua ex quibus rex sustentari possit. Ergo populus praedicta iura fecit vel decrevit.”

“contractualistic” moment about the source of political power co-existed that would be divided by Thomas Hobbes. In fact, what was original was not the individual of modern jusnaturalism who lived in a natural condition where he was owner of natural rights; that individual was, for Aristotle and for the entire tradition of political Aristotelism, the *apolis*, the asocial, the *ex-lege*, that is the *barbarus simpliciter* of medieval exegesis of the *Politics*.

In the primitive natural condition, the individuals are thought not as a multitude (*multitudo*), but as a people (*populus*), as members of a natural political community that was the expression of the natural (instinctive) human sociability of the *zoón politikón*. The contractualistic moment (the *pactum subiectionis*) happened only when the community, of its own accord (*electio*), decided to submit itself to the authority of a king.⁸³

The other difference to modern jusnaturalism was the persistence of a “ministerial” conception of political power, a legacy of political Augustinism.⁸⁴ Sepúlveda understood political Augustinism in a traditional and orthodox way, like the theocratic theologians of the Roman Curia, (Ostiense, for example), and conferred to the Church the power of coercion (*compelle intrare*).⁸⁵ Vitoria limited the interference of the Church in political affairs, using the Thomistic principle that the Church had power (*potestas*) only and exclusively for spiritual purposes (*in ordine ad spiritualia*), and that, excluding these aims, the Church had no political power in secular affairs (*sed secluso illo fine, nullam habebat*). But Vitoria and De Soto admitted a wider use of military force and coercion in certain circumstances, if the war against the Indians should become a just war (*justum bellum*).⁸⁶

Las Casas restored the ministerial conception in a double sense. In the literal meaning of the term, the king is a *ministrum*, that is, a servant of the people, because - as Aristotle said in the *Politics* - a power exercised for the benefit of the ruler and not for the benefit of the people is not a legitimate form of government. Power must

⁸³ Idem, p. 88.

⁸⁴ The classic work about the argument is still: H. X. Arquilliere, *L'augustinisme politique. Essai sur la formation des théories politiques du Moyen-âge*. Paris 1955.

⁸⁵ G. Tosi, *La teoria della schiavitù...*, op. cit., pp. 141-144.

⁸⁶ F. de Vitoria, *Relectio de Indis*, op. cit., 1, 2, 2, p. 40; I, 2, 4, p. 46.

promote the public benefit (*bonum commune*); kings and governors are not lords (*domini*) of their kingdoms, but only administrators of the *res publica*. But the king, as a Christian, was also a *ministerium* of the Church, and must use his authority in service of evangelisation.

In this point there was an important divergence between Las Casas and the Salamanca masters. While Vitoria and De Soto denied the Emperor and the Pope not only the *dominium* but also the *jurisdictio totius orbis*; Las Casas affirmed often that the emperor and the pope had a certain supreme authority over the whole world. But this conception was very different from that of the imperial or papal theologians. For Las Casas the two supreme authorities did not have authority by natural right - because there was a natural and original freedom of the people - neither by *jus gentium* or *jus positivum*, but only by *jus divinum*, that is, in function of the mandate of Christ to the church to evangelise the world: due to this order, the entire humanity is potentially (*in potentia*), but not actually (*in acto*), subject to Christ. But this mission was limited very strongly by Christ Himself, who ordered “only one way” of evangelisation: the preaching of the good news “as lambs among wolves.” The ministerial conception of political power found its limit that forbade the justification of the “holy wars” of the conquest, accepted by Sepúlveda.

