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Dominium in the Indies. Juan López de Palacios Rubios' *Libellus de insulis oceanis quas vulgus indias appelat* (1512–1516)

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Abstract

The *conquista* of the Americas confronted Spanish jurists educated in the legal concepts of the European medieval tradition with a different reality, pushing them to develop modern legal concepts on the basis of the European *ius commune* tradition. Traditionally, the School of Salamanca, theologians and jurists centred around the Dominican Francisco de Vitoria are credited with this intellectual renovation of moral and legal thought. However, the role earlier authors played in the process is still insufficiently researched. The Castilian crown jurist Juan López de Palacios Rubios is one of the most interesting authors of the early phase in the conquest of the Americas. His treatise about the Spanish dominion in the Americas is a central text that shows how at the beginning of the 16th century the knowledge and the experiences of the European past were applied to the American present and, in the process, were shaped into modern ideas.

Keywords: School of Salamanca, conquest, dominium, Bartolomé de Las Casas, Juan de Palacios Rubios



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Introduction

With the *conquista* of the Americas, legal concepts of the European medieval tradition were extended to what the eminent Argentinian legal historian Víctor Tau Anzoátegui calls »new and vast territories«, causing a »crisis« of the *ius commune* and, eventually, the formation of a new kind of *ius*, the so-called *derecho indiano*.¹ The School of Salamanca, theologians and jurists centred around the Dominican Francisco de Vitoria, played a major part in this development. They have been credited with the intellectual renovation of moral and legal thought, transposing medieval traditions into modernity: new phenomena from the Americas were explained, analysed and judged using the terminology and concepts of European traditions, often reaching back to Greek and Roman Antiquity;² the concepts of *dominium* and *possessio*, of pagans and slaves are just a few examples. Precisely how those concepts were moulded by the exigencies of the Americas is still a topic of research. A prerequisite for any analysis of the achievements of Vitoria and others is, however, a thorough understanding of the prior state of political and juridical discussion regarding the American territories. Only against the background of these older authors will it be possible to gauge the intellectual innovations of the modern scholastics in Salamanca and elsewhere.³

From a juridical standpoint, the eminent Castilian crown jurist Juan López de Palacios Rubios is one of the most interesting authors of this »pre-Vitorian« phase in the conquest of the Americas.

For centuries, his substantial treatise on the topic of the Spanish dominion in the Americas was presumed to be lost. Now that a scholarly edition of the Latin text has been published,⁴ his position on indigenous property and political power as well as on the justification of the Spanish presence in the Indies can be reconstructed and provides an authentic insight into the discussions and positions held at the court of Ferdinand II and the young Charles V.

1 Juan López de Palacios Rubios (1450–1524)

Juan López de Vivero (1450–1524) today is widely known under his by-name of Palacios Rubios, which he adopted from the village where he was born in 1450.⁵ Palaciosrubios is a small village, a day's walk⁶ east of Salamanca, and Juan López was probably baptized in the parish church of San Andrés, which by that time had not yet acquired its distinctive tower that dates from the 18th century and remains the pride of the *pueblo* to the present day.

As a young man, he studied in Salamanca civil and canon law. He went on to teach canon law in Salamanca⁷ and Valladolid, where he was also *oidor* at the Chancillería. In 1504, King Ferdinand II appointed him a member of the Castilian Crown Council (*Consejo Real de Castilla*). Palacios Rubios served the last twenty years of his life as a juridical councillor to Ferdinand and his grandson, Charles V. In this capacity, he was not only one of

1 TAU ANZOÁTEGUI (2016) 39 describes »el fenómeno de expansión del Derecho común a nuevos y vastos territorios en el siglo XVI, con su consiguiente crisis y formación de un nuevo Derecho, el denominado indiano«.

2 ROJAS (2007) describes the same phenomenon in the field of natural sciences.

3 Cf. also TOSTE (2018) in this volume. The traditional view is represented by e. g. SÁNCHEZ DOMINGO (2012) 12.

4 PALACIOS RUBIOS (2013). Regarding the history of the text, cf. in the following, 2 *The Libellus de insulis oceanis quas vulgus indias appellat*.

5 The most detailed biography is still BULLÓN (1927). See also MARTÍN DE LA HOZ (2013) 14 sq.

6 About 42 kilometres.

7 FUENTE (1870) 246 suggests that Palacios Rubios had been present at the discussions between Colón and the professors of Salamanca in 1486, although no mention of said participation is mentioned in his treatise.

the main actors in Castilian legislation (as one of the four members of the commission who authored the *Leyes de Toro* (1505) as well as their most influential commentator),⁸ but also deeply involved in the juridical and administrative organisation of the *conquista* of the Americas.

Juan López de Palacios Rubios never crossed the Atlantic himself: his knowledge of life in the Americas was restricted to the oral and written reports of conquistadors, Crown envoys, administrators, and missionaries. It is remarkable (and was remarked upon by his contemporaries)⁹ that among the members of the Crown Council, he was not settled with possessions, with land and Indians in the New World. As he remained without economic interests of his own in the Americas, Cardinal Cisneros and others valued his opinions and arguments more than those of other *consejeros reales*.¹⁰

In spite of his numerous writings, today Palacios Rubios is mostly remembered for one particular document: the *requerimiento*, the notorious declaration of Spain's supremacy over the newly discovered territories, at the end of which the Spanish conquerors set the Indians an ultimatum to acknowledge their new status as loyal subjects of the Spanish Monarchs or be subjected to Spanish warfare. Because of the bloodstained history of this document, modern historians almost unanimously cast Palacios Rubios as one of the villains in the drama of the Americas' conquest. He is supposed to have regarded the Indians as slaves by nature, barely human and consequentially without any claims to liberty or property of their own lands.¹¹ He is said to represent an »extreme position«, following Aristotle in the acceptance of the existence of »slaves by nature« and finding them in the Indians who he purportedly described as »born slaves« or »animals«. ¹² Javier Barrientos Grandón tells us that he did not even consider the idea of

indigenous property and rights, encouraging the Spaniards to acquire the supposedly ownerless territories by pure seizure.¹³

This modern picture of Palacios Rubios stands in sharp contrast to his characterisation by Bartolomé de Las Casas who repeatedly declared the jurist to be a »good man and good Christian« and a *favorecedor de los indios*, a champion of the Indians at the Spanish court.¹⁴ Also, he recounted the help he himself received from the crown jurist.¹⁵ This notable discrepancy alone calls for a closer look at Palacios Rubios' position about the Indians and the foundations of Spanish rule in Latin America.

2 The *Libellus de insulis oceanis quas vulgus indias appellat*

2.1 *The Junta of Burgos and the Discussion of the Spanish Government in the Americas*

Palacios Rubios' position regarding the Americas can be found in a systematic treatise, a text that today is widely known under the title of *De las islas del mar océano*, or its Latin title *Libellus de insulis oceanis quas vulgus indias appellat*.

During the 16th century, European powers like England and France began to doubt the validity of the papal donation that gave Spain (and Portugal) the exclusive right to access the American territories.¹⁶ In Spain as well, the discussion about the Spanish presence in the Caribbean was becoming more pronounced as a result of the severe Dominican criticism of the political reality and the settlers' atrocities in the West Indies, triggered by the highly controversial Christmas sermon of Antonio de Montesinos in 1511. In the newly consecrated cathedral of Hispaniola, he told the gathered Spanish conquistadors that they were all heading to hell if they did not make ample resti-

8 MARTÍN DE LA HOZ (2013) 14. FUENTE (1869) 163 sq. mentions in passing the posthumous print publication of the commentary by Palacios Rubios' son Alonso de Vivero in 1523.

9 LAS CASAS (1994) III.7, 1776 chose to interpret this extraordinary lack of American properties as a divine retribution for Palacios Rubios' following of Hostiensis' »heretic opinion« about the indigenous political *dominium*.

10 BULLÓN (1927) 144 cites LAS CASAS' (1994) III.85, 2109 reminiscences: »Ya dijimos que no estaban otros en este Consejo por entonces con el Cardenal sino el Adriano, y el obispo de Ávila, y el licenciado Zapata, y el doctor Carvajal y el doctor Palacios Rubios, y a éste el Cardenal en estos negocios de las Indias daba más credito que a los otros«.

11 Cf. PAGDEN (1986) 52 sqq.

12 CAVALLAR (1992) 229 citing FISCH (1987) 227 sq.

13 BARRIENTOS GRANDÓN (2000) 45.

14 LAS CASAS (1994) III.7, 1775 sq.

15 Cf. in this article, under 2.2 The Only Copy.

16 MARTÍN DE LA HOZ (2013) 11 sq.

tution to the Indians.¹⁷ Montesinos and representatives of the island's government were called to Spain, and the king set up a commission of jurists and theologians to investigate the allegations and to devise a legal-political strategy.¹⁸ The best-known description of the *junta* of Burgos has been given by Bartolomé de Las Casas, written more than forty years after the events.¹⁹ Juan Rodríguez Fonseca (1451–1524), Bishop of Burgos and superintendent of the *Casa de Contratación* (founded in 1503), chaired the seven-member commission: three theologians and four jurists. They included the Dominican theologians Matías de Paz,²⁰ Pedro de Covarrubias and Tomás Duran, and the licentiates Gregorio, de Sosa,²¹ Santiago²² and Juan López de Palacios Rubios.^{23, 24} Palacios Rubios, de Sosa and Santiago were members of the Castilian Crown Council; they, including the bishop of Burgos, had previously dealt with questions related to the Conquista.²⁵ The matter was difficult: a

contemporary memorial records more than twenty meetings of the *junta*, in which the eight members could not agree on a common standpoint. To get a clearer picture of the American circumstances, the committee heard three »experts« with firsthand knowledge: Alonso de Espinar, Franciscan prior of Hispaniola, Pero García de Carrión, a merchant as well as a man of some standing,²⁶ and *el bachiller* Martín Fernández de Enciso,²⁷ who also wrote a *Suma de Geographia*²⁸ about the Indies.²⁹ Antonio de Montesinos, too, stayed at Burgos to champion the case of the Indians; after converting Alonso de Espinar to his point of view,³⁰ the Franciscan helped Montesinos to approach the jurists Palacios Rubios, de Sosa and Santiago, whom he »advised« with characteristic vehemence in favour of the Indians against »those Spanish sinners«.³¹

After many meetings and long deliberations, the *Junta* produced a memorandum to the king with seven fundamental points about the treatment of

17 The main church of Santo Domingo had been consecrated as cathedral on August 8, 1511: LAS CASAS (1995) 225 note 7. The description of the events is based on the detailed account by LAS CASAS (1994) III.3–6, 1757 sqq., cf. also SÁNCHEZ DOMINGO (2012) 13.

