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# THE BIRTH OF THE RIGHT TO ALTERITY IN THE CITY

## The right of indigenous peoples in Francisco de Vitoria

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### ABSTRACT

With the Protestant Reform and the great navigations, the consideration about the other and with the different one, goes through changes, especially against the ones considered infidels and the natives of the New World. On the other hand, in the sixteenth century, the Iberian Peninsula lived the Golden Age, with the rebirth of Scholasticism and the flourishing of important juridical universities, with a marked development of Law Science. The Spanish Dominican Francisco de Vitoria is an exponent of these philosophical and juridical movements. This article aims to understand the contribution of Vitoria to the development of the relationship with the indigenous and, consequently, to the reworking of alterity. By means of bibliographical research and qualitative method, they searched in the writings of Vitoria and in his historical, philosophical, theological and juridical contexts. the elements of reconstruction of his concept about natural law and to see the possibility of recognizing the rationality of the indigenous and the property right over their lands. The project of human rights construction is present in Vitoria, in the defense of the universality

of reason to all human beings and in the recognition of the right of the indigenous not to be expropriated. Thus, Vitoria expands the ethical notion of alterity present at that time.

**Keywords:** alterity; indigenous; human rights; natural law; Francisco de Vitoria.

***O NASCIMENTO DO DIREITO À ALTERIDADE NA CIDADE  
O direito dos índios em Francisco de Vitoria***

**Resumo:** *Com a Reforma Protestante e as grandes navegações, a consideração com o outro e o diferente passa por alterações, especialmente, frente aos considerados infiéis e aos nativos do Novo Mundo. Por outro lado, no século XVI, a Península Ibérica vivia a Era de Ouro, com o renascimento da Escolástica e o florescimento de importantes universidades jurídicas, com acentuado desenvolvimento da Ciência do Direito. O dominicano espanhol Francisco de Vitoria é um expoente desses movimentos filosófico e jurídico. Este artigo objetiva compreender a contribuição de Vitoria para o desenvolvimento da relação com os índios e, por consequência, para a reelaboração da alteridade. Por meio de pesquisa bibliográfica e método qualitativo, buscaram-se nos escritos de Vitoria e nos contextos histórico, filosófico, teológico e jurídico, os elementos necessários para a reconstrução de sua concepção acerca do direito natural e para a verificação da possibilidade de se reconhecer, em relação aos índios, a racionalidade e o direito de domínio sobre suas terras. O projeto de construção dos direitos humanos está presente em Vitoria, na defesa da universalidade da razão para todos os seres humanos e no reconhecimento do direito dos índios a não serem expropriados. Com isso, Vitoria amplia a noção ética de alteridade vigente à época.*

**Palavras-chave:** *alteridade; índios; direitos humanos; direito natural; Francisco de Vitoria.*

## INTRODUCTION

In a way, the European world was, at the time of the discovery of America, a unity. This conception would change, mainly, from XVth, with the Protestant Reformation and the great navigations. With Luther, the Christian religion is fragmented into countless denominations, and therefore these spread all throughout Europe. To complete the division a few decades later, the discoveries of other lands, peoples, and cultures would make Europeans question this unity even further in Europe.

In the midst of this historical effervescence, the question of the “other” becomes a fundamental question. The European, when faced with a seemingly radical other, will have to think not only about the different but about his own situation in the world and his humanness.

The sixteenth century, when such questions would be better elaborated, is the occasion in which there is a rediscovery of Scholasticism in Portugal and Spain. It is remarkable that such countries would be highlighted in the era of navigation. Many European theorists have used the scholastic framework, the originality and the historical context to reflect on the consequences of events. One of the implications is a reflection on alterity. Therefore, such authors can be called precursors of alterity in a practical sense, since the moment was a condition for this.

The city is the place par excellence of alterity, propitiating the use of a common space that must take into account the diversity. The text in question has the intention of bringing to the reflection of alterity in the city the Spanish Dominican Francisco de Vitoria, who can be considered one of the first thinkers to reflect how the difference could coexist in a common space.

The main objective of the article is to understand the contribution of Vitoria to the development of the relationship with the Indians and, consequently, to the re-elaboration of alterity. This attempt is fundamental for understanding the birth of human rights and its most famous feature - universality - as well as for the understanding of alterity in the city, a place of coexistence revalued with Modernity.

By means of bibliographical research and qualitative method, it shall be searched in Francisco de Vitoria’s oeuvre and in the historical, philosophical, theological and legal contexts the elements that creates the possibility of his conception of natural rights and his verification of the plausibility of recognizing indigenous peoples’ rationality and entitlement

over the lands of the New World.

At first, the political contextualization of the historical period - the XVIth century will be made. It will be necessary to characterize the second Scholasticism and the consequences of the discoveries from the great navigations. It will then be seen how the emergence of the Indian, “the other” par excellence, will give rise to debates about alterity. In the sequence, the legal context will be approached, intending to locate the thought of Vitoria in the scope of the Legal Sciences of the time. We then proceed to analyze the questions of alterity and human rights. By a methodological choice, three texts by Francisco de Vitoria will be analyzed with this bias. The main idea is to be able to demonstrate how the reflection on alterity depends on the contact with the totally different and how, from this contact, are born the human rights and their aspiration to universality.

