

# Subjective *Ius*, Casuistry, and Christendom

## The Moral-Theological and Ecclesio-Juridical Significance of Francisco de Vitoria’s Rearticulation of *Ius* in Early Modern Political-Economic Contexts

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### Abstract

*This paper explores two points concerning Francisco de Vitoria’s rearticulation of ius and ius gentium in early modernity, specifically in the context of the Conquest of the New World. First, recognizing the insufficiency of objective ius and the hierocratic paradigm to explain both the divisio rerum and its consequences and the increasing incongruence between Church and State, Vitoria articulates subjective ius. Formed through the heuristic of pura natura, subjective ius is the faculty to execute contingent, contractual actions, accounting for consequences of the divisio rerum. Second, Vitoria posits a complex moral casuistry for theologians to normatively determine the justice of contingent actions, expanding the Church’s juridic authority over consciences for the end of Christendom’s unity. Thus, Vitoria’s subjective ius has a dyadic purpose: it legitimizes the divisio rerum and is the basis for reassertion of the Church’s spiritual power to maintain the unity of Christendom through the prescription of justice.*

**Keywords:** Vitoria, *Ius*, *Divisio Rerum*, Christendom, Ecclesiology, *Ius gentium*

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## 1 VITORIA, CHRISTENDOM, AND EARLY MODERN POLITICS AND ECONOMICS: THE QUANDARIES OF CONQUEST AND *IUS*

In the sixteenth century, Francisco de Vitoria (1483-1546), the *prima* chair of theology at the University of Salamanca, articulated the concept of *ius* in a subjective sense to account for the ontological and moral-theological nature of the division of things (*divisio rerum*) and its political-economic consequences prevalent in early modernity, such as lending, trade, speculation, and the independent polity, which presented moral-theological and juridical quandaries. On one hand, the moral-theological quandary centered on the possibility of justice and rectitude in the execution of complex political-economic practices, and on the other hand, the jurisdictional quandary concerned the legitimacy of claims right or *ius* of the Pope or Emperor over temporal society. While Vitoria's inquiry into the *divisio rerum* and *ius* is a broadly jurisprudential and moral-theological investigation into political-economic circumstances and practices, it is also an effort to rearticulate the relationship of the Church to the state, politics to religion, and law to conscience in light of early modernity, and thus to recapitulate a vision of Christendom.

Spurred on by the invectives of Antonio de Montesinos against the Spanish Crown's conquest of the New World, Vitoria's rearticulation of *ius* is embedded within his analysis of Charles V's *Conquista*. In a 1511 Christmas Day homily, Montesinos broached the question of the justice of Conquest, remarking, "You tell me, with what right [*derecho*] and with what justice [*justicia*] do you hold these Indians in such cruel and horrible servitude?"<sup>1</sup> And further, "Are you not obliged to love *them* [Indians] as *yourselves*?"<sup>2</sup> On one hand, Montesinos' former inquiry "brought into question the crown's rights (its *iura*) in America and above all its rights to *what*, in the language of Thomist jurisprudence, was called *dominium*".<sup>3</sup> This inquiry not only questioned the *iura* of the Spanish Crown in the Americas but also the Papal *plenitudo potestatis* — which legitimized Spanish jurisdiction — as the medieval vision of Christendom with its loci of spiritual and temporal powers residing in the Pope and emperor proved difficult to square with extant

<sup>1</sup>A. de Montesinos, *1511 Christmas Day Homily*, [https://usuariis.tinet.cat/fqi\\_spo2/sermo\\_montes\\_sp.htm](https://usuariis.tinet.cat/fqi_spo2/sermo_montes_sp.htm): "Decid, ¿con qué derecho y con qué justicia tenéis en tan cruel y horrible servidumbre a estos indios?" (trans. from Spanish mine).

<sup>2</sup>*Ibid.*: "¿No estáis obligados a amarlos como a vosotros mismos?" (trans. from Spanish mine).

<sup>3</sup>A. Pagden, *Spanish Imperialism and the Political Imagination*, Yale University Press, New Haven, p. 15.

Amerindian communities in the New World and ultimately failing to integrate into it the “third category of people... [those] who had never known Christianity”.<sup>4</sup> On the other hand, Montesinos’ latter inquiry broaches the question of whether or not by natural law and natural right —objective *ius*— the Spanish acted towards the Amerindians. Like Montesinos, Vitoria asks, “by what right (*ius*) were the barbarians subjected to Spanish rule?”<sup>5</sup>

Two points characterize Vitoria’s theory of subjective *ius* and its correlative theories of *dominium* and *ius gentium*. First, subjective *ius* departs from the objective *ius* posited by Thomas Aquinas, who held that *ius* signified the “object of justice [or] the just thing”, that “considers not the condition of the agent, but relations to another”, and is determined by law as “rule and veritable reason of right”.<sup>6</sup> Ultimately, the objective sense of *ius* proved insufficient for addressing the Conquest understood as a “macro-economic enterprise”, in a nascent “secular world of politics and economy [that] arose at the end of the Middle Ages, in which the practice of Christian faith became unwelcome”.<sup>7</sup> Recognizing the insufficiency of objective *ius*, Vitoria articulates subjective *ius* in the context of pure nature. By conceiving of man in *pura natura*, unaffected by sin or grace, Vitoria distinguishes between actions that are the product of natural inclinations, and thus of the natural law and right, and actions that are not products of natural inclinations, but rather of man’s deliberative and determinative use of reason and will. Of the former type of actions, Vitoria subsumes inclinations to self-defense, socio-political existence, and the elicited worship of God. Of the latter type of actions, Vitoria subsumes the *divisio rerum* as a product of subjective *ius*, the “power or faculty pertaining to an individual according to the laws”, whereby ‘according to the laws’ signifies that which is neither prescribed nor proscribed by the natural law, but merely permitted.<sup>8</sup>

Second, because Vitoria’s theory of subjective *ius* is formed in the context of

<sup>4</sup>F. Todescan, *From ‘Imago Dei’ to ‘Bon Sauvage’: Francisco de Vitoria and the Natural Law School*, in J. M. Beneyto, J. Corti Varela (eds.), *At the Origin of Modernity: Francisco de Vitoria and the Discovery of International Law*, Springer Press, Cham 2017, p. 23.

<sup>5</sup>F. de Vitoria, *De indis*, intro in A. Pagden, J. Lawrence (eds.), *Francisco de Vitoria: Political Writings*, Cambridge University Press, Cambridge 1991, p. 233.

<sup>6</sup>Thomas Aquinas, *Summa Theologiae*, II-II, q. 51, a. 1, resp.

<sup>7</sup>M. Garcia-Salmones, *The Disorder of Economy? The First Relectio de Indis in a Theological Perspective* in S. Kadelbach, T. Kleinlein, D. Roth-Isigkeit (eds.), *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel*, Oxford University Press, New York 2017, p. 443.

