



Francisco de Vitoria's idea of natural law and its relationship with division of things

TOMOYUKI KOBAYASHI
Hitotsubashi University

Abstract

In the sixteenth century, partly because of the Reformation and the Discovery of the New World, a great necessity arose for universal normativity. Spanish theologians worked to establish universal norms applicable beyond Europe, but they were confronted with challenges, which arose not only from the political situation, but also from theoretical criticism. Arguing against the medieval theory of natural law, Duns Scotus (1265-1308) had already cast doubt on its consistency, and the theologians of that century could not ignore his criticism. In this paper I am attempting to add to the discussions of the trends of sixteenth century Spanish theology by explaining how the theory of natural law by Francisco de Vitoria (1492-1546) tried to reconcile theory with reality.

Keywords: Vitoria, Natural Law, Common ownership, Theology

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In the sixteenth century, partly because of the Reformation and the Discovery of the New World, a great necessity arose for universal normativity. The work of Francisco de Vitoria (1492-1546) is thought to be on response to this necessity; however, his innovation was not just the result of the political situation in that period.

In order to understand the novelty and significance of Vitoria's theory of natural right and natural law (*ius naturale, lex naturalis*), we should first be aware of some characteristics of late medieval theories of natural law and natural rights. Although Vitoria is widely acknowledged as a great scholar of Thomistic theology and philosophy, it is not as often acknowledged that he was also familiar with the works of other theologians and humanists such as Duns Scotus, William Ockham, Jean Gerson, and Juan Luis Vives. So, I attempt here to show Vitoria's theoretical relationship with preceding scholarship.

In this paper, I give a brief account of Vitoria's life (section 1), and then the earlier interpretation of Vitoria's theory and the idea of *ius* and *lex* (section 2). Finally, I investigate how Aquinas, Scotus, and Vitoria treat the problem about the foundation of private property (*dominium*) and see distinctiveness of Vitoria by assessment into his text, in this process, we can see his use of new concept about natural law (section3). As we will see, it is difficult to give a definite translation to the Latin word "*ius*", "*lex*" and "*dominium*", and the relationships between "natural right" and "natural law" there were quite delicate; as a result, I am forced to use a variety of words (right, law, faculty, property, dominion, domination) to render them in English, but I always add the original Latin word.

1 Vitoria's life

Francisco de Vitoria,¹ who is well known as one of the founding fathers of international law and as the contributor to the revival of Thomistic theology and philosophy, was born in 1492² of a Basque family in Burgos.

He began to study classical languages (Latin and Greek) at a Dominican convent in 1501. In 1509, he was sent to the University of Paris, which was the center of nominalist philosophy and humanistic movement of the Dominican order. He stayed there for 15 years, and during his stay, he studied not only theology but also works of humanists such as Erasmus and the classical text of Cicero and Seneca written in Latin and Aristotle in Greek.

In 1523 Vitoria returned to Spain and began to teach theology at the Dominican College of San Gregorio. In 1525, Vitoria was elected to the principal chair of theology (Cátedra de Prima) at the University of Salamanca and held this position throughout his life. Vitoria and his pupils and successors, Domingo de Soto, Luis de Molina³ and Francisco Suarez constituted a set of thinkers known as the Salamanca School.

Although he was mainly occupied with teaching theology and most of his lectures were based on interpretations of Thomas Aquinas' *Summa Theologiae*, he sometimes held special lectures (*Relectio*) which were open to the public and discussed contemporary political issues. His two most famous lectures were the *Lecture On the Indians*⁴ and the *Lecture on the Laws of War*.⁵ In these lectures, he developed the idea of the right of indigenous people, the validity of their property and the right of free travel and commerce and missionary work (*ius peregrandi*).⁶

1 This section is mainly based on Noreña (1975, pp. 36-74), Doyle (1997, pp. 11-40), and Campagna (2010, pp. 22-36).

2 As Campagna (2010, p. 26) shows, there are other opinions about Vitoria's birthyear.

3 He did not study in Spain but Portugal.

4 *Relectio De Indis recenter inventis*, it is always abbreviated as *De Indis*.