## **1 THE SECOND SCHOLASTICS AND THE AGE OF DISCOVERIES**

The second Scholasticism was an intellectual movement of rapprochement in the sixteenth century of Scholasticism, a thought school that occurred between the twelfth and fourteenth centuries. Its creation and consolidation would take place mainly in the Iberian Peninsula. The cultural context was essential for new reflections to emerge first in Europe and then in the New World (America). Thomas Aquinas (1225-1274) became the main reference of this period, being commented by several authors. However, from this influence would arise an original thought given the situation. Regarding this period, according to De Boni:

Two challenges lie behind its brightness: the awareness of the need to rethink the Christian faith in the face of the problems of the new times, such as Reform and Modern Philosophy, and the maritime discoveries that brought together questions never posed before. It is characteristic of this time that the work to be commented in the theological chairs is no longer the Book of Sentences by Peter Lombard, but rather Thomas Aquinas’ *Summa Theologiæ*. In the early years of the sixteenth century, the Italian Dominican Thomas de Vio Caietano commented on the *Summa Theologiæ* and his confrere Francisco de Silvestre de Ferrara, the *Sum Against the Gentiles* (these comments were attached to the respective works of Aquinas in the critical edition begun in the nineteenth century). A few years later, the Spanish Francisco de Vitoria, also Dominican, also commented the *Summa Theologiæ*. Along the way, a plethora of theologians, philosophers, and jurists, composed mainly of Dominicans

and Jesuits (these newly founded) followed. (DE BONI, 2009, p. 5).

Within this context, the School of Salamanca would be fundamental for the second Scholastic: “Ugualmente si parla di una Scuola di Salamanca, intendendo così quei teologi spagnoli che utilizzarono i materiali della tradizione tomista per comprendere i problemi sollevati dalla scoperta dell’America”. (SCATTOLA, 2009, p. 53). The University of Salamanca predates the second Scholasticism. It was established by Alfonso IX, between 1218 and 1220. In 1255, Alexander IV granted him the rights of the great European universities. In the Renaissance, Salamanca became quite recognized due to its humanistic studies. But it is from the sixteenth century on that the University would put its name for once in Western history:

In agreement with the determinations of the Council of Trent, Salamanca instituted, in 1560, an apologetic chair. Theologians of the breadth of Francisco de Vitoria (1483-1546), Bañes (1528-1604), Domingos de Soto (1484-1560), all Dominicans, and the Jesuit Francisco Suárez (1548-1617) illustrated the *Studium Salmanticense* in philosophy or in theology. With this body of teachers, the brilliance of the Sorbonne dimmed. (ULLMANN, 2000, p. 295).

In this university environment it was necessary to reflect on the new times, which consisted in dealing with the unknown, the different, the new, that is, the discovery of America and its consequences. The discovery brought with it several legal, philosophical, theological, and moral questions. Regarding legal problems, we can mention: “[...] el atinente a la forma más conveniente de tomar posesión de las tierras; el relativo al derecho al dominio político que España tenía sobre las tierras descubiertas; y, en fin, el referente a la licitud de la guerra que se hacía a los indios, que habían de repercutir necesariamente sobre el derecho a la conquista” (RUIZ, 2007, p. XXXVII-XXXVIII).

Even before the discovery of America, in 1492, the Portuguese and Spanish had already drawn up plans to take possession of any lands eventually found. In this sense, the monarchs surrounded themselves with jurists and ecclesiastics, in order to concretize their plans<sup>1</sup>. After the discovery, on March 3, 1493, Pope Alexander VI issued the *Inter Cetera*

<sup>1</sup> On this point, mention may be made of the following papal documents: *Sicut Carissimus* (04/04/1418), *Cum dum praeclarae* (09/01/1433), *Divino Amore* (08/01/1452), in addition to the Treaty of Alcáçovas (04/09/1479). Cf. RUIZ, 2007, p. XXXVIII-XXXIX, footnote 5.

bull, the first of five documents which will be known as the Alexandrine bulls. Together with nine other bulls, these documents gave possession to the Spanish and also Catholic kings, Ferdinand and Isabella, and to the Portuguese crown the lands that would be discovered:

Lo que debe resaltarse es que, al momento de otorgase, la doctrina y la práctica política consideraba que la potestad pontificia podía otorgar las tierras nuevas pobladas por paganos. Expedidas las bulas, se planteó inmediatamente la cuestión de si concedían un verdadero dominio político o sólo un poder especial para propagar el Evangelio; y, si se trataba de un dominio político auténtico, se suscitó el tema de cómo se incorporaban a la Corona de Castilla. (RUIZ, 2007, p. XLVI-XLVII).

With the colonization, the discovered land was divided and the Indians were ordered to the settlers. The *encomienda* consisted of a contract in which the king gave the colonizer the right to raise wealth by sending a portion to the metropolis, but he was obliged to educate the Indians under his care in the Christian faith and to defend the new lands in the name of the Crown.

A debate about the Indians and the lands newly found began in Europe. Had the native's rights to the land they were in? Were the lands the Crown's? Such questions were not very clear among European thinkers. From the point of view of kings and settlers, the lands discovered should be in the possession of Europeans, since economic interest was present. On the other hand, among the intellectuals, the questions posed were more difficult to answer.

## 2 THE LEGAL CONTEXT OF FRANCISCO DE VITORIA

Although he studied Arts and Theology at the University of Paris, Francisco de Vitoria was also influenced by the juridical content that spread in Europe, with the revival of Roman law.

Its training environment, and especially of teaching, at maturity, is permeated by a normative and argumentative awareness, with an analysis of practical cases.

Under the light of commentators or bartolistas<sup>2</sup> Francis of Victoria

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<sup>2</sup> The reviewers made an analysis of the movement *Corpus Juris Civilis* during the XIV to XVI centuries, which appeared in the revival of roman jurisprudence. At that time, in recent law universities, the *Corpus* was used as a source of rationalization of legal methods, allowing the resurgence of legal technique and theorization and the valuation of normative abstractions. One of the most important members of this movement was Bartolo de Sassoferrato, Italian jurisconsult recognized for his

was interested in the legal analysis of civil and ecclesiastical authorities, examining the exercise of their powers as well as their relationship. He defined the preeminence of the papal's spiritual authority over civil power, but not temporal authority, and was one of the pioneers working the principles of the rights of nations, the embryo of international law, in the work already quoted *De Potestate Civili*.