5. Ancient or Modern

Despite an apparent fidelity to the traditional authorities, the Salamanca theologians and Las Casas elaborated a new notion of man and of his role in the political and juridical order.⁸⁷ In this way the

⁸⁷ Michel Villey, Paolo Grossi, Brian Tierney, Daniel Deckers are in agreement in this interpretation; on the contrary, Venancio Carro, Jaime Brufau Pratz and Philippe André-Vincent defend the idea of a total continuity between the Salamanca Theologians and Saint Thomas. See M. Villey, “La promotion de la loi et du droit subjectif dans la seconde scolastique,” in *Quaderni Fiorentini per La Storia del Pensiero Giuridico Moderno*, 1973, n° 1, p. 54; P. Grossi, “La proprietà nel sistema privatistico della seconda Scolastica,” in *Quaderni Fiorentini per La Storia del Pensiero Giuridico Moderno*, n° 1, 1973, p. 123. B. Tierney, *The Idea of Natural Rights*, op. cit.. D. Deckers: *Gerechtigkeit und Recht. Eine historisch-kritische Untersuchung der Gerechtigkeitslehre des Francisco de Vitoria (1483-1546)*, op. cit. V. Carro, *La teología y los teólogos-juristas españoles ante la conquista de América*, Salamanca 1951, p. 711. J. Brufau Prats, “La aportación de Domingos de Soto a la doctrina de los

Salamanca masters blazed the trail toward a constitution of a subjective natural right, which announced the modern doctrine of human rights.⁸⁸

For Paolo Grossi, for example, the scholastics produced an anthropologic foundation of property through a logical continuity between “me” and “mine,” identifying *dominium* as an inherent attribute of the subject, according to a definition of Suarez: “To assert that our acts are free and that we have dominion over them, is the same thing.”⁸⁹ This operation established “mine” as an indispensable hypostasis of my individuality, and it was, for Grossi, “a fixed and unquestionable principle, maybe the most unquestionable, for all the masters of the Second Scholastic Era.”⁹⁰ The jurists who followed the theologians affirmed that property was an indispensable characteristic of the freedom and dignity of a subject (*dominium pertinet ad dignitatem*) and of his perfection as *ratio independentiae* and *ratio superioritatis* of man with regard to the rest of creation, and a reflection in man of God’s image, who was the supreme *Dominus*.

Brian Tierney is in agreement with this interpretation of the importance of the Spanish scholars for the history of subjective rights, but he points out that a subjective notion of natural rights was already present in medieval jurisprudence, in the works of canonist and civil lawyers of the medieval cities who were the direct sources of Bartolomé de Las Casas.⁹¹ On the contrary, Richard Tuck thinks that the Spanish scholars remained in the objective Thomistic doctrine,⁹² and the same opinion was shared by Philippe André-Vincent, who thought that there was no subjective notion of natural rights in Las Casas.⁹³

derechos del hombre y las posiciones de Bartolomé de las Casas“, in *Las Casas e la politique des droits de l’homme*, Aix-en-Provence 1976. A.-Vincent: “La dialectique lascasienne du droit naturel concret. Las Casas et les droits de l’homme”, in *I diritti dell’uomo e la pace...* cit., pp. 639-649.

⁸⁸ P. Grossi, op. cit., p. 123.

⁸⁹ Idem, pp. 134-135.

⁹⁰ Idem, p. 139.

⁹¹ B. Tierney, *Aristotle and the American Indians-Again. Two critical discussion*, in “Cristianesimo nella Storia”, 12 (1991), pp. 295-322, (p. 299).

⁹² R. Tuck, *Natural Rights Theories: their Origin and Development*, Cambridge 1979, p. 46.

⁹³ A.-Vincent, *La dialectique lascasienne*, op. cit., pp. 639-640.

Maybe it is possible to find a middle way between these two opposing positions. The Salamanca scholars defended a subjective conception of human rights and the debate on the New World played an important role in this “theoretic turn” of the traditional doctrine. When Victoria affirmed that *barbari isti sunt veri domini, publice et privatim*, he recognized that *dominium* was an intrinsic characteristic of the person proper to all human beings because of natural right, which could not be lost even by original sin. But this conception remained within a legal system in which the freedom of the subject was not limited only by the law of the states, but also by the divine and natural law that governed and determined the natural and social order of the world.