5 *Relectio de iure belli*.

6 Although it also became the right of Spaniards to go freely to the New World.

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He criticized the Spanish policy against France and the conquest of New World by a purely theoretical standpoint,⁷ so his criticism might not be radical nor political, but his theory of natural law and human rights had a strong universality which was not restricted only to Christian people and had an effect for a long period.⁸ His lectures are often cited by political philosophers of later ages, such as Hugo Grotius, Alberico Gentili and Samuel Pufendorf,⁹ while his theory of hospitality proved especially influential.¹⁰

2 Preceding interpretations

In this section, I will discuss some of the preceding interpretations of Vitoria's theory of natural right and natural law. The most important problem is whether Vitoria used not only the idea of law, but also the idea of right. Some scholars think that the idea of right is peculiar to modern moral or legal theory and they have tried to prove it. Putting aside the question of their validity, such studies improve our understanding of the idea of right, and their analyses of Vitoria's text is also valuable.

2.1 Bernice Hamilton

Hamilton asserts that in Vitoria's theory of natural right and natural law, "natural" mainly means this which is rational and generally accepted. When something is natural, it is prescriptive too. When something is prevalent among people, it becomes evidence which shows that such thing may be prescribed by natural law. Additionally, consent of all people confirms prescription of the natural law.¹¹

7 Tierney (1997, pp. 258,9).

8 Wagner (2018, pp. 89-91).

9 Hernandez-Martin (1999, pp. 87-112).

10 For more details see Cavallar (2002).

11 Hamilton (1963, p. 12).

According to Hamilton,¹² Vitoria followed Aristotle and observed that the natural thing was at the same time necessary.¹³ Hamilton's classical interpretation was generally reasonable, but she did not go any further into analysis of Vitoria's idea of *ius* in detail.

2. 2 Richard Tuck

Richard Tuck, historian of political thought, emphasizes that Vitoria moderated subjective meaning of *ius* (right) which is formulated by Jean Gerson (1363 -1429) and Conrad Summenhart (1455-1502) with distinguishing *ius* and *dominium* (dominion).¹⁴ According to Tuck's argument, Gersonian rights theory fully admits active human agency and human liberty by assimilating *ius* (right) to *dominium* (dominion) which mean absolute right of disposal and domination. Vitoria rejected Gersonian concept of strictly subjective *ius* (right) because it implies that free men were free to enslave themselves "*ad libitum*" (whatever it pleases, or at liberty) and unconditionally.

According to Tuck, Vitoria denied that liberty can be exchanged like other property and claimed the limited character of human liberty.¹⁵ Tuck's later research also emphasizes only the objective or normative aspect of Vitoria and the other scholars of the Salamanca School.¹⁶ Alongside the interpretation of Tuck, some other researchers also point out the objective character of Vitoria's theory of natural rights.¹⁷ Although in Vitoria's theory undoubtedly the objective meaning of *ius* (right) is present, yet Vitoria's distinctiveness from Aquinas is proved by textual research. So, Tuck's interpretation is difficult to accept.¹⁸

12 Hamilton (1963, p. 13).

13 While it is true that Vitoria specifies that he follows Aristotle, nevertheless, it is still debatable whether Vitoria's term truly follows Aristotle. See Cortest (2008, p. 38).

14 Tuck (1979, pp. 44-47).

15 Tuck (1979, pp. 49, 50).

16 Tuck (1999, pp. 16-77).

17 Todescan (2016, pp. 23-26), André-Vincent (1971, p. 55).

18 Tierney (1997, pp. 257-264), Demelemestre (2015, pp. 473-492).

2.3 Daniel Deckers

Deckers criticizes Tuck's interpretation¹⁹ and points out that in Vitoria's *Commentary on Summa Theologiae* II-II q. 62, Vitoria defined *ius* as "power or faculty according to law"²⁰ which implies a subjective legal relationship.²¹

Deckers (1991, pp. 110-124) also argues that Vitoria's theory of natural law and natural right is based on nature which is expressed in human's natural inclination (*inclinationes naturales*). In Deckers' view, Vitoria founded his theory on human inclination and admitted the priority of natural inclination over natural law.