It is symptomatic that Vitoria brightened his career as a professor at the University of Salamanca, a major center for Romanist studies, founded mainly on the *mos italicus juris docendi*.

The *mos italicus* was the method of analysis and teaching adopted by the School of Commentators or post-glossers, from the 14th century, which gave a practical sense in the use of *Corpus Juris Civilis*, with philological, analytical and synthetic procedures, integrating local sources in its application. The method still held reverence for the authority of the *Corpus*, but it also used the glosses of the previous school (glosters) and regional customs, feudal principles, and ecclesiastical law. The method of "argumentation, debate, and polemic typical of scholasticism" was adopted (CAENEGEM, 2000, p. 74), which would allow the law to assume a scientific position.

From the analysis of the Roman text, it was extracted the general principles to guide the solution of concrete cases. However, the authority of the text was preserved, and those principles were indisputable.

The aim was to reach the *sensus* of the text, that is to say, its intent was no longer satisfied to clarify the letter (*littera*) of the *Corpus*, as the glosses did, but to attain its spirit, its practical content.

Together with other moral theologians and Spanish jurists, Vitoria promoted a European jurationalism, at a time tied to the rebirth of Roman jurisprudence.

This revival of jurisprudence found in the newly constituted lay universities the conducive environment for refusing feudal traditions and allying with bourgeois interests. The main juridical changes were due mainly to the unity of the object of the juridical sciences, which dealt with the *Corpus Juris Civilis* and the unity of methods employed by jurists, among them scholastic dialectics.

Under the lights that would form the modern School of Natural Law, Francisco de Vitoria is one of the forerunners of the new science of

comments. Because of his fame, the lawyers of this school were also known as bartolistas. This recognition gave rise to a Latin adage very famous in the universities of Modern Age Law: *Nemo bonus jurist nisi bartolista*, that is, "no one is a good jurist if not a bartolista".

natural law, in the midst of the Thomistic tradition, but with an axiological objectivism, whereby values and principles assume objective and universal validity, independently of the experience of individuals.

Hugo Grotius (1583-1645), great exponent of the School of Natural Law and considered by many as the father of International Law, in *De Jure Belli ac Pacis* (1625), refers to Francisco de Vitoria as one of his influences both in the elaboration of the principles derived from the common legal experience offered by the Spanish moral-theological tradition, especially on the law of colonial and religious wars, and on the restriction of the position of Pope Innocent IV (GROTIUS, 2005).

Pope Innocent IV sustained the correctness of the war against those who opposed nature and Francisco de Vitoria, on the other hand, admitted it only when it offended the State or when someone under the jurisdiction of the State was harmed. He demanded, therefore, the *injury* and not the simple fact of being unfaithful. (GROTIUS, 2005, Book II, Chapter XX).

Vitoria represents the link between medieval canonical-argumentative tradition and legal rationalism.

### 3 FRANCISCO DE VITORIA AND THE INDIGENOUS QUESTION

In 1510, the Scottish theologian John Mair (1467-1550) discussed in his work *Commentary on Book II of Sentences* the legitimacy of the conquest of the discovered lands. His argument was in favor of possession. He used a theory used in the European context, which consisted in the legal justification of wars against infidels (Tartars and Muslims) who invaded unjustly Christian lands, in addition to the argument that infidels were hostile to Christians. The thesis used paralleled the European infidels and the American “infidels”, thus justifying the war against them. But what if the indigenous people are peaceful? Still, the theologian uses two arguments to defend the ownership of the new lands:

el primero es el de la vía misional, basada en la teoría atenuada de Inocencio IV sobre el poder universal indirecto del Papa sobre los paganos para compelerlos a abrazar la fe y obligar a bautizar a sus niños. Esta prevalencia del Derecho divino de la fe presto se convierte en poder directo de ocupación preventiva, protección por las armas de la predicación y facultad de imponer tributos; por fin, a los príncipes infieles que resisten a la fe puede la Iglesia privarles de su jurisdicción y deponerles en beneficio

de los príncipes cristianos. En el segundo argumento, Mayor admite el estado de barbarie de los indios que les hace esclavos por naturaleza según la teoría aristotélica. Por ello es lícito al príncipe cristiano sojuzgarles, ocupar sus tierras y someterles a efectiva servidumbre. (URDANOZ, 1974, p. 118).

One can see that the first argument is based on the submission of civil power to ecclesiastical power. The second, based on Aristotle, assumes that the Indians would be barbarians, therefore, they are slaves by nature. Such theses were used insistently by the defenders of the indigenous submission and the taking of the American lands. For Aristotle (1998), as stated in *Politics*, there were two types of slaves: slaves by nature, who did not have the intellectual capacity to command themselves and possess properties, which Mair interprets to be the case of the indigenous peoples; and the slaves by convention, who would be the men caught in the war.

In turn, in 1511, a voice dissonant to that of the Scottish theologian was raised. It was the Dominican Antonio de Montesinos (1475-1545) who, in a sermon from the time of Advent, appealed to the Spaniards with the following words:

By what right have you waged an atrocious war against these people who lived peacefully in their own country? Why do you leave them in such a state of extenuation? Why do you kill them to demand that they bring their gold daily? Are not they men? Do they not have reason and soul? Is it not your duty to love them as yourself? (ANTÔNIO DE MONTESINOS apud SALES, 2012, p. 52).

Contrary to Mair, who took the Indians as unreasonable beings, the argument used by Montesinos is that they are men, because they have rationality and soul, and therefore could not be dominated.