In this way, the debate about the sins “against nature” such as cannibalism and human sacrifice was very important: if Indians or barbarians were *veri domini publice et privatim*, these sins against nature were rightful customs which deserved to be respected and tolerated; but our scholastics were not cultural relativists or prospectivists. On this subject we identify three positions. For Sepúlveda the problem was resolved by identifying natural law with divine law, and this position justified the intervention of the church and the crown in order to stop these crimes against the natural and divine law, which were therefore (*eo ipso*) reasons for a just war, since the war punished the most serious injury, the injury against God: just war was also a holy war.⁹⁴

The Salamanca scholars recognized that Indian customs were objectively sins against the natural order established by God, but - following the Thomistic doctrine - they did not immediately identify the natural law with divine law, and did not accord to the church or the Christian princes jurisdiction (*jurisdictio*) or power (*potestas*) over the infidels. In this manner, war was justified only to save and preserve innocent lives, only in extreme case, but not to punish the Indians for their sin against nature.

Las Casas was more radical. Also for him, human sacrifices and cannibalism were objectively sins against nature; but these practices that seemed to us so aberrant and cruel could be explained when situated in their cultural context. In this way, these errors seemed to be more likely to happen because of the force of custom, and they were not so distant and incomprehensible for our culture. It was one of the

⁹⁴ G. Tosi, *La teoria della schiavitù...*, op. cit., pp. 132-147.

first historical exercises of comparative cultural anthropology of modern time that extended unto the very limit of orthodoxy, but did not transgress it, as Todorov thought, assuming a prospective and relativistic vision of cultures, and denying the truth and the unity of catholic religion.⁹⁵

Las Casas was also more radical than Sepúlveda and the scholastics about the best manner to “eradicate” these customs against nature: the Spanish were neither allowed to use force, not even to save innocent lives; not only because Christian kings have no jurisdiction over them, but also because the damage done would be infinitely greater than the evil that they attempted to eliminate; and this was what really happened in the history of the conquest: in the name of divine law and the salvation of innocents, the most impressive genocide of history was perpetrated.

6. Conclusion

The Salamanca theologians developed a doctrine of natural subjective rights different both from the tradition of ancient natural right, and also from the modern theory of natural rights: a *tertium genus* theory. The principal difference to the tradition was the emphasis and relevance of the concept of *dominium*. The distinction between *jus* and *dominium* was progressively abolished, and *dominium*, understood as *potestas* or *facultas* of a subject over himself his actions and his possessions and condition for freedom, occupied the semantic place of the whole concept of right. This was the originality of their contribution.

At the same time, the scholastic theologians differed from the modern conception of natural right that started with Hobbes and continued with the modern jusnaturalists.⁹⁶ State of nature, individualism, social pact, civil state, sovereignty, power, citizenship, and private property are concepts distant from the tradition of the ancient objective natural right. The subjective natural right of the Scholastics remained in the context of a conception of man as a social

⁹⁵ T. Todorov, *La conquista dell'America. Il problema dell'altro*, Torino 1984; *Le morali della storia*, Torino 1995, pp. 231-233.

⁹⁶ N. Bobbio-M. Bovero, *Società e Stato nella filosofia politica moderna*, Milano 1979.

being included in a community in an organic way, who was more a vassal than a citizen with rights. In this conceptual system, the claims of freedom of the subjects were not limited only by the laws of the state, as they would be in Modernity, but they needed to be compatible and in harmony with the divine law which ruled and determined the natural order of the world. Another difference was the theological foundation of *dominium* in the *imago Dei*, which would be lost or secularised by modern thinkers.