<sup>8</sup>F. de Vitoria, *Commentarios a La Secunda secundae de Santo Tomás*, ed. V. Beltrán de Heredia, Biblioteca de Teólogos Españoles, Salamanca 1952, q. 62, a. 1, n. 5, 64: “[Conradus] dicit ergo quod jus est potestas vel facultas conveniens alicui secundum leges, id est, est facultas data, v.g. mihi a lege ad quamcumque rem opus sit”. Henceforth, I shall refer to this and all other editions of Vitoria’s commentary on the *Summa* as *Com ST* (Editor), followed by *quaestio*.

pure nature and because subjective *ius* only ontologically accounts for the actionable consequences of the *divisio rerum*, Vitoria articulates a complex moral casuistry for theologians to normatively appraise the rectitude of those actions in the context of politics and economics. Thus, Vitoria simultaneously expands the Church's spiritual authority over the individual conscience and grants the Church a means to both prescribe and proscribe the commission of certain subjective *ius* actions for the attainment of justice, reflective of Vitoria's ecclesiology that views justice and obedience of conscience as requisites for Christendom's unity. Put simply, subjective *ius* is *capax rei theologicae*, or a concept "apt for cognizing and expressing the essential perspective of the specifically juridical aspect of the theological-ecclesial reality".<sup>9</sup> Casuistry allows for the use of "theology not merely as a speculative science but also as a practical science", that can locate questions of policy overlapping with questions of conscience within the sphere of the Church.<sup>10</sup> Hence, as much as the concepts subjective *ius-dominium* and *ius gentium* legitimize nearly all conceivable practices useful for human flourishing, they equally expand the Church's "moral analysis of issues in all conceivable areas of contemporary life".<sup>11</sup> Thus, Vitoria not only locates the possibility of justice in varied sectors of society but enables the Church to be an advocate of political-economic justice, which is necessary to the substantive spiritual end of Christendom, noting "there must be two powers for the preservation of justice... one which presides over spiritual matters and shapes spiritual life".<sup>12</sup>

## 2 NATURE, *IUS*, AND *DOMINIUM*: THE *DIVISIO RERUM* AND ITS CONSEQUENCES

Confronting the challenges of the political monism of the Holy Roman Emperor and the *divisio rerum* broadly, Vitoria must "tell the history of the whole world", in an anthropological sense.<sup>13</sup> If it is so that the Emperor is not *dominus mundi* and if this is evinced by the plurality of political entities in Europe and America, each distinguished by their constitutions and supported by property, finance, and

<sup>9</sup>P. Popović, *The Goodness of Rights and the Juridical Domain of the Good: Essays in Thomistic Juridical Realism*, Edusc, Roma 2021, p. 373.

<sup>10</sup>D. M. Lantigua, *Aquinas and the Emergence of Moral Theology in the Spanish Renaissance*, in M. Levering, M. Plested (eds.), *The Oxford Handbook to the Reception of Aquinas*, Oxford University Press, Oxford 2021, p. 177.

<sup>11</sup>E. Leites, *Casuistry and Character*, in E. Leites (ed.), *Conscience and Casuistry in Early Modern Europe*, Cambridge University Press, Cambridge 1988, p. 119.

<sup>12</sup>F. de Vitoria, *De potestate ecclesiae prior*, in A. Pagden, J. Lawrence (eds.), *Francisco de Vitoria: Political Writings*, Cambridge University Press, Cambridge 1991, q. 1, a. 1, p. 51. (Hereafter, *DPEPr*).

<sup>13</sup>D. Grant, *Francisco de Vitoria and Alberico Gentili on the Juridical Status of Native American Polities*, «Renaissance Quarterly», 72 (2019), p. 919.

trade, then Vitoria must tackle the distinct quandary of how “humankind had separated itself into distinct commonwealths”.<sup>14</sup> To recount the ‘story of the world’, Vitoria utilizes the pure nature heuristic, a “hypothetical condition that viewed the human being as unaffected by sin and grace”.<sup>15</sup> Pure nature permits Vitoria to delineate between objective *ius* and subjective *ius*, prescription and permissibility, as it demonstrates specific characteristics of humanity that persist across all states.

‘Natural’ possesses two significations in the context of human nature. On one hand, Vitoria notes that man’s desire for happiness is “natural on part of the subject... man, who inclined to happiness”, to fulfill natural passive potency for happiness, yet it can also be called “supernatural because of the mode to reach God”, which requires the action of grace upon a passive obediencial potency that is satisfied by a proportional end.<sup>16</sup> However, Vitoria remarks that while “we have the natural desire for God... God is the supernatural end, since we cannot reach it naturally”, affirming the view that grace is required to know God absolutely.<sup>17</sup> When man is reduced to his purely natural qualities, Vitoria asserts that this desire can only be elicited by natural effects.<sup>18</sup> Per Vitoria, “whenever [man] knows the effect, he naturally desires to know the cause... so it is evident that the philosophers knew of God”, and thus they possessed a desire for divinity “awakened by nature itself” without the action of grace.<sup>19</sup> Thus, Vitoria affirms that man in a *pura naturaliter* condition desires God “insofar as He is included in the number of causes... for it is naturally implanted in us that seeing an effect,

<sup>14</sup>*Ibid.*

<sup>15</sup>C. P. Haar, *Natural and Political Conceptions of Community: The Role of the Household Society in Early Modern Jesuit Thought, c.1500-1650*, Brill, Leiden 2019, p. 29.

<sup>16</sup>F. de Vitoria, *Commentary on the Prima Secunda (Vaticano Latino 4360, fols. 2r-49v)* in A. Sarmiento (ed.), *De Beatitudine: Sobre la Felicidad (In primam secundae Summae Theologiae, de Tomás de Aquino, qq. 1-5)*, Ediciones Universidad de Navarra, Pamplona 2022, q. 5, a. 8, p. 400: “Caietanum supra q. 3, a. 8 dicit quod hoc desiderium potest dici naturale ex parte subiecti, id est, hominis, qui inclinatur ad beatitudinem. Sed dicit quod est supernaturale ex parte modi consequendi Deum” (trans. mine).

<sup>17</sup>*Com ST (Vaticano)*, : “Ergo etiam homo appetit suum finem, puta Deum. Dico tamen quod, dato habemus desiderium naturale erga Deum; sed tamen Deus potius debet dici finis supernaturalis qui non possumus consequi illum naturaliter” (trans. mine).

<sup>18</sup>L. Feingold, *The Natural Desire to See God according to St. Thomas Aquinas and His Interpreters*, Sapientia Press, Ave Maria 2010, p. 174: “The nature of an intellectual creature... desires are formed on the basis of knowledge”.

