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

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, 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.

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. Palaciosrubios is a small village, a day’s walk 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 Salamanca 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
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), 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) 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.

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. 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". 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.

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. Also, he recounted the help he himself received from the crown jurist. 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 oceantis quas vulgus indias appelat*

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 oceantis quas vulgus indias appelat*.

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. 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-

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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."
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. Montesinos and representatives of the island’s government were called to Spain, and the king set up a commission of justiers and theologians to investigate the allegations and to devise a legal-political strategy. The best-known description of the junta de Burgos has been given by Bartolomé de las Casas, written more than forty years after the events. 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 justiers. They included the Dominican theologians Matías de Paz, Pedro de Covarrubias and Tomás Duran, and the licentiates Gregorio, de Sosa, Santiago and Juan López de Palacios Rubios. 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. 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 Espinart, Franciscan prior of Hispaniola, Pero García de Carrión, a merchant as well as a man of some standing, and el bachiller Martín Fernández de Enciso, who also wrote a Suma de Geographia about the Indies. Antonio de Montesinos, too, stayed at Burgos to champion the case of the Indians; after converting Alonso de Espinart to his point of view, the Franciscan helped Montesinos to approach the justiers Palacios Rubios, de Sosa and Santiago, whom he «advised» with characteristic vehemence in favour of the Indians against «those Spanish sinners».

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

18 Martín de la Hoz (2013) 12; Zayala (1954) XII.
19 Las Casas (1994) III.6, 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: Orúque (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 Antoio Montesino que el rey lo envias a llamar, que residía, siendo catredático [sic] (como desimos) en Salamanca: Las Casas (1994) III.7, 1776.
21 «... persona de muncha [sic] virtud y que favoreció mucho a] los indios el tiempo adelante desque fue más instruido, como el licenciado Santiago y el doctor Palacios Rubios: Las Casas (1994) III.7, 1776.
23 «... doctísimo en su facultad de jurista, estimado en ella más que todos y por bueno y bien cristiano también tenido», but criticized for following «en el error de Hostiencias»: Las Casas (1994) III.7, 1775 sq.
24 Bullón (1927) 123 sq.
25 Bullón (1927) 120 citing Antonio de Herrera’s (1601) 10.6, 344 account of the return of Pedro de Arbolancha from Peru in 1514: «Recibirélon con gran gozo Juan Rodríguez de Fonseca que ya era Obispo de Burgos, y el señor Comendador Lope de Conchillos, en quien se resumía todo el consejo y gouvernacion 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, conlos quales el Obispo de Burgos comuni- caua lo que se auia de hacer».
27 Cf. also the memorial of Fernández de Enciso (1864), written at the time of the junta de Burgos, Fernández de Enciso (1519).
28 Munro Obrejón (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.
29 Las Casas (1994) III.7, 1777 sq. describes how Antonio de Montesinos converted Alonso de Espinart to his point of view: «... el padre fray Antoio hácele una vehemente y comi- natoria plática diciéndole con vehe- mencia, como él solía predicar».
30 Las Casas (1994) III.7, 1778.

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his Indian subjects,\textsuperscript{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.\textsuperscript{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 Indies, resuming the debate from a juridical and a theological point of view, respectively.\textsuperscript{34} Palacios Rubios wrote his \textit{Libellus} between 1512 and the beginning of 1516 (Ferdinand II, addressee of the text, died on January 23, 1516).\textsuperscript{35} The crown jurist produced a substantial treatise, covering more than 180 handwritten pages in folio.\textsuperscript{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 \textit{De las Islas}, citing the latter “as if it were well-known” to the recipients, as Vicente de la Fuente carefully puts it.\textsuperscript{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.”\textsuperscript{38} Nevertheless, an early modern print edition never happened; the \textit{Libellus} continued to circulate in manuscript form and was as such cited by authors like Diego de Covarrubias and Leyva, Juan Solórzano Pereira\textsuperscript{39} 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.\textsuperscript{40} In the preface to the reader, Palacios Rubios’ son Alonso enumerates the works of his

