

COLONIZATION OF THE 'INDIES' – THE ORIGIN OF INTERNATIONAL  
LAW?

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It is widely agreed that international law has its origins in the writings of the Spanish theologians of the 16<sup>th</sup> century, especially the so-called “School of Salamanca”, who were reacting to the news of Columbus having found not only a new continent but a new population, living in conditions unknown to Europeans and having never heard the gospel. The name of Francisco de Vitoria (c.1492 – 1546) the Dominican scholar who taught as *Prima* Professor with the theology faculty at the University of Salamanca from 1526 to 1546, is well-known to international law historians. This was not always the case. For a long time, international lawyers used to draw their pedigree from the Dutch Protestant Hugo de Groot (or Grotius) (1583-1645) who wrote as advocate of the Dutch East-India company in favour of opening the seas to Dutch commerce against the Spanish-Portuguese monopoly. Still in the 18<sup>th</sup> and 19<sup>th</sup> centuries, the law of nations – *ius gentium* – was seen as a predominantly Protestant discipline that drew its inspiration from the natural law taught by such followers of Grotius as the Saxon Samuel Pufendorf (1632-1694) and the Swiss Huguenot Emer de Vattel (1714-1767), followed by a series of professors at 18<sup>th</sup> century German universities.<sup>1</sup>

It was only towards the late-19<sup>th</sup> century when the Belgian legal historian Ernest Nys pointed to the Catholic renewal of natural law during the Spanish *siglo de oro* that attention was directed to Vitoria and some of his successors, especially the Jesuit Francisco Suárez, (1548-1617), who had indeed developed a universally applicable

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<sup>1</sup> See further my “The Advantage of Treaties. International Law in the Enlightenment”, 13 *The Edinburgh Law Review* (2009), 27-67.

legal vocabulary – something that late-19<sup>th</sup> century jurists, including Nys himself, were trying to achieve.<sup>2</sup> The Spaniards had adopted from Aquinas the old Roman law notion of *ius gentium* and through it had managed to construct a legal world that seemed astonishingly familiar for late-19<sup>th</sup> century observers. Nys was followed by James Brown Scott (1866-1943), assistant of the US Secretary of State Elihu Root, who made official the theory of the Spaniards as the predecessors of Grotius and thus, also, as having initiated modern international law.<sup>3</sup> Scott read to this law his own aspirations as well as those of his Secretary of State, both engaged during the inter-war years in an effort to give shape to a new architecture of international institutions and systems of dispute-settlement and would enable the emergence of an interdependence-driven global structure of private rights and economic exchanges; a world united in search for peace through prosperity. This would vindicate the liberal policies of Britain and the United States so that it was not for nothing that the two flags that were flown at the inauguration of the Peace Palace in the Hague in 1907 that would eventually house the Permanent Court of International Justice were those of the Netherlands and the United States, and that it was the American industrialist and philanthropist Andrew Carnegie (1835-1919) who stood on podium with the Dutch royal family at that key moment.<sup>4</sup>

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The Spanish colonization of the Indies stands at the origin of international law. But this is not only because it offered a legal language to organise the relations between Europeans and the “natives” and to coordinate imperial activities between the Europeans themselves. That aspect of the matter was, I want to suggest, accompanied by the even more significant adoption by Vitoria and his followers of a politico-theological vocabulary that would extend a certain idea about the justice of private relationships on a universal basis. The Spanish theologians and jurists reacted to the

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<sup>2</sup> Ernst Nys, *Les origines du droit international* (Brussels, Castaignes 1894). For the late-19<sup>th</sup> century project of which Nys was a part, see Martti Koskenniemi, *The Gentle Civilizer of Nations. the Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001).

<sup>3</sup> James Brown Scott, *The Catholic Conception of International Law. Francisco de Vitoria & Francisco Suárez* (Washington, Carnegie Endowment for Peace 1934).

<sup>4</sup> See Calvin DeArmand Davis, *The United States and the Second Hague Peace Conference. American Diplomacy and International Organization 1899-1914* (Duke University Press, 1975), 259. See further, Martti Koskenniemi, “The Ideology of International Adjudication and the 1907 Hague Conference” in Yves Daudet (ed), *Topicality of the 1907 Hague Conference, the Second Peace Conference/Actualité de la Conférence de La Haye de 1907, Deuxième Conférence de la paix* (The Hague, Brill, 2008), 127-152.

conquest by reading the Roman law notion of *dominium* through a theory of virtue they had learned from Aquinas. That reading suggested to them that the relations of power among humans could be separated into public law jurisdiction (*dominium iurisdictionis*) and private ownership (*dominium proprietatis*) in a way that we will immediately recognise as familiar. From now on, these two types of power would operate so as to facilitate and coordinate the pursuit of private property through commercial and economic activities all around the world. Today's globalisation means the universal application of principles of private property and contract – against which the role of States is limited to keeping order in and seeing to the welfare of territorial communities. To have provided the legal vocabulary to make this possible is the lasting heritage of the School of Salamanca.

### 1. The School of Salamanca

The School of Salamanca and especially its “founder” Francisco de Vitoria have been object of a great number of analyses that have focused on the “Black Legend” of Spanish colonization. During and after the Franco regime, Spanish historiography tended to produce more or less apologetic interpretations of the School. Urbano summarises that scholarship in the following way:

“no era estudiado per se, sino por una filosofía que estaba a medio camino entre el moderno derecho internacional y la caridad cristiana; entre la justificación del presente y la dignificación selectiva del pasado”.<sup>5</sup>

Since then, the situation has somewhat changed. The 29 volumes of the *Corpus Hispanorum de Pace* (CHP) produced in Madrid in the 1980's and 1990's contain a huge amount of primary materials on the 16<sup>th</sup> century colonisation and the relevant Spanish debates. But the interpretive essays still carry traces of earlier polemics. That the leading participant in that venture - Luciano Pereña - has titled his summary of the 16<sup>th</sup> century Spanish activities as *La idea de justicia en la conquista de América* shows that focus of recent studies has been to craft a compromise between acceptance of the catastrophic effects of colonisation on Indian communities while highlighting

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<sup>5</sup> Francisco Castilla Urbano, *El pensamiento de Francisco de Vitoria. Filosofía, política e indio Americano* (Barcelona, Anthropos, 1992) 30.

the good intentions of the Crown of Castile, often counselled by the university theologians and jurists, including the leading critic of the manner of the colonization, Bartolomé de Las Casas (1484-1566), the Bishop of Chiapas.<sup>6</sup> The same may be said of the work by the American Lewis Hanke who struck at the Anglo-American habit of distinguishing between the (“bad”) colonization by Spain and the (“civilized”) one of the liberal empires: for Hanke, too, though the result of the colonization was disastrous, it was still often inspired by noble motives about trusteeship and conversion. “No European nation”, Hanke wrote, “took her Christian duty towards native peoples as seriously as did Spain”.<sup>7</sup> When Scott resuscitated Vitoria as the originator of international law, he interpreted the Salamanca school as flickering light of humanitarian sanity in a century of colonizing euphoria.<sup>8</sup> Flattering for international lawyers, the interpretation offered an anachronistic view of Vitoria that was largely torn from its theologico-political context.<sup>9</sup> This was pointed to by the German interwar conservative lawyer Carl Schmitt whose own interpretation of Vitoria, however, remained equally hostage of his project – demonstrating how later interpretations distorted Vitoria’s apparent “neutrality” or “objectivity” as inaugurating modern universalism and its “discriminatory” concept of war.<sup>10</sup>

More recently, Vitoria’s role in illustrating the colonial origins of international law has been laid out by such lawyers and writers as Antony Anghie, Henri Méchoulan, China Miéville and Robert Williams.<sup>11</sup> Vitoria’s humanitarianism, so the argument goes, legitimated conquest and made colonisation on a permanent basis not only possible but an outright religious necessity. Vitoria and his followers, these scholars argue, initiated the idea of Europe’s “civilizing mission” that was translated into

<sup>6</sup> Luciano Pereña, *La idea de justicia en la conquista de América* (Madrid, Mapfre 1992).

<sup>7</sup> Lewis Hanke, *The Spanish Struggle for Justice in the Conquest of America* (Dallas, Southern Methodist University Press, 1949/2002), 175.

<sup>8</sup> James Brown Scott, *The Catholic Conception of International Law. Francisco de Vitoria & Francisco Suárez* (Washington, Carnegie Endowment for Peace 1934).

<sup>9</sup> For a discussion, see Christopher R. Rossi, *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law* (The Hague, Kluwer 1998), 114-133 and passim.

<sup>10</sup> Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Berlin, Duncker & Humblot, 1988), 69-96.

<sup>11</sup> Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press (2004), 13-31; Henri Méchoulan, *Le sang de l'autre ou l'honneur de Dieu. Indiens, juifs et morisques au Siècle d'Or* (Paris, Fayard 1979), 62-67 and 85-90 (concluding on Vitoria’s views on the Indians that “tout cela ne manifeste pas le moindre trace d’universalisme ni de compréhension du drame indien. Le droit de Vitoria est le droit du plus fort”, 89); China Miéville, *Between Equal Rights. A Marxist Theory of International Law* (Leiden, Brill 2005), 173-178; Robert A. Williams Jr, *The American Indian in Western Legal Thought. The Discourses of Conquest* (New York, Oxford 1990), 96-107.

various types of trusteeship imposed by successive European empires over the non-European world. Perhaps predictably, this interpretation has been also challenged by recent authors pointing to the humanizing effect that Vitoria and his colleagues had on Spanish colonial legislation at the time and on the ethics of warfare ever since.<sup>12</sup>

Vitoria' "cosmopolitanism", as it emerged from his lectures, was undoubtedly born of religious doubts about the justice of the way the conquest was being carried out. And in retrospect, it is astonishing to what extent the theologians were able to debate and challenge the policies of their king – even as Charles V himself famously suffered from pangs of conscience about the events in the Indies. But it was also so open-ended that it could easily be used, and was used, to support contrary policies.<sup>13</sup>

Notoriously, even in his first public lecture (*relectio*) on the Indians of 1539 Vitoria vacillated between accepting that the Indians were fully humans on the one hand, and, on the other, that they were “nevertheless so close to being mad, that they are unsuited to setting up or administering a commonwealth both legitimate and ordered in human and civil terms”.<sup>14</sup> There can be no real doubt that Vitoria and his successors were convinced of the superiority of the Spanish over the Indians as well as on their right to penetrate Indian territories for the purpose of trade and proselytising. Whatever the problems with colonization, at no point did Vitoria or the principal representatives of the Salamanca school advocate Spanish departure from the Indies. Civilization and trusteeship remained their objective.

What interests me in Vitoria and his successors here, however, is how their response to the conquest through the twin argument from *dominium* and *ius gentium* developed into a kind of universal sociology or philosophical anthropology that far from being limited to marginal aspects of external State policy became foundational for the idea of universal law divided in two parts: a public law governed structure of diplomatic relations and war on the one hand, and a world of individual private rights that set up a global system of economic relationships on the other. Previous examinations of the

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<sup>12</sup> As attempted e.g. by Georg Cavallar, 'Vitoria, Grotius, Pufendorf, Wolff and Vattel. Accomplices of European Colonialism and Exploitation or True Cosmopolitans?' 10 *Journal of the History of International Law*, (2008), 181- 209; and Pablo Zapatero, 'Legal Imagination in Vitoria. The Power of Ideas', 11 *Journal of the History of International Law* (2009), 221-271, especially (on Anghie and Brett Bowden), 267-271.

<sup>13</sup> Urbano, *Francisco de Vitoria*, *supra* note 5, 317-323.

<sup>14</sup> Francisco de Vitoria, 'On the American Indians', in A Pagden & J Lawrance eds., *Political Writings*, (Cambridge University Press 1991), § 18 (290). See also Méchoulan, *Le sang de l'autre*, *supra* note 11, 62-67.

legacy of Vitoria have concentrated on the former and thus on formal European imperialism. I want to look briefly at how the Salamancans' interest in private rights develop into a universal system of exchanges that can even be enforced by war, if necessary – that is to say, I want to highlight their role in constructing what Justin Rosenberg has called “the empire of civil society”.<sup>15</sup>

## 2. Vitoria's reaction to the *Conquista*

Dominican scholars and missionaries, often trained by Vitoria or his colleagues, played a key role in the definition of the official Spanish position regarding the status and treatment of the Indians. Concern over the behaviour of the *conquistadores* was a strong motivating factor for their engagement. They had been shocked by the destruction by Cortés of the Aztec empire on the Yucatan peninsula (“Tierra firma”) in 1519-1521 and Pizarro's killing of the Inca ruler Atahualpa and the consequent plundering of the Inca riches and destruction of the Inca regime during 1531-1539. And they were concerned over the “*encomienda*” system of distributing Indians to the settlers to carry out forced labour first all over the colonised territory. The former events raised the question of the basis of Spanish title, the latter the nature of Indians as human beings and the legal rules governing the relations among actors from different cultures. In a famous letter to fellow Dominican Miguel de Arcos, Vitoria wrote that stories of conquistador behaviour in Peru “freezes the blood in my veins”. “The Indians”, he wrote, were “most certainly innocent in this war”.<sup>16</sup> Nevertheless, even as Vitoria and his successors were critical of Spanish behaviour, they did not doubt the justice of the Spanish presence in the Indies, their right to travel and evangelize in Indian territory. But on what basis were the relations between the Indians and the Spanish to be conducted? What law applied to the relations between Christians and the infidel?

When Columbus left for the New World in 1492, no serious debate had been waged on the legal basis of his action. Potential problems had been resolved in the Treaty of Alcaçhas and Toledo of 1479-1480 where Portugal abandoned its claims to the

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<sup>15</sup> Justin Rosenberg, *The Empire of Civil Society. A Critique of the Realist Theory of International Relations* (London, Verso 1994).

<sup>16</sup> Francisco de Vitoria, Letter to Miguel de Arcos OP, 8 November [1534], in *Political Writings*, *supra*, note 14, 331, 332.