The influence of the Salamanca scholars and of Bartolomé de Las Casas was important for the political thought of Europe, and not only in the Catholic countries. As Brian Tierney wrote:

The battles that were sometimes won in the debating halls of Salamanca and Madrid were nearly always lost among the hard realities of life in Mexico and Peru. [...] But, if the Spanish debates did nothing for the hapless Indians, they did significantly affect the development of Western political theory, and this is especially true when we consider the theme of natural rights.⁹⁷

Brian Tierney introduced the suggestive hypothesis that the persistence of the idea of subjective natural rights elaborated by the Scholastic masters - but that finds its roots in the medieval jurisprudence and in the debate on poverty - exercised an important influence on the modern jusnaturalism⁹⁸. Tierney, speaking about the debate between Karl Löwith and Hans Blumemberg on Modernity as a process of secularisation of Christendom, affirmed that Scholastic masters could be the historical link of union between medieval theory and its secularised modern version.⁹⁹

Using this kind of interpretation, Tierney affirmed that the true scholastic novelty was the introduction of the concept of subjective rights in the *corpus* of the Thomistic natural system of law: in this way, the scholastic masters represented an historical bridge between the Middle Ages and Modernity, between the objective right of the Ancients and the subjective rights of the Modern Ages, between right and rights.

⁹⁷ B. Tierney, *The Idea of Natural Rights...* op. cit. p. 256

⁹⁸ Idem, *Aristotle and the American Indians-Again*. op. cit. p. 299. And also: *The Idea of Natural Rights*, op. cit. pp. 255-287.

⁹⁹ Idem, *Aristotle and the American Indians*. op. cit., p. 320.

In Latin America the influence of the Salamanca School and Las Casas inspired generations of missionaries who tried to establish a different way of evangelisation, such as the exceptional experiences of the Jesuit's *reducciones* and *misiones* that fulfilled the idea of Las Casas' pacific evangelisation on a large scale.

In spite of all the atrocities and injustices of five hundred years of the exploitation of Indian peoples, there was always a persistent and obstinate opposition of Indians to their enslavement and assimilation, a "struggle for justice" and for the recognition of their natural rights that, after five hundred years, are not yet guaranteed. The struggle of the Indians of Chiapas, the same region where Las Casas was forbidden to exercise his mission as Bishop, is a tragic example that the historical problems denounced by Las Casas have not been resolved.

This is one of the reasons for the growth of the historical significance of the *Procurador de los indios* in the recent years in Latin America, especially on the part of theologians and philosophers of the liberation who are reinterpreting the history of the continent from the point of view of the losers, the Indians, the black people, the poor and all the subjects that, during these centuries, have still been the victims of a social injustice and a political structure that has its roots in the profound iniquities of the early time of the conquest and colonisation, iniquities that Las Casas never stopped denouncing.

At this crucial and tragic moment of history Bartolomé de Las Casas, not only because of his ethical and political position, but also due to his originality and theoretical force, appears not as a forerunner but as one of the apices in relation to the long journey between "us" and the "others." If, as Tzvetan Todorov affirms, "the Discovery of America, or better of the Americans, is the most extraordinary meeting in our history,"¹⁰⁰ the understanding that Las Casas had of his age is one of the most extraordinary of our time.

In it was manifested one of the highest points of the "discovery" which the "I" made of the "other," a point rarely reached in later time, when the theory of superiority of the European civilization over the rest of the world - so untiringly fought by Las Casas - became hegemonic, as can be clearly shown in the many forms of

¹⁰⁰ T. Todorov, *La conquista dell'America*. op. cit., pp. 5-6.

Published in: KAUFMANN, M. – SCHNEPF, R. (Hrsg.), *Politiche Metaphysik. Die entstehung moderner Rechtskonzeptionen in des Spanischen Scholastik*, Frankfurt am Main: Peter Lang, 2007, pp. 125-154.

Eurocentrism which have dominated the long process through which the history of Europe has become the history of the world.¹⁰¹

¹⁰¹ Enrique Dussel, *L'occultamento dell'altro*, Celleno 1993, pp. 31-41. See also: Antonello Gerbi. *La disputa del Nuovo Mondo. Storia di una polemica: 1750-1900*, Milano-Napoli 1983 (1955¹).