From these different positions, Europe will enter into a dispute to justify the destruction and possession of the new regions or the care and fraternity with the inhabitants of America. It is interesting to note that, through different actors, the same Europe that will destroy American culture will also be the one that will defend the rights of indigenous peoples.

Inserted in this debate is the name of Francisco de Vitoria (1483-1546). Vitoria was born in Burgos, Spain, in 1483. He entered the Dominican Convent of St. Paul in his city. Possibly, in 1508, he was sent to the Convent of Santiago in Paris by his superiors to study Humanities, Arts and later Theology, having a class with the aforementioned John Mair in

1522, he acquired the title of Doctor of Theology. In 1523, he went to the city of Valladolid, working at the College of St. Gregory, where he had the opportunity to explain in class the *Theological Sum* of Thomas Aquinas, great inspirer of the second Scholastica.

In 1526, after the death of Pedro de Leon, the Dominicans invited Victoria to take over the First Chair, which he kept until 1546, the year of his death:

En Salamanca consiguió gran prestigio por la profundidad y nítida exposición de las cuestiones de la *Suma* en sus selecciones o exposiciones solemnes y públicas. Así se convirtió en el maestro por excelencia de las selecciones. De entre ellas sobresalen las que se refieren al derecho, tanto civil interno y eclesiástico como internacional. (FRAYLE DELGADO, 2007, p. XI).

Francisco de Vitoria enters into the thematic of the consequences of the discovery with the concern to understand if the Indians were submitted to the Spanish power. At bottom, the question was whether the peoples of America had property (*dominium*) over their property and the lands on which they lived. Thus, one could decide on the legitimacy or not of the Spanish conquests.

It is important to turn to the works of Vitoria, seeking to summarize their arguments, which will include the theological, philosophical and legal aspects.

In *De Potestate Civili* (1528), Vitoria asks about secular power. For him, the city is not an artificial human creation, but:

[...] algo que brota de la naturaleza que sugirió este modo de vida de los mortales para su defesa y conservación [...] ninguna sociedad puede tener consistencia sin una fuerza o poder que la gobierne y la proteja. En efecto, la utilidad y finalidad del poder público y de la sociedad o comunidad son una misma cosa". (FRANCISCO DE VITORIA, 2007, p. 13).

The city is a natural creation that needs the power to preserve itself; however, such ability and power emanate from God.

Francis will wonder if those who govern the republics of the infidels (pagans) have legitimate princes and magistrates. Drawing on Paul and Peter as authorities, the Spanish thinker states that:

Además no hay que poner en duda que entre los paganos haya príncipes y señores legítimos, puesto que el Apóstol en los textos antes citados manda obedecer a los poderes y a los príncipes y servirles en todo tempo; y éstos ciertamente entonces eran todos infieles. José y Daniel eran administradores y ministros de los príncipes paganos. Y los príncipes cristianos seculares o eclesiásticos no podrían privar a los infieles de tal potestad y principado sólo por el hecho de ser infieles, a no ser que hubieran recibido de ellos otra cualquier injuria. (FRANCISCO DE VITORIA, 2007, p. 22) (I, 9)<sup>3</sup>

For Francisco de Vitoria, even the governments of the indigenous peoples were legitimate, since the apostles commanded to obey any existing government because they were submitted to the power of God. On the other hand, he asserts that Christian or ecclesiastical princes do not have the right to deny the power of unfaithful people, even if they do not cope with the same faith.

If in the work *De Potestate Civili* Vitoria focuses on civil power in general, in the works *De Indis Recenter Inventis, relectio prior* (On the newly discovered Indians, *relectio primeira* (1538-1539)) and *De Indis, sive de jure belli hispaniorum in barbarians, relectio posterior* (On the Indians or On the law of the war of the Spaniards on the barbarians, *relectio second* (1539)), the thinker will stop on the issues that involve the discovery and the Indians. These three works are from his period in Salamanca. They are part of the writings called *relectiones*. There was an obligation at the universities for the teacher to give a public lesson about his studies once a year; such texts were known as *relectiones*: “Dichas relecciones eran exposiciones solemnes que los catedráticos hacían cada año para toda la comunidad universitaria y, según la tradición y costumbre, tenían lugar en días festivos para facilitar la asistencia de todos” (FRAYLE DELGADO, 2007, p. XII).

In the first *relectio* on the Indians, Vitoria affirms that this writing is due “por causa de esos bárbaros del Nuevo Mundo, llamados vulgarmente indios que desconocidos antes en nuestro mundo han venido hace cuarenta

<sup>3</sup> The writings of Paul used as authority are in Epistle to the Romans: Rom 13: 1-2: “Submit yourselves to the established authorities, for there is no authority that is not of God, and those that are were instituted by God. Anyone who opposes authority is opposed to the order established by God. Those who oppose, draw upon themselves condemnation.” Epistle to Titus: Titus 3, 1: “Remind them that they should be submissive to the magistrates and authorities, who must obey and be ready for every good work.” First Letter to Timothy: 1 Tim 2: 1-2: “First and foremost, I urge you to make requests, prayers, supplications, and thanksgiving on behalf of all men, by kings, and by all who have authority, that we lead a calm and serene life, with all piety and dignity.” Peter’s text is in 1 Peter 2: 13-14: “Submit yourselves to every human creature for the sake of the Lord, whether to the king as ruler, 14 or to the governors as his messengers to punish the evildoers, and to praise those who do good.” Cf. *BÍBLIA SAGRADA*: Edição Pastoral. Disponível em: <[http://www.paulus.com.br/biblia-pastoral/\\_INDEX.HTM](http://www.paulus.com.br/biblia-pastoral/_INDEX.HTM)>. Acesso em: 30 abr. 2017. (our translation)

años a poder de los españoles” (FRANCISCO DE VITORIA, 2007, p. 59). The central theme is the American Indian.