Canaries in exchange for the Spanish consent to respect Portuguese trade in Africa.<sup>17</sup> Spain's title was derived from the *Siete partidas* (Third Part, Title 28, Law 29) that embodied the Roman law notion of islands belonging to their first occupant in accordance with the rules of the occupant of the sea in which the island was found.<sup>18</sup> The famous mediation by the Pope was only required as Portugal claimed the Islands as part of the Azores. The line set up in the Pope's five letters that include the *Inter caetera* of 5 May 1493 were slightly amended and reaffirmed by the Treaty of Tordesillas a year later.<sup>19</sup> The aim of Columbus's voyage had been exclusively economic. Evangelisation had become part of the plan only by Queen Isabella's famous "testament" of 1504 that also spoke of the "civilization" of the Indians.<sup>20</sup>

Among the first scholars to discuss the matter in the first decade of the 16<sup>th</sup> century had been Vitoria's teacher from his Paris period, the Scottish nominalist John Mair (1467-1550) who analysed Indians as natural slaves in the Aristotelian tradition.<sup>21</sup> This was incompatible with Isabella's testament, however, and even the Crown's leading legal expert, Juan Lopez Palacios Rubios (c. 1450-1524), whom King Ferdinand enlisted to examine the matter in 1512 after the first complaints of Spanish behaviour had come to his ears, rejected the view of Indians as natural slaves.<sup>22</sup> In his study Palacios Rubios affirmed that Indians were indeed humans and as such entitled to private possessions and public law jurisdiction. However, he based Spanish presence on the old hierocratic theory of the pope as the Lord of the World and wrote this into the infamous *requerimiento* that was to be read to the Indians before war against them could be undertaken.<sup>23</sup>

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<sup>17</sup> For the treaty, see John Parry & Rachel Keith (eds), *New Iberian World. A Documentary History of the Discovery and Settlement of Latin America to the Early 17<sup>th</sup> Century. Vol I: The Conquerors and the Conquered* (New York, Times books, 1984), 266-271.

<sup>18</sup> Michèle Escamilla-Colin, 'La question des justes titres: repères juridiques. Des bulles Alexandrines aux Lois de Burgos', in Carmen Val Julian (ed.), *La conquête de l'Amérique espagnole et la question du droit* (Fontenay-aux-Roses, ENS 1996), 86-87.

<sup>19</sup> For these documents, see Parry & Keith, *New Iberian World*, *supra* note 17, 271-280.

<sup>20</sup> Escamilla-Colin, 'La question des justes titres', *supra* note 18, 92-93.

<sup>21</sup> See Anthony Pagden, *The Fall of Natural man., The American Indian and the origins of Comparative Ethnology* (Cambridge University Press 1982), 38-52; Urbano, *Francisco de Vitoria*, *supra* note 5, 212-218 and e.g. Dieter Janssen, 'Die Theorie der gerechten Kriegeres im Denken des Francisco de Vitoria', in Frank Grunert & Kurt Seelmann, *Die Ordnung der Praxis. Neue Studien zur spanische Spätscholastik* (Tübingen, Niemeyer, 2001), 207-208.

<sup>22</sup> Juan Lopez de Palacios Rubios, *De las Islas del Mar Océano* (México, Fondo de cultura económica 1954).

<sup>23</sup> The story of the composition and later use of the *Requerimiento* has been told in many places. See e.g. Patria Seed, *Ceremonies of Possession in Europe's Conquest of the New World 1492-1640*

However, when the *conquistadores* returned from the Indies, many of them had grave doubts of conscience weighing upon them. And so they flocked the Convent of St Esteban in Salamanca where Vitoria and many of his colleagues lived, to confess their sins, and to seek absolution. But what kind of a sin was it to take infidel property, to kill an Indian and to occupy their land? Vitoria was a religious scholar and he needed to teach his students about the nature of the Spanish activities so as to prepare them to manage the sacrament of penance properly – were the Spanish activities sinful, and if so, how grave? Vitoria included a discussion of the Indian question in his lectures on the *Summa theologiae* of Aquinas of 1534-35 and in three famous public lectures (*relectiones*) held in 1537-1539. In all of these, Vitoria concluded that the Indians were rightful owners of their property and that their chiefs validly exercised jurisdiction over their tribes. This had already been the position of Palacios Rubios. But Vitoria went on to deny the latter's theory of the pope as Lord of the World. Neither the pope nor the emperor – Vitoria's sovereign, Charles V – had a rightful claim over Indian lives or property. No violent action could be taken against them, nor could their lands or property be seized, unless the Indians had caused harm or injury (“*iniuria*”) to the Spanish by violating the latter's lawful rights.<sup>24</sup>

To make this argument, Vitoria's starting-point was that under natural law, as affirmed by tradition going back to the Church fathers and accepted by Aquinas, no human being had natural dominion over another. Under it, everyone was born free and property was held in common.<sup>25</sup> Judged by natural law, however, not only the conquest, but every aspect of 16<sup>th</sup> century European life – continuous warfare between European rulers, the emergence of an international system of trade based on private property and the search for profit – were a moral abomination. One could not argue on the basis of natural law and hold the present government in Europe anything but a criminal conspiracy – as some such as the notorious Juan de Mariana (1536-

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(Cambridge University Press, 1995), 69-99; Hanke, *Spanish Struggle for Justice*, *supra* note 7, 31-41; Pereña, *La idea de justicia*, *supra* note 6, 31-44; Urbano, *Francisco de Vitoria*, *supra* note 5, 208-232 (on all the debates from 1492 to the *Requerimiento*).

<sup>24</sup> Francisco de Vitoria, 'On the American Indians, in A Pagden & J. Lawrance (eds.), *Political Writings* (Cambridge University Press 1991), Q 2 A 1-2 (252-264) and 'On the Law of War', Q1 a 3 § 13 (303-304)

<sup>25</sup> "Non cognoscit jus naturale differentiam inter homines, quia quidquid habet unus, est alterius de jure naturali", Francisco de Vitoria, *Comentarios a la Secunda secundae de Santo Tomás* [ComST II-II], (Edition preparada por Vicente Beltrán de Heredia (Salamanca, 1934/1952) Tomo III, Q 62 A 1 n. 18 (75).

1624) suggested. Humans could be ruled only through force, Mariana wrote, and nothing but the threat of tyrannicide would keep rulers from oppressing their subjects.<sup>26</sup>

But Vitoria would not go that way; he lumped Machiavellian amoralism together with protestant irrationalism. He was thus in a bind. On the one hand, he could not endorse a divinely created natural law – an ethic of love - without undermining the policies of his Emperor not only in the Indies but everywhere. On the other hand, he could not endorse the *raison d'état* either, without appearing just like the cynical apologists of power Luther had always accused Catholic churchmen of being. He needed a vocabulary that would accept the basic contemporary forms of territorial government, private ownership and war but that would nevertheless restate the unity of humankind under God. This was provided to him by the twin vocabulary of *dominium* and *ius gentium*, the former covering a particular theory of forms of lawful human power, the latter extending that theory to be applicable everywhere.

The first question that Vitoria had to pose was how, if natural law provided for human freedom and the ownership of all property was in common, was it at all possible for humans to exercise jurisdiction over each other and to own property. In the lectures on the *Summa* that Vitoria gave to his students during 1534-35 he formulated the issue in this way:

“But if it is the case that God made everything to be owned by all, and human beings are the common owners of everything by natural law, how and from which facts follows the division of things? [This division] is not made by natural law. For natural law is always the same and never varies”.<sup>27</sup>

And Vitoria stated the obvious conclusion in his famous *relectio* on the Indians, “dominion and supremacy (*praelatio*) were introduced by human law, not natural law”.<sup>28</sup> But how could merely human law possibly deviate from a divinely originated

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<sup>26</sup> Juan de Mariana, *The King and the Education of the King (De Rege et Regis Institutione)*, (G.A. Moore intr. & transl. Washington, Georgetown University 1947), Ch V & VI (135-151) and for a discussion of Mariana's pessimism, see Harold E. Brown, *Juan de Mariana and Early Modern Spanish Political Thought* (Aldershot, Ashgate 2007).

<sup>27</sup> “Sed si ita est quod deus fecit omnia communia omnibus, et homo est omnium dominus iure naturali, quomodo et unde facta est ista rerum divisio? [This division] non est facta de iure naturali. Patet quia ius naturale semper est idem et non variatur”, Vitoria, ComST II-II, *supra* note 25, Q 62 A 1 n. 18, 74-75.

<sup>28</sup> Vitoria, ‘On the American Indians’, in *Political Writings*, *supra* note 14, Q 2 A 1 (254).

natural law? Hence the issue of concern: where the conquistadors, the traders, or indeed the emperor himself living in sin?

Vitoria resolved the problem by the usual scholastic way – by making a distinction, namely a distinction between binding and merely recommendatory provisions of natural law. Freedom and common ownership were not based on a binding prescription (*praescriptio*) but only a recommendation, (*concessio*). They provided for common property but did not prohibit the *divisio rerum* – either in its public law form as independent communities or in terms of private property.<sup>29</sup> The division was undertaken by consensus – not by a formal consensus but by a “virtual” one (“*non aliquo consensu formali, sed virtuali*”), by the taking into use of pieces of land and others following suit. Because this division was valid everywhere it could not have been based on the civil law of this or that state. It had to have been undertaken by *ius gentium*.<sup>30</sup> It followed from this, too, that neither the pope nor the emperor had any basis for claiming *dominium* over the whole world. The dominion of Christ had not been “of this world” and could not, therefore, have devolved to Peter or the latter’s successors. Nor had such dominion ever been granted to or exercised by the (Roman) emperor.<sup>31</sup> Dominion lay with all humans on the basis of natural law, and the communities they had established as well as the properties they divided among themselves were rightly theirs on the basis of the *ius gentium*.<sup>32</sup>

In his lecture on the Indians Vitoria makes *ius gentium* to do a lot of work starting from the division of territories and properties to supporting the right to travel and to trade, occupation of *terrae nullius*, citizenship and the despatch of ambassadors. Yet he is frustratingly unclear about its legal nature. In an early lecture on civil power (1528), he speaks of the *ius gentium* as a law enacted by “[t]he whole world which is in a sense a commonwealth” – a kind of universal positive law in other words. In the lecture on the Indians, again, he quotes the old definition by Gaius to the effect that the law of nations is “what natural reason has established among all nations”,<sup>33</sup> thus apparently collapsing *ius gentium* into natural law. In his treatment of war, Vitoria

<sup>29</sup> Vitoria, ComST II-II, *supra* note 25, Q 62 A 1 n 20 (77).

<sup>30</sup> Vitoria, ComST II-II, *supra* note 25, Q 62 A 1 n 23 (79).

<sup>31</sup> Vitoria, ‘On the American Indians’, in *Political Writings*, *supra* note 14, Q 2 A 1 & Q 2 A 2, (252-264).

<sup>32</sup> Vitoria, ComST II-II, *supra* note 25, Q 62 A n 22-27 (78-81).

<sup>33</sup> Vitoria, ‘On the American Indians’, in *Political Writings*, *supra* note 14, Q 3 A 1 § (278).

regards military action in self-defence as natural law while admitting that even “custom may establish the right and authority to wage war”.<sup>34</sup>

But Vitoria was not too concerned over legal classifications. In his lectures on the *Summa*, he admitted that whether *ius gentium* was called natural or positive was only a terminological issue.<sup>35</sup> The important point – a point often overlooked by commentators – was that he followed Aquinas in locating the substance of *ius gentium* in the latter’s systematic theology as part of “justice” (*iustitia*) and not at all the discussion of “law” (*ius*). It was not a part of the external directives for human action, but of the internal directives – of the virtues – and more specifically of the other-related virtue of (commutative) justice.<sup>36</sup> It had to do with finding the right relationship with others in the context of actual (political) communities. At the heart of commutative justice Vitoria found the Roman law concept of *dominium*, in both of its senses as jurisdiction and ownership. If the prince had *dominium* over his commonwealth this was because the community had delegated it to him.<sup>37</sup> And it was through *dominium* that Vitoria would analyse not only Spanish rights in the Indies, but also, and above all, the rights and duties of Spanish and foreign travellers and traders engaging in manifold commercial activities everywhere in the world. All humans had *dominium* over their actions as part of their natural liberty. It was in this that they resembled God. And the *dominium* they had as members of commonwealths and over their lives and their goods was a part of that liberty. From this theological basis, Vitoria derived a theory of individual rights (of *dominium*) as well as its universal applicability as the foundation of just relationships between all human beings.<sup>38</sup>

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<sup>34</sup> Vitoria, ‘On the Law of War’, in *Political Writings*, *supra* note 14, Q.1 A 2 (302).

<sup>35</sup> Vitoria, ComST II-II, *supra* note 25 Q 57 A 3 n 2 (14) and Q 62 A 1 n 23 (79).

<sup>36</sup> Or in other words, his was a subjective-right based definition of *ius* as a “potestas vel facultas conveniens alicui secundum leges” (a power of faculty that belonged to somebody in accordance with law), Vitoria, ComST II-II, *supra* note 25 Q 62 A 1 n 5 (64). For a useful discussion of the theological context of Vitoria’s theory of *dominium*, See Daniel Deckers, *Gerechtigkeit und Recht. Eine Historisch-kritische Untersuchung der Gerechtigkeitslehre des Francisco de Vitoria* (Freiburg, Universitätsverlag 1991), 23-195.

<sup>37</sup> This theory is laid out in quite a complicated and partly contradicting way in the early lecture ‘On Civil Power’, in *Political Writings*, *supra* note 14, § 5-8 (9-17).

<sup>38</sup> See especially the Vitoria’s commentary on *Quaestio* 57 of the *Secunda secundae*, in ComST II-II, *supra* note 25, Q 57 A 1 (in which Vitoria adopts the Thomistic definition of “*ius*” as the object of “*iustitia*”), Q 58 A 1 where the definition of “justice” is given in terms of providing everyone his due and the discussion of *dominium* in terms of commutative justice and as a property all humans have in 62 A n 8-17 (1-6, 20-21, 67-74). See further Annabel Brett, *Liberty, Right and Nature. Individual Rights in Later Scholastic Thought* (Cambridge University Press 1997), 124-137.

In his lectures on the Indians, Vitoria concluded that all humans enjoy *dominium* in both of its senses as public law jurisdiction and the private individual's right of property over things lawfully acquired. This right was based on natural law but the form of its specific realization had been decided by human communities through *ius gentium*. But even if its nature was historical and social, it was universally valid and thus fully applicable to the infidel, too. And finally, as part of a theory of virtue it could be articulated as a subjective right or a faculty that could now be used as a universal theory of commutative justice: it would articulate social relations in interpersonal terms, as rightful forms of exercise of *dominium*.

### 3. *Dominium* as the foundation of a universal system of private exchanges

Through the discussion of *dominium* Vitoria and the subsequent Salamanca scholars grounded an extensive right for human beings to appropriate, use, transfer or abandon things in accordance with their choice. Such right belonged only to rational (human) beings, but it belonged to *all* of them. Vitoria followed the official Church line since the Council of Constance (1414-1418) according to which neither sin nor infidelity took away *dominium*; that was why Christians may lawfully engage in trade with pagans and the rights of ownership of the latter may be enforced even against the Christians.<sup>39</sup> But the problem was larger than about Indian rights. As Vitoria was teaching, the gold and silver that were being imported to Sevilla from the Indies and the export opportunities for manufactured goods to the Americas, as well as the financing operations related to them, began to create a network of global relations that was transforming the cultural and economic milieu around the Dominicans out of recognition. Commercial operators (including the Crown itself) were engaged in new types of transactions for long-distance trade, monopolies and price-speculation in a moral-legal grey zone that could not leave theologians cold. What to think of the drive to profits on the basis of large-scale exchanges of private property?