18 MARTÍN DE LA HOZ (2013) 12; ZAVALA (1954) XII.

19 LAS CASAS (1994) III.7, 1775–1778; for the date, see LAS CASAS (1994) III.8, 1780 (»... hoy que es el año de mill y quinientos y cincuenta y nueve ...«). He had, however, first-hand experience of the occurrences: Pedro de Córdoba, the Dominican prior of Hispaniola, had suggested that Las Casas accompany Antonio de Montesinos to Spain as an additional witness to the atrocities taking place in the Indies: ORIQUE (2018) 9.

20 »... catredático [sic] de teología en la Universidad de Salamanca, fraile de la misma orden se Sancto Domingo, trabajó mucho el dicho padre Antoño Montesino que el rey lo enviase a llamar, que residía, siendo catredático [sic] (como deximos) en Salamanca«: LAS CASAS (1994) III.7, 1776.

21 »... persona de muncha [sic] virtud y que favoreció mucho [a] los indios el tiempo adelante desde fue más instruído, como el licenciado Santiago y el doctor Palacios Rubios«: LAS CASAS (1994) III.7, 1776.

22 »... varón cristiano y de muy buena voluntad«: LAS CASAS (1994) III.7, 1775.

23 »... doctísimo en su facultad de jurista, estimado en ella más que todos y por bueno y bien cristiano también tenido«, but criticised for following »en el error de Hostiensis«: LAS CASAS (1994) III.7, 1775 sq.

24 BULLÓN (1927) 123 sq.

25 BULLÓN (1927) 120 citing ANTONIO DE HERRERAS' (1601) 10.6, 344 account of the return of Pedro de Arbolancha from Peru in 1514: »Recibieronle con gran gozo Iuan Rodríguez de Fonseca que ya era Obispo de Burgos, y el señor Comendador Lope de Conchillos, en quien se resumia todo el consejo y gouernacion de las Indias, porque no auia aun entonces Consejo particular dellas, sino que para las cosas arduas, se llamaua al Doctor Zapata, al Doctor Palacios Rubios, al Licenciado Santiago, y al Licenciado Sosa, todos del Consejo Real, con los quales el Obispo de Burgos comunicaua lo que se auia de hazer«.

26 »... y un Pero [sic] García de Carrión, mercader, hombre de auctoridad en su manera«: LAS CASAS (1994) III.8, 1779.

27 Cf. also the *memorial* of FERNÁNDEZ DE ENCISO (1864), written at the time of the *Junta* de Burgos.

28 FERNÁNDEZ DE ENCISO (1519).

29 MURO OREJÓN (1956) 67 claims that these three were the real authors of the laws concerning *encomiendas* and the modalities of Indian work and life under the Spanish rule, the members of the *Junta* just accepting their terms.

30 LAS CASAS (1994) III.7, 1777 sq. describes how Antonio de Montesinos converted Alonso de Espinal to his point of view: »... el padre fray Antoño hácele una vehemente y conminatoria plática diciéndole con vehemencia, como él solía predicar«.

31 LAS CASAS (1994) III.7, 1778.

his Indian subjects,³² which were subsequently cast into the legal form of the so-called Laws of Burgos, the first attempt to control the Conquista by legislation.³³

To bring the cycle of discussion and legislation to a close, Ferdinand II asked Palacios Rubios and the theologian Matías de Paz to write a treatise on the topic of the Spanish presence in the Indias, resuming the debate from a juridical and a theological point of view, respectively.³⁴ Palacios Rubios wrote his *Libellus* between 1512 and the beginning of 1516 (Ferdinand II, addressee of the text, died on January 23, 1516).³⁵ The crown jurist produced a substantial treatise, covering more than 180 handwritten pages in folio.³⁶

The text circulated in manuscript form at the Castilian court, possibly also at the universities of Salamanca and Alcalá. Palacios Rubios' treatise about the Castilian conquest of Navarre contains a number of references to the simultaneously composed *De las Islas*, citing the latter »as if it were well-known« to the recipients, as Vicente de la Fuente carefully puts it.³⁷ Bartolomé de Las Casas tried to

persuade Cardinal Cisneros to order a print edition of the treatise: Regarding their shared interest in protecting the indigenous peoples of the Americas, Las Casas wrote that the text would be most useful because it showed clearly that Indians »are brothers and free and how they should be treated«. ³⁸ Nevertheless, an early modern print edition never happened; the *Libellus* continued to circulate in manuscript form and was as such cited by authors like Diego de Covarrubias y Leyva, Juan Solórzano Pereira³⁹ and by Bartolomé de Las Casas himself.

2.2 *The Only Copy: A Working Relationship between Bartolomé de Las Casas and Juan López de Palacios Rubios*

After the 17th century, the treatise was considered lost – tantalisingly alluded to in Palacios Rubios' treatise about the conquest of Navarre and in the introduction to the 1576 edition of his commentary on the donations between husband and wife.⁴⁰ In the preface to the reader, Palacios Rubios' son Alonso enumerates the works of his

32 BULLÓN (1927) 122 sq. provides a copy of the *Junta's* memorandum from December 1512; cf. also LAS CASAS (1994) III.8, 1781 sq. It contains seven points: (1) Amerindians are free persons and are to be treated as such by the Spanish administration and settlers. (2) Amerindians have to be taught the Christian faith; the responsibility for this missionary activity lies with the king. (3) Amerindians are to be held to work for their own good and that of the community. (4) The work demanded of the Amerindians may not be excessive, and daily and yearly times free from work must be provided for their recreation. (5) Amerindians must have private houses and fields, and they have to have enough time to cultivate them. (6) Amerindians should live in permanent contact with Spaniards, as it is hoped that by daily contact they will adopt a Christian way of life faster and more fully. (7) Amerindians have to be adequately paid for the work demanded of them by the Spaniards.

33 Cf. MURO OREJÓN (1956) with a paleographic rendering of the text of the *Reales ordenanzas dadas para el buen regimiento y tratamiento de los*

indios (Burgos, December 27, 1512) and of the *Declaración y moderación* of these first laws given the following year (July 28, 1513); SÁNCHEZ DOMINGO (2012).

34 PALACIOS RUBIOS (2013) 44 writes about the king requesting him to summarise his position in the form of a treatise. LAS CASAS (1994) III.12, 1298–1800 also provides the text of a brief *memorandum* of the licentiate Gregorio in which he pleads for a despotic government of the Indians in the Aristotelian sense, as they are »as everybody says, like talking animals« (»... estos indios, que, según todos dicen, son como animales que hablan«). For Matías de Paz' treatise cf. EGÍO (2018); editions: PAZ (1933) and PAZ (2017), with Spanish translation.

35 MARTÍN DE LA HOZ (2013) 15 suggests that treatise had been written in 1512, in the midst of the discussion about Montesinos' sermon and the future *Leyes de Burgos*. That would mean that Palacios Rubios worked on the questions of the Castilian conquest of the Indies and of Navarre took place at roughly the same time: FUENTE (1869) 165.

36 Description of the manuscript Bibl. Nacional (Madrid) MS 17641:

MARTÍN DE LA HOZ (2013) 24; ZAVALA (1954) XXI.

37 FUENTE (1869) 172: »Lo que sí debe notarse acerca de este tratado [*i. e. De las islas*], es que Palacios Rubios lo cita como cosa sabida y conocida, ora porque lo hubiese impreso, ora porque hubiese entregado aquel memorial en manos del Rey, como entregaba ahora el de la conquista de Navarra«.

38 BULLÓN (1927) 127 sq. cites Las Casas writing the following: »Unas obras que el doctor Palacios Rubios, del Consejo Real, y el maestro Matías de Paz, catedrático que solía ser de Valladolid, han hecho cerca de los indios, mándense imprimir, y se verá que los indios son hermanos y libres y como tales deben ser tratados«.

39 However, FUENTE (1870) 243 claims that Solórzano had never seen the treatise himself (»[el] tratado inédito de *insulis oceanis*, cuya existencia aparecía dudosa, no habiendo logrado verlo el Dr. Solorzano, sábio y diligente investigador de las cosas de Indias«).

40 PALACIOS RUBIOS (1576).

father, printed or otherwise, mentioning a »copious work about the islands« that written in protest to the maltreatment of the Indians, declaring and proving their personal and political freedom:

Et cum Negritarum, sive ut imperitum vulgus Indios falso appellat, sub cuiuslibet capientis ditione ac iugo satis iniuria oppressorum acerbis & intestinus tuo [sic] in hoc authore dolor inardesceret, & eius viscera latenter dilaniaret ut eos liberos & sub nullius potestate subiiciendos ostenderet copiosum insularum librum literis mandavit.⁴¹

Only in 1870 did Vicente de la Fuente re-discover the manuscript in private hands,⁴² which is now in the National Library in Madrid.⁴³ In 1954, Agustín Millares Carlo y Silvio Zavala published Spanish translations of the treatises written by Palacios Rubios y Matías de la Paz.⁴⁴ That is why the *Libellus* today is primarily known under the Spanish title *De las Islas (del mar océano)*. A scholarly edition of the Latin text was published first in 2013 by a team from the university of Navarra, together with the revised Spanish translation.⁴⁵

The manuscript in the National Library in Madrid is the only known text witness of the *Libellus*: 90 folio sheets, unbound in a leather folder. It is a remarkable text witness: the copy was written for and partly by Bartolomé de Las Casas himself who also annotated the copy with his own comments in the margins.⁴⁶