Initially, Vitoria was interested in knowing if the Indians, before the arrival of the Spaniards, were the owners of their possessions and if there were true princes among them. The argument of those who defended the position that the Indians did not have and could not have possessions was based on a) being sinful and unfaithful; and b) being idiotic and demented (ie, lacking in reason). In relation to the first argument, contrarily, Francisco de Vitoria (2007: 70) states that “El pecado mortal no impide el dominio civil ni el verdadero dominio” In order to defend this claim, Vitoria uses seven arguments: 1 - the sinner does not lose the natural domain (God’s gift) and the civil domain (gift of God and human right), because, it remains with the mastery of its own acts and members, which proves the right to defend one’s life; 2 - the Holy Scriptures call evil men and sinners of kings (Solomon, Ahab and others), who, therefore, are also masters; 3 - the domain is based on rationality (image of God), and sin does not remove rationality; 4 - King David was also a sinner; 5 - Genesis (49, 40) speaks of the possibility of a kingdom being ruled by an evil king; 6 - just as mortal sin does not withdraw spiritual power (eg a bad bishop has the power to ordain priests), sin does not withdraw civil power either; 7- The Scriptures (Romans 13, 5 and 1Pe 2:18) speak in obedience to the princes (even evil) and the precept of not taking the thing of others. (FRANCISCO DE VITORIA, 2007, p. 71-72).

Then Vitoria would dwell on this question: if infidelity is a reason for losing the domain. For him, “La infidelidad no es impedimento para ser verdadero dueño”. (FRANCISCO DE VITORIA, 2007, p. 73). His reflection is based on the *Summa Theologiae* (IIaIIae, q. 90, a10 and a12) of St. Thomas Aquinas and in some passages of the Scriptures (Rom 13: 5, 1Pe 2, 18, To 2, 13 and Gn 47, 20-21), which illustrate unfaithful kings in power and the need to obey such monarchs. In short, infidelity is not capable of destroying the domain either in natural law or in positive law, including in the latter the possession of material goods. Obviously, thinking of the Indians, Francisco de Vitoria (2007, 74) states that “De lo cual se deduce claramente que no es lícito despojar a los sarracenos, a los judíos y a cualesquiera de los infieles de los bienes que poseen, sólo por el hecho de ser infieles. El hacerlo es hurto o rapiña como si se hiciera a los cristianos. “

Francisco de Vitoria (2007 p. 78) concluded on the question

analyzed, “Que ni el pecado por infidelidad ni otros pecados mortales son obstáculo para que los bárbaros sean verdaderos dueños tanto pública como privadamente, y que por este título los cristianos no puedan ocupar sus bienes e sus tierras”. Thus, the infidel barbarians, in the Dominican’s view, are allowed to own property, which means that even Christians can not withdraw and invade the properties of the Indians.

Victory, then, dwells on the second point: if those who are not right (idiots) can not have property, or, in other words, “if one is capable of dominion, the use of reason is rich.” (FRANCISCO DE VITORIA, 2007, p. 78). In this context, it will be discussed whether or not the Indians have reason.

First, Vitoria analyzes the notion of Conrad Summerhart (1455-1502) that, in order to have dominion, the reason is not necessary. For this theologian, the domain extends to irrational creatures, since, in his view, mastery is the right to use something to his advantage. For example, brutes are entitled to herbs and plants (Gen 1, 29-30) and the stars have the right to light (Gen 1, 17-18). However, Vitoria does not share this view, since, for him, irrational creatures do not have dominion because they have no right, as Conrado himself says. They have no right, for they can not suffer injury. (FRANCISCO DE VITORIA, 2007, p. 78-79).

On the basis of Thomas Aquinas, Vitoria affirms that only the rational creature has control over his acts, that is, the capacity to decide on this or that, since, on the one hand, “si los brutos no tiene dominio sobre sus actos, tampoco sobre las demás cosas” (FRANCISCO DE VITORIA, 2007, p. 80). On the other hand, animals also do not move, but they are moved, not having control (FRANCISCO DE VITORIA, 2007, p. 80). The fundamental point in these arguments is the fact that for something to have mastery it must be the master of one’s own acts.

Next, Vitoria wonders if a child, before the total use of reason, has dominion. The answer is “[e]sto é evidente porque pueden sufrir injurias, luego también tienen derecho sobre las cosas; luego también dominio, que no es sino derecho”. (FRANCISCO DE VITORIA, 2007, p. 81). The question allows the author to affirm the theological thesis that the foundation of dominion is the image of God, equally present in children.

In the case of the insane, those who do not use reason and won’t ever do, they can also have possession, as they can suffer injuries, which means having rights.<sup>4</sup> (FRANCISCO DE VITORIA, 2007, p. 82).

<sup>4</sup> Roberto Pich draws attention to the possible interpretations on this point: “The interpretative difficulty

## Barbarians (Indians) are also not demented, since:

Se prueba porque en realidad no son dementes sino que a su manera tienen uso de razón. Está claro, porque tienen cierto orden en sus cosas, una vez que poseen ciudades establecidas ordenadamente, y tienen matrimonios claramente constituidos, magistrados, señores, leyes, artesanos, mercaderes, cosas todas ellas que requieren el uso de razón; asimismo tienen una especie de religión, no yerran en cosas que son evidentes para los demás, lo cual es indicio de uso de razón. (FRANCISCO DE VITORIA, 2007, p. 82).

The above quotation is spectacular, in the sense of illustrating a sixteenth-century author describing the indigenous way of life so well, as well as opening the thesis that they are as men as the Europeans, for they have reason (although they can improve it, in Vitoria's view), and therefore have the capacity for dominance, which means that the American lands were theirs and that the Spaniards (and Portuguese) did not respect this condition. Moreover, the author believes that the indigenous people have a religion, being able to act correctly through reason like all humanity. The conclusion is that there is only one human nature. Perhaps here is the birth of modern human rights.