<sup>19</sup>F. de Vitoria, *Commentary on the Prima Secunda, (Cod. Ottoboniano Latino 1000, fols 1v-19)* in A. Sarmiento (ed.), *De Beatitudine: Sobre la Felicidad (In primam secundae Summae Theologiae, de Tomás de Aquino, qq. 1-5)*, Ediciones Universidad de Navarra, Pamplona 2022, q. 5, a. 5, p. 168: “[Q]uia quandocumque cognoscit effectum naturaliter desiderat cognoscere causam... patet quia philosophi cognoverunt Deum... et ad hoc ultimum dico primo quo appetitus videndi Deum est naturalis” (trans. mine).

we desire to know the essence of the cause”.<sup>20</sup> Nevertheless, God causes supernatural effects “and the desire to know them is not natural to man”, but arises through “faith, hope, and charity”, infused by God’s divine aid.<sup>21</sup> The former sort of arousal of the natural desire sates the natural passive potency, while the latter sates the obediential passive potency requiring grace. Thus, Vitoria concludes that once “God is known [either by natural or supernatural effects], we desire Him according to our nature”.<sup>22</sup> Therefore, man in pure nature can only know and desire God according to his mode, whereby God is understood as the primal cause.<sup>23</sup>

Since man’s desire for God in pure nature is elicited by natural effects, pure nature allows for an “exploration of natural law without taking recourse in any way to revelation or supernatural gifts”.<sup>24</sup> Thus, Vitoria can identify the content of the natural law, and ultimately, natural right and dominion. By Vitoria’s account, natural law is a set of self-evident, normative precepts resulting from both an understanding of what is right and a natural inclination to execute right actions. When man with “an untutored understanding” judges that a given thing is good, the “will is naturally inclined to all these [good] things”.<sup>25</sup> Vitoria further contends that if the will is naturally inclined to a given thing, then the inclination is a self-evident precept of the natural law regarding ethical conduct.<sup>26</sup> Moreover, the natural law is *pura naturaliter*. Not by appealing to “innate ideas or pre-rational desires” but by reason alone can man mete out the precepts of the natural law as “self-evident *dignitates* that everyone *sine docente* understands upon reflection”.<sup>27</sup> Men are not passive recipients of natural law, but rather active inquirers into “a set of first principles of practical reason with an explicitly normative conception of the good”.<sup>28</sup> These precepts are normative not only because

<sup>20</sup>T. Cajetan, *Commentary on ST Ia IIae*, q. 3, a. 8, n. 1, quoted in L. Feingold, cit., p. 178.

<sup>21</sup>*Com ST (Ottob.)*, q. 5, a. 5, p. 168: “Sed Deus habet aliquos effectus supernaturales, et appetitus cognoscendi istos non est naturalis homini, sed per fidem, spem, caritatem” (trans. mine).

<sup>22</sup>*Com ST (Vaticano)*, q. 5, a. 8, p. 170: “Sat est quod, cognito Deo, desideremus illum ex natura nostra” (trans. mine).

<sup>23</sup>L. Feingold, *The Natural Desire to See God according to St. Thomas Aquinas and His Interpreters*, cit., p. 179.

<sup>24</sup>C. P. Haar, *Natural and Political Community*, cit., pp. 128-129.

<sup>25</sup>F. de Vitoria, *On Law*, in A. Pagden, J. Lawrence (eds.), *Francisco de Vitoria: Political Writings*, Cambridge University Press, Cambridge 1991, q. 94, a. 1, p. 170.

<sup>26</sup>*Ibid.*, q. 94, a. 1: “So it is too in ethical conduct: some principles are recognized by everyone, such as that good should be done, while others are not self-evident to all... To act against natural inclination is to act against natural law; but there are various natural inclinations, and hence several principles”.

<sup>27</sup>A. Spindler, *Law, Natural Law, and the Foundation of Morality in Francisco de Vitoria and Francisco Suarez*, in K. Bunge, M. J. Fuchs, D. Simmermacher (eds.), *The Concept of Law in the Moral and Political Thought of the School of Salamanca*, Brill, Leiden 2016, p. 183.

<sup>28</sup>A. Spindler, *Francisco de Vitoria on Prudence and the Nature of Practical Reasoning*, «Archiv

they are *pura rationaliter* and thus accord with the nature of law, but ultimately they are *pura naturaliter*, corresponding to man's nature.<sup>29</sup>

In light of the normative and necessary character of natural law, the most uncontested inclination of human nature, self-preservation, is necessary.<sup>30</sup> Therefore, civil power is also necessary. While the demonstration of the natural quality of the civil power follows the close syllogistic logic of Vitoria's theory of pure nature and a *pura naturaliter* conception of natural law, it seems spurious that temporal power existed in pure nature, as he insists on equality of all men and a community of goods.<sup>31</sup> Vitoria easily overcomes this through several propositions. First, both the several precepts of the law of nature and "their consequences" are "unchangeable" and cannot be removed from the law itself.<sup>32</sup> To this point, Vitoria insists that the precepts of the natural law cannot be dispensed of, considering it an "unreasonable opinion" because if a precept is dispensed of, it implies that at one point something was necessary and then it was not, so "it would follow that God could lie".<sup>33</sup> Moreover, what appears as a substantial change in the law is rather an indication of the "variability of the matter to which it [law] applies".<sup>34</sup> Second, Vitoria contends that positive law can assume one of two qualities, either functioning as a "guiding force (*vis directiva*)" or as a "coercive force (*vis coactiva*)".<sup>35</sup> Thus, in innocence, even though there were no discrete *dominia*, "directive and governing power nevertheless did exist", otherwise "mere confusion of goods and formal disorderliness would have ruled".<sup>36</sup> Because of Vitoria's rationalistic natural law, the directive power that existed in innocence would have subsisted in a state of *pura natura* because it relates to the natural inclination of man, and "man cannot give up his right to an ability of self defense... because

für Geschichte der Philosophie», 101/1 (2019), p. 45.

<sup>29</sup>F. de Vitoria, *On Law*, cit., q. 94, a. 2, p. 171: "A natural inclination... comes from God."

<sup>30</sup>*Ibid.*: "And since good has no opposite other than evil... if the preservation of life is a good, the destruction of life must be an evil".

<sup>31</sup>M. Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, «University of Toronto Law Journal», 61 (2011), p. 13: "Vitoria's starting-point was that, under natural law... no human being had natural dominion over another. Everyone was born free and property was held in common".

<sup>32</sup>F. de Vitoria, *On Law*, cit., q. 94, a. 3, p. 171.

<sup>33</sup>*Ibid.*, q. 100, a. 8: "Quia si Deus potest praecipere alteri ut mentiatur, ergo et ipse potest mentiri, quia tantam malitiam aut maiorem habet etc. Est omnino irrationabilis opinio" (trans. from Latin mine).

<sup>34</sup>S. Langella, *Sovereignty in the Works of Francisco de Vitoria*, in J. M. Beneyto, J. Corti Varela (eds.), *At the Origin of Modernity: Francisco de Vitoria and the Discovery of International Law*, Springer Press, Cham 2017, p. 49.