The story of this copy is remarkable. It sheds not only light on the contacts of Bartolomé de Las Casas at court, but also explains his positive appraisal of Palacios Rubios.⁴⁷ After the death of Fernand II in January 1516, Cardinal Cisneros and Adrian of Utrecht, the later pope Adrian VI, were installed as regents for the young Charles V. Las Casas did not hesitate to write substantial

letters (*relaciones*) to both of them, informing them about the cruelties in the Indies: a Latin version for the Flemish Adrian, a Spanish one for the Castilian cardinal.⁴⁸ The shocked Adrian, so Las Casas tells us, asked Cisneros, if the sender of the letter was to be believed, and the cardinal, having received similar reports from his fellow Franciscans, acknowledged the truth of the allegations. Cisneros and Adrian addressed the matter:

Juntaba consigo el cardenal, cuando oía al clérigo [i. e. Las Casas], al Adriano y al licenciado Zapata y al doctor Carvajal y al doctor Palacios Rubios. Y éste era el que con verdad favorecía la justicia de los indios y oía y tractaba muy bien al clérigo y a los que sentía que por los indios alguna buena razón alegaban.⁴⁹

Convinced of the necessity of taking action, Cisneros commanded Las Casas and Palacios Rubios to sit down together and write a normative text about the Indians, about the liberty and the way they should be treated. Palacios Rubios left the task of drafting the text to Las Casas because of his first-hand experiences in the Indies. Both roped in Antonio de Montesinos to assist, and as the fruit of their discussions, Las Casas pens the first draft of the memorial.⁵⁰

Todo lo cual [i. e. the draft] pareció primero bien al padre fray Antoño Montesino, que estaba en su posada; y después, llevado al doctor Palacios Rubios, también lo aprobó en su estancia, puesto que él lo mejoró, añidido [sic] y puso en el estilo de corte, y así lo llevó al cardenal y al Adriano, teniendo Consejo sobre ello.⁵¹

The draft, its contents approved by Montesinos, was then revised by Palacios Rubios: According to Las Casas, the jurist honed the text, amended it and

41 PALACIOS RUBIOS (1576), s. p. (*Alfonso Perez de Bivero, Caesareo iure licentiatu, lectoris*).

42 MARTÍN DE LA HOZ (2013) 25 sq. with further references to the use of the treatise in publications after 1870. Cf. the original account of FUENTE (1870).

43 Bibl. Nacional (Madrid) MS 17641; see also MARTÍN DE LA HOZ (2013) 24; ZAVALA (1954) XXI.

44 PALACIOS RUBIOS (1954).

45 PALACIOS RUBIOS (2013).

46 MARTÍN DE LA HOZ (2013) 24 with further references.

47 Cf. above at footnote 9.

48 LAS CASAS (1994) III.85, 2106: »Para lo cual, hizo en latín una relación a Adriano de todo lo que en estas islas pasaba en crueldad contra estas gentes, porque no entendía el Adriano cosa de nuestra lengua, sino en latín con él se negociaba. Hizo en romance la misma relación al cardenal«.

49 LAS CASAS (1994) III.85, 2107.

50 LAS CASAS (1994) III.85, 2108: »Hizo el clérigo la traza, según le que sintió que para el remedio de los indios convenía, el fundamento del cual era ponerlos en libertad, sacándolos de poder de los españoles para que dexasen de perecer quedando en poder dellos ...«.

51 LAS CASAS (1994) III.85, 2109.

put it into »court style«, something very new for the cleric who had as yet little experience in courtly conventions. That the copy of Palacios Rubios' *Libellus* was produced in these weeks or months of intense discussions and writing seems highly probable: as a continuation of the debates between the young cleric and the elderly crown jurist, who had decades of experience in questions of legal counselling and drafting legal texts under his sleeve. The substantial *Libellus* helped Las Casas draft his own *memorial*, offering a treasure chest of arguments, citations and political deductions. Also, it served as a model for a text destined to be read and discussed in the council chambers of the Castile court. The result is the *Memorial de Remedios para las Indias*, which Las Casas presented in 1516.⁵²

Unfortunately, Las Casas' copy of the *Libellus* does not contain the full text Palacios Rubios wrote: left out are those parts that Las Casas considered superfluous or of no use for his own purposes. The structure of the *Libellus*, however, remains clear: in seven chapters, Palacios Rubios discusses the central questions of the legitimacy of the Spanish presence in the Americas. Chapter 1⁵³ deals with the indigenous way of life and the aptitude of the Indians to adopt the Christian faith. Chapter 2⁵⁴ affirms the freedom of the indigenous peoples and their unlawful enslavement by the

Spanish conquerors. Chapter 3⁵⁵ focuses on the civil *dominium* of the Indians and chapter 4⁵⁶ on the political *dominium* and jurisdiction of their caciques. These four chapters are copied by Las Casas in their entirety.

The *lacunae* begin in chapter 5:⁵⁷ Palacios Rubios talks in great length about how the jurisdiction and political *dominium* in the Americas were transferred to the Spanish king by papal donation. Here, his argument appears to get a little off track and lost in a string of details about Roman law and examples from Antiquity, and this is where Las Casas decided to cut his copy short.⁵⁸ With the exception of a brief note about how Palacios Rubios recommended a non-violent, suave proceeding when preaching the faith in the Americas,⁵⁹ chapter 6 is missing entirely – no doubt Las Casas felt no need for input from the jurist on this particular topic. Chapter 7⁶⁰ finally deals with the questions what taxes, tributes and labour the king can demand from all his subjects and therefore also from the Indians. In it, Palacios Rubios takes a wide-ranging tour through the tax laws of Roman Antiquity, and Las Casas leaves out some passages that may have seemed to him of purely antiquarian interest.⁶¹

So, what we are left with is the complete text of the first four chapters, which deal with the fundamental political, ethical and juridical questions of

52 LAS CASAS (1995). It would be an interesting and worthwhile endeavour to submit both texts, the *memorial* of 1516 and the *Libellus*, to a stylistic analysis, looking for discernible traces of Palacios Rubios' influence on Las Casas' draft.

53 PALACIOS RUBIOS (2013) 46 sqq.: »Tractaturus de Insulis novis, per Christophorum Colon noviter adinventis, ut eorum quae, Deo propitio, dicere constitui aliqualis habeatur notitia, pauca de illarum, situ, gente, et moribus, necessario praetermittenda sunt«.

54 PALACIOS RUBIOS (2013) 92 sqq.: »Secundo loco videndum est de illius gentis ingenuitate ac libertate, ad cuius investigationem praemitto«.

55 PALACIOS RUBIOS (2013) 122 sqq.: »Tertio disserendum est de rerum possessionumque dominio quod insulares, antequam christiani efficerentur et Maiestati Vestrae subderentur, habebant, an postea sibi retineant«.

56 PALACIOS RUBIOS (2013) 198 sqq.: »Quarto loco dicendum est de potestate et iurisdictione quam insulares domini, quos caciques appellant, in suos inferiores subditos habebant: utrum hodie, post baptismum, eandem sibi retineant eaque uti valeant.«

57 PALACIOS RUBIOS (2013) 332 sqq.: »Quinto videndum est de dominio, potestate et iurisdictione quam Sacra Vestra Maiestas habet in illas insulas earumque habitatores«.

58 Cf. PALACIOS RUBIOS (2013) 348 (»Et infra«), 352 (»Et infra«), 356 (»Infra parum«), 358 (»Et infra«), 362 (»Hic infert, doctor iste decem corolaria, et pro illis amplificat et implet multas paginas satis ad propositum indorum impertinentibus, etc. Et in fine ait sequentia«).

59 PALACIOS RUBIOS (2013) 372: »In toto isto cap. 6, nihil aliud dicit nisi instruere prelatos et praedicatores qualiter se debeant circa praedicationem fidei et doctriunam his gentibus

impartiendam cum quadam mellifluitate ac charitate habere. Addit etiam quod non statim sint instigandi ut haeretici dato quod rerrent aliquando in fide, quia debeamus considerationem admittere, videlicet, fore plantas novellas, etc.«

60 PALACIOS RUBIOS (2013) 374 sqq.: »Septimo dicendi adhuc restat quae tributa et servitia ad insularis exigi possunt et quae onera eis imponere licet«.

61 Cf. PALACIOS RUBIOS (2013) 376 (»et infra«), 412 (»Ubi multa disputat de praescriptione et infra dicit«), 414 (»Et infra«), 426 (»Et infra«), 464 (»Et infra«).

the *conquista* that were central not only for Bartolomé de Las Casas' political work. In this article, I propose to concentrate on the way Palacios Rubios conceptualises the *dominium*, the private ownership and political power over the West Indian territories. At the beginning of his treatise, Palacios Rubios states that though these territories may be called *las Indias*, they had nothing whatsoever to do with *India*, the rich land of spices and gold in the east that geographers had described since Antiquity.⁶² He thinks about *las Indias* as primarily consisting of islands, although the Spaniards had already gathered that there was more land than just islands in this part of the world: a part of the newly discovered territory seems to be more aptly described as a continent, writes Palacios Rubios.⁶³ Nevertheless, whether *las Indias* predominantly consisted of islands was not only a geographical matter but also of importance for their juridical status.⁶⁴

The following paragraphs will give a brief introduction to Palacios Rubios' position concerning indigenous private and political *dominium* before focusing on his views about the Spanish *dominium* in the Americas: What does it mean from a juridical point of view when the Pope transfers the political *dominium* to a Christian king, as he did by donating the Indies to Ferdinand and Isabella? What prerequisites need to be fulfilled? What are the legal norms upon which such a

donation could be based? And what legal consequences result from such a papal donation?

3 *Dominium* as property of the Indians

The first sentence in which Palacios Rubios talks about the Indians sets the tone of his discourse: As he learnt from trustworthy accounts, he writes, those islands are populated by people who are rational, mild-mannered, peaceful and in every way capable of becoming good Christians.⁶⁵ By their traditions, they knew no individual ownership of land, with the exception of their cultivated fields, which were considered common property of the cultivating group.⁶⁶ As there was no individual property, Palacios Rubios idealistically adds, there was also neither greed nor avarice, a paradisaical state of affairs further enhanced by the universal, shame-free nakedness of the people.⁶⁷

Palacios Rubios does not set out to discuss the question *whether* the Indians were *veri domini* of their cultivated lands or not – that he states as a matter of fact for both individual and common property »because infidels are capable of ownership and possession«. ⁶⁸ Nevertheless, he enters into a long discourse about the origin of individual ownership and its applicability to non-Christians: God created the earth and all things for »the rational creature« that is mankind – proof of which the jurist finds

62 PALACIOS RUBIOS (2013) 48 sq. cites the Roman geographer Pomponius Mela about the »true« India as the western part of Asia: a huge country comprising a third of the whole world; containing 5,000 cities; overflowing with precious stones and gleaming marble; and surrounded by lush palm forests through which huge animals roam. Drily he concludes that these examples show plainly that the territories he is going to write about are not India, as their features are rather the opposite of the geographer's descriptions.