For Aquinas, the move from common to private property had an originally utilitarian basis: "everyone is more diligent in procuring something for himself than something

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<sup>39</sup> "Infideles possunt habere tale dominium *supra* christianos, id est stando in jure naturali, no perdit infidelis dominium suum propter infidelitatem, sed talibus tenentur christiani obedire", Vitoria ComST II-II *supra* note 25, Q 62 A 10 § 1 (200).

which is to belong to all or many”; “human affairs are conducted in a more orderly manner if each man is responsible for the care of something which is his own” and “a more peaceful state of things is preserved for mankind if each is contented with his own”.<sup>40</sup> The Salamanca scholars’ writings follow this direction; their relatively relaxed discussion of profit-making in commercial operations and usury presuppose the justice of such activities as long as they can be understood as motivated by concern for the livelihood of one’s family or the good of the commonwealth.<sup>41</sup> True, many Christians were critical of private property, pointing to biblical passages such as the statement by Jesus about the difficulty of the rich man to ascend to Paradise [Luke 18:25]. But most of them followed Aquinas and accepted private property as a pragmatic “addition” to natural law (instead of a sinful deviation from it) and valid overall as *ius gentium*, a position that consolidated within the Church at the latest during the Franciscan poverty controversy.<sup>42</sup>

In his massive *De iustitia et iure* (1556/1556) Domingo de Soto (1494-1560), Vitoria’s contemporary as (*Visperas*) professor of theology at Salamanca, began his discussion of private ownership by attacking Plato’s communist utopia in *Timaeus* and *Republic*. The effective use of resources requires that each is given his own property to use and administer. Moreover, only such division ensures the right distribution of burdens between the members of the community. In Paradise, there may have been sufficient fruit for everyone. But since the expulsion, humans have had to work in order to earn their living. In such conditions, maintaining common property would lead to some working excessively while others would simply lay back to enjoy the fruits of others’ labour. The peace, tranquillity and friendship sought after by the philosophers would be inevitably thwarted.<sup>43</sup> Moreover, Soto points out

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<sup>40</sup> Aquinas, ST II-II in *Political Writing* (R.W. Dyson ed, Cambridge University Press, 2002), 66 A 2 resp. (208).

<sup>41</sup> As especially stressed in Joseph A. Schumpeter, *Histoire de l’analyse économique. I. L’age des fondateurs (Des origines à 1790)* (J-C Casanova trad. Paris, Gallimard 1983), 141-157.

<sup>42</sup> Aquinas, II-II Q 66 A 2 in *Political Writings*, *supra* note 40, 208 and Janet Coleman, ‘Property and Poverty’, in J.H. Burns (ed), *The Cambridge History of Medieval Political Thought c. 350-c. 1450* (Cambridge University Press, 1988), 621-625. On the Franciscan poverty controversy, see *id*, 631-648; Brett, *Liberty, Right and Nature*, *supra* note 38, 13-20.

<sup>43</sup> Domingo de Soto, *De iustitia et iure Libri decem / De la justicia y el derecho en diez Libros* (Intr. By P.V. Diego Carro, Spanish transl. by P.M. Gonzalez Ordonez, Madrid 1967), Bk IV Q III A 1 (296a-297a). “Hac ergo delira communitate praetermissa...demonstrandum [est] quam sit congruens naturae corruptae possessionum divisio...nempe ex humana negligentia et ex cupiditate”, *id*. (296b). See also Alejandro A. Chafuen, *Faith and Liberty. The Economic Thought of the Late Scholastics* (Oxford, Lexington 2003), 33-34.

following Aristotle, under conditions of common property it would be impossible to cultivate the virtues of generosity and liberality. The same fate would befall the virtues of hospitality and gratitude – without private ownership none of them would serve any point.<sup>44</sup>

Everything Vitoria and Soto wrote about the laws of contract and inheritance, prices, money, and commerce at home and with foreign countries as well as of objectives and limits of public power presumes not only the existence but the beneficial nature of private property and the transactions connected with them.<sup>45</sup> Such transactions had been discussed in Roman (civil) law but no systemic view of them had emerged until the scholastics brought them under the title of commutative justice “intimately bound with the sacrament of confession”.<sup>46</sup> For Vitoria and Soto were keenly aware that accumulation of wealth could easily cross the threshold of the sin of avarice. In their commentaries to questions 77 and 78 of the *Secunda secundae* they thus balance their utilitarianism with their concern for the souls of the merchants by developing an extremely detailed casuistic of different types and practices of contracts, usury and other economic operations.<sup>47</sup>

Following Aristotle, Vitoria distinguishes between two types of *ars mercatorum*, “natural” exchanges the purpose of which is to see to the good of the household (“*ad usus necessarios hominum*”) and those “artificial” operations whose point was to

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<sup>44</sup> “Qui enim proprium non habet, liberalis esse non potest et qui omnia possidet, alienae liberitatis non eget”, Soto, *De justitia et de iure*, *supra* note 43 Bk IV Q III A 1 (297b). See also Aristotle, *The Politics* (trans. By A.T. Sinclair, rev. and re-pres. By T.J. Saunders, Harmondsworth, Penguin 1981), 1263a (115).

<sup>45</sup> In this, they departed significantly from medieval writers who were usually dubious about economic activity and accepted it only to the extent it was directed towards satisfaction of necessities or caring for offspring. See e.g. Antonio Garcia Garcia, & Bernardo Alonso Rodriguez, ‘El pensamiento económico y el mundo del derecho hasta el siglo XVI’, in Gómez Camacho & Ricardo Robledo (eds), *El pensamiento económico en la escuela de Salamanca* (Ediciones Universidad Salamanca, 1998), 66-75 Diane Wood observes that it was the Church that put a brake on economic activity. For “to be socially ambitious, to want to be upwardly mobile, was a sin”, *Medieval Economic Thought* (Cambridge University Press, 2002), 3, 2-5.

<sup>46</sup> Thomas Duve, ‘La teoría de la restitución en Domingo de Soto: Su significación para la historia del derecho privado moderno’, in Juan Cruz Cruz, *La ley natural como fundamento moral y jurídico en Domingo de Soto* (Pamplona, Eunsa, 2007), 190, 187-190.

<sup>47</sup> Juan Belda Plans, *La escuela de Salamanca y la renovación de la teología en el siglo XVI* (Madrid, Biblioteca de autores cristianos, 2000), 926; José Barrientos García, ‘El pensamiento económico en la perspectiva filosófico-teológica’, in Gomez Caracho & Robledo, *El pensamiento económico*, *supra* note 45, 94-95. To give a sense of the detailed nature of the result, it might be noted that the mere discussion of the question “whether it is allowed to receive for loan something else than money in exchange” is divided into 75 paragraphs that discuss 51 “doubtful cases”, many of them developed in several “corollaries”, all of which takes from the modern Latin edition altogether 68 pages, Vitoria ComST II-II *supra* note 25, Q 68 A II (167-235).

produce profit (“*ad lucrum*”). The former was just and lawful but the latter – that is to say, the practice of buying cheaply and selling expensively – involved great danger (“*est valde periculosum*”) as it involved the temptation of the sin of avarice.<sup>48</sup> Like Aquinas, however, Vitoria assumed that the justice of profit-making depended ultimately on its purpose and he did not wish to discourage activities that were beneficial to the commonwealth. What was needed was to learn to discriminate between situations. The profit due to the merchant could be justified above all by the change that had been introduced in the commodity by transporting it from the place where it was bought to where it will be sold. As the goods were introduced in a location where they were scarce or perhaps not at all available, the merchant was doing a socially useful service for which he could be justly awarded (“*hoc est necessarium ad bonum et ad provisionem reipublicae*”).<sup>49</sup> If profit enabled commerce where it would otherwise be lacking, or if it contributed to the good of the community in other ways, it was just. But if it was motivated only by the desire for private gain – for example, if the seller waits until the price of the commodity rises – then engaging in it involved, depending on the gravity of the matter, either venial or mortal sin.<sup>50</sup>

An especially significant extension of the theory of *dominium* was the subjective (but non-arbitrary) theory of the just price that lies at the heart of Vitoria’s views on commerce.<sup>51</sup> Drawing on Duns Scotus, Vitoria accepted that the goods on the market had no essential or natural value. He was familiar with the paradox under which water, though normally of no value, may be sometimes regarded as more valuable than gold. But how then, if different people value things differently, could a just exchange be carried out? To this he responded that the just price was relative to how a

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<sup>48</sup> Vitoria ComST II-II, *supra* note 25, Q 77 A 4 § 2 (146).

<sup>49</sup> Vitoria ComST II-II, *supra* note 25, Q 77 A 4 § 2 (147).

<sup>50</sup> Vitoria ComST II-II, *supra* note 25, Q 77 A 4 § 1-2 (141-147). This is in fact a very relaxed standard – for mortal sin is involved only if profit is actually intended to harm others. If it is motivated only by greed, the sin is only venial – an illustration that Vitoria and the humanists generally were shifting attention from the state of mind of the economic operators to the actual injury possibly caused by their operations. Antonio García García & Bernardo Alonso Rodríguez, ‘El pensamiento económico y el mundo del derecho hasta el siglo XVI,’ in Gómez Camacho & Robledo, *El pensamiento económico*, *supra* note 45, 82.

<sup>51</sup> The just price is not only an economic category in Vitoria and Soto but above all a measure of the requirement of commutative justice in the moral-legal order. It put to practice the need to ensure equality and reciprocity of exchanges. See Juan Antonio Widow, ‘Economic Teachings of Spanish Scholastics,’ in Kevin White (ed.), *Hispanic Philosophy in the Age of Discovery* (Washington, Catholic University of America Press 1997), 135-136. Vitoria and Soto were not simply adopting a nominalist position. Although the price of a commodity was determined subjectively, that determination reflected an objective assessment of the situation on the market.

thing is valued in the market (“*ex communi hominum aestimatione vel conducto*”).<sup>52</sup> That “common estimation”, again was a function of many things, including the product’s relative abundance or scarcity. In other words, though price-formation was a subjective process, this did not mean there was no just price. Instead of regarding price-formation as fully open (he were critical of price-manipulation as well as the so-called “dry contracts” that contained hidden forms of usury) they fell back on the *communis aestimatio*.<sup>53</sup> A regular exchange contract was lawful if it involved no fraud or deception, it was carried out voluntarily (and not through coercion), involved no monopolistic price-juggling and if there was a “legal price”, it had been followed.<sup>54</sup>

The Salamancans did not see money as just a sign or an instrument of exchange. It possessed value in itself so that it could also be understood to accumulate for investment purposes and exchanged for profit (interest). Vitoria’s extensive treatment of usury opens with an apparently unconditional prohibition of interest-taking for loan: money is “sterile” and making it produce contrary to natural law.<sup>55</sup>

Nevertheless, in the course of his discussion, he makes several qualifications to that prohibition and ends up positively endorsing the operations of the *cambistas*, or professional money exchangers (banks), as they provided credit and letters of exchange that enabled merchants to move between fairs in Europe without having to carry large quantities of money with them.<sup>56</sup> Modest interest could be raised for lending activities inasmuch as they facilitated international exchanges and created the basis for accumulation that could be useful for investment purposes. The discussion of the lawfulness of financial activities revolved around the concept of usury that was treated, of course, as a violation of commutative justice and a mortal sin in its many express and implied forms. In complicated international exchanges that involved several parties it was of course often difficult to determine the equilibrium or reciprocity commanded by commutative justice: one flexible basis for accepting

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<sup>52</sup> Vitoria ComST II-II, *supra* note 25, Q 77 A 1 § 2 (117-118).

<sup>53</sup> Deckers, *Gerechtigkeit*, *supra* note 36, 247-8.; Chafuen, *Faith and Liberty*, *supra* note 43, 82-3.

<sup>54</sup> See also Ricardo F. Crespo, ‘La posibilidad y justicia del intercambio: De Aristoteles a Marx, pasando por Tomás de Aquino y Francisco de Vitoria’, in Juan Cruz Cruz (ed), *Ley y Dominio en Francisco de Vitoria* (Pamplona Eunsa 2008), 273-275.

<sup>55</sup> Vitoria, ComST II-II *supra* note 25, Q 78 A 1 § 1, 3 (153-154, 155).

<sup>56</sup> Vitoria, ComST II-II *supra* note 25, Q 78 A 2 § 61-75 (223-235). The *cambista* provides a service that is useful for the community and for which it is lawful to require a benefit. However, unlike Cajetan, Vitoria extends this right beyond professional bankers to the transactions that merchants do on a permanent basis and that have the objective of facilitating long-distance trade (but not between nearby cities), *id.* § 66, 69 (227-228, 229),

interest was provided by the assumption that lending caused some damage to the lender and that interest could be understood as a compensation (*damnum emergens*) even in some instances for unattained profit (*lucrum cessans*).<sup>57</sup>

Vitoria and Soto assumed that these economic exchanges would be based on a universal right of *dominium* and thus applicable all over the world. They would provide, for example, the basis on which Catholic merchants from Spain could engage in mutually profitable transactions with Islamic or Jewish traders (as they had of course done for centuries), travel to Protestant markets in Germany and the Netherlands and to trade and exchange goods with the inhabitants of the New World. The most famous sketch of this worldwide system of *dominium* is contained in Vitoria's discussion of the right of the Spaniards to travel and trade in the Indies (*ius pergrinandi & ius negotiandi*) that was based on the naturalist theory of human sociability, accompanied by *dominium* that was articulated as *ius gentium*. Vitoria portrays trade and commerce as part of the "natural partnership and 'communication'" between humans. Since the beginning of times, "everyone was allowed to visit and travel through any land he wished [and t]his right was clearly not taken away by the division of property (*divisio rerum*).<sup>58</sup> It was a practical consequence of this that all nations were to show hospitality to strangers and everybody had the right to "all things that were not prohibited or others to the harm or detriment of others".<sup>59</sup> This, again, meant that

"Spaniards may lawfully trade among the barbarians, so long as they do no harm to their homeland. In other words, they may import the commodities which they lack, and export the gold, silver, or other things which they have in abundance; and their princes cannot prevent their subjects from trading with the Spaniards, nor can the princes of Spain prohibit commerce with the barbarians... [T]he law of nations (*ius gentium*) is clearly that travellers may carry on trade as long as they do no harm to the citizens... [A]ny human enactment (*lex*) which prohibited such trade would indubitably be unreasonable."<sup>60</sup>

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<sup>57</sup> Vitoria, ComST II-II *supra* note 25, Q 78 A 2 2 167-168). See also Soto, *De iustitia et iure*, *supra* note 43, Bk VI Q I A 1 and A 3 (508a-514b, 521b-525b).