\begin{itemize}
\item \textsuperscript{32} BULLÓN (1927) 122 sq. provides a copy of the \textit{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 free persons and are to be treated as 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.
\item \textsuperscript{33} \textit{Cf.} Muro Oreqón (1956) with a palaeographic rendering of the text of the \textit{Reales ordenanzas dadas para el buen regimiento y tratamiento de los indios} (Burgos, December 27, 1512) and of the \textit{Declaración y moderación} of these first laws given the following year (July 28, 1513); SÁNCHEZ DOMÍNGO (2012).
\item \textsuperscript{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 \textit{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. ECÍO (2018); editions: PÁZ (1933) and PÁZ (2017), with Spanish translation.
\item \textsuperscript{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 \textit{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.
\item \textsuperscript{36} Description of the manuscript Bibl. Nacional (Madrid) MS 17641:
\item \textsuperscript{37} MARTÍN DE LA HOZ (2013) 24; ZAVALA (1954) XXI.
\item \textsuperscript{38} FUENTE (1869) 172: “Lo que sí debe notarse acerca de este tratado [i.e. \textit{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.”
\item \textsuperscript{39} 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.”
\item \textsuperscript{40} However, FUENTE (1870) 243 claims that Solórzano had never seen the treatise himself (“el tratado inédito de insulæ oceantis, cuya existencia aparecía dudosa, no habiendo logrado verlo el Dr. Solórzano, sábio y diligente investigador de las cosas de Indias”).
\end{itemize}
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 falsus appellat, sub cuiuslibet capientes ditione ac iugo satis inuria oppressorum acerbus & intestinus tuo [sic] in hoc authore dolor inadsereret, & eius viscera latenter dilaniaret ut eos liberos & sub nullius potestate subiciendiostentderet copiosum insularum librum literis mandavit.  

Only in 1870 did Vicente de la Fuente re-discover the manuscript in private hands, which is now in the National Library in Madrid. In 1954, Agustín Millares Carlo y Silvio Zavala published Spanish translations of the treatises written by Palacios Rubios and Matías de la Paz. 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.

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.

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.

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 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.

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.

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 aprobió en su estancia, puesto que él lo mejoró, añadió [sic] y puso en el estilo de corte, y así lo llevó al cardenal y al Adriano, teniendo Consejo sobre ello.

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 Rivero, Caesario inae licentiacos, lecto).  
42 Martín de la Hoz (2013) 25 sq. with further references to the use of the treatise in publications after 1870. Cfr. 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 Cfr. 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 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 desasen de perecer quedando en poder de los...».  
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 Remediis 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 and metric analysis, looking for discernible traces of Palacios Rubios’ influence on Las Casas’ draft.

53 Palacios Rubios (2013) 46 sqq.: «Tractatus de Insulis novis, per Christopthorum Colon noviter adinventus, ut eorum quae, Deo propitio, dicere constitui aliquis habeatur notitia, paqua de illarum, situ, gente, et moribus, necessario praeremitenda sunt.»

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

55 Palacios Rubios (2013) 122 sqq.: «Tertio disserendum est de rerum possessionemque dominio quod insulares, antequam Christiani effecerint et Maistenti Vestræ 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 suis inferioribus subditis habeant: 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 Vesta Maiestas habet in illas insulas earumque habitatores.»

58 Cf. Palacios Rubios (2013) 348 (»Et infras«), 352 (»Et infras«), 356 (»Infra parum«), 358 (»Et infras«), 362 (»Hic infert, doctor iste decem corollaria, et pro illis amplificat et implet multas paginas satis ad propositionem inordinum imperinentibus, etc. Et in fine ait sequentia«).

59 Palacios Rubios (2013) 372: «In toto isto cap. 6, nihil aliud dicit nisi instruere prelatos et praedicatorum Qualler se debant circa praedicationem fidei et doctrinam 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 deus nee consultationem admittere, vide licet, fore plantas novellas, etc.»

60 Palacios Rubios (2013) 374 sqq.: «Septimo dicendi adhuc restat quae tributa et servitut ad insularis exiger possunt et quae onera eis imponere licet.»

61 Cf. Palacios Rubios (2013) 376 (»et infras«), 412 (»De infra multa disputat de praescriptione et infra dicit«), 414 (»Et infras«), 426 (»Et infras«), 464 (»Et infras«).
the *conquesta* 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 Antiq-uity.\(^{62}\) 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 paradisical 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 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

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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; over-flowing with precious stones and gleaming marble; and surrounded by lush palm forests through which huge animals roam. Only 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 existimatam insula, sed potius continentem«.