<sup>35</sup>F. de Vitoria, *On Law*, cit., q. 96, a. 5, p. 180.

<sup>36</sup>*DPEPr*, q. 4, a. 1, p. 74.

this power belongs to him by natural and divine law”.<sup>37</sup> As Vitoria asserts, while “from the beginning all things were common... the human community [had] *dominium* over all things”, for man’s flourishing and benefit.<sup>38</sup> Thus, it is “by right of nature” that man preserve himself in being.<sup>39</sup> Consequently, Vitoria demonstrates the *pura naturaliter* origin of the political community, and ultimately the *pura naturaliter* character of *dominium naturale*. Political *dominium* as an extension of individual natural *dominium* persists across all states, relying solely on natural law, which communicates God’s grant of *dominium naturale* to the rational creature as a being rendered *imago Dei*. Thus for Vitoria, there is no possible condition of mankind where he could neither preserve himself as an individual or as a member of a community.

### 3 SUBJECTIVE *DOMINIUM-IUS* AND *IUS GENTIUM*: RATIONALITY AND THE LACUNA OF MORAL PERMISSIVITY

Yet, notwithstanding natural inclinations across all possible states of human existence, Vitoria admits that not all human actions are necessary according to nature, as nature does not account for actions related to contingency. For Vitoria, contingent actions possess “relative necessity” as they are not “not instituted by nature itself, but by the will of men”.<sup>40</sup> By Vitoria’s account, actions relating to the use of the will arise out of the exercise of subjective *ius* understood as the equivalent of *dominium*. *Dominium* not only signifies “eminence or superiority” over inferiors as a ruler to the ruled, or the mastery over “property... distinguished from use, enjoyment, and possession”, but it also signifies a “certain faculty to use things according to rights [*secundum iura*]... or reasonably instituted laws”.<sup>41</sup> Taken this way, Vitoria asserts that “right and dominion will be the same”.<sup>42</sup> In contingent circumstances, man exercises this *facultas* through use of reason and will for deliberation (*deliberatio*). With reason, man has the capacity of “consulting, and of deciding what is good and what is evil”.<sup>43</sup> In turn, with the will man “has in his

<sup>37</sup>F. de Vitoria, *De potestate civili*, in A. Pagden, J. Lawrence (eds.), *Francisco de Vitoria: Political Writings*, Cambridge University Press, Cambridge 1991, q. 1, a. 7, p. 19, (Hereafter, *DPC*).

<sup>38</sup>*Com ST* (Beltrán de Heredia), q. 62, a. 1, n. 9.

<sup>39</sup>*Ibid.*, q. 62, a. 13: “Item, de iure naturali es quod homo conservet se in esse” (trans. mine).

<sup>40</sup>J. Cruz Cruz, *La soportable fragilidad de la ley natural: consignación transitiva del ius gentium en Vitoria*, in Id. (ed.), *Ley y dominio en Francisco de Vitoria*, Ediciones Universidad de Navarra, Pamplona 2008, p. 21.

<sup>41</sup>*Com ST* (Beltrán de Heredia), cit., q. 62, a. 1, n. 8: “Tertio modo capitur dominium largius prout dicit facultatem quamdam ad utendum re aliqua secundum iura, etc., sicut diffint Conradus, ubi dicit quod dominium est facultas utendi re secundum iura vel leges rationabiliter institutas”.

<sup>42</sup>*Ibid.*: “Et isto modo, si sic diffiniatur large capiendo, idem erit jus et dominium”.

<sup>43</sup>F. de Vitoria, *De eo ad quod tenetur veniens ad usum rationis*, Jacobus Boyerius, Lyons 1557, p. 334: “Alterum, ut homo habeat facultatem consultandi, ac deliberandi quid bonum est, et quid



power to choose and leave”, the action he subjected to moral consideration.<sup>44</sup> Emphatically, Vitoria denies that actions arising from natural inclinations are subject to *deliberatio*, noting that “one is not the master (*dominus*) of his own actions... if he follows the plan of necessity”.<sup>45</sup> Thus, if one deliberates, he does not follow a natural inclination, and consequently, his action arises out of subjective right, rendering him master of his acts. Because these actions do not immediately pertain to necessity or divine law, they are actions that are “good, or at least not bad”.<sup>46</sup> Thus, subjective *ius* is not “explicitly natural” as if the natural law were its *ratio*, but “has naturalistic implications”.<sup>47</sup> The actualization of *dominium-ius* is less concerned “with doing what is allowed under the law, but with the pursuit of a moral end *under* the law”.<sup>48</sup> As Vitoria notes, the subjective articulation of *ius* permits one to say “‘I have not a right’ to do this that it is not permitted to me or, ‘I have a right, that is, it is permitted’”.<sup>49</sup> Ultimately, Vitoria’s notion of subjective right permits a significant degree of autonomy to rational actors, permitting them to consider and execute certain courses of action without reference to necessity.

Consequently, the *divisio rerum* of universal natural dominion into polities and property is not by natural right because “natural law never commanded that [division]”.<sup>50</sup> Rather, it is a right simply permitted to the exercise of reason and will. Moreover, natural law does not contain a precept that commands the possession of goods in common, which Vitoria asserts was a mere concession that was consonant with the *dominium naturale*.<sup>51</sup> Natural law only dictates that man is *dominus* of created things, ceding the minutiae of how man as *dominus* organizes and distributes those created things to man’s rational deliberation. Thus, when it became advantageous to divide the common ownership of tangible goods,

malum est” (trans. from Latin mine).

<sup>44</sup>*Ibid.*: “Alterum est, ut habeat in sua potestate post deliberationem, eligendi, et relinquendi quod sic deliberatum est” (trans. from Latin mine).

<sup>45</sup>*Ibid.*: “Neque quis esset dominus suarum actionum, si post deliberationem necessario aut sequeretur consilium” (trans. from Latin mine).

<sup>46</sup>A. Brett, *Liberty, Right, and Nature: Individual Rights in Later Scholastic Thought*, Cambridge University Press, Cambridge 1997, p. 134.

<sup>47</sup>C. P. Haar, D. Simmermacher, *The Foundation of the Human Being Regarded as a Legal Entity in the School of Salamanca: Dominium and Ius in the Thought of Vitoria and Molina*, «Jahrbuch für Recht und Ethik», 22 (2014), p. 464.

<sup>48</sup>*Ibid.*, p. 472.

<sup>49</sup>*Com ST* (Beltrán de Heredia), cit., q. 62, a. 1, n. 5: “Dicimus enim: non habeo ius faciendi hoc, id est non mihi licet; item, iure meo utor, id est licet” (trans. mine).

<sup>50</sup>*Ibid.*, q. 62, a.1, n. 20: “Ergo ad faciendam divisionem rerum non opus erat revocare legem naturale, quia *lex naturalis nunquam praecepit illud*” (trans. mine).

