Leonardo Polo's Rectification of the Foundations of Legal Modernity. The Theology of Dominion of Francisco de Vitoria

Daniel H. Castañeda y G.
Panamerican University (Mexico)
danielhcastaneda@yahoo.com.mx

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ABSTRACT: In the following study I will analyze a core aspect of modern legal thought, an aspect which can be rectified by means of the philosophy of Leonardo Polo: the doctrine of dominion of goods (property) of Francisco de Vitoria. Dominion has historically been pre-eminent in the legal order, and in the case of Vitoria it acquires a special relevance, as one of the great constructions of modern legal thought, the influence of which is still felt in the 21st century. In order to introduce my discussion of Vitoria's teaching I first perform an historical-legal analysis of dominion as it figures in Roman jurisprudence, which will provide a contrast with Vitoria's theory of dominion. This contrast will permit a study of the foundations of Vitoria's approach, foundations which are not primarily based on a theory developed with a basis in the experience acquired in the defense of the dominion of goods in the courts. Rather, they are based on a certain way of understanding theology. This is where Polo's philosophy allows us to correct the foundations of Vitoria's approach, and thereby to correct those of the entirety of legal modernity. Finally, the convergence point of the theory of knowledge and transcendental anthropology –as well as theology (topic) and the personal intellect (method) –is employed both as an interpretative paradigm for this stage of the history of law, and as the cognitive light for understanding the focus and the method of jurisprudence. The path blazed by Vitoria, locating the human person (*esse hominis*) as creative method of the *ius*, will find in Polo a solid foundation.

KEYWORDS: Theology, Human person, Francisco de Vitoria, Leonardo Polo, Law of property.

1. APPROACH

Francisco de Vitoria's proposal regarding the dominion of goods was developed at a moment which saw the ascent of the economic model that would ultimately evolve into bourgeois liberalism. In this model, it is a fundamental necessity to free property from feudal entanglements by considering it to be an individual natural right, so that economic traffic may be secured and streamlined.

Vitoria worked at the universities of Paris and Salamanca, both of which were influenced by nominalist teaching. This doctrine was not the primary factor responsible for the "abstract conception" of property, or its grounds and determinations. As far back as the classical world there was a *breeding ground* which fostered the substitution of knowledge of extramental reality for the *knowledge of propositions and of the terms* in which that knowledge is expressed. This meant that the true knowledge of what fits (*ajusta*) the relations would be less reality and more proposition. In any case, the abstract conception of property was the result of a process that took centuries, and which was principally caused by the inability of First Scholasticism and its sources[1] to provide a response to the new challenges arising from such paradigm-changing phenomena as the scientific revolution and the discovery of America and its consequences.

The first rectification that can be applied to Vitoria's doctrine of dominion can be drawn from the history of law, which teaches that it is not easy to come to a definitive definition of an institution. Rather, the content of each one changes together with economic, social and political conditions. In the case of property we can note briefly that the term *mancipium*, in the archaic period of Rome, designated a power of a paterfamilias over specific things or goods in a concrete context. Over time, and with further social and economic development, the

[1] Leonardo Polo holds that Aristotle substitutes the syllogism for the operation of founding, so it would seem that the problem dates back to Greek times. *Curso de teoría del conocimiento*, Pamplona, Eunsa, 2ª ed., 1999,41-2; 77. Idem, *El conocimiento del universo físico*, Pamplona, Eunsa, 2007, 233.

term *dominium* developed, a term which also presupposed specific relations of the paterfamilias, enforceable (*oponible*) *erga omnes*, with determined types of things. In the Late Antique world there appears a series of terms in addition to that of *proprietas*, such as *firmiter possidere*, *securus possessor*, *iure domine possidere*, etc., which developed over the course of various epochs of Roman history (Diocletian, Constantinian and Theodosian). These terms *did not precisely delimit* dominion from possession, which permitted the proliferation of limited *real rights* which only conferred certain powers over things. In the world of Justinian we can distinguish *possessio* from *proprietas* and from *dominium*, which tended towards a full *potestas* over the thing; this fact distinguished them from the proliferation of limited real rights.[2] During the Middle Ages and the Modern era, the transformation of dominion accompanied important historic changes, especially economic change.[3] The doctors of *ius commune* interpreted the notion of dominion based on their experience of tribunals, albeit sifted through logical schemas. Even so, their conclusions are not deductions from conceptions about the human being or nature, but stem from the study of classical sources, from their experience in the university and from the treatment of cases in the courtroom, in order to extend the notion towards new forms of usage.[4]

What I have presented up to now shows how "rights" (*derechos*), over the course of history, have been highly "elusive", since in a given place and time they have certain characteristics, but in an instant they

[2] Margarita Fuenteseca, *La formación romana del concepto de propiedad (*dominium*,* proprietas *y* causa possessionis*)*, Dykinson, Madrid, 2004, 172-81.

[3] The reader can also consult the writings of Paolo Grossi, in particular, *Il dominio e le cose: percezione medievali e moderne dei diritti reali*, Milan, Giuffré, 1992.

[4] The work of the commentators—up through the end of the 15th century—is explored by Emilio Bussi, in *La formazione dei dogmi di diritto privato nel diritto comune*, CEDAM, Padua, 1937, t. I., 13-19. This can be contrasted with the treatment of this issue by the jurists—beginning with the reception of *ius commune* and continuing through the 17th century—in Helmut Coing, *Derecho privado europeo*, Madrid, Fundación cultural del notariado, 1996, t. I, 369-79. Here the change in trend is clear, in accord with the world Vitoria lived in.

can change. Finally, it is not easy to establish *an absolute starting place* in order to resolve controversies regarding the use of goods. In order to theorize about the administration of justice (i.e. giving each person their *ius*) we will need to investigate the capacities that permit the human person to know the obstacles to the use of things and resolve them in order to safeguard human coexistence and subsistence.

Thus, before establishing the *definitive content* of a right and constructing a system on that basis, one needs to know what a good is, and how it is susceptible to being used in a concrete context, so that it becomes possible to resolve a controversy between people about its use. In addition, one needs to know which cognitive acts know this good, the conflicts that that good produces, as well as their solutions. This implies, therefore, the development of the doctrine of the theoretical knowledge of the good, followed by practical knowledge of it. Of course, this cognitive objection does not get in the way of a *typification*[5] or list of rights that are established in written collections. But these types –be they jurisprudential, legal, doctrinal or customary –follow extramental reality, i.e. they follow the manner that people of one place and time have of carrying out determinate acts of usage of determinate goods.[6]

In this study I will offer a brief look at the doctrine of dominion in the Roman classical period, in order to be able to contrast it with the theory of dominion in Vitoria. This contrast will provide a guide for

[5] On this topic see A. Guzmán Brito, "Tipo función y causa en la negocialidad", *Revista de derecho de la Pontificia Universidad Católica de Valparaíso*, 41, (2013), 39-67. Guzmán does not propose his typification based on philosophical notions; rather, he proposes it based on a vast historical experience.

[6] These types cannot be established *a priori*, and even less in a utopian manner; rather, they are the result of acts of knowledge, both of the actions that people repeatedly perform in order to attain benefit, and of the goods that this benefit is obtained through. In addition, one must know the circumstances (a determinate ecology, technology and social organization) in which the action of use takes place. Based on the knowledge of these realities, practical reason develops the types, the same ones that are expressed in texts by means of words. It is possible to reduce all the ways that people use goods to this typification, so that judges can resolve their cases, reducing them to one of these types.

discovering how Vitoria came to develop his theory, and which bases he employed. I am not engaged in a study of comparative law; instead, I am investigating the origin and ground of the Vitorian doctrine of dominion, as analyzed through the binomial of the theory of knowledge and transcendental anthropology. This investigation has a certain importance, since in Leonardo Polo's words, when one forgets the *correspondence of what is thought with thinking itself* one interprets realities from outside, as though they were placed out there and were foreign to the knower. Taking this position leads to a Gordian knot of aporias. Notions become hypostatized and remain out of control. Thus it is not until one knows how to think a notion that one knows what reach it has, since one can only *make an affirmation* about something if one knows how those affirmations are thought.[7] From this perspective we can perform the second rectification of Vitoria's doctrine about dominion.