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

65 Palacios Rubios (2013) 53: »Hominres racionales mansueti, pacifi ci & fidei nostri capaces«.

66 Palacios Rubios (2013) 52: »Nihil proprium, sed quasdam terrae terminos sibi notos in communi habentes, in quibus quadam herbarum radices plantabant, quibus panis vice uetebantur.«

67 Palacios Rubios (2013) 52: »Et quia propri a non habebant, nec erant cupidii, nec avari, nudi inverecunde incedebant.«

68 Palacios Rubios (2013) 122: »In his, ergo, et aliis rebus ac possessionibus in quibus illi, ante quem converterentur et dominio vestro subderentur, dominium in communi vel in particulari habeant, licite ac iuste tenebant, et hodie similiter tenent ... infideles enim sunt domini rerum ac possessionum capaces«, citing Psalm 23:4 (»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.

69 (1512–1516)
not only in the Genesis but also in Justinian’s Digest. In the first beginning of the world, however, the creation did not belong to any individual but was only gradually taken into possession by mankind: theologically described in Deuteronomy and juridically classified as the occupation of a res nullius. Furthermore, the Old Testament tells us about the individual property of the patriarchs, most prominently in the history of Abram and Lot dividing the country around the river Jordan between them. 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 neglect or conflict. 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, goes unremarked.

So, private property has a proud parentage, being engendered by natural law, law of nations and positive human law. From the Roman times onward, it was deemed necessary by emperors 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” but also created the earth for all mankind, or, as Palacios Rubios puts it, “pro omni rationali creatura”. As a consequence, infidels and Christians alike possess and own legitimately the things of this world. So, infidels are perfectly capable of being legitimate owners of all sorts of things; moreover, they do not lose their dominium after converting to Christianity. Palacios Rubios cites Pope Alexander III in the Liber Extra

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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 (Gelasian).

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 tum semper rerum dominia fuerunt divisa et cognita, et merito quidem, quia naturale est res communes neglectis«, citing Cod. 10.35.1.1. Cod. 10.35.1.1: »Ita sicut et praefati successores et cognitores cura promiscui rerum dominii liberabantur incommodis. Naturale quippe vitium est neglecti, quod communiter possidetur, utque se nihil habere, qui non totum habeat, arbitretur, denuque quam quoque partem corrumpi patiatur, dum invidet aliena.«

78 Palacios Rubios (2013) 124: »Communio etiam discordiam partit», 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.\textsuperscript{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.\textsuperscript{86}

Ex quibus omnibus conclusetur quod infideles rerum suarum dominium obtinent, sibique post controversiarum retinent, et non est sibi aliquo modo sine culpa vel causa iusta afferendum.\textsuperscript{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.\textsuperscript{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.\textsuperscript{89} Consequently, to deprive quietly living Indians of their private property, their *dominium rerum suarum*, is prohibited by natural law.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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*.\textsuperscript{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.\textsuperscript{94} But outside the situation of a just war, Palacios Rubios roundly affirms the

\begin{footnotes}
85 Palacios Rubios (2013) 128: "Videtur mihi textus clarus in c. Ludaei sive Sarraceni, de Iudaeis [i. e. X 5.6.5.]: X 5.6.5: "Ludaei sive Sarraceni neque sub alendorum puerorum suorum obtentu, nec pro servitore vel alia qualibet causa Christiana mancipia in dominibus suis permitterunt habere. Excommunicentur autem qui cum eiusmodem corpore felet habebantur. Excommunicentur autem qui cum eiusmodem corpore felet habebantur."

86 Palacios Rubios (2013) 128: "... quando ad fidem convertuntur, permittituntur habere bona iusta acquisita, et coguntur dimittere bona ex usuraria pravitate 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 nostris 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 comendatas, papa vel quisvis alias pugnare non debet, nec bona eiusmodem...

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.


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

272 Dominium in the Indies. Juan López de Palacios Rubios’ *Libellus de insulis oceanis quas vulgus indias appelat* (1512–1516)
Indians as owners of their private goods, be they infidels or already baptized. Their ownership derives, \textit{inter alia}, from natural law and as such is indisputable.