<sup>51</sup>*Ibid.*: “Concedimus ergo quod nullus fuit praeceptum quod omnia essent communia, sed solum fuit concessio” (trans. mine).

man determined through his rational deliberation that some men ought “to cultivate certain lands and others, others”, and eventually “from the use of those things it came about that one was content with the land he occupied, and another, with others”.<sup>52</sup> According to Vitoria this division occurred according to a “virtual agreement”, the *ius gentium*, whereby a gradual, universal process of deliberative division occurred.<sup>53</sup> As a consequence of division, land and goods are received either by private or public masters. Private, because men exercise *dominium-ius* to determine what is *meum et tuum*, the sole means by which transfer of *dominium* could occur is by the will of the possessor.<sup>54</sup> Public, because through the division of land, “people give him [the prince] authority so that he can dispose of the goods of citizens”, for the commonweal.<sup>55</sup> The transition from a single, universal dominion of all men to a plurality of distinct dominions reflects the exercise of subjective *ius*, where right is a faculty for “using a thing according to right or reasonably instituted laws”, and the ‘thing’ that is used is the “reason and will” without direct reference to necessity and instead as responses to contingent circumstances within the moral boundaries merely permitted by the natural law.<sup>56</sup> Concerning subjective *dominium-ius* then, the natural law is not its *ratio iuris* insofar as it prescribes the commission of certain political actions, but rather it is the *ratio iuris* insofar as it permits the commission of certain political actions. These actions —such as lending, trade, and speculation— reside within the lacuna between prescription and proscription is what one might call, ‘fair game,’ “permissible means to natural-law ends”.<sup>57</sup>

Vitoria subsumes the *divisio rerum* within the *ius gentium*, as natural law “says little about the practice of government relations between a prince and his subjects, rights of colonisation or the new commercial transactions”, thus necessitating a means of conceptualizing the activities derived from subjective right.<sup>58</sup>

<sup>52</sup>*Ibid.*, q. 62, a. 1, n. 23: “Et forte sic facta fuit, non consensu certo et formali, sed quodam consensu interpretativo, ita quod incooperint aliqui colere certas terras et alius alias; et ex usu illarum rerum factum est ut ille esset contentus terris quas occupaverat, et alius aliis” (trans. from Latin mine).

<sup>53</sup>*Ibid.*, cit., q. 62, a. 1, n. 23: “Et hoc non aliquo consensu formali, sed virtuali” (trans. from Latin mine).

<sup>54</sup>*Ibid.*, q. 62, a. 1, n. 27: “Facta prima divisione et appropriatione, duobus precise modis et duobus tantum titulis potuit quis acquirere dominium rerum; nam etiam duobus potest transferri dominium ad nos ab uno in alium. . . Primo ergo modo potuit transferri dominium ad nos voluntate prioris domini”.

<sup>55</sup>*Ibid.*, q. 62, a. 1, 33: “Sed populus dat ei istam auctoritatem ut possit disponere de bonis civium” (trans. from Latin mine).

<sup>56</sup>*Ibid.*, q. 62, a. 1, n. 8: “Dominium est facultas utendi re seuncum iura vel leges rationabiliter institutas” (trans. from Latin mine); see, F. de Vitoria, *De eo quod*, p. 334.

<sup>57</sup>B. H. Turner, *The Law of Nations as Developing Moral Law: Two Interpretations of Ius Gentium in the Thomistic Tradition*, «The Thomist», 84/3 (2020), p. 355.

<sup>58</sup>M. Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power*,

Taken together, *dominium-ius* and *ius gentium* relate whereby “the former covers a particular theory of forms of lawful human power, the latter extends that theory to be applicable everywhere”.<sup>59</sup> Unlike Aquinas, Vitoria denies that the *ius gentium* contains any of the precepts of the natural law.<sup>60</sup> Whereas the natural law is “absolutely good”, the *ius gentium* is “relatively good” because it “has not equity of itself... but was established as inviolable from agreement among men”.<sup>61</sup> Therefore, the *ius gentium* is elastic, as it “can change with changing social conditions, should a custom be recognized as better realizing what the natural law demands”.<sup>62</sup> While the “world could go on”, without these positive arrangements, the world would go on “with great difficulty, for men would be likely to rush into discord and wars”.<sup>63</sup> Therefore, since the *ius gentium* is established by a virtual consensus and is conducive to universal concord, Vitoria contends that “it is always illicit” to violate it, as it follows that there arises “inequality and injustice” amongst persons.<sup>64</sup> In other words, it is a “moral and fitting necessity” that characterizes the *ius gentium*.<sup>65</sup>

Because the *ius gentium* relies upon a rational and virtual agreement between men for the sake of universal concord, Vitoria offers a compelling account of the nexus of private and public acts of *dominium-ius*. Since the *ius gentium* is instituted by men and concerns contractual affairs, it assumes the quality of a *privato pacto* as it “applies to individuals vis-a-vis each other”. as a sort of “interpersonal law”.<sup>66</sup> That is, it necessarily “limits the claims” any individual can make of another, either interior or exterior of the juridic forum.<sup>67</sup> Hence, Vitoria admits that by *ius gentium*, the Spaniards as men and not because they are Spaniards, maintain the right to “free mutual intercourse” with any person in the world, including the Native Americans, provided they do so without injury.<sup>68</sup> In this respect, the

1300-1870, Cambridge University Press, Cambridge 2021, p. 139.

<sup>59</sup>Id., *Empire and International Law*, cit., p. 14.

<sup>60</sup>F. de Vitoria, *Commentaries on Summa theologiae II-IIae* (Scott), in J. Brown Scott (ed.), *The Spanish Origins of International Law: Francisco de Vitoria and His Law of Nations*, Oxford University Press, Oxford 1934, q. 57, a. 3, p. cxi.

<sup>61</sup>*Com ST* (Scott), q. 57, a. 3, p. cxii.

<sup>62</sup>B. H. Turner, *The Law of Nations*, cit., p. 355.

<sup>63</sup>*Com ST* (Scott), q. 57, a. 3, p. cxii.

<sup>64</sup>*Ibid.*

<sup>65</sup>B. H. Turner, *The Law of Nations*, p. 363.

<sup>66</sup>F. Iurlaro, *The Invention of Custom: Natural Law and the Law of Nations: 1500-1750*, Oxford University Press, Oxford 2022, p. 52.

<sup>67</sup>A. Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law*, Cambridge University Press, Cambridge 2011, p. 13.

<sup>68</sup>F. de Vitoria, *De indis*, cit., q. 3, a. 1, p. 278: “When all things were held in common, everyone was allowed to visit and travel through any land he wished. This right was clearly not taken away by the division of property, as it was never the intention of nations to prevent men’s free mutual intercourse with one another by this division”.