<sup>58</sup> Vitoria, 'On the American Indians,' *Political Writings*, *supra* note 14, Q 3 A 1 § 2 (278).

<sup>59</sup> Vitoria, 'On the American Indians,' *Political Writings*, *supra* note 14, Q 3 A 1 § 2 (278).

<sup>60</sup> Vitoria, 'On the American Indians,' *Political Writings*, *supra* note 14, Q 3 A 1 § 3 (279-280).

And to make sure that he is not only discussing some special (colonial) relationship between the Spanish and the Indians, Vitoria adds that these principles are the same as those applying between Christian commonwealths. For the Spanish or the French kings to intervene in the travel of private traders would be “unjust...and contrary to Christian charity”.<sup>61</sup>

All of this begins to sketch an international system of commerce, based on the free use of their *dominium* by private merchants and bankers that the princes were not entitled to impede.<sup>62</sup> The extent of *dominium* was wide, covering use and non-use, trading and exchange as well as throwing away of the object. The prince was not entitled to intervene in his subjects’ use of private property “unless this is necessary for the defence and government of the nation”.<sup>63</sup> Nor could he limit hunting, fishing, or collecting firewood from the forest, without just cause. The right to use all this flows from the original natural law provision that humans may use everything that is necessary for their conservation.<sup>64</sup> If the ruler abused his authority, he committed a crime and had the obligation to restore the property taken.<sup>65</sup> To expropriate subjects arbitrarily – something that had been a persistent reality in 15<sup>th</sup> century Spain – would turn the prince into a *tyrant* and trigger the right of resistance of the commonwealth. Expropriation was possible only when the prince had a permissible *causa*, that is to say, only so far as needed by the commonwealth – “[b]eyond that, man must not only have his own rights as an individual, but he must also have their exercise in his own control: in other words, he must be *sui iuris*, have *dominium* of himself or his liberty.”<sup>66</sup>

These views on economic relations, *dominium*, commerce, price-formation and usury were largely accepted and defended by the subsequent generations of Spanish scholastics.<sup>67</sup> The Jesuit Luis de Molina (1535-1600), for example, expanded the utilitarian justification behind private property. In his *De iustitia et iure* he tells the

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<sup>61</sup> Vitoria, ‘On the American Indians,’ *Political Writings*, *supra* note 14, Q 3 A 1 § 3 (280).

<sup>62</sup> Barrientos García, ‘El pensamiento económico,’ *supra* note, 120.

<sup>63</sup> “nisi quando eidem reipublicae tuendae & administrandae necesse fuerint”, Soto, *De iustitia et de iure*, *supra* note 43, Bk IV Q IV A 1 (301a).

<sup>64</sup> Vitoria, ComST II-II *supra* note 25, Q 62 A 1 § 13 (72-73). See also Deckers, *Gerechtigheit*, *supra* note 36, 210-211.

<sup>65</sup> Soto, *De iustitia et de iure*, *supra* note 43 Bk V Q III A 5 (430a).

<sup>66</sup> Brett, *Liberty, Right and Nature*, *supra* note 38, 159.

<sup>67</sup> See further Marjorie Grice-Hutchinson, *Early Economic Thought in Spain 1177-1740* (London, Allen & Unwin 1978), 98-102.

old story about how the move had taken from natural law-based common ownership through the *ius gentium* into private property. To the objection – “How can human law go against (God-enacted) natural law?” – he retorts that God had inserted a natural light (“*lumen naturale*”) through which it was understood that among sinners, to avoid worse evils, properties needed to be divided. This was not a natural light about what was “necessary” but what was “expeditious” (“*expediens*”).<sup>68</sup> Again, it was Molina’s Jesuit colleague, Mariana, who chose to interpret this situation in dark, even tragic tones and did not hide his nostalgia towards the golden age of common property. After the Fall, human beings had become selfish and unjust and lived without a sense of natural benevolence to their communities. Nevertheless, that early situation could no longer be restored so that not only private property had become a necessary evil but it had become an urgent imperative to seek to protect it against all kinds of encroachments constantly planned by corrupt rulers.<sup>69</sup>

The theory of *dominium* as the sphere of freedom – especially economic freedom – belonging to human beings by *ius gentium* opened now a wholly new way to speak of universal authority beyond dubious claims about papal or imperial power. Any statement under the *via antiqua* that laid out duties connected with an office or rule could now be re-described as a statement about what (some) human beings had an entitlement to. “And the important thing about the sixteenth-century Spanish theologians and lawyers was that they *did* frame those issues in terms of the individual”.<sup>70</sup> The universal structure of private rights that emerges from Vitoria and Soto spoke to popular views about the electoral basis of Spanish monarchy and bound the ruler – at least in principle – to the original authorization to rule in the common good, understood as the free operation of *dominium*-rights.<sup>71</sup> It set up a universal field of economic liberty that could be invoked against all holders of public power. Wherever authority was being exercised, it could now be assessed by universal rights of property, self-defence, travel, trade, taking of possession of ownerless things and so on.<sup>72</sup> This was an inevitable consequence of the fact that Vitoria and Soto dealt

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<sup>68</sup> Ludovici Molinae, *De iustitia et iure. Tomi sex* (Antverpiae, Keerberginum, 1615), T II Disp 20 (43b).

<sup>69</sup> Mariana, *The King and Education of the King*, *supra* note 26, Ch II (115-121).

<sup>70</sup> Annabel Brett, ‘The Development of the Idea of Citizens’ Rights’ in Quentin Skinner & Bo Stråth, *States and Citizens. History, Theory, Prospects* (Cambridge University Press, 2003), 100.

<sup>71</sup> Giovanni Ambrosetti, *Il diritto naturale della riforma cattolica* (Milano, Giuffrè 1951), 60-61.

<sup>72</sup> For the reference to “needs” see, Vitoria, ‘On Civil Power’, Q. 1 Art 2 para. 5 in *Political Writings*, *supra* note 14, 9

with *dominium* in the context of commutative and not distributive justice, that is relationships between subjects themselves, excluding ideas about the intervention of public power. Chafuen summarises the resulting economic views of the Spanish scholastics as follows:

“Late-scholastic theory analyzed profits, wages and rent as matters of commutative justice and applied rules similar to those used to analyze the prices of goods. The Schoolmen determined that wages, profits and rents are not for the government to decide. Since they are beyond the pale of distributive justice, they should be determined through common estimation of the market”.<sup>73</sup>

The world was an empire, but an “empire of private rights”.

## 5. Epilogue: Suárez

Let me end with the way the Jesuit Francisco Suárez, the most influential of the Spanish, develops *ius gentium* into a historical justification of the most important modern political institutions, including the universal system of private commerce. Suarez agreed that natural law provided for freedom, common ownership and peace and also that it was not subject to any change.<sup>74</sup> But its content was often derived only “negatively” from the absence of an express prohibition. In that space of non-prohibition the subjective freedom of humans – their *dominium* – operated as their legal right to create commonwealths, to divide and exchange property, to defend themselves and others as well as to see to the good of their communities. Natural law, Suárez wrote, left “the matter to the management of men, such management to be in accordance with reason”.<sup>75</sup>

This created a difficulty, however. If private property was based on human law – did natural law then have nothing to say about stealing? To strengthen the (subjective) *dominium*-right Suárez referred back to the distinction he had made at the outset between *ius* as objective law and *ius* as subjective right. When natural law provides

<sup>73</sup> Chafuen, *Faith and Liberty*, *supra* note 43, 102-103 (footnote omitted).

<sup>74</sup> Francisco Suárez, ‘On Law and God the Lawgiver’ (De legibus, ac Deo legislatore), in *Selections from Three Works. Vol II the Translation* (G. Williams transl., Oxford University Press, 1944) Bk II, Ch XV § 14 (276) and Bk III, Ch II § 3 (373-374).

<sup>75</sup> Suárez, *On Laws and the Lawgiver*, *supra* note 74, Bk II, Ch XIV, § 6 (270)

for subjective right, he explains, it does this always as a positive precept. In the original state, everyone had *dominium* in common with others. After the intervention of *divisio rerum*, that positive, non-derogable right now attaches to the private property so that stealing will become an evil, subject to punishment.<sup>76</sup> Even if the institution of private property is purely human, in other words, once it is created, it is protected by natural law. This is also a command of faith. Already Soto had made the point that to deny private property was to engage in heresy. Suárez would agree but would provide a better explanation for why this was so: not because of utility but because of the nature of subjective *ius*. None of this is to say that Suárez would turn out having the preferences of the modern liberal. In fact, his view of the sphere of liberty of the individual in society is very limited. But the authoritarian basis of his view of the government of the commonwealth is based on an liberal argument from individual liberty: “for the very reason that man is lord of his own liberty, it is possible for him to sell or alienate the same”.<sup>77</sup>

Suárez takes great trouble to distinguish the customary nature of *ius gentium* from natural law, developing the former into a positive law process of law-creation, a system of ruling the world by constant interaction between peoples and their sovereigns, each operating their *dominium* so as to adjust to changing circumstances. The distinction between natural law was between that which is intrinsically necessary and that which contributed to the attainment of the necessary in the real conditions of the social world. Suárez gives two examples: diplomatic and commercial exchanges. Peace is dictated by natural law and the function of the ambassador is to contribute to peace. However, this does not make diplomacy part of natural law. Other means may lead to peace as well so that while the use of ambassadors may be useful, it is not *necessary*. Hence its nature as *ius gentium*, and not as natural law. It is part of the way humans have come to look for the good of their communities. The same argument applies to international commerce. Trade is by no means intrinsically necessary. But it may be useful for the good of nations. Thus, like diplomatic relations, trade has been established by the customary activities under the *ius gentium* and – like the subjective

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<sup>76</sup> Suárez, *On Laws and the Lawgiver*, *supra* note 74, Bk II, Ch XIV § 13 and 16-17 (275-277, 278-279)

<sup>77</sup> Suárez, *On Law and God the Lawgiver*, *supra* note 74 Bk II, Ch XIV § 18 (279). See also Reijo Wilenius, *The Social and Political Theory of Francisco Suárez* (Helsinki, Societas Philosophica Fennica 1963), 102-108.

rights on which trade relations are based – once they have been established, they are binding. Let me quote Suárez:

“...it has been established by the *ius gentium* that commercial intercourse shall be free, and it would be a violation of that system of law if such intercourse were prohibited without reasonable cause”.<sup>78</sup>

In other words, humankind has certain positive institutions – sovereignty, property, war, and diplomatic and commercial relations – that enjoy universal validity as *ius gentium* under customary law. And what is customary law? Suárez now puts forward the familiar “two-element theory”, the view of custom as repetition of similar acts, accompanied by the conviction that those acts are binding, the *opinio iuris*. He writes: “For a custom will never establish a rule of law by prescription, even if it lasts a thousand years, unless the frequency of the acts arises from the intention of creating a legal obligation”<sup>79</sup> But this is not only a theory of custom. It is the basis for a new kind of normative sociology. The sense of human practices, Suárez is now saying, is dependent on what people think of them. Just like for Vitoria, the value of goods on the market was received from “*communis aestimatio*”, the value of our practices for Suárez, become dependent on how humans view that value. This view grows neither from some extrinsic principle nor from a vote: it is part of the way the community lives, its members exercising their rights with the view to virtue and reason. This is a purely secular, fact-based view of justice. It is the reconception of human relations in ultimately economic terms.

Finally, let me quote the famous distinction Suárez makes between two senses of the *ius gentium*, each corresponding to a certain way in which the world is united:

“A particular matter...can be subject to then *ius gentium* in either one of two ways: first it is the law which all the various nations and people ought to observe in their relations with each other; secondly, on the ground that it is a body of laws which individual states of kingdoms observe within their

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<sup>78</sup> Suárez, *On Law and God the Lawgiver*, supra note 74 Bk II, Ch XIX § 7 (347).

<sup>79</sup> Suárez, *On Law and God the Lawgiver*, supra note 74, Bk VII, Ch XV. § 10, (573).

borders, but which are called *ius gentium* because the said laws are similar [in each instance] and are commonly accepted.”<sup>80</sup>

This distinction between public international law as law among states, and the shared aspects of the civil laws of various states has of course become a key part of our understanding of two types of universal law. We separate the two in watertight boxes because we believe they are somehow so utterly distinct: the public law of sovereignty – the private law of ownership and economic exchanges. That separation now comes from Suárez, together with the clear privileging of the latter over the former. For even as the private relationships are covered by the civil laws of the various countries, the general principles of those civil laws, including above all the freedom of commercial exchanges on the basis of private ownership, are still valid as *ius gentium* and enforceable through all those means through which princes may react to violations of not only their public rights but of any serious injury to *dominium* irrespective of where it takes place. To disrupt commercial relations is a violation of *ius gentium* that is punishable by war.<sup>81</sup>

Spanish imperialism was constituted of the exercise of public power by the Spanish State in the form of conquest and settlement, administration and the conduct of mercantilistic policies that ultimately failed to uphold the position of Spain as the leading European power. It was followed up by Netherlands and England whose political leaders well understood the importance of the Salamancan doctrines: their imperialism was imperialism of the free trade, carried out by private companies through private transactions, if necessary protected by the public power of the State. National resources would not be wasted when private operators could be liberated to carry out the work of disciplining the natives through commerce and the extraction of resources.

Since decolonization in the 1960's, Western domination of the “people without history” has returned to its classical mainstay, informal empire, the creation of wealth

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<sup>80</sup> Suárez, *On Law and God the Lawgiver*, supra note 74, Bk II Ch XIX, § 8 (347).

<sup>81</sup> Suárez, *On Law and God the Lawgiver*, supra note 74, Bk II Ch XIX, § 7 (347) and on the relevant grounds of just (aggressive) war in the case of “denial, without reasonable cause, of the common rights of nations, such as the right of transit over highways, trading in common &cet.”, in ‘On The Three Theological Virtues: On Charity’, Disp XIII: On War, Sect IV § 3 (817) as well as Josef Soder, *Francisco Suárez und das Völkerrecht. Grundgedanken zu Staat, Recht und internationale Beziehungen* (Frankfurt, Metzner, 1973), 261.

and influence and the distribution of material and spiritual resources through the exercise of private power. Today's *ius gentium* continues to be divided into the law of treaties on the one side and the law of contract on the other. There is no doubt on which side the more significant aspects of *dominium* – that is, the power of human beings over other human beings – is exercised. It is a great paradox that Spanish political leaders never really understood that this is what their brightest thinkers were prophesying.