4 Indigenous \textit{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.\textsuperscript{95} Palacios Rubios treats it in the longest chapter of his treatise\textsuperscript{96} and formulates the problem as follows:

Quarto loco dicendum est de potestate et iurisdictione quam insulares domini, quos cacaques appellant, in suos inferioris subditos habebant: utrum hodie, post baptismum, eandem sibi retinente eaque uti valeant. Ad quod, salva decisione cuisiublibet sentientis, respondetur quod domini et cacaques illi, antequam christiani efficerentur, nullam penitus potestatem, prelationem vel iurisdictionem habebant iure proprio, sed ex quaudam Ecclesiae permissione precaria, nec similiter hodie eam habent, nec uti ea possunt, Maiestate Vestra vetante …\textsuperscript{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 \textit{dominium} and jurisdiction in his own right, from the beginning of humankind until the present day of 1516.\textsuperscript{98} Instead, they held and hold their political power by \textit{a certain permission} of the Church:\textsuperscript{99} a position that Bartolomé de Las Casas roundly rejects as \textit{most absurd} in the manuscript’s margin.\textsuperscript{100}

The jurist takes a two-step approach to this knotty problem: first, he discusses at length the basis and nature of political dominion \textit{per se},\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{104} From then until the Deluge, God ruled the world himself, without any human king or sovereign.\textsuperscript{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.\textsuperscript{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.\textsuperscript{107} At the time Christ
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. This version of world history is based on Nebuchadnezzar’s dream of a quadripartite statue and its interpretation by St Jerome and St Augustine. 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.

With the Romans, however, the line of essentially secular holders of potestas and iurisdiction ends; during the reign of Augustus, God established the fifth and ultimate regnum: the reign of Christ and, consequently, of the Church. became the dominus mundi in every sense, holding spiritual and secular potestas over all men, including the infidels. That we do not see in the Gospels Christ wielding his worldly potestas and iurisdiction is a matter of choice: Christ used only his spiritual power because he prioritized the redemptory instruction and salvation of mankind, leaving the practice of secular ruling as a secondary matter to others.

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). As St Peter’s successor, the pope follows in this perfecto potestatis, 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; because today’s infidels may very well be tomorrow’s Christians. So acknowledging the Indians as indubitably and fully human, as Palacios Rubios does at the beginning of his treatise, inevitably places them under the potestas of the pope.

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 iurisdiction. This means that even before the arrival of the

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 order, which led to Jesus being born in Bethlehem instead of Nazareth, nearly 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 Decretum (C. 23 i. 4 c. 38, taken from a letter of St Augustine to Donatus).
116 Palacios Rubios (2013) 240: »Unde Romanus Pontifex successit beato Petro in perfectione potestatis et dignitate vicarius, qua ipse beatus Petrus a Christo in Ecclesia sublimatus est«.
118 Palacios Rubios (2013) 274: »Verum tamen est quod pagani, et infidelibus, non sunt ex ovibus Christi fidei adhesione, de nullo tamen est diffidentium, quia qui hodie sunt ludaei vel pagani, cras poterunt esse christiani«.
119 Palacios Rubios (2013) 53: »Homines rationales sumus, pacifici & fidei nostri capaces«.
120 Palacios Rubios (2013) 286: »Infidelibus, autem, permissa est ex quaedam Ecclesiae permissione tacita et precatia, per quam eis permissum est iurisdictionis usus ex iusta et inevitabili causa quia Ecclesia per se vel per suos ministros eam exercere non potuit; siquidem exercendii facultatem habuisse indubitantur possent, quia data sunt sibi universalis mundus pro navicula vel dioecesi; unde in qualibet mundi parte sedere ac judicare potest, etiam inter infidelibus, ad vocando, si opus fuerit ad se causas apud alios cepit... vel prohibendo et vetando infidelibus ne amplio iurisdictione utantur, quia iudicium solvitur venturate ei qui iudicare iussisset«.
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. 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 praeescription immemorialis. The Church or, of even greater interest to the Spanish crown, the secular ruler to whom she has donated the iurisdiction, can at any time end the permission and take the ruling power of the caziques for his own.

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 iurisdiction, having held their potestas only by the precarious tacit permission of the Church. But as the indigenous people are only ruled by the law of nature, they can be punished only if they transgress »nature’s precepts«. Palacios Rubios cites Augustinus de Ancona, a 13th-century theologian and disciple of Thomas Aquinas:

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

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

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: »Habebat etiam Ecclesia vel papæ eius pretas et iurisdictionenet potestatem in istos insulares ante quem ad fidem converteretur, quia totus mundus est datus Petro et successoribus.«

122 Palacios Rubios (2013) 292: »Ecclesia, ergo, quae ex precaria permissione permittit infideles iurisdictionem habere per quam permissionem nec dominium nec possessio 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: »Habebat etiam Ecclesia vel papæ eius pretas et iurisdictionenet potestatem in istos insulares ante quem ad fidem converteretur, quia totus mundus est datus Petro et successoribus. Interessingly, Palacios Rubios slightly changes wording and perspective in this final part of chapter 4: after having extolled the pope’s plenteudo potestatis, he now writes about the Church’s iurisdiction and potestas over pagan peoples.

