

**THE POSSIBILITY OF CONCEIVING UNIVERSAL HUMAN RIGHTS IN
THE SIXTEENTH CENTURY POLITICAL THEORY:
THE VIEWS OF VITORIA AND LAS CASAS**

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ABSTRACT

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In this thesis, it has been aimed to evaluate the claims which argue that the human rights thought has been firstly formulated by *Francisco de Vitoria* and *Bartolomé de Las Casas* in the *early 16th Century Spain*. These two striking figures of the Spanish Golden Age have concentrated on *the New World Indians*, in an era in which they have been qualified as *apelike* creatures. Vitoria and Las Casas have achieved thoroughly different approaches by focusing on the problem of the Indians in their works. Vitoria endeavoured to build a philosophy of law and political philosophy defending the universality of laws with its reflections on the national and international spheres. On the other hand, Las Casas depended on a practical attempt that only aimed to protect the Indians against the massacres of the Spanish conquerors, because he possessed a narrower perspective of theology and

philosophy in comparison with Vitoria. He described the Indian culture and their religious rituals from a pragmatist outlook, and this outlook have brought him to defend the superiority of the Indians against the assertions that argued the killing, or the enslavement of them. For the thesis, neither Vitoria nor Las Casas cultivated a modern human rights perspective, and for this reason, even though the opposite view has been supported generally, they were not able to formulate the human rights thought. Nevertheless, it can be asserted that Vitoria was relatively closer to the idea of human rights with his formulation of universality of laws, yet he was not totally successful in surpassing the Scholastic framework founded by Aquinas which is, for the thesis, necessary for thinking human rights. Consequently, in a broader context, it can be argued that the possibility of thinking universal human rights largely depends on leaving behind cultural and religious prejudices of any kind.

Keywords: Human Rights, 16th Century Political Thought, Vitoria, Las Casas, Aquinas, the New World Indians, Universality of Laws, the Other, Conquest, Just War, Right of Communication, Conversion.

ÖZ

ONALTINCI YÜZYIL SİYASET KURAMINDA EVRENSEL İNSAN HAKLARININ KAVRANMASI OLANAĞI: VITORIA VE LAS CASAS'IN DÜŞÜNCELERİ

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Bu tezde, insan hakları düşüncesinin ilk olarak *erken 16. Yüzyıl İspanya'sında Francisco de Vitoria ve Bartolomé de Las Casas* tarafından formüle edildiği iddialarının değerlendirilmesi amaçlanmaktadır. İspanyol Altın Çağı'nın bu iki çarpıcı siması *Yeni Dünya Yerlileri*'nin *maymunumsu* yaratıklar olarak nitelendirildiği bir dönemde, çalışmalarında Yerli problemini merkez alan tamamen farklı iki yaklaşım ortaya koydular. Vitoria hukukun evrenselliğini ulusal ve uluslararası ortamdaki yansımalarıyla beraber savunan bir hukuk ve siyaset felsefesi oluşturmaya çaba gösterdi. Diğer taraftan, daha sıkı bir teolojik ve kuramsal altyapıya sahip Las Casas ise, yalnızca, Yerliler'i İspanyol fatihlerin kırımlarına karşı korumayı amaçlayan pratik bir amaca bağlı kaldı. Yerli kültürünü ve dini törenlerini pragmacı bir bakış açısıyla betimledi ve bu bakış açısı O'nun

Yerliler'in öldürülmesini ya da köleleştirilmesini ileri süren argümanlara karşı Yerliler'in üstün ırk olduğunu savunmaya kadar götürdü. Teze göre, tersi daha geniş bir biçimde savunulduğu halde, ne Vitoria ne de Las Casas modern insan hakları perspektifine sahip değildi ve bu nedenle insan hakları düşüncesini formüle etmekte yetersiz kaldılar. Bununla birlikte, Vitoria'nın hukukun evrenselliği üzerine yaklaşımıyla insan hakları fikrine daha yakın olduğu savunulabilir. Ancak insan hakları fikrini kavraması için gerekli olan çabayı, yani Aquinas tarafından oluşturulan Skolastik çerçeveyi tamamen aşma yeterliliğini gösterememiştir. Sonuç olarak, daha geniş bir düzlemde, evrensel insan haklarını kavrama olanağı büyük ölçüde her türden kültürel ve dini önyargının geride bırakılmasına dayanmaktadır.