63 PALACIOS RUBIOS (2013) 50: »Aliqua, tamen pars terrae nunc inventa non existimatur insula, sed potius continens«.

64 Cf. in this article: 5 Political *dominium* of the Spanish crown in the Americas, about footnote 159.

65 PALACIOS RUBIOS (2013) 53: »homines rationales mansueti, pacifici & fidei nostri capaces«.

66 PALACIOS RUBIOS (2013) 52: »Nihil proprium, sed quosdam terrae terminos sibi notos in communi habentes, in quibus quasdam herbarum radices plantabant, quibus panis vice utebantur.«

67 PALACIOS RUBIOS (2013) 52: »Et quia propria non habebant, nec erant cupidi, nec avari, nudi inverecunde incedebant.«

68 PALACIOS RUBIOS (2013) 122: »In his, ergo, et aliis rebus ac possessionibus in quibus illi, antequam converterentur et dominio vestro subderentur, dominium in communi vel in particulari habebant, licite ac iuste tenebant, et hodie similiter tenent ... infideles enim sunt dominii rerum ac possessionum capaces«, citing Psalm 23.1

(»The earth is the Lord's, and the fulness thereof; the world, and they that dwell therein«) and regarding a common property of the Amerindians DG D.8 c.1, also X 3.30.25.

not only in the Genesis⁶⁹ but also in Justinian's Digest.⁷⁰ In the first beginning of the world, however, the creation did not belong to any individual⁷¹ but was only gradually taken into possession by mankind: theologially described in Deuteronomy⁷² and juridically classified as the occupation of a *res nullius*.⁷³ As the *lex naturalis* prohibits doing to another what one would not have done to oneself, it requires everybody to respect the other's property. So any violence and robbery are prohibited by natural law.⁷⁴

Not only supported by natural law, the distribution of goods into individual property of man is also a result of the *ius gentium*.⁷⁵ Furthermore, the Old Testament tells us about the individual property of the patriarchs, most prominently in the story of Abram and Lot dividing the country around the river Jordan between them.⁷⁶ From that time onward, individual ownership of land had been known and accepted in the history of mankind. Palacios Rubios does not omit to add that he approves of this institution: Common property, he says, leads naturally to neglect⁷⁷ or conflict.⁷⁸ He illustrates these natural accompaniments of joint ownership with a norm of the Roman inheritance law dealing with a quarrelling

community of heirs. The contradiction of the presumed natural state of conflict to his former description of the Indians peacefully farming their communal fields, without greed, envy or avarice,⁷⁹ goes unremarked.

So, private property has a proud parentage, being engendered by natural law, law of nations and positive human law.⁸⁰ From the Roman times onward, it was deemed necessary by imperators and kings that the Earth's surface was divided into properties with known and undisputed owners, if only to be able to organise a reliable collection of taxes.

All this juridical, theological and philosophical foundation of private property was not only applicable to Christian nations but likewise to the infidels. God not only »maketh the sun rise on the evil and on the good«⁸¹ but also created the earth for all mankind, or, as Palacios Rubios puts it, »pro omni rationali creatura«. ⁸² As a consequence, infidels and Christians alike possess and own legitimately the things of this world.⁸³ So, infidels are perfectly capable of being legitimate owners of all sorts of things;⁸⁴ moreover, they do not lose their *dominium* after converting to Christianity. Palacios Rubios cites Pope Alexander III in the Liber Extra

69 Gen.1.26: »And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.«

70 Gaius Dig. 22.1.28.

71 Psalm 113.16 = 115.16 (KJV): »The heaven, even the heavens, are the Lord's: but the earth hath he given to the children of men.«

72 Deut. 11.24: »Every place whereon the soles of your feet shall tread shall be yours: from the wilderness and Lebanon, from the river, the river Euphrates, even unto the uttermost sea shall your coast be.«

73 Dig. 41.1.3.1, Inst. 2.1.12, DG C.25 q.1 c.3 (Gelasius).

74 PALACIOS RUBIOS (2013) 124, citing Exodus 20.15 (»Thou shalt not steal«), DG C.14 q.5 c.13, DG C.14 q.5 c. 11.

75 PALACIOS RUBIOS (2013) 124, citing Dig. 1.1.5.1, DG D.1 c.9 (Isidore of Seville).

76 Gen. 13.9: »Is not the whole land before thee? separate thyself, I pray

thee, from me: if thou wilt take the left hand, then I will go to the right; or if thou depart to the right hand, then I will go to the left.«

77 PALACIOS RUBIOS (2013) 124: »Ex tunc semper rerum dominia fuerunt divisa et cognita, et merito quidem, quia naturale est res communes negligi«, citing Cod. 10.35.1.1. Cod. 10.35.1.1: »Ita scilicet et praefati successores et curia promiscui rerum dominii liberabuntur incommodo. Naturale quippe vitium est negligi, quod communiter possidetur, utque se nihil habere, qui non totum habeat, arbitretur, denique suam quoque partem corrumpi patiat, dum invidet alienae.«

78 PALACIOS RUBIOS (2013) 124: »Communio etiam discordiam parit«, citing Dig. 31.1.77.20.

79 Cf. at footnote 67.

80 PALACIOS RUBIOS (2013) 126.

81 Matthew 5.45: »That ye may be the children of your Father which is in heaven: for he maketh his sun to rise on the evil and on the good, and sendeth rain on the just and on the unjust.«

82 PALACIOS RUBIOS (2013) 126.

83 PALACIOS RUBIOS (2013) 126, citing Innocent IV, Petrus de Ancharano, Guido de Baysio and Antoninus Florentinus.

84 With the one exception of Christian slaves, as transpires from X 5.6.5, cited by PALACIOS RUBIOS (2013) 128.

as an especially clear exponent of this view.⁸⁵ When the Indians undergo baptism, they retain all of their former *dominium* that had been acquired in a legitimate way; other possessions, for instance, acquired by usury, have to be restituted according to the general canon law rules.⁸⁶

Ex quibus omnibus concludetur quod infideles rerum suarum dominium obtinent, sibi que post controversionem retinent, et non est sibi aliquo modo sine culpa vel causa iusta auferendum.⁸⁷

No one is entitled to take away the property of the Indians, either before or after their conversion, without just cause (*causa iusta*) or the committing of a sin. That the Indians are heathens does not prevent them from acquiring *dominium* and *possessio* in a *ius commune*-sense, and their infidelity in itself does not justify the Spanish in taking Indian property for their own. This is a direct consequence of rooting the *dominium* in natural law, »which they share with us«, as Palacios Rubios puts it.⁸⁸ Even more, the natural law requires the Christians to help and respect the infidels. So to fight against

infidels for no other reason but their infidelity would be just the same as to fight against your neighbour or against the other sheep in Saint Peter's flock.⁸⁹ Consequently, to deprive quietly living Indians of their private property, their *dominium rerum suarum*, is prohibited by natural law.⁹⁰

There is, however, one big exception to this benign attitude towards indigenous property: In a just war, the Indians can be deprived of their homes and property as a matter of course.⁹¹ A reason for such a war seems, unfortunately, never far away. Palacios Rubios names explicitly the refusal to admit Christian missionaries to travel and teach freely in the indigenous territories.⁹² – An idea that became famous through the teachings of Francisco de Vitoria in his *relectio De Indis*, thirty years later as the so-called *ius praedicandi*.⁹³

In a just war, special rules apply for the acquisition of property: seized indigenous goods pass immediately into the ownership of the soldier who took them. Special rules, however, apply to the seizure of whole cities, villages and castles: they become the king's property the moment they are seized by his soldiers.⁹⁴ But outside the situation of a just war, Palacios Rubios roundly affirms the

85 PALACIOS RUBIOS (2013) 128: »Videtur mihi textus clarus in c. Iudaei sive Sarraceni, de Iudaeis [i. e. X 5.6.5]«. X 5.6.5: »Iudaei sive Sarraceni neque sub alendorum puerorum suoram obtentu, nec pro servitio vel alia qualibet causa Christiana mancipia in domibus suis permittantur habere. Excommunicantur autem qui cum eis praesumpserint habitare. (Et infra: cf. c. 21. de testib. II. 20.) Si qui praeterea Deo inspirante ad fidem se converterint Christianam, a possessionibus suis nullatenus excludantur, quum melioris conditionis ad fidem conversos esse oporteat, quam, antequam fidem susceperint, habebantur. Si autem secus fuerit factum, principibus seu potestatibus eorundem locorum iniungimus sub poena excommunicationis, ut portionem hereditatis suae et bonorum suorum ex integro eis faciant exhiberi.« This is canon 26 of the Third Lateran Council, held under Alexander III in March 1179.

86 PALACIOS RUBIOS (2013) 128: »... quando ad fidem convertuntur, permittuntur habere bona iusta ac-

quisita, et coguntur dimittere bona ex usuraria pravitare habita«.

87 PALACIOS RUBIOS (2013) 130.

88 PALACIOS RUBIOS (2013) 132: »... iure enim naturae nobis participant« citing DG De Penitentia D.2 c.5 §§ 5,6: »Non illis proximi nostri tantum credendi sunt, quos nobis gradus sanguinis iungit, sed proximi nostri credendi sunt omnes homines naturae nostrae, sicut dixi, participes ...«.

89 PALACIOS RUBIOS (2013) 132, 134: »Contra infideles, ergo, tamquam contra proximos et oves Petro et successoribus commendatas, papa vel quivis alius pugnare non debet, nec bona eis auferre«.