125 Palacios Rubios (2013) 276: »Unde, potest papæ punire gentilem qui non habet nisi legem naturae, si contra naturae praecpta fecerit, sicut Dominus punivit Sodomitas 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.

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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 Christian subjects well. 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 … Indifeles 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 praeせずum, 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 lucrificare quantum possumus, ratione humanitatis, cum sint nostrae naturee participes».
131 Palacios Rubios (2013) 280.
133 Palacios Rubios (2013) 308.
134 Palacios Rubios (2013) 304.
135 Aquinas (1538) q. 10 art. 10, fol. 39r: «Urum infideles possint habere praetatione, seu dominium supra fi-deles».
137 Palacios Rubios (2013) 304. 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.\textsuperscript{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.\textsuperscript{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*.\textsuperscript{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.\textsuperscript{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 *dominum* of the Spanish crown in the Americas

Both the Spanish rule in the Americas as well as the *dominum, potestas* and *jurisdiction* of King Ferdinand over the islands and their inhabitants are the topics of the *Libellus*’ 5\textsuperscript{th} chapter.\textsuperscript{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 *jurisdiction* over the whole world.\textsuperscript{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.\textsuperscript{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

\textbf{Fokus focus}

\begin{itemize}
\item \textsuperscript{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: »Sad si ipsi Saraceni, & infideles, christianos non persequantur, nec alia turbulentum contra christianam fidem attentare praesumant: & cum christianis velint pacifice consensari, non debent ab eis tolli illa, quae sine peccato possunt possidere«.
\item \textsuperscript{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. Vide Papa omnes infideles tali potestate merito potest [eos] priuare, licet quandoque in primitiva Ecclesia hoc fuerit pretermissum propter scandalum uitandum, & propter multiplicationem ipsorum infidelium«. Palacios Rubios (2013) 304–306 quotes this more or less verbatim.
\item \textsuperscript{141} Palacios Rubios (2013) 307.
\item \textsuperscript{142} Rivera (1991) 201.
\item \textsuperscript{143} Palacios Rubios (2013) 332: »Quinto videndum est de dominio, potestate et jurisdictione quam Sacra Vestra Maiestas habet in illas insulas earumque habitatores«.
\item \textsuperscript{144} As explained at length in chapter 4 of the *Libellus*, cf. above »4 Indigenous dominium in the political sense«.
\item \textsuperscript{145} Palacios Rubios (2013) 332.
\end{itemize}
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{154} This medieval precedence concerned the King of Aragón, who had donated a piece of land to the Knights Hospitalers – land that had never been under his dominium and was held by Muslims. The Hospitalers, 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.\textsuperscript{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 aliquae aprehensione vel traditione illius conquestae transfertur dominium in principem donatarii.\textsuperscript{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.\textsuperscript{157} This was already pointed out in the 14th century by Johannes Andrea, the most renowned medieval canonist, and consented among the jurists.\textsuperscript{158} The very convenient result is achieved by equating the papal donation with a

\textsuperscript{146} The Staufen Authentica Si dominium temporalis, post Cod. 1.5.4, and Constitutioni coll. 10, De statutis contra libertatem ecclesiae, § Si vero temporalis.

\textsuperscript{147} Palacios Rubios (2013) 334.

\textsuperscript{148} Palacios Rubios (2013) 334.

\textsuperscript{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.

\textsuperscript{150} 1 King 1.

\textsuperscript{151} Palacios Rubios (2013) 336.

\textsuperscript{152} Palacios Rubios (2013) 336–340.

\textsuperscript{153} Palacios Rubios (2013) 340.

\textsuperscript{154} VI 2.14.3 ‹Abbate›.

\textsuperscript{155} Palacios Rubios (2013) 342.

\textsuperscript{156} Palacios Rubios (2013) 342.