Anahtar Kelimeler: İnsan Hakları, 16. Yüzyıl Siyaset Düşüncesi, Vitoria, Las Casas, Aquinas, Yeni Dünya Yerlileri, Hukukun Evrenselliği, Öteki, Fetih, Haklı Savaş, İletişim Hakkı, Din Değiştirme.

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Date: 15. 07. 2004

Signature:

to my dear parents
annem ve babam için

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CHAPTER 1

INTRODUCTION

Many of the scholars agree that even a superficial reading of the history of the twentieth century enables us to notice two radically opposite tendencies. On the one hand, *over 180 million people* have been *killed* in two world wars and in numerous civil wars. On the other hand, witnessing the most terrible massacres of the history of humanity throughout the First and Second World Wars, most *nation-states* have *accepted human rights universally*, and recognized their intention to protect the human rights in the national and international spheres. Thus, with the acceptance of the 1948 Universal Declaration of Human Rights, various ideas such as human dignity, liberty and security rights, prohibition of slavery, and equality of people have been debated intensely in the process of national and international law-making, as well as in political philosophy. The normative content of the human rights thought has been framed by the universal and regional conventions to a remarkable extent. Yet, one might argue that the protection of the human rights against the violations has remained far limited in comparison with its normative content. The application of the human rights requires the protection of nation-states, yet many nation-states of the world, especially some Third World Countries, have rejected the universality of human rights and repudiated the application of these rights for their peoples by asserting their traditional and cultural particularity. In the debate concerning cultural reasons, many scholars are supporting these claims and arguing that during the

process of defining the content of human rights, the cultural variety should not be ignored, and the states should be allowed to accept the human rights conventions with certain reservations. This thesis is profoundly suspicious with respect to these claims, and maintains that, if one rejects the universality of human rights, there would be no human rights thought left to discuss. It can be argued that the crucial problem in this discussion concerns accepting, or refusing the *human as a unified category*. The thinkers who reject the universality of human rights, also implicitly, reject the validity of human rights. For this reason, nobody may expect from the human rights defender to defend the rights only for certain people.

At this point, I should explicate the standpoint of this thesis. First of all, this thesis acknowledges that contemporary understanding of human rights stems from the acceptance of a universal reasoning. That is: “all human beings are born free and equal in dignity and rights”. The human rights thought is considered within the context of moral and theoretical perspective. The 1948 Declaration is taken as the most important example of such moral and theoretical outlook. The basic rights of security and freedom referred by the Declaration will be understood as the basis constituting political and moral assumptions of my research. In the Declaration, it is argued that “everyone’s right to life shall be protected” (Article 2), and “no one shall be subjected to torture or inhuman or degrading treatment or punishment” (Article 3). In addition, “no one shall be held in slavery or servitude” (Article 4). Consequently, following these and the other articles of the Declaration it can be suggested that thinking about human rights inevitably necessitates the recognition of the rights for all human beings without exception of anyone or any group, and the rights should be asserted from such a perspective.

This thesis aims to focus on the question concerning the *origin*, or the *foundation* of the human rights thought. The claims about the origin of the human rights thought is important because they cultivate claim for rejecting the universal validity claims, and implicitly repudiating the human rights thought itself. In this sense, some of the scholars claim that, in the Middle Ages and Antiquity, there could be found some thinkers who possessed human rights consciousness. They argue that the thinkers, in the Middle Ages and Antiquity, for instance, who defended the revolt against the tyrants, or the thinkers who suggested the people to participate in the law-making process of a state, could be evaluated as the founders of the human rights thought. It is clear that the arguments concerning the revolt against the tyrant, or the arguments concerning the participation of the people in the law-making process of a state can be evaluated as quite significant from the angle of political and legal rights. However, the sympathy of the human rights defenders to these claims does not demonstrate that these thinkers have argued from human rights perspective. Their claims were probably built upon a different political, and moral concern, rather than human rights. For this reason, the assertions of these thinkers should be examined in their historical context by focusing on their overall works. From the foregoing it can be argued that, if one argues that a thinker in the Middle Ages and Antiquity possessed human rights consciousness one should demonstrate that this thinker believed in the universal equality and freedom of humanity and relied on the unified category of human beings. Otherwise, indicating a thinker of pre-modern times as a founder of human rights by merely referring to that thinker's idea of the revolt against the tyrant, or any idea that rests on the similar claims, will be not only groundless, but also a misleading claim that blurs the origin of human rights.