90 PALACIOS RUBIOS (2013) 136: »Ex merito, ergo, suae infidelitatis, infideles quiete viventes, non debent rerum suarum dominio privari, quamvis de iurisdictione aliud sit dicendum, ut dicemus infra, cap. 4, § 8, ad finem«.

91 PALACIOS RUBIOS (2013) 160: »Subsistente autem causa iusta, bene potest ab infidelibus rerum suarum dominium auferri«.

92 PALACIOS RUBIOS (2013) 160.

93 Cf. HÖFFNER (1969) 332 sqq.; STIENING [2011] 144 sq.; BACH (2011) 211; BRIESKORN [2011] 233 sq.

94 PALACIOS RUBIOS (2013) 194: »Ex quibus aperte colligitur an et quando bella contra infideles geri potest a christianis. Unum finaliter non omitto quod capta ab inimicis fidei, efficiuntur occupantis, nisi locus vel castrum sit, quae acquiruntur regi. Ita disponit Lex Regnis in Partidas 2, tit 29, l. 10 quam tene menti«. Reading the cited *ley* of the *Siete Partidas* (SP 2.29.10), I cannot quite make out the connection to Palacios Rubios' argument, though.

Indians as owners of their private goods, be they infidels or already baptized. Their ownership derives, *inter alia*, from natural law and as such is indisputable.

4 Indigenous *dominium* in the political sense

The question of the political power of indigenous caziques turns out to be the most complicated problem of the discussion.⁹⁵ Palacios Rubios treats it in the longest chapter of his treatise⁹⁶ and formulates the problem as follows:

Quarto loco dicendum est de potestate et iurisdictione quam insulares domini, quos caciques appellant, in suos inferiores subditos habebant: utrum hodie, post baptismum, eandem sibi retineant eaque uti valeant. Ad quod, salva decisione cuiuslibet sentientis, respondetur quod domini et caciques illi, antequam christiani efficerentur, nullam penitus potestatem, prelationem vel iurisdictionem habebant iure proprio, sed ex quadam Ecclesiae permissione precaria, nec similiter hodie eam habent, nec uti ea possunt, Maiestate Vestra vetante ...⁹⁷

He declares to treat the question whether the lords of the islands, who are called caziques, have political power over their subjects, even today when some of their subjects have already been baptized. But before answering this rather specific question, it seems important to clarify that no cazique has ever had political *dominium* and jurisdiction in his own right, from the beginning of

humankind until the present day of 1516.⁹⁸ Instead, they held and hold their political power by »a certain permission« of the Church:⁹⁹ a position that Bartolomé de Las Casas roundly rejects as »most absurd« in the manuscript's margin.¹⁰⁰

The jurist takes a two-step approach to this knotty problem: first, he discusses at length the basis and nature of political dominion *per se*,¹⁰¹ and second, he applies the general findings to the specific case of non-Christian rulers and, even more specifically, to the case of the American caziques.¹⁰²

4.1 Origin, history and holders of political dominion: from the world's creation to the conquest of the Americas

Palacios Rubios begins by asking for the origin of every kind of political power or jurisdiction.¹⁰³ He starts at the very beginning: the creation of the world when, at first, every sphere in the spiritual and temporal world governed itself. Jurisdiction came into existence with God's punishment of Lucifer and his followers among the angels: the first decision of a hierarchical superior about the fate of another being with enforced consequences.¹⁰⁴ From then until the Deluge, God ruled the world himself, without any human king or sovereign.¹⁰⁵

The era of human kings and rulers began with Noah, who, by setting up rules for humans and animals on board the Arc, became the first human ruler and legislator.¹⁰⁶ He was then followed by a long line of patriarchs, judges, kings, priests and other authorities. Kingdoms and empires took turns in ruling the world.¹⁰⁷ At the time Christ

95 To chapter 4 of PALACIOS RUBIOS (2013) cf. BIRR/EGÍO (2018a) and BIRR/EGÍO (2018b).

96 Chapter 4: PALACIOS RUBIOS (2013) 198 sqq.

97 PALACIOS RUBIOS (2013) 198.

98 PALACIOS RUBIOS (2013) 198.

99 PALACIOS RUBIOS (2013) 198.

100 »Absurdum valde«: cf. PALACIOS RUBIOS (2013) 199 note 1.

101 PALACIOS RUBIOS (2013) 198 sqq.

102 PALACIOS RUBIOS (2013) 276 sqq.

103 PALACIOS RUBIOS (2013) 198: »Ad huius conclusionis elucidationem, necessario inchoandum est a potestatis sive iurisdictionis origina et processu«.

104 PALACIOS RUBIOS (2013) 198: »A principio quidem creavit Deus coelum et terram et omnia quae in eis sunt, angelicam et humanam naturam, spiritualia et temporalia, ipsaque per se ipsum rexit, sicut factor rem suam gubernat. Videns autem in coelo angelos ingratos et supervinentes poena debita punivit eosque a coelo proiecit, ut habet Isaias, cap. 14. Et iste fuit primus actus iurisdictionis.«

105 PALACIOS RUBIOS (2013) 200: »Deus, ergo, rexit mundum per se ipsum usque ad tempora Noe.«

106 PALACIOS RUBIOS (2013) 200: »Ex tempore vero Noe coepit Deus creaturas suas regere per ministros, quo-

rum primus ipse Noe, qui fuit rector populi quod apparet ex eo quod Dominus Arcae gubernationem sibi comissit«. Palacios Rubios also repeats the myth that at the end of his long life, Noah himself came to Spain, founding two cities (in Galicia and Asturia) and thereby completing his reign over all peoples (ibid.).

107 PALACIOS RUBIOS (2013) 202–204.

was born, all political power and jurisdiction in the world had been held in turn by four empires, passed on in a chronological line: from the Israelites to the Assyrians to the Persians or Medes to the Greek and, finally, to the most powerful of them all, the Romans.¹⁰⁸ This version of world history is based on Nebuchadnezzar's dream of a quadripartite statue¹⁰⁹ and its interpretation by St Jerome and St Augustine.¹¹⁰ In their reading, the statue's iron and clay feet stand for the Romans who had subjugated all other kingdoms, just as iron subdues all other metals.¹¹¹

With the Romans, however, the line of essentially secular holders of *potestas* and *iurisdictio* ends; during the reign of Augustus, God established the fifth and ultimate *regnum*: the reign of Christ and, consequently, of the Church.¹¹² Christ became the *dominus mundi* in every sense, holding spiritual and secular *potestas* over all men, including the infidels.¹¹³ That we do not see in the Gospels Christ wielding his worldly *potestas* and *iurisdictio* is a matter of choice: Christ used only his spiritual power because he prioritized the redemptory in-

struction and salvation of mankind, leaving the practice of secular ruling as a secondary matter to others.¹¹⁴

Christ transferred his whole and undivided *potestas* onto St Peter by entrusting him with the *claves regni coelorum* (Matthew 16:18–19) and the command *«Pasce oves meas»* (John 21:17).¹¹⁵ As St Peter's successor, the pope follows in this *perfectio potestatis*,¹¹⁶ and therefore the papal *potestas* comprises the two swords of secular and spiritual rulership over the whole world. As there is only one humankind, all the gentile and heathen people are under papal jurisdiction as well as the Christian nations:¹¹⁷ because today's infidels may very well be tomorrow's Christians.¹¹⁸ So acknowledging the Indians as indubitably and fully human, as Palacios Rubios does at the beginning of his treatise,¹¹⁹ inevitably places them under the *potestas* of the pope.¹²⁰

The Americas belonging to the *orbis mundi*, and the Indians being as human as any European, they are subject to the Church's *potestas* and *iurisdictio*. This means that even before the arrival of the

108 PALACIOS RUBIOS (2013) 220–222.

109 Daniel 2:31–33.

110 PALACIOS RUBIOS (2013) 220.

111 PALACIOS RUBIOS (2013) 222: «... nam sicut ferrum metala domat, sic regnum romanorum sibi omnia regna subiecit». Augustus' universal taxing ordered, which led to Jesus being born in Bethlethem instead of Nazareth, neatly established the universality of the Roman reign, *non sine misterio* just at the moment in which the true Lord and monarch of the world was born (ibid.).

112 PALACIOS RUBIOS (2013) 222 substantiates this with a chain of allegations from the prophets of the Old Testament (Micah 5:2) via the evangelists Matthew 2:6 and Luke 1:32–33 and the church father St. Augustine into the heart of canon law, Gratian's Decree (C. 23 1. 4 c. 38, taken from a letter of St Augustine to Donatus).

113 PALACIOS RUBIOS (2013) 224–226. To emphasise the completeness of Christ's power, Palacios Rubios cites an impressive array of authorities: from the Psalms, St. John the Evangelist, St. Paul's letter to the Philipians to the theologians Peter Lombard, Thomas Aquinas and Ricardus de Mediavilla and the jurists and

canonists Oldradus de Ponte, Albericus de Rosate, Johannes Antonius de Sancto Georgio. He takes special care to support these authorities with apposite allegations from canon law whenever possible, so that citations of the *Decretum*, the *Liber Extra* or the *Liber Sextus* accompany the biblical and doctrinal references (ibid., pp. 232–236).

114 PALACIOS RUBIOS (2013) 226–228: «Sed quamvis Christus utranque haberit potestatem sive iurisdictionem, scilicet, spiritualem et temporalem, quando inter homines fuit, sola spirituali usus est, ut ex discurso evangelistarum liquide constat, quia cum opus praecipuum ad quod Redemptor Christus venerat in mundum erat instructio et redemptio nostra, cui ipse totus erat intentus, alia utpote minora aliis relinquebat». Cf. also PALACIOS RUBIOS (2013) 244 where he cites the cleansing of the temple (Matthew 21:12–17, Mark 11:15–19, Luke 19:45–48, John 2:13–16) as Christ's one and only use of his *potestas vel iurisdictio temporalis*.

115 PALACIOS RUBIOS (2013) 232–236.

116 PALACIOS RUBIOS (2013) 240: «Unde Romanus Pontifex successit beato Petro in perfectione potestatis et dig-

nitare vicariatus, qua ipse beatus Petrus a Christo in Ecclesia sublimatus est».