\textsuperscript{157} 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.\textsuperscript{159} Besides the renowned canonist Johannes Andrea, the no less renowned 14\textsuperscript{th}-century civilist Baldus de Ubaldis is Palacios Rubios\textquoteright warrantor in this matter.\textsuperscript{160}

The jurist then embarks on a lengthy and detailed discussion of the immediate effect of a sovereign\textapos;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 \textit{et infra}.\textsuperscript{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. \textemdash; Which, from the legal historian\textapos;s point of view, is a pity.

Returning to the main argument, Isabella and Ferdinand received the \textit{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 \textit{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\textendash;1357).

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

So, let us now turn back to Bartolus\textapos; expert views on the ownership of islands. Given that already existing islands are invariably owned by someone, the question is how to acquire their \textit{dominium}. More than once in history, Bartolus writes,\textsuperscript{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 \textit{cavalcata} or \textit{currentia} across the island with light troops will not be enough to claim it as one\textapos;s own.\textsuperscript{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 \textit{locus principalis}, has not conquered the island at all.\textsuperscript{167}

\begin{itemize}
\item \textsuperscript{159} Palacios Rubios (2013) 344: \textquoteleft\textquoteleft Non est ergo, necessaria traditio quaod hoc ..., nam privilegium lex principis est, et lex dominium transfere potest sine instrumenti adminiculo vel pedium positione.\textquoteright\textquoteright
\item \textsuperscript{160} Numerous allegations: Palacios Rubios (2013) 344 sq.
\item \textsuperscript{161} Palacios Rubios (2013) 348.
\item \textsuperscript{162} Saxoferrato (1562).
\item \textsuperscript{163} Saxoferrato (1562) lib. 3 pr., 637, echoing Gaius Dig. 41.1.7.3: \textquoteleft\textquoteleft Insula quae in mari nascitur (quod rarum accidit) occupantis fit: nullius enim esse creditur.\textquoteright\textquoteright Cf. Knütel (1999) 550\textendash;552.
\item \textsuperscript{164} Cf. above 3 Dominium as property of the Indians.
\item \textsuperscript{165} Saxoferrato (1562) lib. 3 no. 6, 639: \textquoteleft\textquoteleft ... potest ergo superior re integra concedere uni illud ius occupandi, & hoc plurie factum est a Papa.\textquoteright\textquoteright
\item \textsuperscript{166} Saxoferrato (1562) lib. 3 no. 9, 639: \textquoteleft\textquoteleft Sed quid si non iiurit aliquis dominus cum exercitu, sed aliquam caualcatam, seu currentiam fecit fieri super illum terram, an ex hoc uiuatur ius praeoccupaturn. Resp. non, sicut enim terram per donationem libelli, uel per repositionem ad unam positionem, ubi de negotio tractatur aliquid principari dictur, neque res dictur coepta, ut ext. de lit. contest. c. i. ita per unam caualcatam, uel currentiam, non dictur res coepta, & praeoccupata facta, sed cum iiurit cum exercitu quo poterat terram acquirere, secundum rei exsistentiam, quod optime probatur ff. de uerb. oblig. l. continuus. § item qui insulam.\textquoteright\textquoteright
\item \textsuperscript{167} Saxoferrato (1562) lib. 3 no. 9, 639: \textquoteleft\textquoteleft Sed an illud territorium in quo cum exercitu stat, uiuatur occupasse, ut statim suum fiat. Resp. aut coepti aliqua loca quae possunt retineri, etiam si totum territorium non capiat forte, uel aliqua castra, vel fortillcia, uel aliquam regionem inter montes, uel intra flumina, & tunc illud suum efficit, si uero non possit illud rei nere, nisi locum principalem capitat, tunc ille locus, in quo est eum/cum (??) exercitu non efficitur suus: quia ille sustinendo, uel praeliando adhuc liberari potest, unde non dictur ille locus occupatus, ar. ff. de acquir. rei. dom. l. in laqueum\textquoteright\textquoteright.
\end{itemize}
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:

Multa 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 able and enjoyable. Unfortunately for the modern reader, Las Casas, as the copyist of the text, more

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 prae dicta utra quando conceditur ius occupandur.»


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 Sefeminate 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 elucidaciones de los siglos pasados, en que, para decir que los hombres son mortales, se citaba al Génesis, a Séneca y a Plutarco».


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. 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 appropriate solutions for the American questions.

Consequently, Palacios Rubio 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 Rubious, 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 Rubious, 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 Rubio 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, possesso, 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 Rubious’ 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 Rubio, cf. above at 2.2 The Only Copy, footnote 49.
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