This itinerary of rectifications is fundamental in the case of dominion. It is hard to know whether the good (the usable) –which one seeks to obtain from the dominated thing –is true, if one does not know how it is *known theoretically*. Without that knowledge one will not *attain practical knowledge* either, since he or she will not know what acts are necessary for achieving that benefit, nor find a solution when a conflict arises about it.

2. DOMINION IN ROMAN SOURCES[8]

The jurisprudence of the past, of ancient and medieval times, had the propensity to employ *less polished rational arguments* in the for-

[7] L. Polo, "Conversaciones sobre física: el movimiento circular", in J. A. García González (ed.), *El conocimiento de lo físico según Leonardo Polo*, Cuadernos de Pensamiento Español n. 45, Servicio de Publicaciones de la Universidad de Navarra (SPUN), Pamplona, 2011, pp. 108ff.

[8] Certain other manuals can be consulted for a study of dominion in Roman law, including the following: Álvaro d'Ors, *Derecho privado romano*, Pamplona, Eunsa,

mulation of those notions. There were arguments presented during trials which were also found in doctrine, specifically at the moment of establishing and defining the *legal dogmas*[9] that serve to resolve conflicts. Nevertheless, the character of the arguments was very different.

One of these dogmas or doctrinal notions developed by Roman jurisprudence,[10] perhaps the central notion, was *dominium* or dominion. I am not seeking to perform a specialized study of the history of property and dominion in Rome; rather, I will merely sketch a profile[11] of the institution, so that it can be understood prior to engaging with Vitoria's doctrine. This will allow me to briefly reflect on its cognitive ground.

The origin of dominion was in the realm of the family, which was a religious-ancestral unity of kinship, above all of an economic-agrarian character. In this context we encounter *mancipium*, a power over everything that makes up a family: people, slaves, animals and things. These goods were transmitted by *mancipatio*. The *mancipium* would thus be a *partial aspect of* the *paterfamilias's* sovereignty over the people and things of the *domus*. Although we lack a term to designate this power over things, in the late Republican era (the 2nd and 1st centuries BC) these power relations were brought together in the term *dominium*. With the increase in economic development, and Rome's transition to a Mediterranean-wide empire, the *pater* was recognized to have

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2006; Max Kaser, *Derecho privado romano*, Madrid, Reus, 1968; Gumesindo Padilla Sahagún, *Derecho romano*, Mexico, McGraw-Hill Interamericana, 2008.

[9] In broad strokes, the basic concepts of the legal system are what make it integrate or cohere; it is this system that makes possible the interpretation of the norms. Francesco Galgano, *Dogmi e domatica nel diritto*, Padova, Cedam, 2010, 12ff.

[10] This legal system was designed by jurists. It was they who developed the criteria contained in the norms, which were binding criteria for the judges in their resolution of conflicts. A. Guzmán Brito, "La seguridad y certeza jurídicas en perspectiva histórica", *Revista de estudios histórico jurídicos*, 8, (1983), pp. 57ff.

[11] Aedo Barrena, Cristian, "*Las fuentes romanas del concepto de dominio en el código civil chileno*", http://www.instituta.cl/wp-content/uploads/2013/08/Prof.-Cristi%C3%A1n-Aedo-Barrena.pdf August 19, 2015; basically paragraphs 2 and 4.

a full capacity for using things and their splitting up into different acts. This configuration of *dominium* was associated with the development of procedural law, since with the promulgation of the new system of procedures in the second half of the 2nd century BC, the *actio legis per sacramentum in rem* gave rise to the new *actio in rem*, which presupposes the full configuration of *dominium*.

Thus, Roman jurisprudence understood dominion as an *enforceable possibility (posibilidad oponible)* for everybody, *erga omnes*, i.e. to have and make maximum or full use of a good.[12] This possibility depended on the actions bestowed by the judges, who founded their decision or *ius* on the recognition that the *dominus* would exercise his act because he had effectively acquired dominion, i.e. that *enforceable possibility*. D'Ors called dominion *the position of full usage*, that is, the exercise of a relationship of force or power which is licit to use on the thing.

This power unfolds into four acts: possession (*possidere*), disposition (*habere*), use (*uti*) and benefit (*frui*). The last three *are a reflection of the possible ways of using the thing*, at least in that moment.[13] In turn, if new channels of use are discovered, more acts might be included in dominion, while other acts would be eliminated as obsolete or else transformed.

In possession, *possidere*, we are dealing with a *naturalis possesio* or "mere possession", which is presupposed in the other acts of usage. This *mere having* implies a physical or material relationship with a thing, and thus would be a factual phenomenon. Despite the reality of

[12] A. Guzmán Brito, *Derecho privado romano*, vol. I, Editorial Jurídica de Chile, Santiago, 1996, 450ff.

[13] The unitary dominion exercised in those four acts had various classes, such as *ius quiritarium*, *ius bonitarium*, etc. Nonetheless, a distinction was made, not according to one's acts, but formally: in accordance with a host of circumstances within which the subject exercises that dominion. These circumstances included whether one is a Roman citizen, or a pilgrim, whether the good was acquired in one or another way, etc.

possession, the jurists discovered that it involved socio-economic consequences, and thus became the object of their resolutions, that is, of their legal opinions: of the *ars iuris*. Thus, the possession in fact that the *dominius* employs will be *possesio civilis* once it is protected by the jurists.

These acts are exercised on goods that are not consumed in their use, since the recognition of the thing as belonging to somebody is rooted in its identifiability. A ton of wheat was not identifiable, so that in the case of proving whether payment for it was owed to somebody, one solicited payment for it or else its substitution by a similar species, quantity or quality. In addition, dominion did not, of itself, offer limitations; rather, they were exterior, deriving from public norms or from the so-called *real rights* recognized by the judges. At the same time, dominion of the thing only ended if the thing was abandoned by its owner or it was acquired by a third party. Finally, in the jurisprudence there are various classifications of the modes of acquisition; nonetheless, only the distinction between solemn modes and real modes has any practical interest.[14] The solemn modes are those which consist in a ritual that follows a prescribed format, while the real modes are those in which dominion derives from the possession of a good.

This is, broadly speaking, the way that contemporary scholars (based on the study of fragments of classical jurists, i.e. those from the 1st century BC and the 1st and 2nd centuries AD) characterize dominion. This is a question of Roman dogmatics about dominion. On this basis we can come to certain conclusions that allow us to advance towards Vitoria's views.

First, dominion is not a historical continuum, which appears in a particular moment, with a term that designates it, and which develops over the course of history in a linear form, and which develops or loses characteristics or which is divided into classes and types. Dominion is, rather, the act of the human will in a determined moment, directed to the full and exclusive use of something seen as a good in that moment,

[14] The other classifications of the modes of acquisition have, it seems, little functional efficacy, since they do not fully explain the phenomenon of dominion.

which is denominated with a term or word. That is, this voluntary act arises as a consequence of a specific manner of making use of something that is seen as a good. In this act of will the cognitive faculty is involved, which conceives the good theoretically. This permits its practical use as a result of the exercise of the sensitive faculties in interaction with the circumstances, specifically ecologies, technologies and social circumstances. It is in this context in which the human being of that historical moment comes to know a good theoretically, with all its "aspects", and is able to desire it and obtain it. When these circumstances change, it will be possible to exercise new acts which know the good, which give way to new concepts of the good with new and diverse aspects. These may rescue aspects of the good of the past, which unleash new kinds of necessities and new ways of using it, giving rise to a new term that will designate it.