In this context, I may now explicate the main problem of my thesis: to evaluate the validity of certain claims which assert that the human rights thought has first been formulated in the sixteenth-century, by *Francisco de Vitoria* and *Bartolomé de Las Casas*, in Spain and Latin America¹. According to Pagden for instance, (1982), modern formulation of the human rights thought has been founded upon a continuing discussion on the *natural law*. He argues that the Catholic theologians of the sixteenth-century Spain, especially Vitoria and Las Casas, by linking their theological perspective to the natural law, were able to think and formulate the idea of human rights in a universalistic manner.

The particular importance of the sixteenth-century for Spain and Europe, and also for this thesis, stems from the *discovery* of the *New World* (America) in 1492 by Christopher Columbus. The conquest of the New World provided the Spain the opportunity to become the most powerful state of that era in Europe in terms of political and economic superiority. This *discovery* also aided the Catholic theologians of the Spain to pioneer the Catholic revival against the Reformation in that era. I may now explain the relation between the foundation of the human rights thought and the discovery of the New World. In short, the legitimacy of the conquest have been discussed by these theologians from the beginning by focusing on a crucial and striking question: *whether the Indians*, i.e. the aborigines of the New World, *were human or not?* In that era, most of the Spaniards and Europeans believed that the Indians were *apelike* humans. In responding to this question, the Catholic theologians of Spain made appropriations of the natural law so as to

¹ For such views and the relevant disputes, see especially Capizzi 2002, Schmitt 1996, Carman 1998, van Lieere 1997, Cerio 1991, Smith 2002, Torrens 1992, Alker 1992, Starkloff 1992, DiSalvo 1993, Akal 1997, 2003, Skinner 1990, Pagden 1982, Pagden and Lawrence 1991, Donovan 1974, Sullivan 1995.

combine it with Catholicism. The attitude of the Spanish Crown during the conquest encouraged the theologians to argue about the Indian problem. First, the Spanish Crown convoked an Indian Council to solve the social and political problems in the New World. This act aimed to prohibit the enslavement of the Indians. Second, by the second voyage of Christopher Columbus to the New World, the theologians and friars went to the New World, and became an important part of the administrative and judicial authority of the New World. Theologians and jurists at the universities of Spain were affected by the writings and reports of these friars and theologians living in the New World. Millions of the Indians had been killed throughout the conquest, and millions of them also died because of the new diseases that the conquerors carried to the New World. Faced with this catastrophe, the theologians and the friars in Latin America² and Spain began to question the overall legitimacy of the conquest. From one angle, two theologians, mentioned above, namely, Vitoria and Las Casas, by focusing on the legitimacy problem and by taking the above question seriously, have reflected upon the possibility of formulating basic rights for all human beings. Within the confines of this thesis, I will focus on these two effective and learned figures of the sixteenth-century, and present a detailed textual analysis of their works. My aim in this thesis is to demonstrate whether Vitoria, and Las Casas were able to formulate the basic human rights, and if not, what were the obstacles that prevented them from reaching such a perspective. I will pursue this by concentrating on the idea of *universality of laws*, in Vitoria, and the *other*, in Las Casas, respectively.

The particular importance of Francisco de Vitoria stems from his role during

² The name Latin resulted from the religion of the Catholic Spaniards.

the revival of Catholicism against the Reformation in the sixteenth-century. The sixteenth-century has been recognized as the revival of the Catholic and Thomist traditions against the Lutheran and Calvinist reformists³. The rebirth of the Scholastic thinking was mainly realized by the Dominican and Jesuit theologians of the *School of Salamanca* in Spain. The movement was led by Vitoria between 1526 and 1546 as a prime professor of theology at the University of Salamanca. The Catholic thinkers of the School of Salamanca, Dominicans [Domingo de Soto (1494-1560), Melchor Cano (1509-1560)] and Jesuits [Francisco Suarez (1548-1617), Luis de Molina (1535-1600)] , have written their works mostly on moral and political philosophy, jurisprudence, natural rights, social contract, and also on the European expansion. “And it was to Vitoria that they owed the foundations of their common project” (Pagden and Lawrence, 1991: xii). Vitoria has deeply influenced his pupils as a professor, and 30 of them were held professorship at Salamanca before his death (Hamilton, 1963: 175, quoted in Skinner, 1990: 136). Vitoria and his successors constituted a new ground for Catholic tradition to challenge the arguments of the Reformists, and this ground also assisted Hobbes and Rousseau in later times, in their pursuit of social contract theories and in defining the structure of the modern state. By the arguments of these counter-reformers the state has been portrayed as a constitution which is constituted by its participants, i.e. the people. They argued that the state is constituted by the free will of individuals to protect and maintain their