*ius gentium* “has an attractive dimension of what we now call ‘cosmopolitanism,’ ” because it binds all men together as a sort of “universal human society”.<sup>69</sup> *Pacta sunt servanda* thus figures as the normative principle of the *ius gentium*.

In political and economic contexts, subjective *ius* and *ius gentium* function as limits on the exercise of temporal power for the sake of justice. As Vitoria notes, “although the prince is over the whole commonwealth he is nevertheless part of the commonwealth”. and thus should act according to *ius naturale* and the *ius gentium*.<sup>70</sup> While he may dispose of the goods of private citizens, Vitoria unambiguously asserts that a ruler can only do so for a just cause because the “prince has *this* authority from human authority”, since *divisio rerum* itself is a product of human authority.<sup>71</sup> Thus, not only is subjective *ius* the origin of the *divisio rerum* and the *ius gentium*, but it also is the origin of legal subjectivity by way of establishing the relationship between persons and a specific polity.<sup>72</sup>

As a principle of legal subjectivity, subjective *ius* compels the Spaniards “to treat Native American polities as the formal equals of European commonwealths”.<sup>73</sup> Consequently, this entails a denial of either the Emperor or the Pope possessing any *ius* to the *dominia* of the Natives. As Vitoria notes, not only do the Native possess their *ius* to their *dominia*, any universalizing imperial dominion “would be solely by authority of some enactment (*lex*), and there is no such enactment”.<sup>74</sup> Even if there was an enactment, “it would have no force, since an enactment presupposes the necessary jurisdiction”, or the plausibility of its actualization through an authority.<sup>75</sup> Equally, Vitoria denies any temporal authority to the Papacy. By Vitoria’s account, if a power is possessed by Peter, then it is possessed by Christ, and Christ did not have kingly power for, “temporal purposes alone, but chiefly for spiritual ends”.<sup>76</sup> Thus, the Alexandrine Bulls that the Spanish Crown interpreted as affording them temporal rights over the New World only granted them with the spiritual, missionary mandate. It might appear that subjective *ius* widens the gap between the temporal spiritual powers, resulting in two wholly “distinct and independent

<sup>69</sup>A. Brett, *Changes of State*, cit., p. 14.

<sup>70</sup>F. de Vitoria, *On Law*, cit., q. 96, a. 5, p. 181.

<sup>71</sup>*Com ST* (Beltrán de Heredia), q. 62, a. 1, n. 33: “Princeps habet hanc auctoritatem ex humana auctoritate” (trans. mine).

<sup>72</sup>*DPC*, q. 1, a. 5, p. 16: “The power of the sovereign clearly comes immediately from God himself, even though kings are created by the commonwealth. That is to say, the commonwealth does not transfer to the sovereign its power, but simply its own authority”.

<sup>73</sup>D. Grant, *Francisco de Vitoria and Alberico Gentili on the Juridical Status of Native American Polities*, cit., p. 914.

<sup>74</sup>F. de Vitoria, *De indis*, cit., q. 2, a. 1, p. 257.

<sup>75</sup>*Ibid.*

<sup>76</sup>*DPC*, q. 1, a. 11, p. 26.

legal jurisdictions”.<sup>77</sup> To the contrary, subjective *ius* is the barycentric principle that allows Vitoria to reconceptualize the unity of Christendom.

#### 4 *IUS* AND *UNITAS*: SUBJECTIVE *IUS* AND THE MAKING OF ECCLESIAL UNITY THROUGH THE CASUISTRY OF JUSTICE IN THE INTERIOR FORUM

As a consequence of the exercise of subjective *ius*, the *ius gentium* has “great elasticity” insofar as it contains varied practices.<sup>78</sup> However, the *ius gentium* is not merely a set of advantageous practices, but it is also a space for the expansion of the ecclesio-juridical power over the conscience. Pointedly, the *ius gentium* merely demonstrates that a practice, such as private property, is permissible and useful. It is silent concerning the execution of private property relations, such as when one person transfers to another the ownership of legal objects with possessory interest or when a contingency relating to either party in a contract subverts procedural norms and presents a moral quandary. Moral navigation of the narrow straits between prescription and proscription by the natural law requires clarity. Thus, Vitoria subjects the exercise of subjective *ius* to the Church’s juridic forum as the civil polity possesses an end not only of natural happiness, but also of supernatural beatitude, and thus must conform to the principles of justice. In turn, he widens the scope of the Church’s interior forum, figuring it as the primary means of asserting the Church’s supremacy in early modernity and of preserving Christendom through the attainment of justice.

Per Vitoria, the Church possesses jurisdictional power, which is the power “to govern the Christian people”, through “laws, excommunication, and delivering judgment”, on spiritual and moral matters.<sup>79</sup> That is, the Church possesses the power to bind and loose in the forum of the conscience.<sup>80</sup> Matters of conscience extend to any issue “where there is some reasonable doubt as to whether an action is good or bad, just or unjust”.<sup>81</sup> These issues must be meticulously scrutinized, for “if they are undertaken without due deliberation, on the mere assumption that they are lawful, they may lead a man into unpardonable wrongdoing”.<sup>82</sup> Thus, a

<sup>77</sup>N. Mull, *Divine Law Divided: Francisco de Vitoria on Civil and Ecclesiastical Powers*, «Intellectual History Review», 23/2 (2021), p. 7.

<sup>78</sup>D. Alonso-Lasheras, *Luis de Molina’s De iustitia et iure: Justice as a Virtue in an Economic Context*, Brill, Leiden 2011, p. 115.

<sup>79</sup>*DPEPr*, q. 2, a. 1, p. 58.

<sup>80</sup>*Ibid.*, q. 4, a. 7, p. 81: “The apostles... received jurisdictional power ... in the inner court of conscience at John 20:23. Peter seems to have received the primacy and plenitude of [this power] at John 21:15-17”.

<sup>81</sup>F. de Vitoria, *De indis*, cit., intro, p. 234.

<sup>82</sup>*Ibid.*, p. 235.

case of conscience relating to the actualization of subjective *ius* is “the business of the priests, that is to say of the Church, to pass sentence upon it”.<sup>83</sup>

For Vitoria, the necessity of the Church’s authority over the conscience is demonstrated through pure nature. Recognizing that *pura naturaliter* man possessed a desire for God, Vitoria admits that man “should worship God not only with his soul and intellect but also with his exterior bodily actions... in every state”.<sup>84</sup> Thus for Vitoria, the worship of God is *pura naturaliter* and would carry on through the oversight of men to oversee worship.<sup>85</sup> While pure nature demonstrates that man desires God and needs “supernatural faith [which] has been necessary in every age and time”, and that “ecclesiastical power has always existed”, it also highlights the insufficiency of spiritual power without authority over the consciences granted by Christ.<sup>86</sup> As Vitoria suggests, it was not until Christ that the spiritual power was transformed from its *pura naturaliter* condition, as the priests of the Old Testament take “care of the material temple; they could neither forgive sins nor have any other purely spiritual power”.<sup>87</sup> Vitoria asserts Christ “was the first author and giver of the keys and spiritual power, and by His own authority could confer grace and forgive sins by the power of His excellence”, that is, a power over conscience for a salvific end.<sup>88</sup> Consequently, Vitoria’s insistence that worship of God existed in a primeval condition besides the *status innocentiae* unambiguously emphasizes the natural and supernatural necessity of the Church, particularly as regards the forgiveness of sins through power over the conscience. Additionally, Vitoria’s theory of pure nature leads him to the conclusion that “civil power depends on the spiritual power” for the “perfection of supernatural felicity”, and that a ruler might be obliged to alter “civil policy... detrimental to the spiritual ministry” of the Church, which includes matters of justice.<sup>89</sup>