Second, in the theoretic-dogmatic construction of dominion, jurists speculate on real facts and necessities that people brandished in *trials that really took place*. These speculations are expressed in their writings, whose words lead to those realities or to real relations of use. What has to be emphasized here is that the argument was a rational exercise seeking to find out what reality is. They certainly cite the authority of other jurists or of the laws, but not as a strategy of force in order to justify the construct of ideas. Rather, it is to understand and resolve the problem by way of knowledge of the true good. Argumentation was a dialectical game oriented towards knowledge of that true good, and its attainment. The writings of these jurists were transmitted to the jurists of later eras, who took advantage of them with the same purpose in mind.

A couple of examples[15] extracted from the Roman sources can help to make it clear why the character of this argumentation was very dif-

[15] H. Coing, *Derecho privado europeo*, Madrid, Fundación cultural del notariado, 1996, t. I, 369, provided some basic sources for understanding dominion in the Roman era: *Digest* 5.3.38; **6.1; 7.6; 8.5**; 10,1,4,2; 12.1.19; 13.6.5; 14.5.5.1; 22.1.45; 28.7.27pr.;

ferent. The first is the text of the *Digest* 6.1.43, coming from the *Commentary on the Edict of the Praetor* by the jurist Paulo, who lived towards the end of the 2nd century AD.

This fragment is the result of direct knowledge of the problems that Paulo was asked about this specific topic. Even though it was a generic response, it is the result of a slow process of analyzing a number of concrete experiences. The purpose that is proposed is clearly the protection of the use of a specific burial ground, of others in similar circumstances, and of the monuments that are frequently built on them. Neither the rocks that make up the monument nor the terrain itself distract from that function. The fragment states that whatever is connected to a *res religiose* becomes *res religiose* as well, i.e. an accession. However, what is most important is the declaration of the consequences that produce the fact that the terrain and the monument possess that *ius*.

These *religious things* are the goods destined for the cult of the manes or lesser gods; principally they are burial plots, which are not subject to commerce. There thus exists a *ius sepulchri*, which is the position that the burial plot has, and which destines it to be a sepulcher for those that have the authorization of the owner. The transgression of this position or *ius* gives rise to an action *in factum* that protects the owner if someone inters a body in the sepulcher he owns. In addition, this *ius* can be inherited, and creates a *servitude via* in the surrounding plots so that it can be visited. Furthermore, whenever someone buries a body in a plot, there exist actions for monetarily indemnifying the owner, since this burial means the plot cannot be sold, thus causing a loss for its owner. Therefore, it is not a mere "right to a sepulcher", as though it were given personality and could be granted rights, such as social assistance or the education of a sepulcher or its monument. Rather, it is a position which benefits the sepulcher, but in the final analysis benefits its owner.

41.1; 41.2; 49.17.19.3;50.16.25; *Codex* 3.31.1.1; 3.32; 3.34.8; 3.34.9; 4.19.2; 4.19.16; *Instituciones* 21.1.35; 4.17.2.

The response of the jurist is based exclusively on the protection of the economic equality of the sepulcher's owner. This is the *implicit foundation for the response*. There is no appeal to any foundation other than the protection of the use of this good, which in the final analysis is the protection of the sustenance of persons, of their welfare, and of that which contributes to the fullness of their lives. Although this jurist does not do so, he could appeal to other sources (not just of other jurists), in whose texts one encounters keys to understanding this good and the owner's manner of using it, thereby contributing to clarifying them.

Another example is from the *Digest* 6.1.59 by the jurist Salvius Julianus, dating from the second century AD, and found in his book *ad Minicium.*

This fragment is about a renter who put windows and doors in his residence, which after a year were removed by the landlord. Julian was asked whether the renter could sue to reclaim them, to which he responds in the affirmative, since he held that when those furnishings were incorporated into the immovable property (the residence) their ownership passes to the landlord, but when they are abandoned they return to the dominion of those who put them there. As a result the renter can reclaim them, since he is once again the owner of the doors and the windows.

As with the previous fragment, this one is a generic response to a certain type of problem, but is also a result of the repeated observation of similar occurrences. For the economic protection of goods, and ultimately of persons, the jurist holds that the solution is that which permits the best and greatest use in that place and time, where these objects are costly and rare. It is not a solution formulated on the basis of eternal and atemporal maxims, but rather is based on circumstances and facts that are definable and real, such as the specific situation of the renter and of the world in which he lives. This is the foundation for the decision: it is not based on theories about people and society; rather, it is a reaction to the concrete situation of the person and his circumstances. This is the argumentation used in jurisprudence.

3. DOMINION AND PRIVATE LAW IN VITORIA

Given the limitations of space, I must pass directly to the analysis of the *Commentaries* on II-IIae, q. 62, art. 1[16]. Here I will skip a biographical analysis as well as any contextualization of Vitoria's thought, which is already the subject of an ample bibliography.[17] These conditions mean that this article can only be an introduction, since it narrows the focus of study to the just-cited question in the *Commentaries*, leaving aside other works by this author. My topic will be dominion in itself in Vitoria, to the degree in which it reveals its foundations, so that a rectification can be offered that is based on the theory of knowledge and of transcendental anthropology. I do not seek to write a history of dominion, nor present a dogmatic explanation of dominion in Roman law or in Vitoria; rather, I will discuss the manner in which Vitoria understands dominion, contrasting him with *iurisprudentia* in order to propose a rectification to the mode of knowing it.

The principal author of treatises on the notion of dominion in Vitoria's thought is Alejandro Guzmán Brito, who not only has studied Vitoria, but has also studied those who preceded him as well as those who came after. This has permitted Guzmán Brito to meticulously analyze Vitoria's legal thought and understand his concepts in the light of history, of his predecessors and his relations with his contemporaries, so that he can establish with greater precision the significance of Vitoria's legal doctrine. In addition, a good part of the articles contained in the book edited by Juan Cruz are fundamental,[18] in particular that of Teodoro López.[19] There are also other articles that deal with

[16] *Comentarios del Maestro Francisco de Vitoria a la Secunda Secundae de Santo Tomás*, edition of V. Beltrán de Heredia, Salamanca, Editorial San Esteban, t. III, 1933.

[17] Coujou, J-P., e I. Zorroza, *Bibliografía vitoriana*, Pamplona, SPUN, 2014.

[18] Cruz Cruz, Juan, *Ley y dominio en Francisco de Vitoria*, Pamplona, Eunsa, 2008.

[19] López, Teodoro, "Propiedad y dominio en Francisco de Vitoria", *Ley y dominio en Francisco de Vitoria*, Pamplona, Eunsa, 2008, 71-91.

dominion in Vitoria, but they are more general or do not specifically deal with dominion on its own.[20]

Although Vitoria understands dominion in three ways,[21] the one that interests us here is the third, i.e. *the faculty of using a thing in accordance with law or right (directum)*. In turn, this is grounded in the manner in which he understands *ius*, as *what the law permits*. From this understanding the *law-faculty* is deduced, also called *subjective law.*[22] This means that *ius* is a legal faculty, i.e. a power established in the laws. In this sense, Guzmán holds that the *juridical core* of Vitoria is rooted in dominion, since the topic he was interested in was the linkage of the law-faculty *with dominion as a function of restitution*. In this way, in the *Commentaries* to II-IIae, q. 62 a.1, from number 9 through 53, he writes of problems with the faculties of dominion*, which the language of the law-faculty lends itself to directly*

[20] J. Brufau Prats, "La noción analógica del *dominium* en Santo Tomás, Francisco de Vitoria y Domingo de Soto", *Salamanticensis*, 4, (1957), 126-9; M. C. Añaños Meza, "La doctrina de los bienes comunes en Francisco de Vitoria como fundamentación del dominio en el Nuevo Mundo", *Persona y derecho*, 68, 1, (2013), 112-21.; IDEM, "El título de 'sociedad y comunicación natural' de Francisco de Vitoria. Tras las huellas de su concepto a la luz de la teoría del dominio", *Anuario mexicano de derecho internacional*, 12, (2012), 553-73; V. Aspe, "Del Viejo al Nuevo Mundo: el tránsito de la noción de dominio y derecho natural de Francisco de Vitoria a Alonso de la Veracruz", *Revista española de filosofía medieval*, 17, (2010), 143-55; R. Hofmeister Pich, "*Dominium* e *ius*: sobre a fundamentação dos direitos humanos segundo Francisco de Vitoria (1483-1546)", *Teocomunicação*, 42, 2, (2012), 381-92; A. Chaufen, "El pensamiento católico medieval sobre los bosques, los animales y el subsuelo", *Revista Cultura Económica*, 31, 86, (2013), 9-16.