³ For this important dispute, see Skinner, 1990, especially part two “Constitutionalism and the Counter Reformation”, pp.113-84. Skinner in this work argues that the Thomist thinkers of the sixteenth-century were mainly concerned with two major Lutheran heresies, and they developed their works mostly to overcome these heresies. For Skinner, the first heresy was Luther’s rejection of the Catholic, and therefore the Thomist tradition. The second one was the abolition of the ecclesiastical hierarchies, and the assumption that the Church as an institution constituted by all the Faithful. Therefore, the existent Church as a concrete and hierarchical institution was being attacked by the Reformists in that era. Skinner, in particular, also maintains that Vitoria’s double *relectiones*, *On The Power of the Church* were mostly directed against the arguments of heretics, like Luther.

interests. For this reason, the people should possess a crucial role in the governing process of the states.

As a matter of fact, this thesis aims particularly to examine the endeavour of Vitoria to formulate an unequivocal and viable understanding of the universality of laws, in the context of the problem of the Indians. From one angle, with his arguments on the universality of laws, and especially with his conceptions such as the *right of communication* and *just war*, he contributed to a certain extent, to the development of basic human rights. His endeavour can be conceived as an early attempt to develop the idea of human rights.

To evaluate this claim, I will focus on Vitoria's works in the second chapter. In that chapter, I will first present the views of Aquinas on law to demonstrate the background of Vitoria's arguments. Vitoria's arguments on the universality of laws have relied, for the most part, on the arguments of Aquinas in *Summa Theologica*. By presenting the arguments of Aquinas on law, I am aiming to explicate the points of similarity and difference between their arguments, and to demonstrate Vitoria's attempt to surpass the theological framework of Aquinas. Then, I will discuss Vitoria's own understanding of law by examining certain concepts employed by him such as *dominium* (dominion). To explicate his original contribution, Vitoria remains closer to a theoretical perspective which is heavily influenced by Roman Law. He discusses the universality of laws in the theoretical perspective of the *law of nations* which is called *ius gentium* in Roman Law. He wants to discuss the *law of nations* in the context of the problem of the Indians, and the problem of *just war*. By discussing the questions "whether the Indians are human or not" and "whether waging a war against the Indians is just" Vitoria determines his position.

To show the limits of his claims concerning universality, I will also articulate his arguments on the conversion problem to see whether he was able to develop a genuinely surpassing perspective on law, or he remained within the horizon of Scholasticism and Thomistic tradition of Catholicism. In the last section of the second chapter, I will argue that Vitoria cannot easily be recognized as the founder of the idea of human rights, because, first of all, he does not cultivate an egalitarian and pluralist viewpoint, and cannot reach a coherent theory in his attempt to defend the universality of laws. However, his endeavour for establishing the universal laws cannot be ignored. His attempt should rather be considered as a contribution for the later efforts for applying the idea of human rights in the international sphere. The right of communication, Vitoria formulates, allows the states to intervene in the other states for maintaining the universal laws and principles. For this reason, if the universal laws and principles are constructed on behalf of the idea of human rights, the states will intervene in the other states which violate the rights of their people. Only about this suggestion one may see a contribution in Vitoria.