To expand this power over both the individual and politics, Vitoria articulates a theory of casuistry reflective of contemporary circumstances, which “retains the sense of locality, and thus of the jurisdiction that Vitoria was reclaiming”, for the Church in early modernity.<sup>90</sup> Thus, Vitoria’s casuistry is a response to

<sup>83</sup>*Ibid.*, p. 238.

<sup>84</sup>*DPEPr*, q. 4, a. 1, p. 76.

<sup>85</sup>*Ibid.*, q. 4, a. 1, p. 77: “There can be no doubt... that if the state of innocence had continued undisturbed, constitutions and ordainments would have arisen... for the conduct of spiritual life and divine worship. And there would have been men set up to take care of the things to be ordained, and their power would have been spiritual”.

<sup>86</sup>*Ibid.*, q. 4, a. 2, p. 75.

<sup>87</sup>*Ibid.*, q. 4, a. 2, p. 78.

<sup>88</sup>*Ibid.*, q. 4, a. 7, p. 79.

<sup>89</sup>*Ibid.*, q. 5, a. 6, p. 90.

<sup>90</sup>M. Garcia-Salmones, *The Disorder of Economy? The First Relectio de Indis in a Theological Perspective*, cit., p. 458.

both the subversion of Christian morals in political and economic life and the disavowal of spiritual power *in toto*. As a technique of moral science, casuistry is “case-directed moral reasoning” that navigates precepts and laws because “the conscience derives concrete practical judgments” from these sources.<sup>91</sup> Casuistry can be spoken of in two ways, as the moral science *per se* or as the application of the moral science, particularly in a confessional or consultative context.<sup>92</sup> As a means for the Church to exercise spiritual power, because casuistry is “anchored in the role of the confessor as a judge or a ‘doctor of the soul’ (*medicus animae*), who excises moral errors and heresies like tumors”, and provides “mild discursive therapy” to the conscience, casuistry serves as a powerful means to direct persons according to standards of justice and right.<sup>93</sup>

Two *loci* arise for the application of casuistic logic, confession and counsel. While confession represents an *ex post facto* use of casuistry to determine the sinfulness of an act, counsel is a means to preempt the commission of sin and secure a rectitudinous exercise of subjective *ius*, especially in political-economic contexts. In no little part due to the discovery of the New World, sixteenth-century statecraft evolved from its medieval antecedents, subsuming a variety of practices that had “both good and bad on both sides... like many kinds of contracts, sales, and other transactions”.<sup>94</sup> Thus, Vitoria asserts that “meticulous inquiries into any matter”, are necessary.<sup>95</sup> In fact, Vitoria asserts that one must, “act in accordance with the ruling and verdict of wise men”, otherwise he acts wrongly.<sup>96</sup> If a doubt arises, then it is a moral obligation to seek counsel. Further, Vitoria remarks that “it is not the province of lawyers, or not lawyers alone, to pass sentence” on moral doubts because a doubt is a “case of conscience”, and only the Church has power over the conscience.<sup>97</sup> Hence, the integrity of the political community does not rely merely on the goodness of statutory laws, but rather on the degree to which rulers obey the dictates of conscience that are aimed at producing justice. The insufficiency of lawyers to resolve the conscience reinforces Vitoria’s view that the Church is “an autonomous order” that can situate itself “against the concentration of power pursued by states” by taking “conscience as its object”, for the

<sup>91</sup>R. Schuessler, *Casuistry and Probabilism*, in H. E. Braun, E. De Baum, P. Astorri (eds.), *A Companion to the Spanish Scholastics*, Brill, Leiden 2022, pp. 334, 336.

<sup>92</sup>H. Kallendorf, *Conscience on Stage: The Comedia as Casuistry in Early Modern Spain*, University of Toronto Press, Toronto 2007, pp. 5-6: “Casuistry can refer both to moral reasoning contained in guidebooks and to the use of such books by a priest. In the history of the Church [...] casuistry has been applied not only to the process of guiding conscience [...] but to the confessional process by which penitents have been assessed penalties”.

<sup>93</sup>R. Schuessler, *Casuistry and Probabilism*, cit., p. 342.

<sup>94</sup>F. de Vitoria, *De indis*, cit., intro, p. 235.

<sup>95</sup>*Ibid.*, p. 234.

<sup>96</sup>*Ibid.*, p. 235.

<sup>97</sup>*Ibid.*, p. 238.

sake of obtaining a spiritual end, of which justice is a prerequisite.<sup>98</sup> Whereas the lawyers concern themselves with the interpretation of law, theologians like Vitoria, concern themselves with the conscience and the moral rectitude of actions, notwithstanding what is right according to statute. To the same point concerning the insufficiency of the temporal order and its laws to address concerns of conscience, Vitoria contends that “if the upshot of the consultation with wise men is a verdict that disregards the action as unlawful... their opinion must be respected”.<sup>99</sup> Equally, “if on the other hand the verdict of the wise is that the action is lawful, anyone who accepts their opinion may be secure in his conscience”.<sup>100</sup> For either conclusion, he asserts that the opinion of the priests is normative, “regardless of whether the action concerned is lawful or unlawful”.<sup>101</sup> By Vitoria’s logic, because contemporary statecraft assumed so many permutations that could trouble the conscience due to injustice, nearly every policy decision requires the normative input of a cleric to ensure justice. Critically, not only does the Church possess the right to direct the conscience, but by exercising a ‘government of consciences’ over public persons, casuistry offers a viable methodology for the Church to prescribe justice in political and economic life. The very language inherent to political life, that “of natural law and *ius gentium*”, is “an instrument for the government of Christian consciences both within and outside confession” through casuistic counsel precisely because of the narrowness of the precepts of the natural law and the volatility of exercise of subjective *ius*, and the overriding necessity of justice in society.<sup>102</sup>

Thus, under Vitoria’s view of casuistry, casuists were “expected to know a great deal” about whatever topic was at hand, such as war, contracts, finance, or trade.<sup>103</sup> This is not to say that casuists needed expert competence, but as confessors and counselors, they required a sufficient degree of knowledge on a given matter to render a judgment on a just course of action that accorded with the natural law. Certainly, Vitoria was aware that several of his students were on paths to becoming “the future pastors of the Spanish Crown” just as he served Charles V.<sup>104</sup> The necessity of the acquisition of this knowledge by clerics further evinces Vitoria’s ‘theologization’ of any morally relevant affair. Similar to Carl Schmitt’s assertion that “any matter could be political”, for since any matter could have relevance to the conscience, “any matter could be theological, and thus fall into

<sup>98</sup>L. Nuzzo, *The Law That Wasn’t There: The Political Theology of Ius Gentium - The Expansion of Spain, 1524-1559*, «The European Journal of International Law», 32/3 (2021), pp. 958-959.