117 PALACIOS RUBIOS (2013) 238, 253, 270, 274.

118 PALACIOS RUBIOS (2013) 274: «Verum tamen est quod pagani, et infideles, non sunt ex ovibus Christi fidei adhesionem, de nullo tamen est diffidentium, quia qui hodie sunt Iudaei vel pagani, cras poterunt esse christianiani».

119 PALACIOS RUBIOS (2013) 53: «homines rationales mansueti, pacifici & fidei nostri capaces».

120 PALACIOS RUBIOS (2013) 286: «Infidelibus, autem, permissa est ex quadam Ecclesiae permissione tacita et precaria, per quam eis permissus est iurisdictionis usus ex iusta et inevitabili causa quia Ecclesia per se vel per suos ministros eam exercere non potuit; siquidem exercendi facultatem habuisset indubitanter posset, quia datus est sibi universalis mundus pro navicula vel dioecesi; unde in qualibet mundi parte papa sedere ac iudicare potest, etiam inter infideles, advocando, si opus fuerit ad se causas apud alios ceptas ..., vel prohibendo et vetando infidelibus ne amplius iurisdictione utantur, quia iudicium solvitur ventate eo qui iudicare iussit».

Spaniards, the caziques held their *potestas* only by means of a tacit and precarious papal permission. This is all the more the case in the current situation when the pope actually knows about the existence of the caziques and their peoples. Although as pagans they are not yet members of Christ's flock, the Church (or the pope as its head) holds jurisdiction and *potestas* over them.¹²¹ This tacit permission does not transfer any kind of *dominium* or *possession*; it just grants a »certain holding« of political power, as long as the permission is not retracted. There is no independent legal position the caziques can claim, neither tradition nor custom nor the usually heal-all figure of the *praescriptio immemorialis*.¹²² The Church or, of even greater interest to the Spanish crown, the secular ruler to whom she has donated the *iurisdictio*, can at any time end the permission and take the ruling power of the caziques for his own.¹²³

4.2 Natural law and political power in the Americas

With the foundations now established, Palacios Rubios moves on to discuss the question he set off to answer: Do the caziques keep their political power in a Christianized environment? Or are the Spaniards justified in taking the political *dominium* in their own hands? – Taking the *dominium* of the caziques away is considered a punishment, so Palacios Rubios sets out to discuss under what circumstances they can be punished by the pope, the Church or the Spanish crown.

According to the indisputable fact that the Americas belong to the *orbis mundi*, and Palacios

Rubios' repeated conviction that the Indians are as human as any European, the caziques are subject to the pope's *potestas* and *iurisdictio*, having held their *potestas* only by the precarious tacit permission of the Church.¹²⁴ But as the indigenous people are only ruled by the law of nature, they can be punished only if they transgress »nature's precepts«. ¹²⁵ Palacios Rubios cites Augustinus de Ancona, a 13th-century theologian and disciple of Thomas Aquinas:¹²⁶

Legis naturalis Papa debet esse observator. non enim potest ipsam mutare: quia sicut ab ipso non ponitur, ita ab eo non deponitur. sed immediate talis lex a Deo menti rationali imprimitur.¹²⁷

Quia igitur legis naturalis Papa debet esse observator: omnes Paganos, & transgressores talis legis iuste potest punire. Nam vnusquique iuste potest puniri pro transgressione illius legis, quam recipit, & quam profitetur observare: aliter secundum Augustinum contra quemquam sententia ferri non potest, nisi sit conuictus, vel sponte confessus. Pagani vero, & omnes barbarae nationes per legem diuinam veteris, vel noui testamenti conuinci non possunt: Nec per legem posituam, cum neutram recipiant. Vnde sicut per solam legem naturae, qua coguntur profiteri, conuinci possunt: ita per ipsam possunt iuste puniri.¹²⁸

Augustinus de Ancona explains that the pope has to observe the natural law, over which he has no influence, as legislator because it is immediately

121 PALACIOS RUBIOS (2013) 276: »Habet etiam Ecclesia vel papa eius prelatatus iurisdictionem et potestatem in istos insulares antequam ad fidem converterentur, quia totus mundus est datus Petro et successoribus«.

122 PALACIOS RUBIOS (2013) 292: »Ecclesia, ergo, quae ex precaria permissione permittit infideles iurisdictionem nec dominium nec possessionem transferri videtur ..., sola quaedam detentatio ad nutum vel voluntatem Ecclesiae duratura«.

123 PALACIOS RUBIOS (2013) 294–296. For eventual misgivings Palacios Rubios may have had regarding this drastic

position towards the caziques, cf. in the following paragraphs.

124 PALACIOS RUBIOS (2013) 276: »Habet etiam Ecclesia vel papa eius prelatatus iurisdictionem et potestatem in istos insulares antequam ad fidem converterentur, quia totus mundus est datus Petro et successoribus«. Interestingly, Palacios Rubios slightly changes wording and perspective in this final part of chapter 4: after having extolled the pope's *plenitudo potestatis*, he now writes about the Church's *iurisdictio* and *potestas* over pagan peoples.

125 PALACIOS RUBIOS (2013) 276: »Unde, poterit papa punire gentilem qui non

habet nisi legem naturae, si contra naturae praecepta fecerit, sicut Dominus puniuit Sodomitae qui contra legem naturae peccabant« citing Genesis 19:14 which is taken up in X 5.31.4 and C. 2 q. 1 c. 20.

126 PALACIOS RUBIOS (2013) 278: »... pulchre loquitur ...«.

127 ANCONA (1584) q. 23 art. 4, 139.

128 ANCONA (1584), q. 23 art. 4, 139.

communicated by God to every rational being. As natural law's observer, he is entitled to punish its pagan transgressors because one can be justly punished only for violating a law one has »received« and therefore is obliged to hold. Consequently, the pope cannot punish the pagans for not holding the precepts of the positive divine law derived from the Old and New Testament nor for any breach of (Christian) positive law at all. As they had not »received« these laws, they were not bound by them.

A breach of the natural law, however, could already be construed out of a polytheistic practice; Palacios Rubios refers – without providing a specific citation – to Innocent's IV *dictum* that it is natural to adore just one God.¹²⁹

On the other hand, the Indians have to be treated favourably: they are our neighbours, Palacios Rubios writes, whom we are obliged to love and to help because they and we share the same human nature.¹³⁰

This positive attitude towards the indigenous population of the Americas sits uneasily alongside the strong emphasis of the pope's power to take the caziques *potestas* away and his jurisdiction over them in natural law and ecclesiastical¹³¹ matters. The ambivalence Palacios Rubios seems to feel shows plainly in his treatment of the question about whether pagan caziques automatically lose their *potestas* when at least some of the subjects are baptized: Is it permissible to let Christian subjects live under a pagan cazique? The answer is pretty straightforward, if we assume the cazique treats his newly converted subjects badly: the Church could and should deprive any infidel ruler of his *potestas* who actively oppresses or mistreats his Christian subjects,¹³² an evident abuse of the Church's tacit permission on which his power is founded.¹³³

More difficult is the case of an infidel ruler who treats his Christian subjects well. The question whether he can be ousted from power causes Palacios Rubios discernible uneasiness. As the revoking of the *permissio tacita* by the pope does

not require the existence of any Christian subjects at all,¹³⁴ the question could be easily answered in the affirmative. Moreover, Palacios Rubios cites Thomas Aquinas' verdict that the Church can easily revoke the *potestas* because an infidel ruler deserves to lose his power over Christian subjects;¹³⁵ his own infidelity is reason enough (*iusta causa*) to retract the Church's *permissio tacita*.¹³⁶ Still, the jurist continues his musings:

Fidelitas, quidem, subditorum quamvis illi sit meritoria, non tamen videtur causa sufficiens tollendi domino vel superiori ius suum, qui ex subditorum conversione nullo deliquit, unde sine culpa sua privaretur suo dominio, et per indirectum, ne illum perderet posset, ad fidem nostram invitus converti, quod esse non debet ... Infideles enim merentur amittere libertatem et potestatem gratiae, non autem potestatem naturae; ideo ordo naturalis regiminis, qui est de lege naturae, ab eis non subtrahitur, si christianos non sequuntur nec aliquod turbulentum contra christianam fidem attentare praesumunt, et cum christianis velint pacifice conversari.¹³⁷

While it is commendable for those Indians who convert to Christianity, this does not seem to constitute sufficient grounds for depriving their cazique of his *dominium* (without any guilt of his own), because their conversion does not make him a delinquent in any way. There is also the possibility that the cazique lets himself be baptized just to keep his power, i. e. without the true will to receive the sacrament,¹³⁸ and insincere conversions from worldly motives are to be avoided. Any position granted by natural law should not be taken from them, if they do not persecute or actively trouble their Christian subjects.

As Palacios Rubios remains torn between a more generous view of the infidels' *potestas* and the strict interpretation of the Church's tacit permission, he finds his authorities at variance with each other, too. To illustrate his point, he again

129 PALACIOS RUBIOS (2013) 278.

130 PALACIOS RUBIOS (2013) 280: »Infideles, enim, dicuntur proximi nostri quod debemus diligere et lucrifacere quantum possumus, ratione humanitatis, cum sint nostrae naturae participes«.