For Vitoria, there is no doubt that the Indians were masters before the arrival of the Spaniards, therefore, owners of what they had. Like this,

los bárbaros eran pública y privadamente tan dueños como los cristianos, y que tampoco por este título ni sus príncipes ni los particulares pudieron ser despojados de sus posesiones como no fueran verdaderos dueños. Y sería inicuo negarles a éstos, que

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is as follows, and is related to Vitoria's propositions on the souls: he believes that a minimal measure of participation in reason - which makes it possible only to obey a master by nature - is sufficient for the mastery of something, or indeed does it not accept that the permanent deficiency of reason was a convincing thesis on any human being, since it would seem to injure some other philosophical or theological conviction? It is almost unnecessary to say that in these cases Vitoria basically believes that the Indians are "barbarians" in the specific sense that they have little developed their rational powers or do not have a stage of culture and civilization equal to that of the Spaniards. It is not possible here to relativize or repudiate this judgment, but it should be said that, in Vitoria, it would be only a judgment of cultural appreciation, not anthropological. Nothing in Vitoria's texts suggests that he would accept the first hypothesis - which, in fact, is eventually unsustainable -; and although he does not literally affirm the second hypothesis, it seems to him that he takes it as most likely to be true (remembering that *relectio* has as its goal to argue in favor of more probable sentences according to reason). The last sentence on the attribution of disability on the grounds of the barbarians and the consequent contesting of their dominion is this: "And whatever it may be about [that is, the opinion of the jurisconsults on the civil domain], here is the fourth proposition: neither of this part [= of the part of the full civil domain] the barbarians are prevented from being true owners". As already said, this last sentence under this theme adds something to the previous one: even if the attribute of "deficiency in reason" is attested to the barbarians, it is concluded that they have mastery, both natural and civil. In what follows, I suggest that the second hypothesis described above is at hand "(PICH, 2012, pp. 389-390).

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nunca nos hicieron ninguna injuria. (FRANCISCO DE VITORIA, 2007, p. 82-83).

From the main argument analyzed above, Vitoria will consider other issues related to the conquest. In his text, there is a critique of the power of civil rulers, as well as a critique of papal power. At the beginning of the second part of *De Indis Prior*, the Spanish thinker wonders whether he had the right to dominate the whole land. Clearly, the bottom line is whether the Spanish rulers, as kings, were entitled to the new lands. For Francisco de Vitoria (2007, p. 91), the answer will be negative, because, “el dominio no puede ser sino de derecho natural, bien sea divino, bien humano. Ahora bien, por ninguno de esos derechos hay un solo señor de todo el orbe”.

Another argument used by those who defended the possession of the new lands by the European monarchs was based on the fact that some understood the pope as being the monarch of the whole world, and he, in turn, recognized the emperor’s right over the lands discovered. Francisco de Vitoria (2007, p. 99), based on the authority of Christ, affirms, “Y si Cristo no tuvo el dominio temporal, como antes hemos defendido como lo más probable, y también de acuerdo con la sentencia de Santo Tomás, mucho menos lo tendrá el Papa, que es su vicario”. Moreover, “The Pope, however, has no such power over the infidels, nor could he excommunicate them, nor prohibit the marriages permitted by divine right. “ (FRANCISCO DE VITORIA, 2007, p. 100).

Even if the barbarians do not want to accept Christ, they can not wage war on them or cause any damage, for if this were so, such an attitude would be commonplace in Christian lands, since there are infidels who remain with their possessions: “De lo dicho se desprende claramente que los españoles, cuando por primera vez llevaban navegando a las tierras de los bárbaros, no llevaban consigo ningún derecho para ocupar sus territorios”. (FRANCISCO DE VITORIA, 2007, p. 105).

At the beginning of the third part of *De Indis Prior*, Vitoria defends the thesis that the Spaniards could stay in the new territories, provided they did no harm to the natives, and they could not prohibit the Spaniards from staying there. Hastily, one might argue that such a view is the colonizer’s; however, Vitoria’s position, once again, is surprising. The justification would be based on a common law existing for all peoples of the Earth! Vitoria elaborates fourteen reasons for maintaining relations between peoples. The first, because it is of great lucidity, deserves to be

transcribed:

Se prueba, primero, por el derecho de gentes, que es derecho natural o se deriva del derecho natural, según el texto de las *Instituciones* ‘Lo que la razón natural ha establecido entre todas las gentes se llama derecho de gentes’. En efecto, en todas las naciones se tiene por inhumano el tratar mal, sin motivo alguno especial, a los huéspedes y transeúntes y, por el contrario, es de humanidad y cortesía portarse bien con los transeúntes que viajan a otras naciones. (FRANCISCO DE VITORIA, 2007, p. 130).

What is behind these words is the realization that, because of a common law, men should treat each other well, which shows humanity. The intercommunication between men is also a reason that justifies a respectful relationship among peoples, since there is a communion among the nations, thus allowing men to pass through all regions of the planet. In short, there is a right to come and go among peoples:

Second. Al principio del mundo, siendo todas las cosas comunes, a cualquiera le estaba permitido dirigirse y recorrer las regiones que quisiera. Y eso no parece que haya sido abolido por la división de bienes, pues nunca fue intención de las gentes suprimir la intercomunicación de los hombres por ese reparto, y en Verdad en tiempos de Noé eso hubiese sido inhumano. (FRANCISCO DE VITORIA, 2007, p. 130).

According to a common law, Spaniards and barbarians can trade among themselves, as long as they do not harm the citizens of both communities. Thus, the trade is authorized, if there is an excess of the products commercialized. (FRANCISCO DE VITORIA, 2007, p. 132).