Deckers conclusively agrees with sociologist Niklas Luhmann's interpretation that Vitoria brought the subjective idea of *ius* into the classical tradition of objective idea of *ius* by Aristotle and Thomas Aquinas.²²

Deckers' emphasis on subjectivity seems in some point favorable for the purposes of this paper, but his interpretation of Vitoria's concept of natural sociability²³ and the idea of natural inclination²⁴ are mistaken. Although Deckers associated Vitoria's idea of "*natura*" with bare humanity and pointed out Vitoria's optimistic view of humanity, Vitoria (1995, pp. 122-126) in fact used the idea of "*natura*" with a strong normative implication and showed the negative side of human's unbounded liberty in his earlier lecture.²⁵

19 Deckers (1991, p. 160). He indicates that Tuck's explanation of Gerson's "extreme subjectivism" is misleading concept and description of Vitoria's objective aspect by comparison with such a concept is historically nonsense.

20 "potestas vel facultas ... secundum leges".

21 Deckers (1991, pp. 160-163).

22 Luhmann (1981, p. 56). Deckers (1991, p. 145).

23 Deckers (1991, pp. 50-53).

24 Deckers (1991, pp. 110-124).

25 In this point I agree with criticism by Spindler (2016, pp. 177-185).

2. 4. Ernst-Wolfgang Böckenförde

Böckenförde, known as a great pupil of Carl Schmitt, refers to Deckers's work positively, but he criticizes that Deckers only emphasized Vitoria's two aspects,²⁶ but did not understand that these two aspects coexist.²⁷ He points out that Vitoria faced the criticism against Thomistic theory of natural law and natural right by Duns Scotus and William Ockham. In his interpretation, Vitoria tried to reconcile Thomas with Scotus and Ockham.²⁸ Vitoria's relationship with Scotus's theory was delicate. Böckenförde acknowledges that while Scotus emphasized that natural law and natural right are ordained by God's absolute will, and these law and right are easily changed by God freely, Vitoria distinguished God's power of legislation and absolute creation and as a result denied the idea that God's absolute will can freely change the contents of natural law and natural right.²⁹ Vitoria certainly rejected God's agency against natural law and natural rights.³⁰

According to Böckenförde's interpretation (2006, p. 351), Vitoria did not emphasize natural law and natural right based exclusively on *ratio* (reason), but he understood God's will as integrated with God's wisdom and reason. So Böckenförde concludes that in terms of reference to God's will, Vitoria's argument is not different from that of Scotus.

I agree with the historical overview and the indication of the two aspects of Vitoria by Böckenförde, but his explanation was not sufficiently supported by citation of Vitoria's text, so there is a need for more inquiry and some emmendations.

26 Thomistic-objective and subjective.

27 Böckenförde (2006, pp. 355).

28 Böckenförde (2006, pp. 350-352).

29 Böckenförde (2006, pp. 347-348).

30 "deus in omnibus istis non fecit contra ius naturale nec contra iustitiam, nec dispensavit in aliquo praecept. Dato quod deus non esset legislator sed creator" *Commentary on Summa II-II q104 a.4 n2 105 a2* Böckenförde (2006 p. 348).

2. 5. Brian Tierney and Annabel Brett

Brian Tierney, a scholar of medieval canon law, shows that in medieval era natural law had an important role in legal practice by regulating human law.³¹

He indicates that the subjective meaning of “*ius*” was already present in 13C within the text of Romanist and Canonist. So, Tierney (1997, pp. 257,258) suggests that Aquinas deliberately adopted the use of “*ius*” with exclusively objective sense. He also points out the conclusive defect of Aquinas’s theory, for example, it is void of the idea of the right of self-defense or of subsistence and showed that Vitoria’s break from Aquinas derived from his conviction of Aquinas’s theoretical defect, especially the argument about restitution.³²

Tierney emphasizes that Vitoria articulated the idea of permissive law with defining *ius* as “what is permitted according to law”.^{33 34}

Tierney (1997, pp. 262-264) shows that by this definition, Vitoria integrated the idea of subjective right with objective justice (*iustum*).³⁵ Although this idea is found in Vitoria’s *Commentary on Summa Theologiae*, Aquinas himself did not deploy this idea.³⁶

31 Tierney (2007, p. 104). Tierney showed that Decretum Gratiani, which is fundamental code of canon law, declared that any custom or statute contrary to natural law was “vain and void” (Dist.8 c.1).