COLONIZATION OF THE 'INDIES' – THE ORIGIN OF INTERNATIONAL  
LAW?

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(Talk at the University of Zaragoza, December 2009)

It is widely agreed that international law has its origins in the writings of the Spanish theologians of the 16<sup>th</sup> century, especially the so-called “School of Salamanca”, who were reacting to the news of Columbus having found not only a new continent but a new population, living in conditions unknown to Europeans and having never heard the gospel. The name of Francisco de Vitoria (c.1492 – 1546) the Dominican scholar who taught as *Prima* Professor with the theology faculty at the University of Salamanca from 1526 to 1546, is well-known to international law historians. This was not always the case. For a long time, international lawyers used to draw their pedigree from the Dutch Protestant Hugo de Groot (or Grotius) (1583-1645) who wrote as advocate of the Dutch East-India company in favour of opening the seas to Dutch commerce against the Spanish-Portuguese monopoly. Still in the 18<sup>th</sup> and 19<sup>th</sup> centuries, the law of nations – *ius gentium* – was seen as a predominantly Protestant discipline that drew its inspiration from the natural law taught by such followers of Grotius as the Saxon Samuel Pufendorf (1632-1694) and the Swiss Huguenot Emer de Vattel (1714-1767), followed by a series of professors at 18<sup>th</sup> century German universities.<sup>1</sup>

It was only towards the late-19<sup>th</sup> century when the Belgian legal historian Ernest Nys pointed to the Catholic renewal of natural law during the Spanish *siglo de oro* that attention was directed to Vitoria and some of his successors, especially the Jesuit Francisco Suárez, (1548-1617), who had indeed developed a universally applicable

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<sup>1</sup> See further my “The Advantage of Treaties. International Law in the Enlightenment”, 13 *The Edinburgh Law Review* (2009), 27-67.

legal vocabulary – something that late-19<sup>th</sup> century jurists, including Nys himself, were trying to achieve.<sup>2</sup> The Spaniards had adopted from Aquinas the old Roman law notion of *ius gentium* and through it had managed to construct a legal world that seemed astonishingly familiar for late-19<sup>th</sup> century observers. Nys was followed by James Brown Scott (1866-1943), assistant of the US Secretary of State Elihu Root, who made official the theory of the Spaniards as the predecessors of Grotius and thus, also, as having initiated modern international law.<sup>3</sup> Scott read to this law his own aspirations as well as those of his Secretary of State, both engaged during the inter-war years in an effort to give shape to a new architecture of international institutions and systems of dispute-settlement and would enable the emergence of an interdependence-driven global structure of private rights and economic exchanges; a world united in search for peace through prosperity. This would vindicate the liberal policies of Britain and the United States so that it was not for nothing that the two flags that were flown at the inauguration of the Peace Palace in the Hague in 1907 that would eventually house the Permanent Court of International Justice were those of the Netherlands and the United States, and that it was the American industrialist and philanthropist Andrew Carnegie (1835-1919) who stood on podium with the Dutch royal family at that key moment.<sup>4</sup>

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The Spanish colonization of the Indies stands at the origin of international law. But this is not only because it offered a legal language to organise the relations between Europeans and the “natives” and to coordinate imperial activities between the Europeans themselves. That aspect of the matter was, I want to suggest, accompanied by the even more significant adoption by Vitoria and his followers of a politico-theological vocabulary that would extend a certain idea about the justice of private relationships on a universal basis. The Spanish theologians and jurists reacted to the

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<sup>2</sup> Ernst Nys, *Les origines du droit international* (Brussels, Castaignes 1894). For the late-19<sup>th</sup> century project of which Nys was a part, see Martti Koskenniemi, *The Gentle Civilizer of Nations. the Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001).

<sup>3</sup> James Brown Scott, *The Catholic Conception of International Law. Francisco de Vitoria & Francisco Suárez* (Washington, Carnegie Endowment for Peace 1934).

<sup>4</sup> See Calvin DeArmand Davis, *The United States and the Second Hague Peace Conference. American Diplomacy and International Organization 1899-1914* (Duke University Press, 1975), 259. See further, Martti Koskenniemi, “The Ideology of International Adjudication and the 1907 Hague Conference” in Yves Daudet (ed), *Topicality of the 1907 Hague Conference, the Second Peace Conference/Actualité de la Conférence de La Haye de 1907, Deuxième Conférence de la paix* (The Hague, Brill, 2008), 127-152.

conquest by reading the Roman law notion of *dominium* through a theory of virtue they had learned from Aquinas. That reading suggested to them that the relations of power among humans could be separated into public law jurisdiction (*dominium iurisdictionis*) and private ownership (*dominium proprietatis*) in a way that we will immediately recognise as familiar. From now on, these two types of power would operate so as to facilitate and coordinate the pursuit of private property through commercial and economic activities all around the world. Today's globalisation means the universal application of principles of private property and contract – against which the role of States is limited to keeping order in and seeing to the welfare of territorial communities. To have provided the legal vocabulary to make this possible is the lasting heritage of the School of Salamanca.

### 1. The School of Salamanca

The School of Salamanca and especially its “founder” Francisco de Vitoria have been object of a great number of analyses that have focused on the “Black Legend” of Spanish colonization. During and after the Franco regime, Spanish historiography tended to produce more or less apologetic interpretations of the School. Urbano summarises that scholarship in the following way:

“no era estudiado per se, sino por una filosofía que estaba a medio camino entre el moderno derecho internacional y la caridad cristiana; entre la justificación del presente y la dignificación selectiva del pasado”.<sup>5</sup>

Since then, the situation has somewhat changed. The 29 volumes of the *Corpus Hispanorum de Pace* (CHP) produced in Madrid in the 1980's and 1990's contain a huge amount of primary materials on the 16<sup>th</sup> century colonisation and the relevant Spanish debates. But the interpretive essays still carry traces of earlier polemics. That the leading participant in that venture - Luciano Pereña - has titled his summary of the 16<sup>th</sup> century Spanish activities as *La idea de justicia en la conquista de América* shows that focus of recent studies has been to craft a compromise between acceptance of the catastrophic effects of colonisation on Indian communities while highlighting

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<sup>5</sup> Francisco Castilla Urbano, *El pensamiento de Francisco de Vitoria. Filosofía, política e indio Americano* (Barcelona, Anthropos, 1992) 30.

the good intentions of the Crown of Castile, often counselled by the university theologians and jurists, including the leading critic of the manner of the colonization, Bartolomé de Las Casas (1484-1566), the Bishop of Chiapas.<sup>6</sup> The same may be said of the work by the American Lewis Hanke who struck at the Anglo-American habit of distinguishing between the (“bad”) colonization by Spain and the (“civilized”) one of the liberal empires: for Hanke, too, though the result of the colonization was disastrous, it was still often inspired by noble motives about trusteeship and conversion. “No European nation”, Hanke wrote, “took her Christian duty towards native peoples as seriously as did Spain”.<sup>7</sup> When Scott resuscitated Vitoria as the originator of international law, he interpreted the Salamanca school as flickering light of humanitarian sanity in a century of colonizing euphoria.<sup>8</sup> Flattering for international lawyers, the interpretation offered an anachronistic view of Vitoria that was largely torn from its theologico-political context.<sup>9</sup> This was pointed to by the German interwar conservative lawyer Carl Schmitt whose own interpretation of Vitoria, however, remained equally hostage of his project – demonstrating how later interpretations distorted Vitoria’s apparent “neutrality” or “objectivity” as inaugurating modern universalism and its “discriminatory” concept of war.<sup>10</sup>

More recently, Vitoria’s role in illustrating the colonial origins of international law has been laid out by such lawyers and writers as Antony Anghie, Henri Méchoulan, China Miéville and Robert Williams.<sup>11</sup> Vitoria’s humanitarianism, so the argument goes, legitimated conquest and made colonisation on a permanent basis not only possible but an outright religious necessity. Vitoria and his followers, these scholars argue, initiated the idea of Europe’s “civilizing mission” that was translated into

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<sup>6</sup> Luciano Pereña, *La idea de justicia en la conquista de América* (Madrid, Mapfre 1992).

<sup>7</sup> Lewis Hanke, *The Spanish Struggle for Justice in the Conquest of America* (Dallas, Southern Methodist University Press, 1949/2002), 175.

<sup>8</sup> James Brown Scott, *The Catholic Conception of International Law. Francisco de Vitoria & Francisco Suárez* (Washington, Carnegie Endowment for Peace 1934).

<sup>9</sup> For a discussion, see Christopher R. Rossi, *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law* (The Hague, Kluwer 1998), 114-133 and passim.

<sup>10</sup> Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Berlin, Duncker & Humblot, 1988), 69-96.

<sup>11</sup> Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press (2004), 13-31; Henri Méchoulan, *Le sang de l'autre ou l'honneur de Dieu. Indiens, juifs et morisques au Siècle d'Or* (Paris, Fayard 1979), 62-67 and 85-90 (concluding on Vitoria’s views on the Indians that “tout cela ne manifeste pas le moindre trace d’universalisme ni de compréhension du drame indien. Le droit de Vitoria est le droit du plus fort”, 89); China Miéville, *Between Equal Rights. A Marxist Theory of International Law* (Leiden, Brill 2005), 173-178; Robert A. Williams Jr, *The American Indian in Western Legal Thought. The Discourses of Conquest* (New York, Oxford 1990), 96-107.

various types of trusteeship imposed by successive European empires over the non-European world. Perhaps predictably, this interpretation has been also challenged by recent authors pointing to the humanizing effect that Vitoria and his colleagues had on Spanish colonial legislation at the time and on the ethics of warfare ever since.<sup>12</sup>

Vitoria' "cosmopolitanism", as it emerged from his lectures, was undoubtedly born of religious doubts about the justice of the way the conquest was being carried out. And in retrospect, it is astonishing to what extent the theologians were able to debate and challenge the policies of their king – even as Charles V himself famously suffered from pangs of conscience about the events in the Indies. But it was also so open-ended that it could easily be used, and was used, to support contrary policies.<sup>13</sup>

Notoriously, even in his first public lecture (*relectio*) on the Indians of 1539 Vitoria vacillated between accepting that the Indians were fully humans on the one hand, and, on the other, that they were “nevertheless so close to being mad, that they are unsuited to setting up or administering a commonwealth both legitimate and ordered in human and civil terms”.<sup>14</sup> There can be no real doubt that Vitoria and his successors were convinced of the superiority of the Spanish over the Indians as well as on their right to penetrate Indian territories for the purpose of trade and proselytising. Whatever the problems with colonization, at no point did Vitoria or the principal representatives of the Salamanca school advocate Spanish departure from the Indies. Civilization and trusteeship remained their objective.

What interests me in Vitoria and his successors here, however, is how their response to the conquest through the twin argument from *dominium* and *ius gentium* developed into a kind of universal sociology or philosophical anthropology that far from being limited to marginal aspects of external State policy became foundational for the idea of universal law divided in two parts: a public law governed structure of diplomatic relations and war on the one hand, and a world of individual private rights that set up a global system of economic relationships on the other. Previous examinations of the

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<sup>12</sup> As attempted e.g. by Georg Cavallar, 'Vitoria, Grotius, Pufendorf, Wolff and Vattel. Accomplices of European Colonialism and Exploitation or True Cosmopolitans?' 10 *Journal of the History of International Law*, (2008), 181- 209; and Pablo Zapatero, 'Legal Imagination in Vitoria. The Power of Ideas', 11 *Journal of the History of International Law* (2009), 221-271, especially (on Anghie and Brett Bowden), 267-271.

<sup>13</sup> Urbano, *Francisco de Vitoria*, *supra* note 5, 317-323.

<sup>14</sup> Francisco de Vitoria, 'On the American Indians', in A Pagden & J Lawrance eds., *Political Writings*, (Cambridge University Press 1991), § 18 (290). See also Méchoulan, *Le sang de l'autre*, *supra* note 11, 62-67.

legacy of Vitoria have concentrated on the former and thus on formal European imperialism. I want to look briefly at how the Salamancans' interest in private rights develop into a universal system of exchanges that can even be enforced by war, if necessary – that is to say, I want to highlight their role in constructing what Justin Rosenberg has called “the empire of civil society”.<sup>15</sup>

## 2. Vitoria's reaction to the *Conquista*

Dominican scholars and missionaries, often trained by Vitoria or his colleagues, played a key role in the definition of the official Spanish position regarding the status and treatment of the Indians. Concern over the behaviour of the *conquistadores* was a strong motivating factor for their engagement. They had been shocked by the destruction by Cortés of the Aztec empire on the Yucatan peninsula (“Tierra firma”) in 1519-1521 and Pizarro's killing of the Inca ruler Atahualpa and the consequent plundering of the Inca riches and destruction of the Inca regime during 1531-1539. And they were concerned over the “*encomienda*” system of distributing Indians to the settlers to carry out forced labour first all over the colonised territory. The former events raised the question of the basis of Spanish title, the latter the nature of Indians as human beings and the legal rules governing the relations among actors from different cultures. In a famous letter to fellow Dominican Miguel de Arcos, Vitoria wrote that stories of conquistador behaviour in Peru “freezes the blood in my veins”. “The Indians”, he wrote, were “most certainly innocent in this war”.<sup>16</sup> Nevertheless, even as Vitoria and his successors were critical of Spanish behaviour, they did not doubt the justice of the Spanish presence in the Indies, their right to travel and evangelize in Indian territory. But on what basis were the relations between the Indians and the Spanish to be conducted? What law applied to the relations between Christians and the infidel?

When Columbus left for the New World in 1492, no serious debate had been waged on the legal basis of his action. Potential problems had been resolved in the Treaty of Alcaças and Toledo of 1479-1480 where Portugal abandoned its claims to the

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<sup>15</sup> Justin Rosenberg, *The Empire of Civil Society. A Critique of the Realist Theory of International Relations* (London, Verso 1994).

<sup>16</sup> Francisco de Vitoria, Letter to Miguel de Arcos OP, 8 November [1534], in *Political Writings*, *supra*, note 14, 331, 332.