[21] The first is like *preeminence* and the second is the Roman meaning of the *dominion of bodily things*. *Commentaries* on II-IIae, q. 62 a.1, 6-7.

[22] There is ample bibliography on this issue, but its origin can be found in: A. Guzmán, "Breve relación histórica sobre la formación y el desarrollo de la noción de derecho definido como facultad o potestad (≪derecho subjetivo≫)", *Ars iuris salamanticensis*, 1, (2013), 69-91; idem, "Historia de la denominación del derecho-facultad como subjetivo", *Revista de estudios histórico-jurídicos*, 25, (2003), 407-43; idem, "'in quaelibet re, tantumdem est de iure quantum de entitate' la concepción ontológica del derecho-facultad a fines de la edad media y en la época moderna", *Revista de estudios histórico-jurídicos*, 29, (2007), 271-331.

and congruently, with the result that his doctrine is technical and dogmatic.[23] The guiding axis of the discussion is, firstly, determining if someone can be an exclusive owner, in response to which Vitoria carries out an exercise of proposing and counterproposing theses. For my part, I seek to maximally synthesize this exercise, following its order, but in such a way that one can understand what dominion is, thus permitting an understanding of how it is known.

Vitoria begins by attributing to God a dominion over all things and all creatures, because He is their creator. *God is the owner of everything*, but since dominion is the power to use things according to law, He cannot cease to dominate things; He could choose between conceding dominion over all things to humanity, or else conceding just their use.

Just as all powers come from God, with dominion being a power, *all dominion of the human being over things is conceded by God to each person individually*.

God conceded dominion over everything created to all human beings. From the fact that human beings can use things, we can infer that they have a right to them, since dominion is a faculty of using things. This is natural law, since it is a natural right for human beings to conserve themselves in being; and if dominion is for using and obtaining sustenance so as to conserve oneself in being, then dominion is thus part of natural law. The natural foundation would thus be utility.

This is also a *dominion in common*. The human being was not owner of all things for all possible uses, since dominion does not include all uses: *some are excepted*. It is thus in the state of nature that anybody can be owner of any thing, and could even abuse those things *with the limit of not harming oneself or others*.

Original sin did not deprive human beings of dominion; rather, they continued to be owners in common.

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[23] Guzmán Brito, Alejandro, *El derecho como facultad en la neoescolástica española del siglo XVI*, Madrid, Iustel, 2009, 6-61.

The division of things was not rooted in natural law, which is invariable, and as a result continues to prescribe dominion in common. Nor was it caused by divine positive law, since it was not present in the Scriptures. Rather, *the division of things was introduced by human or positive law*. Nonetheless, this division would be against *ius naturale*, and as a result things would continue to be held in common. But community of property was never ordained by *ius naturale*; rather, it was conceded by God, attentive to the fall of original sin. As a result, on this point *ius naturale* is *permissive*, which means that the division is licit, without any revocation of the *ius naturale*.

This division or sharing was performed by all human beings by common consensus, this being more probable than that Adam had done it, or some ruler chosen by universal consensus. If there was, in common consensus, a minority that opposed a particular action, *the majority could impose its decision.* In matters of common utility*, it is by natural law that the majority may impose its views,* in order to keep the peace.

The division could have been made *by means of the assignment of specific goods to everybody, or else by simple occupation or possession*, with everything depending on utility. What was most probable is that this occupation occurred *through a virtual and interpretative consensus, faced with the use and repeated cultivation of occupied lands*. This is the principle of formation of *ius gentium*, which is formulated based on custom.

The moment of the division of things would occur *after original sin*, because afterwards *human beings focused more on their own possessions than on things held in common*. After the first division of things, *anyone could take possession –for their utility –of anything still undivided*, so that *in the present day one can take possession of undivided things*, such as things obtained by hunting and fishing, or by sailing in seas and rivers.

With these divisions made, *the acquisition of property will take place by the choice of the seller and by authority of the ruler*. This latter is because human beings, their persons and goods, *belong more to the*

republic than to themselves, such that *the one who leads* for a just cause *may make use of particular goods*. On the one hand, the power of the prince comes from God, who provides the human being with the capacity to take possession of goods. On the other hand, the prince is chosen by the will of the citizens, a choice that confers the power to take possession of their goods and to promulgate laws. This is why *the republic can nullify the act* of the transmission of dominion, even if the owner wants to transfer it, just as it can transmit the goods of the subjects themselves. Prescription is also included in this same principle, since it is a legal mandate of the prince.

Thus, having reduced the Vitorian theory of dominion to these few "sentences", it would be possible *to systematically construct* –through dominion –a large part of the institutions of private law. Guzmán, upon analyzing the legal institutions that derive from dominion, states that by following the spirit of Vitoria, it would be possible to construct –if not everything –at least a large part of civil institutions.[24] This would be by making *deductions* based on the principle of dominion.

Once the Vitorian theory of dominion has been established, we can seek to discover its cognitive foundations, that is, how one can know that human beings exercise the dominion of things in this way. What I will attempt to determine in what follows is why Vitoria carried out this apparently generalizing construction[25] of the legal system. The Sacred Scriptures play a very important role in this, since it is from the Scriptures that Vitoria took a good part of his *finely honed rational argumentation*.

[24] Guzmán Brito, Alejandro, *El derecho como facultad en la neoescolástica española del siglo XVI*, Madrid, Iustel, 2009, 60-1, 79ff.

[25] This term is used in agreement with Polo's understanding of it. As an introduction to its meaning, cf. Leonardo Polo, "Indicaciones acerca de la distinción entre generalización y razón", *Razón y libertad. Homenaje a Antonio Millán-Puelles*, Madrid, Rialp, 1990, 87-91.

4. THE KNOWLEDGE OF DOMINION IN VITORIA

The notion of dominion in Vitoria is very different from the Roman and medieval conceptions. The difference is not just formal, as a systematization would be; rather, Vitoria seems to begin with *dominion as being a mental object*. On the basis of this "principle", he continues making more mental objects linked one to another, by means of logical and rhetorical tools, and with the aid of ideas taken from sources like the Holy Scriptures and Roman texts. Here one notes the stamp of legal humanism,[26] which broadened the circle of sources to include the so-called *juridical principles*, poets, philosophers and ancient historians. Nevertheless, this broadening is not a guarantee that these texts would be a cognitive light for understanding the problems of a contested reality for which a solution is sought.

Thus Vitoria, when explaining *dominium*, begins with certain presuppositions, rather than employing the conclusions extracted from real cases handled by the courts. This is probably due to the stamp of his theology, as I will later discuss. Apparently, the cognitive light emitted by Revelation was not appropriately employed, with the result that there was a certain clash between reason and faith. Vitoria alludes to this in his *Commentaries* on II-IIae, q. 62 a.1, n. 38, where it seems as though reason was side-stepping the "temporal and contentious", in order to leave the field of *human consciousness* as the exclusive patrimony of faith. In turn theology, apparently without needing the support of reason, would illuminate cognitively and determine whether contracts, in particular civil contracts, are valid or not.

In his profile of *dominium* he reveals that he borrowed notions from Thomas Aquinas, Gerson, Summenhart, Scotus, Maior etc. These notions were apparently not used in order to provide light for understanding a real phenomenon (related to the human action of using things in concrete situations). Rather, these notions were employed

[26] Klaus Luig, "Humanism", in *The Max Planck encyclopedia of European private law*, Oxford University Press, 2012, t. I. 344ff.

to provide armor for a construct of ideas. Certainly the activity of jurists and lawyers involves arguing in order to win, but what I seek to emphasize here is that in the Roman and medieval eras the arguments employed notions that were inferred from knowledge, albeit predominantly sensible, of the real and not from mental objects, as in the case of Vitoria, whose principles were deduced from theology. Thus, concluding that *ius* is the *faculty of using a thing in accordance with law or right (directum)* is the result of an exchange of general ideas and not of knowledge derived from experience in courts or the parliamentarian decisions that produce the laws or from the historical tradition.