32 In *Summa Theologiae* II-II q.62.a1, Aquinas said “secundum ius domini ab uno possunt ad alium devenire” This sentence cannot be understood when *ius* only means “what it is right objectively”.

33 “*ius ergo licitum por leges*”, “patet hoc ex sancto Thoma supra q. 57 a.1 ad secundum, ubi dicit quod lex non est proprie *ius*, sed est ratio iuris, id est, illud ratione cuius aliquid est licitum.” (II-II62.1 p. 64).

34 Tierney1997, 258,259. “patet hoc ex sancto Thoma supra q. 57 a.1 ad secundum, ubi dicit quod lex non est proprie *ius*, sed est ratio iuris, id est, illud ratione cuius aliquid est licitum.” (Vitoria1935,64, II-II. q62.a1).

35 Brett (1997, p. 128) also makes the same point.

36 As Tierney (2002, p. 402) 3(2014, pp. 69-91) shows, Aquinas also had the idea of “indifferens” which is distinguished from good or evil, but this idea was not based on natural law but regarded as exception from such law. This theoretical treatment was fatal to the consistency of natural law theory.

As Annabel Brett (1997, pp. 89-122) implied, this concept of permissive law is innovative in the history of natural law theory. She indicated that till 16C, some influential scholars (especially interpreter of Aquinas and Aristotle) kept in the intellectual tradition which understood the idea of *ius naturale* and *lex naturalis* only in the obligatory sense. In this tradition, *ius naturale* and *lex naturalis*, indicators of good and evil are prescriptive not only in the sense that evil must be avoided but also in the sense that good must be pursued. They are sources of both prohibition and direction. Within the Aquinas's system of natural law and objective natural rights, all things must be intrinsically obligatory. As in the case of "duty" of self-defense, Vitoria's theory also had the echo of such tradition.³⁷

Brett also points out the significance of concept of *dominium* (property, dominion, domination) in Vitoria's theory, and she denied that Vitoria's idea of *ius* means natural subjective right, it had only traditional sense.³⁸ Even if Brett's interpretation is right, it is also true that Vitoria's idea of *dominium* has close relationship with *ius*, as I will show.

2. 6. "*ius*" and "*dominium*" —fundamental outline

In the *Commentary on Summa Theologiae*, Vitoria asserted that all *dominium* is based on *ius*,³⁹ and he defined *dominium* as the faculty to use something according to law (*ius*).⁴⁰

In *De indis*, Vitoria clearly observed that *dominium* is *ius* and that only rational beings, who have control over their actions (*dominium*)⁴¹ have *ius*. In this sentence, *dominium* has two senses, one means rational control over the action, the other means property, and both meanings had

37 This obligatory character of self-defense became one of the justifications for Spanish Conquest, duty to help prey of pagan ritual.

38 Brett (1997, pp. 129-131). In there, Brett criticized Deckers' interpretation.

39 "nullum est dominium quod non fundetur in jure" (II-II.q.62. a.1).

40 "facultas quadam ad utendum re aliqua secundum iura"(II-II q.62 a.1 n8). Otte 1964,40 asserted this definition based on definition of Gerson.

41 *dominium sui actus*.