Canaries in exchange for the Spanish consent to respect Portuguese trade in Africa.<sup>17</sup> Spain's title was derived from the *Siete partidas* (Third Part, Title 28, Law 29) that embodied the Roman law notion of islands belonging to their first occupant in accordance with the rules of the occupant of the sea in which the island was found.<sup>18</sup> The famous mediation by the Pope was only required as Portugal claimed the Islands as part of the Azores. The line set up in the Pope's five letters that include the *Inter caetera* of 5 May 1493 were slightly amended and reaffirmed by the Treaty of Tordesillas a year later.<sup>19</sup> The aim of Columbus's voyage had been exclusively economic. Evangelisation had become part of the plan only by Queen Isabella's famous "testament" of 1504 that also spoke of the "civilization" of the Indians.<sup>20</sup>

Among the first scholars to discuss the matter in the first decade of the 16<sup>th</sup> century had been Vitoria's teacher from his Paris period, the Scottish nominalist John Mair (1467-1550) who analysed Indians as natural slaves in the Aristotelian tradition.<sup>21</sup> This was incompatible with Isabella's testament, however, and even the Crown's leading legal expert, Juan Lopez Palacios Rubios (c. 1450-1524), whom King Ferdinand enlisted to examine the matter in 1512 after the first complaints of Spanish behaviour had come to his ears, rejected the view of Indians as natural slaves.<sup>22</sup> In his study Palacios Rubios affirmed that Indians were indeed humans and as such entitled to private possessions and public law jurisdiction. However, he based Spanish presence on the old hierocratic theory of the pope as the Lord of the World and wrote this into the infamous *requerimiento* that was to be read to the Indians before war against them could be undertaken.<sup>23</sup>

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<sup>17</sup> For the treaty, see John Parry & Rachel Keith (eds), *New Iberian World. A Documentary History of the Discovery and Settlement of Latin America to the Early 17<sup>th</sup> Century. Vol I: The Conquerors and the Conquered* (New York, Times books, 1984), 266-271.

<sup>18</sup> Michèle Escamilla-Colin, 'La question des justes titres: repères juridiques. Des bulles Alexandrines aux Lois de Burgos', in Carmen Val Julian (ed.), *La conquête de l'Amérique espagnole et la question du droit* (Fontenay-aux-Roses, ENS 1996), 86-87.

<sup>19</sup> For these documents, see Parry & Keith, *New Iberian World*, *supra* note 17, 271-280.

<sup>20</sup> Escamilla-Colin, 'La question des justes titres', *supra* note 18, 92-93.

<sup>21</sup> See Anthony Pagden, *The Fall of Natural man., The American Indian and the origins of Comparative Ethnology* (Cambridge University Press 1982), 38-52; Urbano, *Francisco de Vitoria*, *supra* note 5, 212-218 and e.g. Dieter Janssen, 'Die Theorie der gerechten Kriegeres im Denken des Francisco de Vitoria', in Frank Grunert & Kurt Seelmann, *Die Ordnung der Praxis. Neue Studien zur spanische Spätscholastik* (Tübingen, Niemeyer, 2001), 207-208.

<sup>22</sup> Juan Lopez de Palacios Rubios, *De las Islas del Mar Océano* (México, Fondo de cultura económica 1954).

<sup>23</sup> The story of the composition and later use of the *Requerimiento* has been told in many places. See e.g. Patria Seed, *Ceremonies of Possession in Europe's Conquest of the New World 1492-1640*

However, when the *conquistadores* returned from the Indies, many of them had grave doubts of conscience weighing upon them. And so they flocked the Convent of St Esteban in Salamanca where Vitoria and many of his colleagues lived, to confess their sins, and to seek absolution. But what kind of a sin was it to take infidel property, to kill an Indian and to occupy their land? Vitoria was a religious scholar and he needed to teach his students about the nature of the Spanish activities so as to prepare them to manage the sacrament of penance properly – were the Spanish activities sinful, and if so, how grave? Vitoria included a discussion of the Indian question in his lectures on the *Summa theologiae* of Aquinas of 1534-35 and in three famous public lectures (*relectiones*) held in 1537-1539. In all of these, Vitoria concluded that the Indians were rightful owners of their property and that their chiefs validly exercised jurisdiction over their tribes. This had already been the position of Palacios Rubios. But Vitoria went on to deny the latter's theory of the pope as Lord of the World. Neither the pope nor the emperor – Vitoria's sovereign, Charles V – had a rightful claim over Indian lives or property. No violent action could be taken against them, nor could their lands or property be seized, unless the Indians had caused harm or injury (“*iniuria*”) to the Spanish by violating the latter's lawful rights.<sup>24</sup>

To make this argument, Vitoria's starting-point was that under natural law, as affirmed by tradition going back to the Church fathers and accepted by Aquinas, no human being had natural dominion over another. Under it, everyone was born free and property was held in common.<sup>25</sup> Judged by natural law, however, not only the conquest, but every aspect of 16<sup>th</sup> century European life – continuous warfare between European rulers, the emergence of an international system of trade based on private property and the search for profit – were a moral abomination. One could not argue on the basis of natural law and hold the present government in Europe anything but a criminal conspiracy – as some such as the notorious Juan de Mariana (1536-

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(Cambridge University Press, 1995), 69-99; Hanke, *Spanish Struggle for Justice*, *supra* note 7, 31-41; Pereña, *La idea de justicia*, *supra* note 6, 31-44; Urbano, *Francisco de Vitoria*, *supra* note 5, 208-232 (on all the debates from 1492 to the *Requerimiento*).

<sup>24</sup> Francisco de Vitoria, 'On the American Indians, in A Pagden & J. Lawrance (eds.), *Political Writings* (Cambridge University Press 1991), Q 2 A 1-2 (252-264) and 'On the Law of War', Q1 a 3 § 13 (303-304)

<sup>25</sup> "Non cognoscit jus naturale differentiam inter homines, quia quidquid habet unus, est alterius de jure naturali", Francisco de Vitoria, *Comentarios a la Secunda secundae de Santo Tomás* [ComST II-II], (Edition preparada por Vicente Beltrán de Heredia (Salamanca, 1934/1952) Tomo III, Q 62 A 1 n. 18 (75).

1624) suggested. Humans could be ruled only through force, Mariana wrote, and nothing but the threat of tyrannicide would keep rulers from oppressing their subjects.<sup>26</sup>

But Vitoria would not go that way; he lumped Machiavellian amoralism together with protestant irrationalism. He was thus in a bind. On the one hand, he could not endorse a divinely created natural law – an ethic of love - without undermining the policies of his Emperor not only in the Indies but everywhere. On the other hand, he could not endorse the *raison d'état* either, without appearing just like the cynical apologists of power Luther had always accused Catholic churchmen of being. He needed a vocabulary that would accept the basic contemporary forms of territorial government, private ownership and war but that would nevertheless restate the unity of humankind under God. This was provided to him by the twin vocabulary of *dominium* and *ius gentium*, the former covering a particular theory of forms of lawful human power, the latter extending that theory to be applicable everywhere.

The first question that Vitoria had to pose was how, if natural law provided for human freedom and the ownership of all property was in common, was it at all possible for humans to exercise jurisdiction over each other and to own property. In the lectures on the *Summa* that Vitoria gave to his students during 1534-35 he formulated the issue in this way:

“But if it is the case that God made everything to be owned by all, and human beings are the common owners of everything by natural law, how and from which facts follows the division of things? [This division] is not made by natural law. For natural law is always the same and never varies”.<sup>27</sup>

And Vitoria stated the obvious conclusion in his famous *relectio* on the Indians, “dominion and supremacy (*praelatio*) were introduced by human law, not natural law”.<sup>28</sup> But how could merely human law possibly deviate from a divinely originated

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<sup>26</sup> Juan de Mariana, *The King and the Education of the King (De Rege et Regis Institutione)*, (G.A. Moore intr. & transl. Washington, Georgetown University 1947), Ch V & VI (135-151) and for a discussion of Mariana's pessimism, see Harold E. Brown, *Juan de Mariana and Early Modern Spanish Political Thought* (Aldershot, Ashgate 2007).

<sup>27</sup> “Sed si ita est quod deus fecit omnia communia omnibus, et homo est omnium dominus iure naturali, quomodo et unde facta est ista rerum divisio? [This division] non est facta de iure naturali. Patet quia ius naturale semper est idem et non variatur”, Vitoria, ComST II-II, *supra* note 25, Q 62 A 1 n. 18, 74-75.

<sup>28</sup> Vitoria, ‘On the American Indians’, in *Political Writings*, *supra* note 14, Q 2 A 1 (254).

natural law? Hence the issue of concern: where the conquistadors, the traders, or indeed the emperor himself living in sin?

Vitoria resolved the problem by the usual scholastic way – by making a distinction, namely a distinction between binding and merely recommendatory provisions of natural law. Freedom and common ownership were not based on a binding prescription (*praescriptio*) but only a recommendation, (*concessio*). They provided for common property but did not prohibit the *divisio rerum* – either in its public law form as independent communities or in terms of private property.<sup>29</sup> The division was undertaken by consensus – not by a formal consensus but by a “virtual” one (“*non aliquo consensu formali, sed virtuali*”), by the taking into use of pieces of land and others following suit. Because this division was valid everywhere it could not have been based on the civil law of this or that state. It had to have been undertaken by *ius gentium*.<sup>30</sup> It followed from this, too, that neither the pope nor the emperor had any basis for claiming *dominium* over the whole world. The dominion of Christ had not been “of this world” and could not, therefore, have devolved to Peter or the latter’s successors. Nor had such dominion ever been granted to or exercised by the (Roman) emperor.<sup>31</sup> Dominion lay with all humans on the basis of natural law, and the communities they had established as well as the properties they divided among themselves were rightly theirs on the basis of the *ius gentium*.<sup>32</sup>

In his lecture on the Indians Vitoria makes *ius gentium* to do a lot of work starting from the division of territories and properties to supporting the right to travel and to trade, occupation of *terrae nullius*, citizenship and the despatch of ambassadors. Yet he is frustratingly unclear about its legal nature. In an early lecture on civil power (1528), he speaks of the *ius gentium* as a law enacted by “[t]he whole world which is in a sense a commonwealth” – a kind of universal positive law in other words. In the lecture on the Indians, again, he quotes the old definition by Gaius to the effect that the law of nations is “what natural reason has established among all nations”,<sup>33</sup> thus apparently collapsing *ius gentium* into natural law. In his treatment of war, Vitoria

<sup>29</sup> Vitoria, ComST II-II, *supra* note 25, Q 62 A 1 n 20 (77).

<sup>30</sup> Vitoria, ComST II-II, *supra* note 25, Q 62 A 1 n 23 (79).

<sup>31</sup> Vitoria, ‘On the American Indians’, in *Political Writings*, *supra* note 14, Q 2 A 1 & Q 2 A 2, (252-264).

<sup>32</sup> Vitoria, ComST II-II, *supra* note 25, Q 62 A n 22-27 (78-81).

<sup>33</sup> Vitoria, ‘On the American Indians’, in *Political Writings*, *supra* note 14, Q 3 A 1 § (278).

regards military action in self-defence as natural law while admitting that even “custom may establish the right and authority to wage war”.<sup>34</sup>

But Vitoria was not too concerned over legal classifications. In his lectures on the *Summa*, he admitted that whether *ius gentium* was called natural or positive was only a terminological issue.<sup>35</sup> The important point – a point often overlooked by commentators – was that he followed Aquinas in locating the substance of *ius gentium* in the latter’s systematic theology as part of “justice” (*iustitia*) and not at all the discussion of “law” (*ius*). It was not a part of the external directives for human action, but of the internal directives – of the virtues – and more specifically of the other-related virtue of (commutative) justice.<sup>36</sup> It had to do with finding the right relationship with others in the context of actual (political) communities. At the heart of commutative justice Vitoria found the Roman law concept of *dominium*, in both of its senses as jurisdiction and ownership. If the prince had *dominium* over his commonwealth this was because the community had delegated it to him.<sup>37</sup> And it was through *dominium* that Vitoria would analyse not only Spanish rights in the Indies, but also, and above all, the rights and duties of Spanish and foreign travellers and traders engaging in manifold commercial activities everywhere in the world. All humans had *dominium* over their actions as part of their natural liberty. It was in this that they resembled God. And the *dominium* they had as members of commonwealths and over their lives and their goods was a part of that liberty. From this theological basis, Vitoria derived a theory of individual rights (of *dominium*) as well as its universal applicability as the foundation of just relationships between all human beings.<sup>38</sup>

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<sup>34</sup> Vitoria, ‘On the Law of War’, in *Political Writings*, *supra* note 14, Q.1 A 2 (302).

<sup>35</sup> Vitoria, ComST II-II, *supra* note 25 Q 57 A 3 n 2 (14) and Q 62 A 1 n 23 (79).

<sup>36</sup> Or in other words, his was a subjective-right based definition of *ius* as a “potestas vel facultas conveniens alicui secundum leges” (a power of faculty that belonged to somebody in accordance with law), Vitoria, ComST II-II, *supra* note 25 Q 62 A 1 n 5 (64). For a useful discussion of the theological context of Vitoria’s theory of *dominium*, See Daniel Deckers, *Gerechtigkeit und Recht. Eine Historisch-kritische Untersuchung der Gerechtigkeitslehre des Francisco de Vitoria* (Freiburg, Universitätsverlag 1991), 23-195.

<sup>37</sup> This theory is laid out in quite a complicated and partly contradicting way in the early lecture ‘On Civil Power’, in *Political Writings*, *supra* note 14, § 5-8 (9-17).

<sup>38</sup> See especially the Vitoria’s commentary on *Quaestio* 57 of the *Secunda secundae*, in ComST II-II, *supra* note 25, Q 57 A 1 (in which Vitoria adopts the Thomistic definition of “*ius*” as the object of “*iustitia*”), Q 58 A 1 where the definition of “justice” is given in terms of providing everyone his due and the discussion of *dominium* in terms of commutative justice and as a property all humans have in 62 A n 8-17 (1-6, 20-21, 67-74). See further Annabel Brett, *Liberty, Right and Nature. Individual Rights in Later Scholastic Thought* (Cambridge University Press 1997), 124-137.

In his lectures on the Indians, Vitoria concluded that all humans enjoy *dominium* in both of its senses as public law jurisdiction and the private individual's right of property over things lawfully acquired. This right was based on natural law but the form of its specific realization had been decided by human communities through *ius gentium*. But even if its nature was historical and social, it was universally valid and thus fully applicable to the infidel, too. And finally, as part of a theory of virtue it could be articulated as a subjective right or a faculty that could now be used as a universal theory of commutative justice: it would articulate social relations in interpersonal terms, as rightful forms of exercise of *dominium*.

### 3. *Dominium* as the foundation of a universal system of private exchanges

Through the discussion of *dominium* Vitoria and the subsequent Salamanca scholars grounded an extensive right for human beings to appropriate, use, transfer or abandon things in accordance with their choice. Such right belonged only to rational (human) beings, but it belonged to *all* of them. Vitoria followed the official Church line since the Council of Constance (1414-1418) according to which neither sin nor infidelity took away *dominium*; that was why Christians may lawfully engage in trade with pagans and the rights of ownership of the latter may be enforced even against the Christians.<sup>39</sup> But the problem was larger than about Indian rights. As Vitoria was teaching, the gold and silver that were being imported to Sevilla from the Indies and the export opportunities for manufactured goods to the Americas, as well as the financing operations related to them, began to create a network of global relations that was transforming the cultural and economic milieu around the Dominicans out of recognition. Commercial operators (including the Crown itself) were engaged in new types of transactions for long-distance trade, monopolies and price-speculation in a moral-legal grey zone that could not leave theologians cold. What to think of the drive to profits on the basis of large-scale exchanges of private property?