131 PALACIOS RUBIOS (2013) 280.

132 PALACIOS RUBIOS (2013) 306.

133 PALACIOS RUBIOS (2013) 308.

134 PALACIOS RUBIOS (2013) 304.

135 AQUINAS (1538) q. 10 art. 10, fol. 39r: »Utrum infideles possint habere praelatione, seu dominium supra fideles«.

136 PALACIOS RUBIOS (2013) 302.

137 PALACIOS RUBIOS (2013) 304.

138 To the *voluntas* as one of the prerequisites of a true baptism cf. BIRR (2013) 230 sqq.

cites Augustinus de Ancona. On the one hand, Augustinus expressly states that infidel rulers (even Saracens) who do not persecute Christians, but wish to live with them in peace, should not be deprived of their *potestas*, as they hold it without sin.¹³⁹ On the other, Palacios Rubios cites another passage in which he seems to offer the opposite solution: All infidels merit the loss of their *potestas* over Christians because of their infidelity, so that the pope is completely justified in depriving them of it.¹⁴⁰ The apparent contradiction appears less harsh when one takes into consideration the different contexts of both statements: Whereas in the first statement Antonius wrote about the political rule of infidels, the second was a comment on the long-standing problem of Christian slaves owned by Jews. Palacios Rubios, however, does not seem to notice the divergent contexts; instead, he reads Antonius' apparent inconsistency as a mirror of his own doubts in the matter. In the end, he concludes his deliberations with a return to the stricter view, allowing even peaceful caziques to be deprived of their *potestas* for no other reason than their infidelity, *quod videtur de iure verius*.¹⁴¹

This sums up nicely Palacios Rubios' attitude towards the Americas and their indigenous populations. Amerindians are doubtless a part of humankind and therefore also subjected to the general rules and structures underlying every form of worldly *potestas*. The Castilian jurist does not see any reason to treat the Americas in a structurally different way than European regions like Navarre or France; in fact, he writes about the caziques in more or less the same vein as he does about the Navarrese nobility, both being conquered and subjugated with papal permission by King Ferdinand II. This leads to what has been called the

»serious historical contradiction between the theoretical promulgation of the human dignity of the American natives and their displacement, oppression, and decimation«. ¹⁴² But even so, the human dignity of the Amerindians and their explicitly emphasised status as neighbours in the biblical sense of the law of love take a backseat when it comes to the justification and promotion of the Spanish presence in the New World. The Church's power over the infidels is of importance only insofar as the papal donation made in the Alexandrine Bulls, regarded as the legal fundament of exclusive Spanish rule in the Americas.

5 Political *dominium* of the Spanish crown in the Americas

Both the Spanish rule in the Americas as well as the *dominium*, *potestas* and *iurisdictio* of King Ferdinand over the islands and their inhabitants are the topics of the *Libellus*' 5th chapter.¹⁴³ Palacios Rubios, once again, proceeds from the biblical beginnings to the by now well-trodden paths of his arguments: Since the coming of Christ, or rather since the foundation of the Church, these rights had resided in the hands of the Church, together with the *dominium*, *potestas* and *iurisdictio* over the whole world.¹⁴⁴ Christians as well as infidels were obliged to recognise this *dominium* of the Church, and if infidels were not willing to do so, the pope was free to give a mandate to one or more Christian rulers to act as its military arm and subdue those lands and their infidel population.¹⁴⁵ Consequently, the Church could donate the islands of the Indies to the Spanish king, even more so as especially islands could be given as a gift to the

139 PALACIOS RUBIOS (2013) 304 cites Augustinus' refutation of the position that each and every infidel ruler should be deposed by or on behalf of the Church: ANCONA (1584) q. 23 art. 3, »Ad tertium«, 138: »Sed si ipsi Saraceni, & infideles, christianos non persequantur, nec aliud turbulentum contra christianam fidem attentare praesumant: & cum christianis velint pacifice conuersari, non debent ab eis tolli illa, quae sine peccato possunt possidere«.

140 ANCONA (1584), q. 24 art. 6 »Ad Primum«, 146: »planum est autem, quod omnes infideles, & merito eorum in-

fidelitatis merentur potestatem amittere supra illos, qui in filios Dei adoptantur. Vnde Papa omnes infideles tali potestate merito potest [eos] priuare, licet quandoque in primitiua Ecclesia hoc fuerit pretermisum propter scandalum uitandum, & propter multiplicationem ipsorum infidelium«. PALACIOS RUBIOS (2013) 304–306 quotes this more or less verbatim.

141 PALACIOS RUBIOS (2013) 307.

142 RIVERA (1991) 201.

143 PALACIOS RUBIOS (2013) 332: »Quinto videndum est de dominio, potestate et iurisdictione quam Sacra Vestra

Maiestas habet in illas insulas earumque habitatores«.

144 As explained at length in chapter 4 of the *Libellus*, cf. above »4 Indigenous dominium in the political sense«.

145 PALACIOS RUBIOS (2013) 332.

ruler who conquered and occupied them. Civil and canon law were no stranger to such concessions given to kings and princes to conquer and further reign a certain territory or island: Palacios Rubios cites an example from the 13th century.¹⁴⁶

As the Church was the only European power that could have said to be in charge of the (still unknown) American territories, the right to conquer them could only have come from the pope – as it did in the bulls of Alexander VI.¹⁴⁷ In such cases, when it comes to conquering heathen lands, the pope is free to choose his champion, the prince or king whom he deems the most idoneous.¹⁴⁸ To substantiate this papal freedom of choice, Palacios Rubios cites a number of legal and biblical references, which he refers to as his »usual allegations«, probably thinking of his law teaching days at the universities of Salamanca and Valladolid.¹⁴⁹ The references range from Roman inheritance law, and the possibility to choose one's heir, to King David, who chose his youngest son, Solomon, to succeed him.¹⁵⁰ In the end, they all point, the jurist says, to one and the same conclusion: When there are two or more possible candidates with equally substantial claims, the throne should go to the more pious, wise, virtuous and just person.¹⁵¹ Palacios Rubios belabours this point with a dazzling number of references and allegations from feudal law, inheritance law and medieval jurisprudence, only to claim in the end that he has just barely scratched the surface of affirmative allegations from all legal disciplines.¹⁵² His aim here: even if many European kings and princes had jostled for conquering the Indies, the pope justly chose Ferdinand and Isabella as the most idoneous conquerors of those islands. Doubting this papal power, he concludes, would be considered a sacrilege.¹⁵³

That the pope made a donation of a territory that was in the hands of heathen rulers and so, arguably, not his to give, is brushed aside by

Palacios Rubios. Such donations are quite common in Iberian history, and one prominent example even made its way into the official church legislation, the *Liber Sextus*.¹⁵⁴ This medieval precedence concerned the King of Aragón, who had donated a piece of land to the Knights Hospitallers – land that had never been under his *dominium* and was held by Muslims. The Hospitallers, the king proclaimed, were to be the *domini* of this place, provided they managed to conquer it. According to Palacios Rubios, this is a perfectly acceptable legal condition and would stand up to juridical scrutiny, thereby rendering the donation valid.¹⁵⁵

Having thus juridically secured the Spanish monopoly against the covetousness of other European powers, Palacios Rubios turns to the juridical consequences and obligations arising out of the papal donation. Let us first take a look at the juridical consequences. They show why it is well worth the effort to substantiate the validity of the papal donation:

Ratio praedictarum ... est quia ex ista donatione, vel concessione seu privilegio papae, statim ipso iure, sine aliqua apprehensione vel traditione illius conquestae transfertur dominium in principem donatarium.¹⁵⁶

The reason why we have laboured the point of the papal donation, Palacios Rubios writes, is that this donation represents an immediate transfer of the *dominium* of the territories – neither transfer nor seizure of possession is necessary. The pope donates, and the *dominium* settles *ipso iure* on the recipient.¹⁵⁷ This was already pointed out in the 14th century by Johannes Andrea, the most renowned medieval canonist, and consented among the jurists.¹⁵⁸ The very convenient result is achieved by equating the papal donation with a

146 The Staufen Authentica *Si dominus temporalis*, post Cod. 1.5.4, and Constitutio coll. 10, De statutis contra libertatem ecclesiae, § Si vero temporalis.

147 PALACIOS RUBIOS (2013) 334.

148 PALACIOS RUBIOS (2013) 334.

149 PALACIOS RUBIOS (2013) 334: »Ad hoc solitus sum allegare bonum textum«, i. e. Cod. 5.9.3, followed by a number of further allegations.

Cod.5.9.3.pr.: »... in quem contemplatione meritorum liberalitatis suae iudicium ...« is the sentence Palacios Rubios expressly cites.

150 1 King 1.

151 PALACIOS RUBIOS (2013) 336.

152 PALACIOS RUBIOS (2013) 336–340.

153 PALACIOS RUBIOS (2013) 340.

154 VI 2.14.3 »Abbate«.

155 PALACIOS RUBIOS (2013) 342.

156 PALACIOS RUBIOS (2013) 342.

157 PALACIOS RUBIOS (2013) 342.

158 PALACIOS RUBIOS (2013) 342/344, citing ANDREAE (1581), ad X 5.40.16 (even if I do not see the connection between Andrea's explanations on how to interpret a privilege and the question of the eo ipso-acquisition of *dominium*).

papal privilege, then a papal privilege with a law, and finally the law, as is very well known, can transfer the ownership of a thing to a person, even without any act of taking possession by charter or deed.¹⁵⁹ Besides the renowned canonist Johannes Andrea, the no less renowned 14th-century civilist Baldus de Ubaldis is Palacios Rubios' warrantor in this matter.¹⁶⁰

The jurist then embarks on a lengthy and detailed discussion of the immediate effect of a sovereign's donation or privilege. In fact, it is so lengthy and detailed that Bartolomé de Las Casas lost patience while copying the text and omitted the main part of the argument, only just transcribing the first sentence of each paragraph and followed by a laconic *et infra*.¹⁶¹ No doubt, the enthusiastic juridic discussion of exceptions and what-ifs seemed too finicky and of too little use for future reference to the spirited Protector of the Indians. – Which, from the legal historian's point of view, is a pity.

Returning to the main argument, Isabella and Ferdinand received the *dominium* of the Indies directly and immediately from Pope Alexander VI, even before a single Spanish soldier had set foot on land. But it would be a grave mistake to believe that the *possessio*, the actual seizing of the land, did not matter at all.

For a papal donation is not per se indelible. At this point the quality of the Indies as islands comes into play. One of the medieval jurists Palacios Rubios relies upon in his text is the famous Bartolus de Saxoferrato (1313–1357).

Bartolus had written a treatise entitled *De Fluminibus seu Tyberiadis*, which is famous for its attempt to bring geographic and geometric methods into the juridical discussion of property law.¹⁶² In the third book of his treatise (*De Fluminibus et Insula*), Bartolus discusses the question of *dominium* of islands in the sea. A new island that emerges from the ocean is considered no one's property – a very rare event, Bartolus assures his readers.¹⁶³ And anyway, the newly discovered islands of the Americas were already possessed by their indigenous owners – a point Palacios Rubios had already discussed and established in chapter 2 of his *Libellus*.¹⁶⁴

So, let us now turn back to Bartolus' expert views on the ownership of islands. Given that already existing islands are invariably owned by someone, the question is how to acquire their *dominium*. More than once in history, Bartolus writes,¹⁶⁵ the pope has given the right to occupy and to own an island to a king or prince. This not only presents a military challenge, but it also produces legal questions such as: When is an island to be regarded as conquered?