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a strong relationship with *ius*.⁴² *Dominium* in the former sense (rational control over action) is necessary precondition of application of natural law and natural right, only those who have faculty of reason are regarded to have right and to be constrained by natural law,⁴³ this idea is distinct from Aquinas's one because Aquinas regarded *ius* as applicable to irrational beings. *Dominium* in the latter sense (property) is also the foundation of *ius*, and Vitoria used the violation of *dominium* as an example of *injuria* ("injustice" or "negation of *ius*").⁴⁴

3 Foundation of *dominium* and consistency of natural law

In the previous section, I reviewed earlier interpretations of Vitoria's theory. We can safely conclude that Vitoria's theory of right had two aspects which were an objective or normative one and a subjective or liberal one and had strong relationship with the idea of *dominium*. But it is still problematic what is the relationship between them.

In order to understand their relationship, I analyze Vitoria's treatment of the foundation of private property. In the long western tradition, all things are thought to be common to all people at first condition. This is in part the case of Christian tradition.⁴⁵ But in fact from ancient time, things were owned separately, so the relationship between a hypothetical common ownership and the actual separated ownership should be clarified, especially as the search for ways to reconcile them had a strong effect on theory of natural law and natural right. We will first

42 "Creaturae irrationales non possunt habere dominium. Patet, quia dominium est ius, ut fatetur etiam conradus.(.....) Et confirmatur propositio auctoritate S. Thomae: Sola creatura rationalis habet dominium sui actus, quia, ut ipse etiam dicit, per hoc aliquis est dominus suorum actuum, qua potest hoc vel illud eligere" (Vitoria1960, 661-662). Here Vitoria mentions Aquinas's argument, but he deployed the idea which Aquinas did not use. In this sentence, Vitoria used *dominium* in two senses, –control over oneself and property of other things, but he might think both are categorized within single definition of *ius*.

43 Even though Vitoria regarded American Indians as rational beings, it is still problem how children and irrational persons should be treated.

44 Although he did not identify *dominium* with *ius*, because not only violation of property, but also violation of *ususfructus* (right to use) and *possessio* (possession) implied violation of *ius* (*Commentary on II-II q.62.a.1*).

45 *Genesis* 1.26-28, Otte (1964, p. 47) points out that this idea is expressed by Church Fathers, for example, Clemens of Alexandria, Cyprianus and Lactantius.

examine Aquinas's case.

3. 1 Thomas Aquinas

As Pauline Westerman suggests, Thomas Aquinas (1225-1274) allows for what may seem at first sight to be deviations from natural law, this is ascertained by his treatment of private property. Although Aquinas asserted that according to natural law, all material things should be owned in common, he nevertheless maintains that natural law does not prohibit us to act contrary to that precept. If it is for the sake of human convenience to institute private property, we are free to do so, just as natural law does not prohibit people to make clothes although they are born naked.⁴⁶

The institution of private property is therefore regarded as a useful addition to natural law: man's own product. It is only to be condemned if, in times of scarcity, private property undermined the chances of self-preservation of the people. It is only when one of the (sub-)ends are threatened that private property should be abolished.⁴⁷ According to Aquinas, the system of private property is based on *ius gentium*, which is part of natural law.⁴⁸

Aquinas' treatment itself can be regarded as a reasonable one, he and his followers still tried to understand individual property (*dominia*) as the deductions from natural law, but it also implied (or seemed) that natural law admit to act "contrary to" natural law, and it might amount to a contradiction.⁴⁹ I think this is partly because Aquinas did not deploy idea of permissive law, nor relate the idea of subjective right with natural law. In order to express something whose function is like subjective right in Aquinas's theory, which only has the objective prescriptive meaning of *ius*, some exemption from law must be contained in natural law.⁵⁰

46 Westerman (1998, pp. 72-74), *Summa Theologiae*, I-II q.94. a.5 n.3.

47 Westerman (1988, pp. 73-75), II-II q.66a.2.

48 *Summa*, II-II q.57.a.3.