On the second *relectio* on the Indians - *De Indis, sive de jure belli hispaniorum in barbaros, relectio posterior* -, Victoria retakes the first *relectio*, but worries to justify the war and occupation of the discovered land.

Disseminating what would be a just war, Victoria makes important statements about relations between peoples. The thinker works with three insufficient reasons to wage a just war: a) religious diversity; b) the pretension of extending the domains; and c) the glory of the prince or another particular benefit. (FRANCISCO DE VITORIA, 2007, p. 173-174).

It may be noted that such motives were alleged by the conquerors

in order to decimate the American peoples. Therefore, the very idea of exploring colony is a misunderstanding, since it presupposes items (b) and (c).

It is possible to identify in Vitoria some elements common to contemporary human rights. Such rights would be inherent to human nature. In speaking of the American Indians, Vitoria, in fact, speaks of man in general. It is possible to perceive the inalienability, inviolability, equality, and universality of a right common to all men in Vitoria's work. Therefore, this right is never lost, as it must always be respected, it is identical and common for all:

La inalienabilidad porque para Vitoria, son derechos unidos al mismo ser racional del hombre, por lo que no se pierden en ninguna ocasión, ni aun en el caso en que no se puedan ejercitar por las limitaciones que pudiera imponer el derecho positivo.

La inviolabilidad porque a lo largo de sus reelecciones invoca el respecto sobre estos derechos; respecto que afirma en defensa de los indios y se basa en la dignidad e integridad de la persona, el honor debido al hombre, el respeto a sus posesiones y formas de administración política.

La igualdad viene a ser también una cualidad necesaria de los derechos humanos, derivada de la misma formulación, al establecer como campo de derechos el universo de todo el género humano, es decir, propugna que todos los seres humanos deben disfrutarlos por igual.

Y la universalidad porque los derechos humanos se enuncian y reconocen para todo ser racional. El carácter humano es lo que determina la base de todos estos derechos, porque son propios a su misma naturaleza. (MORA HERNÁNDEZ, 2013, p. 44).

There was no ideal in Vitoria to characterize fundamental human rights; however, the analysis of the concrete case of “discovery” was crucial to reach such characteristics.

#### **4 ON ALTERITY: ETHICS BEFORE THE OTHER**

Alterity has played such a fundamental role in modern Ethics that it is possible to verify its presence and development in thinkers with very different premises, such as Francisco de Vitoria and Jean-Paul Sartre, but also in this theme, they also show complementarity of reflections.

Vitoria's theological positioning and Sartre's atheistic existentialism hold the common thread of human defense and recognition

of the other. Sartre made a chorus with him in the struggle against political determinism: Vitoria was in the context of colonization in the New World, under the argument of “humanizing” the infidels; Sartre, in the private freedom of the self.

The Sartrean freedom was in the aptitude of the human being to be the creator of sense, to interrogate. Freedom is not a quality or characteristic of the human, but it is human itself. Therefore, he states:

Indeed, if we were to admit that interrogation is determined by a universal determinism, it would cease to be not only intelligible but conceivable. [...] by a double movement of displacement, the interrogator will not change the subject in question, placing him in a neutral state, between being and non-being, and himself refutes himself to the subject, to be able to extract from him the possibility of a non-being. [...] Questioning is, therefore, by definition, a human process. Therefore, man presents himself, at least in this case, as a being that makes the Nothingness appear in the world, insofar as, to that end, it affects itself not to be. (SARTRE, 2007, p. 66).

The interesting thing is that this “process of being constituted” of the subject is not done alone, although individually. In Vitoria’s work, a discourse of affirmation of the Indian is identified, contingent and necessary for the European to perceive and perceive the other. Most importantly, do not discount your conduct to irrelevance or irresponsibility. Sartre recognizes the human being as the only definer of the world and of himself, but also as the holder of absolute responsibility for what he consciously recognizes. As José Luis Pérez points out:

In Sartre, the responsibility deriving from individual freedom denotes, therefore, the continuous need for each human individual to respond to the peers who observe him during each action, in the expectation of a definition of what this human reality is that is always to be said. [...] Responsibility is, therefore, the exact point at which the odyssey of individual freedom, which is the very existence and singular existence of a single human, is recognized as a truly communal adventure. (PÉREZ, 2012, p. 311).

Thus, the freedom that exists individually contextualizes itself intersubjectively in the other. One can perceive that freedom presupposes an individual moment - of understanding, deliberation and action - and

a relational moment, in the evaluation of oneself and the world, from its previous experiences, its values and its models of understanding.

Beyond the individual's power of action, freedom is projected into the conceptual ordering of the world - by which, in the interrogation, it "becomes one," as Sartre would say.

For this reason, freedom causes codependency to generate responsibility. In the words of Sartre himself:

When I declare that freedom, through each concrete circumstance, can only aim at self-love, then, if man recognizes that in his helplessness he is establishing values, he can no longer want but one thing: Freedom as the foundation of all values. This does not mean that he wants it abstractly. This simply means that the acts of men in good faith have as their ultimate meaning the pursuit of freedom as such. A man who joins such a union, communist or revolutionary, wants concrete goals. These goals imply an abstract will for freedom, but this freedom is concretely wanted. We want freedom for freedom and through each particular circumstance. And, wanting freedom, we find that it depends entirely on the freedom of others and that the freedom of others depends on our own. Of course, freedom as a definition of man does not depend on another, but once there is commitment, I am obliged to want my freedom at the same time as the freedom of others; I can only take my freedom as a target if, likewise, I take the liberty of others as a target. (SARTRE, 2009, p. 636).