This thesis, also, aims to examine the works of the another striking figure of the sixteenth-century Europe whose effect continues in the debates on human rights thought today. Bartolomé de Las Casas's or (Casas's) importance stems from the fact that he differs himself from the discussions going on between the Lutheran and Calvinist reformers and the Catholic counter-reformers in that era. This conscious attitude is directly related with his moral choice that can tersely be explained as dedicating his life, in his words, "to restore them [the Indians] to the original liberty they were lawlessly deprived of, and get them [the Indians] free of death violence" (Las Casas, 1995: 354). In fact, such an angle enables him to write books

discussing and defining the *other*, i.e. the Indians, for the first time in Western history. This is why he merits the same respect with Vitoria as being one of the pioneer figures of that era in Spain. With the contributions of Las Casas the usual ascription of *cannibal native* to the Indians turns into *noble savage*. It has been argued that the descriptions of the unspoiled people in the second part of the *Utopia* written by More (1516) had been drawn from the first memorials of Las Casas⁴ which was given to More by Erasmus whom was the tutor of Charles I⁵ in those years⁶. As we know today, during the expansion of Western powers into the New World, there were not many learned men in the North Europe, disputing the legitimacy of the conquest and the rights of the Indians like Las Casas. From one angle, the arguments of Las Casas seem closer to the spirit of contemporary human rights. However, this thesis is also sceptical about the claim that Las Casas was able to formulate basic human rights in his reflections on the *other*.

In the third chapter of this thesis, which devoted to Las Casas, I will begin by discussing the dominant views of the Europeans considering the Indians by focusing on the views of the Spanish Crown, Papacy and the defenders of the conquerors of that era such as *Juan Ginés de Sepúlveda* for clarifying the ground of arguments made by Las Casas. His endeavour, I will argue, can be understood as a counter-argumentation against the views of the figures who defended the inferiority of the Indians. Then, I will focus on his views aiming to protect the Indians, which he pursues by presenting a detailed examination of their culture. Particularly interesting

⁴ That were presented to the king of Spain, Charles I.

⁵ Charles I ascended the throne in 1516 and was crowned as Charles V of the Holy Roman Empire. Charles V was educated by the Fleming tutors, and one of these tutors was Erasmus.

⁶ Sullivan, S.J., 1995: Int.4. See also, *Las Casas: Defender of the Indians an Interview With Helen Rand Parish*, by: Torrens James S., 1992. Parish has been working on Las Casas for 40 years, and in this interview, she argues that, More was probably influenced by *The Only Way* of Las Casas.

among these views is his insistence that the religious rituals of them are not so different from Catholicism. To show the inconsistency in his outlook, I will also present his arguments on the heretics of Christianity and his parochial viewpoint considering the Jews and Muslims. Consequently, I will argue that the parochial outlook which solely aims to protect the Indians against the conquerors, cannot be qualified as an attempt to formulate the human rights, and it should rather be conceived as closer to *cultural relativist* standpoint of our own age. The case of Las Casas shows us that no matter how the good intention the learned man possesses, the examination of the *other* cultures from a bigoted perspective prevents thinking about the universal human rights.

In the fourth chapter, I will compare the works of Vitoria and Las Casas and I will assert that Las Casas's theoretical perspective is limited when compared with that of Vitoria. Vitoria's formulation of the universality of laws is much more comprehensive. Las Casas, with his one-sided outlook, is far away from formulating a coherent theory. I will argue that, indeed, neither of these thinkers can be seen as founder of the modern understanding of human rights thought, because neither of them possesses an egalitarian viewpoint. They do not have a concern of constructing human rights, either. In particular, Vitoria aims to formulate the basic principles of universal law from his perspective. However, his theory includes some inconsistent points. The right of communication in his theory, indirectly, legitimizes the conquest of the New World and allows the European states to wage war against the Indians if they rejected to make commerce, or did not let the Catholic missionaries to preach Christianity to the Indians. Yet, still Vitoria's attempt should be considered as a contribution to the development of international human rights law. On the other hand, Las Casas aims to protect the Indians in every cases, for this reason he is not

capable of constructing a consistent theory, except cultural relativism. To protect the Indians, on the one hand, he proposes the Spaniards to convert the Indians as Catholics. Yet, on the other hand, he adulates the religious rituals of the Indians such as anthropophagi and human sacrifice.

At the beginning of the introduction, I argued that certain claims which speculates about the foundation of the human rights go back to the works of the thinkers in the Middle Ages or Antiquity cultivate the danger of rejecting the universality of human rights, and implicitly repudiate the idea of human rights itself. In the case of Vitoria and Las Casas, we notice that both of the thinkers, especially Las Casas, were crucially affected by the presuppositions and prejudices of their era. Vitoria draws a hierarchical understanding of society in his works. He, also, accepts the slavery as a constitution for the communities, and he is only concerned with the just application of it. Las Casas accepts the killing and deportation of the Christian heretics for the maintenance of Christianity and the Christian states. More striking is his proposal to enslave the Black people of Africa in the New World, again for the sake of rescuing the Indians⁷. Therefore, if we portray the figures of Vitoria and Las Casas as the founders of human rights, then we should question the content of human rights. Consequently, for the conclusion of the thesis, I will argue that, any kind of assertion which seems to defend the rights of man may introduce certain claims of partiality and exceptionalism (as intended or unintended consequences), if such assertion is made on a religious or culturalist viewpoint.