A simple *cavalcata* or *currentia* across the island with light troops will not be enough to claim it as one's own.¹⁶⁶ A more substantial and more permanent presence is required: an occupying army should at the very least take and hold the main towns and localities (including the capture of fortified locations). In other words, he who cannot hold the capital, the *locus principalis*, has not conquered the island at all.¹⁶⁷

159 PALACIOS RUBIOS (2013) 344: »Non est, ergo, necessaria traditio quoad hoc ... nam privilegium lex principis est, et lex dominium transferre potest sine instrumenti adminiculo vel pedum positione«.

160 Numerous allegations: PALACIOS RUBIOS (2013) 344 sq.

161 PALACIOS RUBIOS (2013) 348.

162 SAXOFERRATO (1562).

163 SAXOFERRATO (1562) lib. 3 pr., 637, echoing Gaius Dig. 41.1.7.3: »Insula quae in mari nascitur (quod raro accidit) occupantis fit: nullius enim esse creditur«. Cf. KNÜTEL (1999) 550–552.

164 Cf. above 3 *Dominium as property of the Indians*.

165 SAXOFERRATO (1562) lib. 3 no. 6, 639: »... potest ergo superior re integra

concedere uni illud ius occupandi, & hoc pluries factum est a Papa.«

166 SAXOFERRATO (1562) lib. 3 no. 6, 639: »Sed quid si non iuerit aliquis dominus cum exercitu, sed aliquam caualcata, seu currentiam fecit fieri super illam terram, an ex hoc uideatur ius praeoccupatum. Resp. non, sicut enim terram per donationem libelli, uel per responsionem ad unam positionem, ubi de negotio tractatur aliquid principari dicitur, neque res dicitur coepta, ut ext. de lit. contest. c. i. ita per unam caualcata, uel currentiam, non dicitur res coepta, & praeoccupata facta, sed cum iuerit cum exercitu quo poterat terram acquirere, secundum rei exigentiam, quod optime probauit ff. de uerb. oblig. l. continuus. § item qui insulam.«

167 SAXOFERRATO (1562) lib. 3 no. 9, 639: »Sed an illud territorium in quo cum exercitu stat, uideatur occupasse, ut statim suum fiat. Resp. aut coepit aliqua loca quae possunt retineri, etiam si totum territorium non capiat forte, uel aliqua castra, uel fortificia, uel aliquam regionem inter montes, uel intra flumina, & tunc illud suum efficit, si uero non possit illud retinere, nisi locum principalem capiat, tunc ille locus, in quo est eum / cum (?) exercitu non efficitur suus: quia ille sustinendo, uel praeliando adhuc liberari potest, unde non dicitur ille locus occupatus, ar. ff. de acquir. rer. dom. l. in laqueum«.

Consequently, a papal donation transfers not only the *dominium* with immediate effect, it also requires the recipient to take some form of positive action: he has to complement the *dominium* resulting from the donation with the *possessio* of the given territory. If he omits to send armed forces to build up a long-term presence on the island, as Bartolus teaches,¹⁶⁸ he loses the *dominium* again, for he is considered negligent. This line of thought was used by the Spanish King himself to argue against a papal privilege given to the King of Portugal regarding the conquest and occupation of the Moorish Kingdom of Fez.¹⁶⁹

6 Conclusion

I would like to sum up a few points of this exploration of Palacios Rubios' thoughts about ownership and political *dominium* in the Americas by first looking at the style of his writing. The jurist employs an overabundant flow of biblical and historical examples and citations, on occasion leaving the point of discussion far behind. He regards this display of erudition and the numerous digressions as important parts of his literary style. As he puts it at the end of his preface to the Navarre treatise:

Multi tamen alia interseruntur/ que legentibus forsitan videbuntur non minus vtilia quam iocunda.¹⁷⁰

Not clinging to the topic, he intersperses the text with digressions, side topics and historical examples in order to make reading it more profitable and enjoyable. Unfortunately for the modern reader, Las Casas, as the copyist of the text, more than once lost patience with these meandering

reminiscences of Latin Antiquity and Old Testament patriarchs, simply omitting particularly long-winded or determinedly juridical passages.

But there may be more to this cornucopia of humanist erudition than just the attempt to convert a juridical treatise into a pleasant reading experience. The *Libellus* is also the enterprise of a skilled and well-read jurist meant to tackle the legal and political questions arising from the American discoveries with the intellectual tools of the European tradition. Reading Palacios Rubios, one can almost overlook the momentousness of the discovery and the otherness of the Americas: The crown jurist adapts the well-established knowledge and legal regimes almost seamlessly to the new situation – on paper, at least. Above all, the Old Testament, Roman and Greek Antiquity as well as the great tradition of medieval jurisprudence seem to offer an extensive toolbox of experiences and knowledge flexible and diverse enough to be applied to the Americas without openly addressing the vast difference in circumstances. Palacios Rubios discusses the juridical problems raised by the Americas almost exclusively in the legal context of *dominium*, understood as property and political power. This property-centred approach to questions, which we might today label political or even constitutional, is quite typical for the legal thinking in the *ius commune* tradition. If the later *Derecho Indiano* is truly the product of a crisis of the *ius commune*, arising from jarring contact of European normativity with the realities of the Americas,¹⁷¹ Palacios Rubios' text shows no signs that such a crisis was imminent.

This may be characteristic for a period in the Spanish outreach to the Americas, when even Bartolomé de Las Casas »still did not see the indigenous people as the fully autonomous Other«,¹⁷² asserting in 1516, that »some day in the

168 SAXOFERRATO (1562) lib. 3 no. 7, 639: »Sed quid si ille, cui conceditur, negligat occupare, an ab illo iure cadat? Resp. sic, si sine iusta causa differat, idem si iuit in exercitu, & eum potest facere, si sine iusta causa recessit, illud amittit, ut ff. de dam. infel. fi. § illud quaeritur. & § si quis meru. Et praedicta uera quando conceditur ius occupandi.«

169 PALACIOS RUBIOS (2013) 350–359.

170 PALACIOS RUBIOS (1515) Prologus, s. n. (the very last sentence of the

prologue). FUENTE (1870) 247 mocks the erudite style with its abundance of citations: »Mas para probar una cosa tan trivial, vulgar y sencilla como la proposicion de que los casados no deben separarse, cita a Graciano en el capítulo 3 y 5 *feminae* y la Glosa, y a los doctores que tratan del comentario a los capítulos *de infidelibus*, y de *consanguinitate et affinitate*. Por aquí se puede inferir ya el carácter de la obra y que pertenece a esas elucubraciones de los siglos pasados, en que, para

decir que los hombres son mortales, se citaba al Génesis, a Séneca y a Plutarco.«

171 TAU ANZOÁTEGUI (2016) 39.

172 ORIQUE (2018) 11.

future, the Indians will be able to live for themselves, to govern themselves and to serve« the Spanish King »as vassals should serve« their sovereign »because they have the capacity for it«. ¹⁷³ Only in his later writings did Las Casas place a greater emphasis on the otherness – the differences between Europe and the Americas – and insist on the necessity to find new, more apposite solutions for the American questions.

Consequently, Palacios Rubios sees no need to put the indigenous people into a special category, different from Europeans like the Navarrese or French. He begins his treatise with the unreserved affirmation of the rationality and the capability of the Indians to become Christians, being ruled like any other subjects of the Spanish crown. That they must be conquered, brought to live in a Christian *res publica* and lead into Christianity is for him as undisputable as it is for the following generation of Spanish theologians and jurists.

In view of his politics, he tries to find a balance between the theocratic position that claims the world-encompassing power of the pope and the sovereignty of the Spanish King, not quite succeeding in producing a seamless blend of both positions. Following Palacios Rubios, the pope may have the power to portion out the territories of the infidels to the Christian kings, and in doing so, he is free in his choice. Once given, however, the *dominium* must be taken up and complemented by effective possession, conquest and political incorporation of the territories. The Spanish King is *dominus* of the Indies, without the pope being able to interfere by appointing church dignitaries, establish church politics of his own or authorise any other Christian prince to intervene. All this holds true as long as the king fulfills the obligations arising from the donation. For Palacios Rubios, this obligation consists first and foremost in the

conquest and occupation of the land. Later jurists and theologians like Francisco de Vitoria and Diego de Covarrubias y Leyva will shift the emphasis and claim the Christianisation of the Indians as the main obligation from the Alexandrine Bulls. But by then, of course, the Spanish presence in the Americas is widely consolidated.

The *Libellus* also offers an excellent example of how law and politics can intertwine. Juridical figures could be used to draft instructions on how to act in the political sphere: Starting with the discussion of the acquisition of ownership through (papal) donation, Palacios Rubios comes to a quite precise definition of the required proceedings in the Americas. Following his logic, armed forces, the occupation of capitals and strategic locations and the establishment of a long-term rulership are not to be regarded as political decisions, but instead as legally required steps for taking possession that the Spanish crown had to take in order to keep the *dominium* transferred by the Alexandrine Bulls. So political actions could be dressed up in juridical clothes: The juridical figures of *dominium*, *possessio*, *donatio* and privilege gave the Spanish crown all the justification it needed for its exploits in the Americas and to defend its exclusive access to the Americas against the other European powers. They led a dance in which the crown and its conquistadors just seemed to follow.

There is still much work to be done regarding the analysis of Palacios Rubios' juridical argumentation. His *Libellus* can help us to understand how at the beginning of the 16th century the knowledge and the experiences of the European past were applied to the American present and, in the process, were shaped into modern ideas.



173 LAS CASAS (1995) 25 sq.: »Y si el tiempo andando, los indios fueren hábiles para vivir por sí y regirse y para que a Su Alteza sirvan con lo que los vasallos los suelen servir, dalles han su facultad para ello«. Interestingly, this is part of the *memorial* Las Casas wrote with the help and input of Palacios Rubios, cf. above at 2.2 The Only Copy, footnote 49.

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