<sup>99</sup>F. de Vitoria, *De indis*, cit., intro, p. 237.

<sup>100</sup>*Ibid.*

<sup>101</sup>*Ibid.*, p. 238.

<sup>102</sup>M. Koskenniemi, *Uttermost Parts*, cit., p. 210.

<sup>103</sup>*Ibid.*, p. 198.

<sup>104</sup>J. E. Nijman, *Ius Gentium et Naturale: The Human Conscience and Early Modern International Law*, «Amsterdam Center for International Law», 32 (2020), p. 4.



the remit of the theologian”.<sup>105</sup> For as many possible permutations of the exercise of the subjective *ius* faculty, there are equal, if not more possibilities for the commission of sin or injustice, and thus the necessity to ‘theologize’ any matter to expand the scope of the Church’s jurisdiction –and clerics’ knowledge– over the conscience to forestall the commission of sin and prescribe the execution of justice.

Therefore, Vitoria’s ‘theologizing’ prescription for a multifaceted casuistry for the exercise of the faculty of subjective *ius* bears significant ecclesiological fruit. While the Church is autonomous from the temporal power and has exclusive jurisdiction over the conscience, it is “not correct to think of civil and spiritual powers as two disparate and distinct commonwealths”, but rather as a unified Christendom.<sup>106</sup> To this point, Vitoria draws an analogy, noting that “human happiness is imperfect and is ordered to supernatural felicity, just as the craft of armory is ordered towards soldiering”.<sup>107</sup> This is not to posit a theory of instrumentality. Rather, it demonstrates that temporal power is “conformable” to spiritual power for the sake of beatitude. To the same point, in the course of policy-making, the casuist does not ‘instrumentalize’ civil policy to produce the best possible temporal outcome for the Church, but rather indirectly shapes civil policy to avoid evil for the sake of temporal happiness, and thus contribute to the happiness of the whole “Christian commonwealth” which has spiritual and temporal “offices, purposes, and powers [that are] subordinated and interconnected”.<sup>108</sup> Any commonwealth, spiritual or temporal, must be directed to “temporal happiness”, which hinges upon the security of justice in society, “enabling them to achieve heavenly bliss”.<sup>109</sup> For Vitoria then, casuistry not only expands the Church’s moral-theological cognizance, but by enabling it to prescribe just actions conducive to happiness, secures a vision of Christendom where there is “one true Church” and “many commonwealths” ordered towards supernatural happiness.<sup>110</sup>

<sup>105</sup>M. Garcia-Salmones, *The Disorder of Economy? The First Relectio de Indis in a Theological Perspective*, cit., p. 457.

<sup>106</sup>*DPEPr*, q. 5, a. 6, p. 90.

<sup>107</sup>*Ibid.*

<sup>108</sup>*Ibid.*, q. 5, a. 6, p. 91.

<sup>109</sup>S. Mortimer, *Reformation, Resistance and Reason of State*, Oxford University Press, Oxford 2021, p. 92.

<sup>110</sup>*Ibid.*, p. 89.

## 5 CONCLUSIONS

There are two main points about Vitoria's rearticulation of the concepts of *ius*, *dominium*, and *ius gentium* in the contexts of early modernity. First, recognizing the insufficiency of objective *ius* for his analysis of the *divisio rerum* and the Conquest of the New World, Vitoria utilizes the heuristic of *pura natura* to delineate between actions prescribed or proscribed by natural law and those actions not prescribed or proscribed but merely permitted by natural law. In turn, he asserts that those actions merely permitted by the natural law originate from man's deliberative exercise of reason and will towards non-necessary actions, the faculty of subjective *dominium-ius*, thereby accounting for the *divisio rerum* and its political-economic consequences, such as private property and independent states. Vitoria subsumes these actions under the positive, cosmopolitan *ius gentium*, which "governs all inter-human relations prior to and outside the laws of particular sovereign states", binding in conscience reciprocal respect of subjective *iura* to maintain the justice and precepts of the natural law.<sup>111</sup>

Second, as a consequence of the merely permissible character of subjective *ius* and the necessity of the spiritual power, Vitoria expands the Church's jurisdiction over conscience through moral casuistry to direct the use of subjective *ius* in political-economic contexts. The expansion of power over conscience through casuistry represents not only a means for Vitoria to recapitulate the spiritual power in early modern circumstances but a means for him to attribute to the Church a normative role in prescribing the commission of just actions by individuals both for the sake of temporal peace and for the sake of maintaining the unity and obedience of Christendom. Furthermore, Vitoria's theory of subjective *ius* and *ius gentium*, together with his expanded moral casuistry, lays the foundations for his articulation of the *potestas indirecta* of the Papacy.

Taken together, these points demonstrate the dynamism of subjective *ius*. It is a faculty that not only accounts for the origin of postlapsarian political and economic life but also functions as a principle of legal subjectivity in temporal and spiritual contexts. Additionally, Vitoria's expansion of the Church's authority over the conscience is "an attempt to build a complete system of norms that would be able to integrate the new balance of power and the competing jurisdictions of political and religious authorities, Church and state, conscience and law", anticipating conflict on the question of who or what can normatively influence politics.<sup>112</sup> In turn, Vitoria influenced not merely all subsequent early modern Scholastics in the Tridentine and post-Tridentine periods, but also the eventual Scholastic anti-Machiavellian reaction, which would target Machiavelli and his

<sup>111</sup>A. Brett, *Changes of State*, cit., p. 13.

<sup>112</sup>S. Mostacio, *Early Modern Jesuits between Obedience and Conscience during the Generalate of Claudio Acquaviva (1581-1625)*, Routledge, New York 2016, p. 156.

inheritors such as Paolo Sarpi, Alberico Gentili, and Jean Bodin, who combatted the influence of the Church in the sphere of the conscience, believing it detrimental to the integrity of politics. As Gentili once chided when singling out Vitoria's application of casuistry to warfare, "*silete theologi in munere alieno!*".<sup>113</sup>

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<sup>113</sup>M. Traversino Di Cristo, *Against the Backdrop of Sovereignty and Absolutism: The Theology of God's Power and Its Bearing on the Western Legal Tradition, 1100-1600*, Brill, Leiden 2022, p. 169: "Silent, you theologians, in foreign walls!".