Thus, his notion of *ius* is, instead, the result of *misguided thought, and not the result of a theory that is based on the experience of the jurisprudential development* of *ius*. From a reading of the majority of the secondary literature cited, we can conclude that Vitoria is the first to understand *ius* as associated with *dominium*, as the *power established in the law*. His predecessors, like Summenhardt, Gerson et al., do not take this road.

It is also fundamental, in agreement with the post-classical vulgar tradition of Roman law, to understand the term *ius* with the semantic content of *directum*.[27] Thus, the *straight line towards the just* is found more in obedience to the command *of God* –who can neither fool himself nor fool us – *who is known more through theology* and less in the troublesome, rational *ars iuris*. This *ars* demands knowledge of the highly technical responses of jurists, which involve knowing things, the human actions that use them, the circumstances, etc., through a series of cognitive operations that are hierarchically distinct, and into which error can enter due to the limitations of human beings.

Regarding the *objective* character of the foundations of the Vitorian doctrine of dominion, there is a certain anthropological drift. This confirms what we have said about *arming and armoring a construct*, since the rootedness or not of the law (*directum*)-faculty in a human ontological structure, is not the result of some knowledge of the being

[27] García Gallo, Alfonso, "*Ius* y derecho", *Anuario de historia del derecho español*, 30, (1960), 5-47.

of human beings, of their nature, of the acts and habits of their essence, etc. Rather, there is a certain lack of knowledge of real human beings and their substitution by an ideal human being, i.e. as known through *theological objective ideas*. In this sense, his refusal to attribute rights to animals and inanimate things is not due to their difference from human beings, which explains the need to employ a scripture-based argument, and use a *petitio principii*.[28] It thus seems that the concept of law in Vitoria is instead an objective-generalist construct, poorly connected to what is real. In addition, he was an author who had the propensity to employ the argument from authority.[29]

A brief analysis of some of his propositions regarding dominion will allow us to confirm this cognitive deficiency in greater detail, and will seek to find its roots.

The affirmation that *God gave dominion over the entirety of creation to all human beings* is taken from Revelation, specifically from *Gen*. 1, 26-31. This proposition is inserted into the context of how theologians dealt with creation and the order of things; indeed, some of these theologians were Vitoria's teachers, who believed God to be *dominus* of creation. This idea seeks to *express His most intimate being*: omnipotence and wisdom. *Divine dominion* would thus be *the model,* knowledge which the description and understanding of *human dominion* would depend on.

It appears as though Vitoria accepted this proposition as a *truth* which could be directly used in human praxis. However, what is problematic about this issue is that it deals with a proposition obtained through *the exercise of reason* which sought to explain a truth of the faith. This truth, in reality, is the matter (*tema*) for a cognitive level which is different from that which knows material things, their use and their availability for being possessed by persons. Of course the faith illuminates our knowledge of the human being and of creation, with

[28] Guzmán Brito, Alejandro, *El derecho como facultad en la neoescolástica española del siglo XVI*, Madrid, Iustel, 2009, 51-3.

[29] Idem, 56-7.

the purpose of aiding in human salvation. What is known by faith, however, is not so *easily unifiable* with the most minute material realities known by the faculties of the essence, in order to resolve a controversy about the use of things.

Finally, theology and in particular Revelation can illuminate the knowledge of the philosophical foundations of jurisprudence and of the knowledge required for developing highly technical responses that imply knowing things, the human actions that use them, circumstances, etc. However, this only can be achieved by a hierarchical distinction between methods and cognitive topics (*temas*), such that they allow knowledge of what each one knows; and it cannot be achieved by an amalgam that is the product of the violation of the axiomatics of the theory of knowledge.

The affirmation that *God conceded dominion of everything created to all human beings* is the point of departure for establishing that *God is the owner of everything*. But for a jurist it is very difficult to attribute dominion of the things He created to God, since dominion, human dominion, is exercised with a view to compensating for indigence, something that does not exist in God.[30] Although throughout Scripture we find abundant affirmations about God's government and the devotion that He has for his creatures,[31] it is difficult to find the scriptural foundation for the exercise on God's part of a *dominius* such as that dealt with by the Roman jurists, who give the word its original technical semantics. To this there is added the difficulty of knowing the "essence" of God directly, and thereby understanding the type of dominion that He exercises; rather, it is known through created things.[32] This task was undertaken by Aquinas, who, on the basis of the Roman

[30] The text of L'Italien Marcotte, C-E. sheds much light on the issue: *Forêts et propriétés*, Québec, Faculté de Philosophie Université Laval, 2011, 90-9, who follows the work of Renoux-Zagamé, M-F., *Origines théolgiques du concept moderne de propriété*, Genève, Droz, 1987.

[31] *Catechism of the Catholic Church* (CCC), 302-5.

[32] *CCC*, 36-8

notion of *dominium* (created things) developed by the jurists, was able to know something of God. Nevertheless, the theologization of jurisprudence as Vitoria intended it is perhaps responsible for his legal opinions being refractory to the practice of the courts, as Ezequiel Abasolo states.[33] This would mean that his notions will serve poorly for knowing goods and demarcating what corresponds to each person in the concrete action of usage.

It looks as though what was important to Vitoria was using arguments in order to uphold his thesis and not to resolve cases. He even employs the *Digest*, but not to drink from the knowledge of reality poured out there –and to be intelligent in the discernment of what corresponds to each person in a concrete case –but rather as support for his doctrinal construction. In the end one obtains a well-developed discourse, but it does not correspond with extramental reality. The words of Cruz are suggestive: "Vitoria *refines rational arguments*".[34]

The analysis could be extended to other Vitorian propositions about dominion, but it is not possible here to deal exhaustively with his decisions. With this brief analysis the only thing that has been highlighted is the character of Vitoria's legal argumentation.

As I mentioned above, other legal sources, such as the *Digest* itself –despite having the stamp of Justinian's compilers, and despite many of these authors being influenced by philosophy[35] –do not begin so radically with *objective* and generalizing notions; rather, they largely

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[33] Abasolo, Ezequiel, "Diálogos y desencuentros entre la filosofía y el derecho positivo: la teoría del dominio de Francisco de Vitoria y la normativa castellana", *Revista facultad de derecho y ciencias políticas*, 38,108, (2008), 163, wonders whether Vitoria's slight impact on the forensic writings of his time is due to his type of argumentation.

[34] Certainly Cruz uses this expression in the context of what is held in *De Indis*, but the fact that he wrote this in cursive draws attention. Juan Cruz Cruz, "Subjetividad. Un enfoque trascendental de Vitoria (1483-1546)", *Francisco de Vitoria en la escuela de Salamanca y su proyección en Nueva España*, Pamplona, Eunsa, 2014, 82.

[35] L. Winkel, "Le droit romain et la philosophie grecque, quelques problèmes de méthode", *Tijdschrift voor Rechtsgeschiedenis/Legal History Review*, 65, 3 (1997), 373ff.

form their doctrines on the basis of real cases of litigation.[36] In this sense, when they are dealing with dominion it is not a *dominion that is in the mind*, an objective dominion, but rather relations of dominion that subjects exercise upon something; that is, concrete cases conducted in the courtroom. In these jurists the cognitive foundation is strongly sense-based; indeed, it is the foundation of a relationship of dominion that is outside of the mind of the knowing subject. From this relation, with circumstances determined spatio-temporally, one can extract the consequences needed for constructing a dogmatics: i.e. that dominion is exercised by this or that person, or is exercised on this or that good, in this or that circumstance. However, we are not dealing here with a generalization-deduction on the basis of an abstract dominion that is supposedly supplied by Revelation.