For Aquinas, the move from common to private property had an originally utilitarian basis: "everyone is more diligent in procuring something for himself than something

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<sup>39</sup> "Infideles possunt habere tale dominium *supra* christianos, id est stando in jure naturali, no perdit infidelis dominium suum propter infidelitatem, sed talibus tenentur christiani obedire", Vitoria ComST II-II *supra* note 25, Q 62 A 10 § 1 (200).

which is to belong to all or many”; “human affairs are conducted in a more orderly manner if each man is responsible for the care of something which is his own” and “a more peaceful state of things is preserved for mankind if each is contented with his own”.<sup>40</sup> The Salamanca scholars’ writings follow this direction; their relatively relaxed discussion of profit-making in commercial operations and usury presuppose the justice of such activities as long as they can be understood as motivated by concern for the livelihood of one’s family or the good of the commonwealth.<sup>41</sup> True, many Christians were critical of private property, pointing to biblical passages such as the statement by Jesus about the difficulty of the rich man to ascend to Paradise [Luke 18:25]. But most of them followed Aquinas and accepted private property as a pragmatic “addition” to natural law (instead of a sinful deviation from it) and valid overall as *ius gentium*, a position that consolidated within the Church at the latest during the Franciscan poverty controversy.<sup>42</sup>

In his massive *De iustitia et iure* (1556/1556) Domingo de Soto (1494-1560), Vitoria’s contemporary as (*Visperas*) professor of theology at Salamanca, began his discussion of private ownership by attacking Plato’s communist utopia in *Timaeus* and *Republic*. The effective use of resources requires that each is given his own property to use and administer. Moreover, only such division ensures the right distribution of burdens between the members of the community. In Paradise, there may have been sufficient fruit for everyone. But since the expulsion, humans have had to work in order to earn their living. In such conditions, maintaining common property would lead to some working excessively while others would simply lay back to enjoy the fruits of others’ labour. The peace, tranquillity and friendship sought after by the philosophers would be inevitably thwarted.<sup>43</sup> Moreover, Soto points out

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<sup>40</sup> Aquinas, ST II-II in *Political Writing* (R.W. Dyson ed, Cambridge University Press, 2002), 66 A 2 resp. (208).

<sup>41</sup> As especially stressed in Joseph A. Schumpeter, *Histoire de l’analyse économique. I. L’age des fondateurs (Des origines à 1790)* (J-C Casanova trad. Paris, Gallimard 1983), 141-157.

<sup>42</sup> Aquinas, II-II Q 66 A 2 in *Political Writings*, *supra* note 40, 208 and Janet Coleman, ‘Property and Poverty’, in J.H. Burns (ed), *The Cambridge History of Medieval Political Thought c. 350-c. 1450* (Cambridge University Press, 1988), 621-625. On the Franciscan poverty controversy, see *id*, 631-648; Brett, *Liberty, Right and Nature*, *supra* note 38, 13-20.

<sup>43</sup> Domingo de Soto, *De iustitia et iure Libri decem / De la justicia y el derecho en diez Libros* (Intr. By P.V. Diego Carro, Spanish transl. by P.M. Gonzalez Ordonez, Madrid 1967), Bk IV Q III A 1 (296a-297a). “Hac ergo delira communitate praetermissa...demonstrandum [est] quam sit congruens naturae corruptae possessionum divisio...nempe ex humana negligentia et ex cupiditate”, *id*. (296b). See also Alejandro A. Chafuen, *Faith and Liberty. The Economic Thought of the Late Scholastics* (Oxford, Lexington 2003), 33-34.

following Aristotle, under conditions of common property it would be impossible to cultivate the virtues of generosity and liberality. The same fate would befall the virtues of hospitality and gratitude – without private ownership none of them would serve any point.<sup>44</sup>

Everything Vitoria and Soto wrote about the laws of contract and inheritance, prices, money, and commerce at home and with foreign countries as well as of objectives and limits of public power presumes not only the existence but the beneficial nature of private property and the transactions connected with them.<sup>45</sup> Such transactions had been discussed in Roman (civil) law but no systemic view of them had emerged until the scholastics brought them under the title of commutative justice “intimately bound with the sacrament of confession”.<sup>46</sup> For Vitoria and Soto were keenly aware that accumulation of wealth could easily cross the threshold of the sin of avarice. In their commentaries to questions 77 and 78 of the *Secunda secundae* they thus balance their utilitarianism with their concern for the souls of the merchants by developing an extremely detailed casuistic of different types and practices of contracts, usury and other economic operations.<sup>47</sup>

Following Aristotle, Vitoria distinguishes between two types of *ars mercatorum*, “natural” exchanges the purpose of which is to see to the good of the household (“*ad usus necessarios hominum*”) and those “artificial” operations whose point was to

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<sup>44</sup> “Qui enim proprium non habet, liberalis esse non potest et qui omnia possidet, alienae liberitatis non eget”, Soto, *De justitia et de iure*, *supra* note 43 Bk IV Q III A 1 (297b). See also Aristotle, *The Politics* (trans. By A.T. Sinclair, rev. and re-pres. By T.J. Saunders, Harmondsworth, Penguin 1981), 1263a (115).

<sup>45</sup> In this, they departed significantly from medieval writers who were usually dubious about economic activity and accepted it only to the extent it was directed towards satisfaction of necessities or caring for offspring. See e.g. Antonio Garcia Garcia, & Bernardo Alonso Rodriguez, ‘El pensamiento económico y el mundo del derecho hasta el siglo XVI’, in Gómez Camacho & Ricardo Robledo (eds), *El pensamiento económico en la escuela de Salamanca* (Ediciones Universidad Salamanca, 1998), 66-75 Diane Wood observes that it was the Church that put a brake on economic activity. For “to be socially ambitious, to want to be upwardly mobile, was a sin”, *Medieval Economic Thought* (Cambridge University Press, 2002), 3, 2-5.

<sup>46</sup> Thomas Duve, ‘La teoría de la restitución en Domingo de Soto: Su significación para la historia del derecho privado moderno’, in Juan Cruz Cruz, *La ley natural como fundamento moral y jurídico en Domingo de Soto* (Pamplona, Eunsa, 2007), 190, 187-190.

<sup>47</sup> Juan Belda Plans, *La escuela de Salamanca y la renovación de la teología en el siglo XVI* (Madrid, Biblioteca de autores cristianos, 2000), 926; José Barrientos García, ‘El pensamiento económico en la perspectiva filosófico-teológica’, in Gomez Caracho & Robledo, *El pensamiento económico*, *supra* note 45, 94-95. To give a sense of the detailed nature of the result, it might be noted that the mere discussion of the question “whether it is allowed to receive for loan something else than money in exchange” is divided into 75 paragraphs that discuss 51 “doubtful cases”, many of them developed in several “corollaries”, all of which takes from the modern Latin edition altogether 68 pages, Vitoria ComST II-II *supra* note 25, Q 68 A II (167-235).

produce profit (“*ad lucrum*”). The former was just and lawful but the latter – that is to say, the practice of buying cheaply and selling expensively – involved great danger (“*est valde periculosum*”) as it involved the temptation of the sin of avarice.<sup>48</sup> Like Aquinas, however, Vitoria assumed that the justice of profit-making depended ultimately on its purpose and he did not wish to discourage activities that were beneficial to the commonwealth. What was needed was to learn to discriminate between situations. The profit due to the merchant could be justified above all by the change that had been introduced in the commodity by transporting it from the place where it was bought to where it will be sold. As the goods were introduced in a location where they were scarce or perhaps not at all available, the merchant was doing a socially useful service for which he could be justly awarded (“*hoc est necessarium ad bonum et ad provisionem reipublicae*”).<sup>49</sup> If profit enabled commerce where it would otherwise be lacking, or if it contributed to the good of the community in other ways, it was just. But if it was motivated only by the desire for private gain – for example, if the seller waits until the price of the commodity rises – then engaging in it involved, depending on the gravity of the matter, either venial or mortal sin.<sup>50</sup>

An especially significant extension of the theory of *dominium* was the subjective (but non-arbitrary) theory of the just price that lies at the heart of Vitoria’s views on commerce.<sup>51</sup> Drawing on Duns Scotus, Vitoria accepted that the goods on the market had no essential or natural value. He was familiar with the paradox under which water, though normally of no value, may be sometimes regarded as more valuable than gold. But how then, if different people value things differently, could a just exchange be carried out? To this he responded that the just price was relative to how a

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<sup>48</sup> Vitoria ComST II-II, *supra* note 25, Q 77 A 4 § 2 (146).

<sup>49</sup> Vitoria ComST II-II, *supra* note 25, Q 77 A 4 § 2 (147).

<sup>50</sup> Vitoria ComST II-II, *supra* note 25, Q 77 A 4 § 1-2 (141-147). This is in fact a very relaxed standard – for mortal sin is involved only if profit is actually intended to harm others. If it is motivated only by greed, the sin is only venial – an illustration that Vitoria and the humanists generally were shifting attention from the state of mind of the economic operators to the actual injury possibly caused by their operations. Antonio García García & Bernardo Alonso Rodríguez, ‘El pensamiento económico y el mundo del derecho hasta el siglo XVI,’ in Gómez Camacho & Robledo, *El pensamiento económico*, *supra* note 45, 82.

<sup>51</sup> The just price is not only an economic category in Vitoria and Soto but above all a measure of the requirement of commutative justice in the moral-legal order. It put to practice the need to ensure equality and reciprocity of exchanges. See Juan Antonio Widow, ‘Economic Teachings of Spanish Scholastics,’ in Kevin White (ed.), *Hispanic Philosophy in the Age of Discovery* (Washington, Catholic University of America Press 1997), 135-136. Vitoria and Soto were not simply adopting a nominalist position. Although the price of a commodity was determined subjectively, that determination reflected an objective assessment of the situation on the market.

thing is valued in the market (“*ex communi hominum aestimatione vel conducto*”).<sup>52</sup> That “common estimation”, again was a function of many things, including the product’s relative abundance or scarcity. In other words, though price-formation was a subjective process, this did not mean there was no just price. Instead of regarding price-formation as fully open (he were critical of price-manipulation as well as the so-called “dry contracts” that contained hidden forms of usury) they fell back on the *communis aestimatio*.<sup>53</sup> A regular exchange contract was lawful if it involved no fraud or deception, it was carried out voluntarily (and not through coercion), involved no monopolistic price-juggling and if there was a “legal price”, it had been followed.<sup>54</sup>

The Salamancans did not see money as just a sign or an instrument of exchange. It possessed value in itself so that it could also be understood to accumulate for investment purposes and exchanged for profit (interest). Vitoria’s extensive treatment of usury opens with an apparently unconditional prohibition of interest-taking for loan: money is “sterile” and making it produce contrary to natural law.<sup>55</sup>

Nevertheless, in the course of his discussion, he makes several qualifications to that prohibition and ends up positively endorsing the operations of the *cambistas*, or professional money exchangers (banks), as they provided credit and letters of exchange that enabled merchants to move between fairs in Europe without having to carry large quantities of money with them.<sup>56</sup> Modest interest could be raised for lending activities inasmuch as they facilitated international exchanges and created the basis for accumulation that could be useful for investment purposes. The discussion of the lawfulness of financial activities revolved around the concept of usury that was treated, of course, as a violation of commutative justice and a mortal sin in its many express and implied forms. In complicated international exchanges that involved several parties it was of course often difficult to determine the equilibrium or reciprocity commanded by commutative justice: one flexible basis for accepting

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<sup>52</sup> Vitoria ComST II-II, *supra* note 25, Q 77 A 1 § 2 (117-118).

<sup>53</sup> Deckers, *Gerechtigkeit*, *supra* note 36, 247-8.; Chafuen, *Faith and Liberty*, *supra* note 43, 82-3.

<sup>54</sup> See also Ricardo F. Crespo, ‘La posibilidad y justicia del intercambio: De Aristoteles a Marx, pasando por Tomás de Aquino y Francisco de Vitoria’, in Juan Cruz Cruz (ed), *Ley y Dominio en Francisco de Vitoria* (Pamplona Eunsa 2008), 273-275.

<sup>55</sup> Vitoria, ComST II-II *supra* note 25, Q 78 A 1 § 1, 3 (153-154, 155).

<sup>56</sup> Vitoria, ComST II-II *supra* note 25, Q 78 A 2 § 61-75 (223-235). The *cambista* provides a service that is useful for the community and for which it is lawful to require a benefit. However, unlike Cajetan, Vitoria extends this right beyond professional bankers to the transactions that merchants do on a permanent basis and that have the objective of facilitating long-distance trade (but not between nearby cities), *id.* § 66, 69 (227-228, 229),

interest was provided by the assumption that lending caused some damage to the lender and that interest could be understood as a compensation (*damnum emergens*) even in some instances for unattained profit (*lucrum cessans*).<sup>57</sup>

Vitoria and Soto assumed that these economic exchanges would be based on a universal right of *dominium* and thus applicable all over the world. They would provide, for example, the basis on which Catholic merchants from Spain could engage in mutually profitable transactions with Islamic or Jewish traders (as they had of course done for centuries), travel to Protestant markets in Germany and the Netherlands and to trade and exchange goods with the inhabitants of the New World. The most famous sketch of this worldwide system of *dominium* is contained in Vitoria's discussion of the right of the Spaniards to travel and trade in the Indies (*ius pergrinandi & ius negotiandi*) that was based on the naturalist theory of human sociability, accompanied by *dominium* that was articulated as *ius gentium*. Vitoria portrays trade and commerce as part of the "natural partnership and 'communication'" between humans. Since the beginning of times, "everyone was allowed to visit and travel through any land he wished [and t]his right was clearly not taken away by the division of property (*divisio rerum*).<sup>58</sup> It was a practical consequence of this that all nations were to show hospitality to strangers and everybody had the right to "all things that were not prohibited or others to the harm or detriment of others".<sup>59</sup> This, again, meant that

"Spaniards may lawfully trade among the barbarians, so long as they do no harm to their homeland. In other words, they may import the commodities which they lack, and export the gold, silver, or other things which they have in abundance; and their princes cannot prevent their subjects from trading with the Spaniards, nor can the princes of Spain prohibit commerce with the barbarians... [T]he law of nations (*ius gentium*) is clearly that travellers may carry on trade as long as they do no harm to the citizens... [A]ny human enactment (*lex*) which prohibited such trade would indubitably be unreasonable."<sup>60</sup>

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<sup>57</sup> Vitoria, ComST II-II *supra* note 25, Q 78 A 2 2 167-168). See also Soto, *De iustitia et iure*, *supra* note 43, Bk VI Q I A 1 and A 3 (508a-514b, 521b-525b).