There is, therefore, a hidden and fundamental element in the defenses of Victoria and Sartre, the *alter*, which, even in individual freedom, imposes the recognition of the other. This element imposes the assumption of an ethical position of respect for the other; therefore, it is not based on the dominating rationalism, which reduces the other to an object, but in the identification of the other as free subject to constitute its own dignity.

The Science of Law sometimes recognizes alterity only from the formal point of view, that is, as the necessary relationship with another individual, expressed in the formula: *Ubi jus ibi societas*. However, alterity in the law must be based on the recognition of individualities, on the differences of the concrete individual, be it Christian or "barbarian", European or American. In this sense, the warning of Roberto de Aguiar also occurs, when affirming that there is a:

[...] dogmatic fixation of the metaphysical root of the common legal sense [that] does not deal with the juridical from the relation between the different, but from a unifying norm that dilutes the subjects within an abstract equality and removes from those involved in the legal relationship their faces, their existences and concreteness. (AGUIAR, 2006, p. 12)

Thus, alterity surpasses the recognition of the other as subject, in order to attain it as a single, free and responsible being, to be respected in its difference and autonomy. This is Vitoria's defense of the Indians: he recognizes them as rational beings and, therefore, masters of their actions; and as holders of rights over land, as capable of domination.

## 5 FROM ALTERITY TO HUMAN RIGHTS

From the recognition of the alterity of the Indians, Francisco de Vitoria brings about mutual solidarity and mutual responsibility in relations between peoples.

Vitoria gives rise to the universalization of rights and, on a jusnaturalist basis, later allows the characteristics attributed to rights to evolve towards the consideration of human rights. These, although not yet named and conceptualized by the Spanish author, are already understood as commands that are independent of the action of States and that are justified as moral duties to be universalized. They reflect, therefore, the acceptance - now so often, but in the time of Vitoria still restricted to scholarly circles - that all human beings must have rights, for there is only one human nature, characterized by rationality.

There are contemporary authors who criticize the universality of human rights based on axiological and cultural relativism, that is, there would be no universal human rights since the pluralism of values and cultures requires a particularism in the recognition of rights. On these objections, Pérez Luño (1998) says that many violations are perpetrated under this argument, as is the case of female illiteracy and female genital mutilation. And it also rejects that this relativism cannot represent a "right to indifference", legitimating impunity. It maintains, therefore, that there are rational characteristics in the tradition of human rights, which can not be disregarded. There is a need to share an ethical attitude in the construction of modernity.

The idea of rights for all humans corresponds to the more

contemporary characterization of human rights. Perez Luño (1999: 48), for example, places them as a set of faculties that “fulfill the requirements for human dignity, freedom, and equality,” something similar to the characterization of the rights of the indigenous towards Europeans, by Vitoria.

Francisco de Vitoria (2007) creates a global space of non-violence, a common law existing for all peoples, which requires harmonious behavior for a communion among nations. In short, there is a right to come and go among peoples and the justification of war against the barbarians is not acceptable simply because they are unfaithful or sinful. For the same reason, the occupation of their lands or the taking of their property is not authorized; though barbaric, they have the right to dominion.

The foundation for the defense of the natural right to equality was made by the rational essence of all men and the right to freedom lies in the very creation of man, who was not created to be a slave nor to be coerced. It is not justified, therefore, the coercion that seeks to imbue faith in the human being.

In the same vein, the theologian accepts the correctness of some wars, but these cannot be based only on religious diversity or on the pretension of extending the domains of the prince, the state or even the papacy. There is no temporal authority over the whole world, neither the pope nor the Spanish kings. (FRANCISCO DE VITORIA, 2007)

War is justifiable as long as it is a path used after the attempts at peace have been exhausted; let it be done without hatred, seeking only justice; and that the consequences of triumph should not be disregarded and justified in the very cause of war. (FRANCISCO DE VITORIA, 2007)

Man is also recognized as a social being, endowed with the right to citizenship, and political power must be exercised in the name of the people. For this reason, Vitoria (2007) also recognizes the right to disobey the rulers who exercise political power in their own interests, and not the people's.

Finally, the embryo of free trade is in the ideas of Francisco de Vitoria (2007), who advocates permission to trade, even with barbarian peoples, if there is a surplus of production.

## CONCLUSION

When Francis of Victory needs to reflect on the other, he is not so much concerned with differences as with what makes all men human beings. When confronted with other societies and cultures and with the indigenous populations, his argument starts from the assumption that the “other” is also human.

Like the Europeans, the Indians had the right to have and conserve their society and state. Vitoria offers arguments that criticize the notion of the colonizer. What the Spaniards were doing was, from the philosophical, theological, and legal point of view of Vitoria, a misconception. Even without believing in the same deity, the Indians had the same rights of dominion as the Spaniards.

When questioned about the rationality of the Indians, Francisco has the opportunity to say that not only are they right, but that is the same for everyone. It is this reason that will enable the Indians to have society, rituals, cities, and politics. In this sense, if there were no consensus among the different peoples, the unilateral relationship would be regarded as prey.

Francis suggests the other as the same, since, in the strict sense, there are common characteristics, which can be the starting point for good coexistence, respect, friendship, and empathy. When one does not see oneself in the other, coexistence is impossible. The lesson of Francis of Victory remains current but often neglected by selfish interests.

Vitoria is a great representative of the Golden Age in Spain and launches important bases for the human rights construction project. His work in the construction of international law is cited by Hugo Grotius himself, considered the “father” of this branch of law, for recognizing his contribution to the discussion of justice for colonial and religious wars and for delimiting the jurisdiction of the State and Church.

Finally, it should be stressed that if the West is always accused in a reductionist way of not respecting difference, it must be said that, despite the various atrocities committed against the other, reflection on alterity is a concern of Western culture through its theoretical framework. For this reason, to retake an author of the sixteenth century is part of the search for the reflection of alterity in the city.

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