The argumentation of Vitoria, albeit well elaborated and linked together, does not seem to be based on experience, at least that of the courtroom, since he was not a man who worked in the courts, but a theologian. In order to demonstrate the thesis that he wants to advance, he doesn't do it with a basis in the observation of cases of appropriation or domination of things in determined circumstances. Nor does he found his arguments on texts that are based on such observations. Instead, he does so with "theological" arguments, such as for example the constant appealing to the will of God as contained in Scripture; to the authority of authors such as Aquinas, Duns Scotus, Gerson, Summenhart and Maior, or directly to atemporal propositions such as *communis omnium possessio*.

In regards to this latter type, Vitoria frequently recurs to *ius naturale*. Nevertheless, because of the manner of invoking it, it seems that he is, again, using a recourse that tends to end the discussion; that is, it is an argument for winning that is unbeatable. In addition, the constant appeal to God is noteworthy: it presages *the comfortable use of*

[36] Max Kaser, *Entorno al método de los juristas romanos*, Valladolid, Publicaciones de los seminarios de la facultad de derecho, 1964, 15ff.

God in late iusnaturalism,[37] similar to Cartesianism, which employs God for the justification of the knowledge of reality, beginning with oneself. It is a curious fact that both Roman and medieval jurists do not appeal to God in their justifications of the operations of legal institutions.

This brief analysis also provides a clue for understanding and tracking how the cultivators of jurisprudence began to lose their connection with reality, and how this knowledge was substituted for by *finely constructed arguments*. That is, there was a moment when juridical authors ceased to understand the problems raised in cases as things that are extramentally real, to understand them by way of *generalizing legal or doctrinal propositions and terms*.[38]

Next I will *highlight some possible responses* to the questions raised in these paragraphs, which will mean relating how Vitoria came to know and develop his doctrine of dominion (the role of the theory of knowledge in the development of the doctrine of dominion) and on that basis implement the rectification with a basis in the highest conquests of the point of confluence between theory of knowledge and transcendental anthropology.

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[37] Francisco Carpintero, "La cómoda función de Dios en el iusnaturalismo otoñal", *Justicia, Solidaridad, Paz. Estudios en homenaje al Prof. D. José María Rojo Sanz*, Valencia, 1996, 41-58

[38] A first step in this direction was the transformation of *ius* as a position into *ius* as a situation, as described in Castañeda, D., "Requirements for the Study of Time and Action in Polo's notion of Law… and in Jurisprudence", *Journal of Polian Studies*, 1 (2014), 147-50. Nevertheless, in a reading of Polo's *Curso de teoría del conocimiento / Course of the Theory of Knowledge*, he notes that right from the beginning of philosophical speculation there has been no clear explanation of the knowledge of reality. The pre-Socratics were unable to give an acceptable response, nor could Plato; Aristotle makes the greatest advance, but throughout the *Curso* and in *El conocimiento del universo físico*, Polo proposes a number of corrections and broadenings of Aristotle's discoveries. The same issue is found in medieval philosophy, where Aquinas stands out; however, we must also substantially broaden and correct his theoretical notions and formulations. This is even more accentuated in modern and contemporary philosophy.

5. THE THEOLOGIZATION OF JURISPRUDENCE

a) Theology in Vitoria

The thought of Vitoria is part of a process Kurt Seelmann calls the "theologization of jurisprudence".[39] This began in the 16th century, and is characterized by a strong theological influence in legal thought. The detonating factors were certain socio-political changes: the discovery of America, which meant that Spain was confronted by new cultures, as well as the Reformation and Counter-Reformation and an economic development without precedent in Europe, among the principal changes. These changes made patent the need for new legal responses that were not to be found in the Romanist tradition, and which involved institutions that were pierced through by a *more universal anthropology* (natural law), by interconfessionality (international law), by the assurance of individual private property (property law) and, paradoxically, of the common possession of the seas (communication law).[40] Here, for example, in the face of economic development and the need for ensuring the agility of mercantile traffic, individual private property must be clothed with the strength of *ius naturale*, whose ultimate origin is Revelation.

Despite the need for renewal in legal responses, its theologization was insufficient. This insufficiency arose because doctrine must provide light for *distinguishing what is distinct* in cases; light that makes viable the employment of these distinctions in concrete lawsuits. But the problem is that this doctrine does not permit this extreme, since what it does is *divinize* certain legal institutions, establishing them as a *paradigm of what should be* without unifying knowledge at the different cognitive levels, which should necessarily be based on experience of cases and of the concrete necessities of legal actors. Only the

[39] Kurt Seelmann, "Teologia e giurisprudenza alle soglie della modernitá. La nascita del moderno diritto naturale nella tarda scolastica iberica", *Materiali per una storia della cultura giuridica*, 29, 2, (1999), 277-298.

[40] Idem, 283-5.

doctrine that is the result of the *unification of operations* is able to be a cognitive light for exercising the *distinctio*, in order to develop *ius* in a concrete controversy. There is a difference between –on the one hand –a doctrine about "what the juridical realm should be like", with a more political character, and which outlines economic and social aspirations, and –on the other –a unifying theory of cognitive levels which casts light on the issue of determining what corresponds to each person in a concrete argument over the use of things.

It is understandable that *misguided theological thought* would arise as the result of the clamor of certain parts of society because of changes in economic circumstances, which directly affect the traditional measure of concrete justice. But it is a matter only of doctrines that proclaim the desire for change in certain circles, among them legal humanism, and it is not a matter of a (legal) theory that would provide new lights for achieving the fit (*ajuste*) of the subsequent, controversial relations about the use of things.

Therefore, and based on the study of Vitoria's doctrine of dominion and its historical setting, we can infer that it is a matter of a doctrine that –supposedly *deduced* from Revelation –seeks to impose new canons of fittingness (*ajuste*) in the relations of the usage of goods. Of course Vitoria developed his doctrines with great seriousness, but was not clear about human cognitive levels and their focuses (*temas*). As a result it was difficult to get to know the cognitive method of Revelation, in order that it might become judicial praxis.

According to Seelmann, Vitoria based himself on the theology of Aquinas, that of Duns Scotus and the discourse about the linkage of the conscience in the doctrine of confession.[41] From the perspective of the gnoseological status of theology, we can see how the Vitorian doctrine of dominion has had a *negligible effect on judicial practice*. To this we must add that Revelation is of course a cognitive light, but it is *not immediately usable* in the development of legal doctrines, nor is it usable for judicial practice. Therefore there is a necessity for theology,

[41] Idem, 287-297.

which must be in (axiomatic) harmony with the rest of the human cognitive dimensions.

b) Theology and Revelation

In a cursory approach to theology, we can describe it as the knowledge of what is contained in *Revelation*; by way of it "God has revealed himself and given himself to man (…) by revealing the mystery, his plan of loving goodness (…) It pleased God, in his goodness and wisdom, to reveal himself and to make known the mystery of his will (…) God, who 'dwells in unapproachable light', wants to communicate his own divine life to the men he freely created…".[42] Consequently, Revelation is the "manifestation and communication of the intimate life of God", and the communication of the Ultimate of Ultimates. Here, God shows Himself as he is, and thus allows *Himself* to be known along with *the rest of the real*, especially *regarding human beings and their personal meaning*. It is, then, the news and message that God communicates about Himself and about his plan for the created cosmos. It is contained in Sacred Scripture and in Tradition, which is the living transmission of the oral preaching of the apostles.[43] Over the course of the centuries there have been so-called "private revelations", but which do not belong to the deposit of the Faith. In addition, God can act directly in each person.[44]

Even though Revelation is complete, the *depth of its meaning has not been fully understood*, so that it *corresponds to the Christian faith* to gradually understand all of its contents over the course of the centuries.[45] In this task he found his vocation: theology. This is distinct from Revelation, but has to do with growth in the understanding of the

[42] *CCC*, 50-2.

[43] *CCC*, 75-8.

[44] On this point the reader may refer, principally, to Ignacio Falgueras, "Itinerario de la razón hacia la fe", *Fe y razón*, Pamplona, Eunsa, 201ff.