<sup>58</sup> Vitoria, 'On the American Indians,' *Political Writings*, *supra* note 14, Q 3 A 1 § 2 (278).

<sup>59</sup> Vitoria, 'On the American Indians,' *Political Writings*, *supra* note 14, Q 3 A 1 § 2 (278).

<sup>60</sup> Vitoria, 'On the American Indians,' *Political Writings*, *supra* note 14, Q 3 A 1 § 3 (279-280).

And to make sure that he is not only discussing some special (colonial) relationship between the Spanish and the Indians, Vitoria adds that these principles are the same as those applying between Christian commonwealths. For the Spanish or the French kings to intervene in the travel of private traders would be “unjust...and contrary to Christian charity”.<sup>61</sup>

All of this begins to sketch an international system of commerce, based on the free use of their *dominium* by private merchants and bankers that the princes were not entitled to impede.<sup>62</sup> The extent of *dominium* was wide, covering use and non-use, trading and exchange as well as throwing away of the object. The prince was not entitled to intervene in his subjects’ use of private property “unless this is necessary for the defence and government of the nation”.<sup>63</sup> Nor could he limit hunting, fishing, or collecting firewood from the forest, without just cause. The right to use all this flows from the original natural law provision that humans may use everything that is necessary for their conservation.<sup>64</sup> If the ruler abused his authority, he committed a crime and had the obligation to restore the property taken.<sup>65</sup> To expropriate subjects arbitrarily – something that had been a persistent reality in 15<sup>th</sup> century Spain – would turn the prince into a *tyrant* and trigger the right of resistance of the commonwealth. Expropriation was possible only when the prince had a permissible *causa*, that is to say, only so far as needed by the commonwealth – “[b]eyond that, man must not only have his own rights as an individual, but he must also have their exercise in his own control: in other words, he must be *sui iuris*, have *dominium* of himself or his liberty.”<sup>66</sup>

These views on economic relations, *dominium*, commerce, price-formation and usury were largely accepted and defended by the subsequent generations of Spanish scholastics.<sup>67</sup> The Jesuit Luis de Molina (1535-1600), for example, expanded the utilitarian justification behind private property. In his *De iustitia et iure* he tells the

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<sup>61</sup> Vitoria, ‘On the American Indians,’ *Political Writings*, *supra* note 14, Q 3 A 1 § 3 (280).

<sup>62</sup> Barrientos García, ‘El pensamiento económico,’ *supra* note, 120.

<sup>63</sup> “nisi quando eidem reipublicae tuendae & administrandae necesse fuerint”, Soto, *De iustitia et de iure*, *supra* note 43, Bk IV Q IV A 1 (301a).

<sup>64</sup> Vitoria, ComST II-II *supra* note 25, Q 62 A 1 § 13 (72-73). See also Deckers, *Gerechtigheit*, *supra* note 36, 210-211.

<sup>65</sup> Soto, *De iustitia et de iure*, *supra* note 43 Bk V Q III A 5 (430a).

<sup>66</sup> Brett, *Liberty, Right and Nature*, *supra* note 38, 159.

<sup>67</sup> See further Marjorie Grice-Hutchinson, *Early Economic Thought in Spain 1177-1740* (London, Allen & Unwin 1978), 98-102.

old story about how the move had taken from natural law-based common ownership through the *ius gentium* into private property. To the objection – “How can human law go against (God-enacted) natural law?” – he retorts that God had inserted a natural light (“*lumen naturale*”) through which it was understood that among sinners, to avoid worse evils, properties needed to be divided. This was not a natural light about what was “necessary” but what was “expeditious” (“*expediens*”).<sup>68</sup> Again, it was Molina’s Jesuit colleague, Mariana, who chose to interpret this situation in dark, even tragic tones and did not hide his nostalgia towards the golden age of common property. After the Fall, human beings had become selfish and unjust and lived without a sense of natural benevolence to their communities. Nevertheless, that early situation could no longer be restored so that not only private property had become a necessary evil but it had become an urgent imperative to seek to protect it against all kinds of encroachments constantly planned by corrupt rulers.<sup>69</sup>

The theory of *dominium* as the sphere of freedom – especially economic freedom – belonging to human beings by *ius gentium* opened now a wholly new way to speak of universal authority beyond dubious claims about papal or imperial power. Any statement under the *via antiqua* that laid out duties connected with an office or rule could now be re-described as a statement about what (some) human beings had an entitlement to. “And the important thing about the sixteenth-century Spanish theologians and lawyers was that they *did* frame those issues in terms of the individual”.<sup>70</sup> The universal structure of private rights that emerges from Vitoria and Soto spoke to popular views about the electoral basis of Spanish monarchy and bound the ruler – at least in principle – to the original authorization to rule in the common good, understood as the free operation of *dominium*-rights.<sup>71</sup> It set up a universal field of economic liberty that could be invoked against all holders of public power. Wherever authority was being exercised, it could now be assessed by universal rights of property, self-defence, travel, trade, taking of possession of ownerless things and so on.<sup>72</sup> This was an inevitable consequence of the fact that Vitoria and Soto dealt

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<sup>68</sup> Ludovici Molinae, *De iustitia et iure. Tomi sex* (Antverpiae, Keerberginum, 1615), T II Disp 20 (43b).

<sup>69</sup> Mariana, *The King and Education of the King*, *supra* note 26, Ch II (115-121).

<sup>70</sup> Annabel Brett, ‘The Development of the Idea of Citizens’ Rights’ in Quentin Skinner & Bo Stråth, *States and Citizens. History, Theory, Prospects* (Cambridge University Press, 2003), 100.

<sup>71</sup> Giovanni Ambrosetti, *Il diritto naturale della riforma cattolica* (Milano, Giuffrè 1951), 60-61.

<sup>72</sup> For the reference to “needs” see, Vitoria, ‘On Civil Power’, Q. 1 Art 2 para. 5 in *Political Writings*, *supra* note 14, 9

with *dominium* in the context of commutative and not distributive justice, that is relationships between subjects themselves, excluding ideas about the intervention of public power. Chafuen summarises the resulting economic views of the Spanish scholastics as follows:

“Late-scholastic theory analyzed profits, wages and rent as matters of commutative justice and applied rules similar to those used to analyze the prices of goods. The Schoolmen determined that wages, profits and rents are not for the government to decide. Since they are beyond the pale of distributive justice, they should be determined through common estimation of the market”.<sup>73</sup>

The world was an empire, but an “empire of private rights”.

## 5. Epilogue: Suárez

Let me end with the way the Jesuit Francisco Suárez, the most influential of the Spanish, develops *ius gentium* into a historical justification of the most important modern political institutions, including the universal system of private commerce. Suarez agreed that natural law provided for freedom, common ownership and peace and also that it was not subject to any change.<sup>74</sup> But its content was often derived only “negatively” from the absence of an express prohibition. In that space of non-prohibition the subjective freedom of humans – their *dominium* – operated as their legal right to create commonwealths, to divide and exchange property, to defend themselves and others as well as to see to the good of their communities. Natural law, Suárez wrote, left “the matter to the management of men, such management to be in accordance with reason”.<sup>75</sup>

This created a difficulty, however. If private property was based on human law – did natural law then have nothing to say about stealing? To strengthen the (subjective) *dominium*-right Suárez referred back to the distinction he had made at the outset between *ius* as objective law and *ius* as subjective right. When natural law provides

<sup>73</sup> Chafuen, *Faith and Liberty*, *supra* note 43, 102-103 (footnote omitted).

<sup>74</sup> Francisco Suárez, ‘On Law and God the Lawgiver’ (De legibus, ac Deo legislatore), in *Selections from Three Works. Vol II the Translation* (G. Williams transl., Oxford University Press, 1944) Bk II, Ch XV § 14 (276) and Bk III, Ch II § 3 (373-374).

<sup>75</sup> Suárez, *On Laws and the Lawgiver*, *supra* note 74, Bk II, Ch XIV, § 6 (270)

for subjective right, he explains, it does this always as a positive precept. In the original state, everyone had *dominium* in common with others. After the intervention of *divisio rerum*, that positive, non-derogable right now attaches to the private property so that stealing will become an evil, subject to punishment.<sup>76</sup> Even if the institution of private property is purely human, in other words, once it is created, it is protected by natural law. This is also a command of faith. Already Soto had made the point that to deny private property was to engage in heresy. Suárez would agree but would provide a better explanation for why this was so: not because of utility but because of the nature of subjective *ius*. None of this is to say that Suárez would turn out having the preferences of the modern liberal. In fact, his view of the sphere of liberty of the individual in society is very limited. But the authoritarian basis of his view of the government of the commonwealth is based on an liberal argument from individual liberty: “for the very reason that man is lord of his own liberty, it is possible for him to sell or alienate the same”.<sup>77</sup>

Suárez takes great trouble to distinguish the customary nature of *ius gentium* from natural law, developing the former into a positive law process of law-creation, a system of ruling the world by constant interaction between peoples and their sovereigns, each operating their *dominium* so as to adjust to changing circumstances. The distinction between natural law was between that which is intrinsically necessary and that which contributed to the attainment of the necessary in the real conditions of the social world. Suárez gives two examples: diplomatic and commercial exchanges. Peace is dictated by natural law and the function of the ambassador is to contribute to peace. However, this does not make diplomacy part of natural law. Other means may lead to peace as well so that while the use of ambassadors may be useful, it is not *necessary*. Hence its nature as *ius gentium*, and not as natural law. It is part of the way humans have come to look for the good of their communities. The same argument applies to international commerce. Trade is by no means intrinsically necessary. But it may be useful for the good of nations. Thus, like diplomatic relations, trade has been established by the customary activities under the *ius gentium* and – like the subjective

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<sup>76</sup> Suárez, *On Laws and the Lawgiver*, *supra* note 74, Bk II, Ch XIV § 13 and 16-17 (275-277, 278-279)

<sup>77</sup> Suárez, *On Law and God the Lawgiver*, *supra* note 74 Bk II, Ch XIV § 18 (279). See also Reijo Wilenius, *The Social and Political Theory of Francisco Suárez* (Helsinki, Societas Philosophica Fennica 1963), 102-108.

rights on which trade relations are based – once they have been established, they are binding. Let me quote Suárez:

“...it has been established by the *ius gentium* that commercial intercourse shall be free, and it would be a violation of that system of law if such intercourse were prohibited without reasonable cause”.<sup>78</sup>

In other words, humankind has certain positive institutions – sovereignty, property, war, and diplomatic and commercial relations – that enjoy universal validity as *ius gentium* under customary law. And what is customary law? Suárez now puts forward the familiar “two-element theory”, the view of custom as repetition of similar acts, accompanied by the conviction that those acts are binding, the *opinio iuris*. He writes: “For a custom will never establish a rule of law by prescription, even if it lasts a thousand years, unless the frequency of the acts arises from the intention of creating a legal obligation”<sup>79</sup> But this is not only a theory of custom. It is the basis for a new kind of normative sociology. The sense of human practices, Suárez is now saying, is dependent on what people think of them. Just like for Vitoria, the value of goods on the market was received from “*communis aestimatio*”, the value of our practices for Suárez, become dependent on how humans view that value. This view grows neither from some extrinsic principle nor from a vote: it is part of the way the community lives, its members exercising their rights with the view to virtue and reason. This is a purely secular, fact-based view of justice. It is the reconception of human relations in ultimately economic terms.

Finally, let me quote the famous distinction Suárez makes between two senses of the *ius gentium*, each corresponding to a certain way in which the world is united:

“A particular matter...can be subject to then *ius gentium* in either one of two ways: first it is the law which all the various nations and people ought to observe in their relations with each other; secondly, on the ground that it is a body of laws which individual states of kingdoms observe within their

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<sup>78</sup> Suárez, *On Law and God the Lawgiver*, supra note 74 Bk II, Ch XIX § 7 (347).

<sup>79</sup> Suárez, *On Law and God the Lawgiver*, supra note 74, Bk VII, Ch XV. § 10, (573).

borders, but which are called *ius gentium* because the said laws are similar [in each instance] and are commonly accepted.”<sup>80</sup>

This distinction between public international law as law among states, and the shared aspects of the civil laws of various states has of course become a key part of our understanding of two types of universal law. We separate the two in watertight boxes because we believe they are somehow so utterly distinct: the public law of sovereignty – the private law of ownership and economic exchanges. That separation now comes from Suárez, together with the clear privileging of the latter over the former. For even as the private relationships are covered by the civil laws of the various countries, the general principles of those civil laws, including above all the freedom of commercial exchanges on the basis of private ownership, are still valid as *ius gentium* and enforceable through all those means through which princes may react to violations of not only their public rights but of any serious injury to *dominium* irrespective of where it takes place. To disrupt commercial relations is a violation of *ius gentium* that is punishable by war.<sup>81</sup>

Spanish imperialism was constituted of the exercise of public power by the Spanish State in the form of conquest and settlement, administration and the conduct of mercantilistic policies that ultimately failed to uphold the position of Spain as the leading European power. It was followed up by Netherlands and England whose political leaders well understood the importance of the Salamancan doctrines: their imperialism was imperialism of the free trade, carried out by private companies through private transactions, if necessary protected by the public power of the State. National resources would not be wasted when private operators could be liberated to carry out the work of disciplining the natives through commerce and the extraction of resources.

Since decolonization in the 1960's, Western domination of the “people without history” has returned to its classical mainstay, informal empire, the creation of wealth

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<sup>80</sup> Suárez, *On Law and God the Lawgiver*, supra note 74, Bk II Ch XIX, § 8 (347).

<sup>81</sup> Suárez, *On Law and God the Lawgiver*, supra note 74, Bk II Ch XIX, § 7 (347) and on the relevant grounds of just (aggressive) war in the case of “denial, without reasonable cause, of the common rights of nations, such as the right of transit over highways, trading in common &cet.”, in ‘On The Three Theological Virtues: On Charity’, Disp XIII: On War, Sect IV § 3 (817) as well as Josef Soder, *Francisco Suárez und das Völkerrecht. Grundgedanken zu Staat, Recht und internationale Beziehungen* (Frankfurt, Metzner, 1973), 261.

and influence and the distribution of material and spiritual resources through the exercise of private power. Today's *ius gentium* continues to be divided into the law of treaties on the one side and the law of contract on the other. There is no doubt on which side the more significant aspects of *dominium* – that is, the power of human beings over other human beings – is exercised. It is a great paradox that Spanish political leaders never really understood that this is what their brightest thinkers were prophesying.