49 According to Otte (1964, p. 48), Vitoria also regarded this as contradiction.

50 For a more detailed discussion of Aquinas, see Torrel (2002).

3. 2 Duns Scotus

Affected by this argument, the nominalist or voluntarist theologians of a later age, Duns Scotus (1265-1308) and William Ockham tried to prove natural law is so variable that even a strict prohibition of murder or fundamental prescription about human agency⁵¹ might be abolished by God's will.⁵²

According to Scotus, private property is found only on human law, because natural law itself didn't imply such a system. So, he said that the foundation of private property from original distinction is not based on natural law or law of God, but on human law.⁵³ Consequently, he suggested, orders of *dominium* are dependent on the will of the human legislator. This theory implied the regulation of *dominium* that includes property and slavery.

Followers of Scotus and other nominalist voluntarist theologian still had influence in 16C,⁵⁴ and humanists in that century had the similar idea, that system of property and treatment of humans outside one's own country are little bound by the regulation of law of God or natural law.⁵⁵

3. 3. Francisco de Vitoria

Against such a trend, Vitoria must show that the foundation of private property itself has a strong relationship with natural law. In order to understand his endeavor, we see Vitoria's *Commentary on Summa Theo-*

51 As it is like Ten Commandment of Holy Scripture.

52 Böckenförde (2006, pp. 273-319).

53 "Tertia conclusio, quod revocato isto precepto legis naturae, de habendo omnia communia, et per consequens, concessa licentia appropriandi et distinguendi communia, non fiebat actualis distinctio per legem naturae, nec per divinam.... Per legem naturae non, ut videtur probabile, quia non apparet quod illa determinet ad opposita; ipsa autem determinavit in natura humana hoc quod omnia essent communia... Et licet quasi statim post naturalem apprehensionem de hoc, quod est res esse dividendas, occurrat ill tanquam probabilis et manifesta, tamen rationabilius est dicere, quod ipsa non sit de lege naturae, sed positiva. Ex hoc sequitur quod aliqua lege positiva fiebat prima distinctio dominiorum" (Scotus1894, 265).

54 For example, Jacques Almain (? ~1515) was influential Scotist and Vitoria also read Almain's commentary on Scotus. See Burns (1991, pp. 149-155).

55 Tuck (1999, pp. 16-77).

logiae II-II Q.62.a1.n20⁵⁶ where he argues about the legal status of division.

At first, it seems that Vitoria also accepts Scotist tradition and reject Aquinas's idea. He observed that appropriation and division are based on human *ius* because natural "*ius*" or "*ius*" of God⁵⁷ do not command such things.⁵⁸

However, this is just one proposition. In the following sentence Vitoria proposed an opposing argument that such division must not be true, or must be injustice even if such division exists because it is not based on natural or God's "*lex*", because "*ius*" make us toward all property or domination (*dominium*) without division.⁵⁹ This proposed opposition says that natural law (*ius*) derives from God and it cannot be changed by anyone else except by God himself.⁶⁰

Vitoria cited Conradus Summenhart's argument and Gratian's definition in *Decretum* that natural law (*ius*) is immutable, and he rejected Scotus's idea.⁶¹

After that, Vitoria deployed the idea of permissive law (*lex*)⁶² and as-

56 It is based on Vitoria's lectures of 1530s.

57 It is difficult to decide whether in this sentence he uses "*ius*" in the sense of "law", or he used this term to mean God's faculty or power of nature.

58 Vitoria, II-II. q.62a.In.20 "Divisio et appropriatio rerum facta fuit jure humano. Patet, quia facta est ut videmus; et non jure naturali nec divino, ut dictum est, nec angeli fecerunt eam."

59 Vitoria, II-II. q.62a.In.20 "Sed contra istam propositionem arguitur sic: Non licuit hominibus facere talem divisionem et appropriationem: ergo talis divisio non est facta, vel si facta est, non tenet, et adhuc omnia sunt communia, immo est praeda injusta facere illam divisionem. Amtecedens tamen probatur, quia divisio et appropriatio rerum est contra legem naturae, nam jus naturale fecit me dominium omnium rerum: ergo nullus potuit a me auferre istud dominium."