[45] *CCC*, 66.

Faith: it is "theological investigation which should penetrate deeply into the knowledge of revealed truth". This is principally thanks to the aid of the Holy Spirit, by way of an *understanding of the divine words* that is derived from contemplating and studying them.[46]

A concise, rudimentary approach to theology, especially to the *theology of the faith* or *supernatural theology*, from the point of view of the theory of knowledge, would understand it as "that atom of knowledge (*saber átomo*) that derives from the subalternation of natural knowledge to revelation".[47] I understand *atom of knowledge* as meaning an indivisible knowledge, without parts or distinction of cognitive levels, i.e. simple. It is a knowledge that is above natural knowledge or the various cognitive operative and habitual levels, subalternated levels, exercised by the *esse hominis* which is actualized by the supernatural habit of the faith.

Supernatural theology is understood better if one knows how *pluripersonal theology is put into practice*. This is the knowledge used by the *esse hominis,* whose focus (*tema*) is another *intellectual, personal Act of being*, which explains the *esse hominis* itself. Consequently, it knows God as knower of the *esse hominis* and therefore is the truth, elucidation or complete meaning of the *esse hominis.*[48] This permits us to know that the *esse hominis* is co-existent with its Knower, that the *esse hominis* is a co-act of a personal being and that there is a reply by the One with whom it co-exists. This focus (*tema*) is, therefore, a search for the knowledge of God; in the end it is a theology.[49]

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[46] *CCC*, 94. Therefore he especially emphasized the charism of episcopal unction.

[47] Leonardo Polo, *El hombre en la historia*, Pamplona, SPUN, 2008, 31.

[48] J. F. Selles, *Antropología para inconformes*, 408ff., http://glifos.unis.edu.gt/digital/libros/21580.pdf, September 10, 2015. English edition *Anthropology for rebels: a different way of doing philosophical anthropology*, Strathmore University, 2010.

[49] J. F. Sellés, *Antropología de la intimidad. Libertad, sentido único y amor personal*, Madrid, Rialp, 2012, 209ff.

This is how the transparent light, which is *personal knowing* (method), is beyond its own light. This *transparency* is regarding the illumination by the Divine Being (focus); thus, the *esse hominis* knows that it is designed natively for being known. This means that its focus (*tema*) is *the Personal Knowing that knows the meaning of personal knowing*; that is, *Light in the light*,[50] which transcends it, since it cannot capture that Light, being already ontologically limited. Thus the *esse hominis* is a search.[51] The *esse hominis* never fully knows itself, and as a result it is called to grow or be an *additionally (además)*. This knowing the light is *to know the Light that knows the light*, knowing the *Esse* that knows each *esse hominis*. This does not mean that the Light prevails over the light, but rather that *the light must co-exist with the Light*. Thus, the *transparent light* does not illuminate anything, but instead points to the Light that illuminates it, to the Light that allows this *esse hominis* to know who it is. One speaks of pluripersonal theology because pursuing it cognitively brings one to the discovery of the one and triune God.[52]

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[50] This and other analogous terms in Polo have been studied exhaustively by Sellés in *El conocer personal. Estudio del entendimiento agente según Leonardo Polo*, Pamplona, SPUN, 2003, 131ff.

[51] J. F. Sellés, *Antropología de la intimidad. Libertad, sentido único y amor personal*, Madrid, Rialp, 2012, 191-4.

[52] The issue of *esse hominis* is thus the *Act of personal knowing*. Exercising this knowledge the *esse hominis* discovers that the Knower with whom it co-exists is a Person, since co-existence is something exclusive to persons. In turn this Person cannot be unique; rather, it co-exists at least with *Another Person*, since his intimacy is an opening that must be corresponded to in the other. Theological knowledge continues in accordance with the other personal transcendentals, so that *personal freedom* permits the discovery that the co-existence of the Persons *opens towards Someone*. In this way, the Persons are at least two, since *personal divine freedom* can only open itself towards *another personal divine freedom*. *Personal knowing* discovers that One of the free divine openings knows originarily, in such a way that the Other divine, free opening is known originarily, in such a way that each of them is a focus for the other, a cognitive origin where the other is a cognitive reply. Finally, *personal love* discovers that the Persons are a reciprocal giving and accepting, which allows us to

At the level of supernatural theology, knowledge is exercised by the *esse hominis* elevated by *the supernatural habit or virtue of the faith*,[53] whose focus (*tema*) is the content of the Scriptures and of Tradition. The *esse hominis* elevated by the habit of the faith thus knows the divine intimacy; that is, the supernatural habit *makes the act of being grow*, *makes it more intense*, permitting it to know what is above its ontological limit. This constitutes an intensification and insertion into natural knowledge: not its annihilation,[54] but rather its subalternation. It is, therefore, an aid for understanding revelation, clarifying the mystery, what God says about Himself and about the rest of the real. As a result, what is revealed is that Light that illuminates the light of the *esse hominis*, in which the supernatural habit of the faith is rooted. It constitutes a *yet more powerful Light* that points to the light and allows its personal meaning to be known without error... together with the meaning of the entirety of reality.

Together with supernatural theology there exist other acts, such as the *pluripersonal theology* referred to earlier, and *natural theology*, also known as *theodicy*, which deals with one of the principles of extramental reality known by the *intellectus.*[55]

c) Vitorian doctrine and the knowledge of reality

From what I have said so far, we can see the line that connects the Vitorian doctrine of dominion to theology, which, ultimately, is its

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discover a Third Person which is the gift. See J. F. Sellés, *El conocer personal. Estudio del entendimiento agente según Leonardo Polo*, Pamplona, SPUN, 2003, 157-9.

[53] Sellés specifies the difference between the pluripersonal theology that is the focus (*tema*) of *esse hominis* and the supernatural theology that is the focus of the *esse hominis* elevated by the theological habit of the faith. "Descubrimientos cristianos relevantes, según Leonardo Polo, para la filosofía", *Estudios filosóficos polianos*, 1 (2014), 46.

[54] On this point one can best consult Francisco Conesa, "El conocimiento de fe en la filosofía de Leonardo Polo", *Anuario filosófico*, 29, (1996), 435ff.

[55] Sobre esta véase Sellés, J. F., "La teología natural según Leonardo Polo", *Revista de humanidades*, 28, (2013), 55-62.

foundation. In contrast, the Roman jurists developed their legal dogmatics based on their reflection on the judicial practice regarding the cases that deal with this matter. We can see, then, that there is a *deduction* of dominion based on Revelation. On the other hand, this methodology would have been a great advance if it had not violated the axiomatics, since Vitoria sought to understand the highest (supraobjective) truths in an objective manner, connecting (by logic) some objects with others. Nevertheless, the highest realities, God, human destiny, the destiny of creation, etc., are not known with the same acts of knowing as the physical world or human praxis, nor are they known objectively.

In the end one can see why Vitoria's doctrine on dominion is not so easily usable in the practice of courts of law, nor in jurisprudence. This relates to the thesis of Jesús Lalinde, who, in referring to the Second Scholasticism, holds that it does not occupy a relevant position in the Spanish private law of the 16th and 17th centuries, and by the 18th century it no longer left visible traces.[56] Lalinde seems also to be referring to the scarcity of modern studies concerning the influence of these authors in private law (except for the bibliography cited here, which is of a more recent date). This is attributed to various causes, spoken of in his study, but his reference to the lack of logical rigor in the Schools is noteworthy. In the case of Vitoria, this was a normal consequence of his violation of the axiomatics.