60 Vitoria, II-II. q.62a.In.20 «Jus enim naturale est a Deo et magis quam positivum divinum, quia forte jus illud scilicet naturale Deus non posset auferre, ut dicit Scotus et alii, quod praecepta decalogi non potest mutare, licet bene jus divinum positivum posset auferre. Ergo nullus potest me privare illo jure." And according to Vitoria, Scotus coped with this problem by asserting that God truly changed the natural law." Ad hoc Scotus in 4, d.15, l.2, conc.2 dicit quod bene verum est quod de jure naturali aliquando omnia fuerunt communia; sed jam non sunt, quia illud praeceptum juris naturae fuit revocatum a Deo." (ibid).

61 Vitoria, II-II. q.62a.In.20 "Sed arguit Conradus contra hoc, quia lex naturalis est immutabilis, ut habetis d.6, SS His itaque, ubi dicit Gratianus: <Itaque naturale jus ab exordio incipiens manet immobile et immutabile>. Ergo. Item quia lex naturalis numquam praecepit fieri talem divisionem."

62 Vitoria, II-II. q.62a.In.20. "Dico praecepit, quia lex potest esse praeceptiva, et alia potest esse consultiva, et alia permissiva." Here he used 1st declension and explicitly referred to idea of permissive

serted that the division of things is not derived from the revocation of natural law (*lex*), because natural law (*lex*) does not command property of all things,⁶³ it is only conceded to human beings.⁶⁴ So against Scotus, the division of things is no violation of natural law (*lex*).⁶⁵ Vitoria says natural law itself admits to divide things by human's authority,⁶⁶ and he concludes⁶⁷ that there is no natural law (*ius*) which "commands" common property, and if human beings have all power toward all things by natural law, the division of things is also derived from natural law (*sequitur quod de jure naturali*).⁶⁸

4 Conclusion

I showed through interpretation of some of Vitoria's writings that Vitoria tried to keep a distance from Scotus and to explain private property as based on natural law. In order to accomplish those tasks, he used the idea of the permissive (or concessive) natural law and asserted that the idea of *dominium* already implied right to divide. At this point, his idea of *dominium*, which has a strong relationship with *ius* is regarded to imply the possibility of free action and division by human beings. Human beings' *dominium* gives people possibility to act freely, but at the same time, natural law is still obligatory for them. Though this approach in-

law and idea of "lex consultiva".

63 Vitoria, II-II. q.62a.1n.20 "ergo ad faciendam divisionem rerum non opus erat revocare legem naturalem, quia lex naturalis nunquam praecepit illud". I understood "illud" as "illud jus naturae, quod erat omnium hominum".

64 Vitoria, II-II. q.62a.1n.20 "Sed illud nunquam fuit praeceptum, sed concessum est ut omnia essent communia."

65 Vitoria, II-II.q.62. a.1n.20.p.77 "Ergo non opus fuit abrogatione legis naturalis ad dividendas res, ut dicit Scotus, contra quem arguimus".

66 Vitoria, II-II.q.62. a.1n.20.p.77 "Dico igitur quod potuit licite humana auctoritate fieri divisio rerum sine tali revocatione".

67 Vitoria, II-II.q.62. a.1n.20.p.77 "Et item, si homo esset dominus omnium de jure naturali, poterat facere quidquid vellet;...Concedimus ergo quod nullus fuit praeceptum quod omnia essent communia, sed solum fuit concessio.Cum ergo homines habebant potestatem in omnibus de jure naturali, et erant vere domini, sequitur quod de jure naturali potuerunt dividere possessiones et facere ex eis quidquid voluerunt."

68 Böckenförde (2006, p. 354) misunderstood this. According to him, Vitoria abandoned natural law as foundation of private property, but this paper shows that it is not true. Otte (1964, p. 49) defines Vitoria's treatment of division "unthomistisch", but Otte's explanation that Vitoria founded private property only on human law is mistaken.

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cludes a break from Aquinas's theory, it is necessary for the validity of natural law against theoretical criticism of nominalists. Finally, I also argued against some research that there is still conflation of subjective and objective meaning in Vitoria's usage of "*ius*" and I suggested that there should be more cautious analysis.

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