Vitoria's theologizing doctrine regarding dominion is not, then, the result of a hierarchical, unified knowledge of the foci (*temas*) by means of their methods. We can affirm this because it confuses methods or cognitive acts and their foci; as Seelmann notes, this due to their doctrinal bases. Antonio Osuna holds that Aquinas, partaking of the atmosphere in the university of Paris of his era, sought to expound theology in harmony with the Aristotelian corpus, which later led Vitoria

[56] Jesús Lalinde Abadía, "Anotaciones iuspravatísticas al iusnaturalismo de la segunda escolástica", *La seconda scolastica nella formazione del diritto privato moderno*, Milano, Giuffre, 1973, 303-75.

into error, as well as other commentators who thought they were defining the nature of theology.[57]

Certain authors have deeply studied the scientific and epistemological status of Vitorian theology. On the basis of those studies we can specify Vitoria's cognitive drift more precisely. This is the case with Langella, who summarizes the epistemological status of Vitorian theology, claiming that "the principles by which the theologian moves in his argumentation are the great mysteries of revelation, i.e. the articles of the faith. These make up the starting point for theological reflection, which directs its search according to the laws of the Aristotelian *demostratio*". So, "the theologian, *in statu viae*, based on the unshakable foundation of the faith (...) proceeds to ulterior knowledge: adhering to the first truth, it can reach knowledge of the rest according to the proper mode of knowing, i.e. proceeding by the discursive path, from principles to conclusions. Thus, the method of theology is essentially deductive…"[58]

This summary allows us to see that from the Vitorian perspective, the knowledge of Revelation would be susceptible to being split apart by dialectics into *objective*[59] arguments, which could be used combinatorially by analytics in inferences from which conclusions would be obtained. Nevertheless, this is to seek that the non-objective knowledge that the *esse hominis* has of supraobjective realities be *objectivized*. Subsequently they will be combined, through logic, in order to infer true conclusions, which would also be the object of practical reason. This is, of course, a violation of the axiomatics of the theory of knowledge. These operations of the *logos* or *unifying operations* take place when the intentional compensations of the rational path involve

[57] Antonio Osuna, "Índole científica de la teología en Francisco de Vitoria", *Helmántica*, 65, (2013), 328-31.

[58] Simona Langella, "El estatuto epistemológico de la teología y de la filosofía en Francisco de Vitoria", *Helmántica*, 65, (2013), 356.

[59] Simona Langella, "El estatuto epistemológico de la teología y de la filosofía en Francisco de Vitoria", *Helmántica*, 65, (2013), 349ff.

objects of the generalizing path, i.e. when the operative unification takes place.

Following this path, we might say that what the *esse hominis* knows is *unified in some form* with the habitual cognitive levels and those of the human essence. However, this is not logic any longer, nor can we speak of science, but is rather another kind of knowledge, in which there can be error, but no demonstration of necessary premises. Whatever the case might be, this supposed theological science has no knowledge of the real, and even less of the supernatural. This is the root of its jurisprudential sterility.

Vitoria certainly assimilated theology to habit, but does not respect its supraobjectivity or *non-objective knowledge*; rather he amalgamates what is habitually known with what is objectively known by *unifying operations*. This ultimately means mixing what is known by abstraction from what is revealed, without distinguishing cognitive operations and hierarchical levels, i.e. violating the axioms, including axiom D.

As is clear, the Vitorian doctrine of dominion and its system of private law is a theological doctrine, or rather, *it is deduced from theology*. Hence, because of not distinguishing the circumstantial in his concept of science, he makes it "sterile and a generator of multiple dialectical reasonings, always biting their own tails, without contributing any real advance to our rational understanding of the truth as revealed by God".[60] Nor does he appear to contribute anything by which one might learn about aspects of the conflictive concrete relations between persons, when goods are used exclusively. Nor does it shed light on making these relations fit (*ajustarse*). This might explain the positions of Abasolo and Lalinde.

[60] Antonio Osuna, "Índole científica de la teología en Francisco de Vitoria", *Helmántica*, 65, (2013), 337.

d) The method of determining what is concretely just

Finally, in order to complete this summary gnoseological examination of the doctrine of *dominium*, I would like to say something relating to the *method of determination* of his system of private law (*derecho privado*), which is supposedly derived from dominion (natural law).

The term used by Aquinas to designate the mental operation that develops civil law on the basis of natural law is *determinatio*. Vitoria hardly comments on this operation, dealt with in *ST* I-II q. 95 a.2 co. Nonetheless, this method seems to be a common inheritance in Second Scholasticism,[61] and is also employed by Vitoria.[62] Sebastián Contreras holds that what is *determined* is in reality obligatoriness; however, the formation of the content of the law is, ultimately, a question of prudence.[63]

It is impossible to enter here into the study of prudential acts or of the operations of practical reason in Vitoria, but we can say that in his dogmatic construction of private law as derived from dominion, there is no other option but to reiterate that he employs the generalizing operations already mentioned. This must be due to the fact that his systematic construction is based on a conception of dominion as subjective right, ultimately abstract, which is used by a man who is also abstract, mixing elements extracted from a theological reflection that was not known by the *esse hominis*, but rather by other inferior cognitive

[61] Sebastián Contreras, "Los teólogos agustinos del siglo XVI sobre la *derivatio per modum determinationis*: Juan de Guevara, Luis de León y Pedro de Aragón", *Cuestiones teológicas*, 40, 94, (2013), 398; IDEM, "La determinación del derecho en el teólogo español Mancio de Corpus Christi (CA. 1507-1576)", *Praxis filosófica*, 36, (2013), 141ff.

[62] Simona Langella, "Estudio introductorio. Francisco de Vitoria y su comentario al *De Legibus*", *De legibus*,Ediciones Universidad de Salamanca / Università degli studi di Genova, Salamanca / Génova, 2010, 45-6.

[63] Sebastián Contreras, "La derivación del derecho positivo desde el derecho natural en Tomás de Aquino. Un estudio a partir de *Summa Theologiae* y *Sententia Libri Ethicorum*", *Teología y vida*, 54, (2013), 691ff.

faculties. Based on this one can only think that the exercise of proposing and counterproposing in order to demonstrate the affirmations is a logical exercise,[64] the result of generalizing operations that do not know extramental reality. This means that generalizing operations cannot know usable goods and their circumstances, and much less can they know the human being, the social order, creation and its Creator Himself. Despite the fact that Vitoria employed very specific cases about the exercise of dominion or about aspects related to the forum of the conscience, he treats them as problems that are in the mind and not in reality (extramental, human and divine): abstract men and women do not make use of goods.

Thus, after the reading of *Commentaries* q. 62 art.1 cited above, it looks as though Vitoria develops his doctrine about dominion by means of generalizing operations. Cordero and Aldunate establish the starting point of this doctrine, when they hold that subjective right was associated from its beginning with property conceived as a function of an abstract subject who is *equally free*. This beginning can be traced back to Second Scholasticism, particularly Vitoria and Soto.[65] Starting from an abstract *dominium* exercised by a man or woman who is also abstract and with support in elements provided by authorities, by means of generalizing operations –for it does not seem that other operations would be compatible with the approach of the *Commentaries* – Vitoria derives "the rudiments of an internally systematic model of private Law (*Derecho privado*)", founded on dominion, as Guzmán suggests. Which, on the other hand, would be the result of a *determination* based on *dominium*.

In the end one might claim that what Vitoria affirms in these fragments of his thought is the consequence of a great reserve of utopian energies, which presage Cartesianism.

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[64] There are few studies regarding this aspect of Vitoria's thought, however J. L Fuertes Herreros has investigated logic in Vitoria: "Lógica y filosofía. Siglos XIII-XVII", *Historia de la Universidad de Salamanca*, vol. 3, t. 1, 2006, 599-63.

[65] Cordero, Eduardo and Eduardo Aldunate, "Evolución histórica del concepto de propiedad", *Revista de estudios histórico-jurídicos*, 30, (2008), 380.

Finally, we can see why Vitorian thought is not employed in jurisprudence (*iurisprudentia* or *iuris scientia*), but is used *in the law* (*directum*). This affirmation must be contextualized in the difference between *ius* and *directum*-derecho-right. Briefly, *ius* is the result of an intellectual *art* developed in order to find the mean that fits (*ajusta*) a relationship between persons who seek to use goods. In contrast, right (*derecho*) consists in *a norm of conduct that is immediately in force for the action* that describes the behavior that is necessary in order that the human being be just. This process finds the path that goes from *ius*-position to *ius*-situation.

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