⁷ It would be fair to acknowledge that he renounced this strange proposal towards the end of his life.

CHAPTER 2

FORMULATION OF THE UNIVERSALITY OF LAWS: FRANCISCO DE VITORIA

2.1 Vitoria's Time and His Works

I will begin this section by introducing Vitoria's life in summary and by presenting the common views on him. Vitoria's birthday and birth place are controversial, however it has been generally accepted that he was born in Burgos, in a year between 1480 and 1486. His theological education started at a Dominican Monastery of San Pablo. Because of his intelligence, he was sent to the Collège de Saint-Jacques at Paris in 1509, and after a seven-year studentship, he started to teach theology there. His early intellectual life was mostly formed by his readings on the works of Ancient Greek and Roman philosophers, and the last discussion on the *conciliar theory*⁸ (1511-2) which focused on the political and spiritual identity of the

⁸ For more information about this debate and Vitoria's position in it, see van Liere's article *Vitoria, Cajetan and the Conciliarists*, 1997. The aim of the article is to show the standpoint of Vitoria in the light of his attitude against the last discussion on the *conciliar theory* in those years. In that discussion, conciliarists conceive the Church and the state as *corpus politicum*. Therefore, they argue that the affairs of the Church should be assumed as the affairs of a political institution such as state, but should not be assumed as the affairs of a supernatural institution. It means that the affairs of the Church should be discussed and ruled by the members of it. However, Dominicans, in the leadership of Cajetan, who was the Master General of the Dominicans from 1508 to 1518, evaluate the state as *corpus politicum*, but the Church as *corpus mysticum*. Therefore, he accepts that Church as a secular institution has some sacred aims, and the affairs of the Church, or its ruling cannot be discussed by ordinary faithful people. Van Liere classifies the arguments of Papacy and the conciliarists under the names of Cajetan and Jacques Almain respectively. Vitoria's arguments are shaped by his criticism of the ideas of both parties. Van Liere's arguments on Vitoria and her description of the development of Vitoria's ideas seem to be critical. She argues, with reference to Anthony Pagden, that Vitoria and his Dominican and Jesuit followers, tacitly direct their claims against the Calvinist and Lutheran reformism. They reject the view of Luther on ecclesiastical power of Church that all human beings are priests and, there is no ecclesiastical dominance of Church in the world. Vitoria, argues that the power of Church is not natural but supernatural, therefore it cannot be accepted as a secular political institution. However, for him Pope has no jurisdiction over kings in civil cases.

Church and the state. In 1523, Vitoria returned Spain, and he was appointed to the Prime Chair of Theology at the University of Salamanca in 1526. He taught ceaselessly at Salamanca until his death. He published nothing during his lifetime, and the discussions on Vitoria have been depending on his manuscript lectures and *relectiones*; re-readings (the lectures given at the end of each university term). Vitoria's lectures are on Aquinas's *Summa Theologica*, and Peter Lombard's *Sentences*, however his *relectiones* do not directly rely on any work. In his *relectiones*, he discusses the most concerned problems of that era, such as the ethical statute and legal position of the Indians in Spanish Empire, the legitimacy of the conquest of the New World, the power of the Church, just war, and also the autonomy of the commonwealth against the Pope and the king.

There are two major approaches to Vitoria. The first one introduces Vitoria as the founder of the international law, and the second, by underlining his arguments on the universality of laws, introduces Vitoria as one of the early theoreticians of human rights. In this chapter, I will evaluate these claims through the political writings of Vitoria with respect to his understanding of universal law, and, in particular, I will discuss if Vitoria formulates the basic principles of the idea of human rights with his conceptualizations concerning universal law. Furthermore, I will respond Pagden's and Akal's claims in which the former argues that Vitoria proposes Aristotle's view on *natural slaves* to be applied also to the Indian problem. Therefore, the Indians would pass under the sovereignty of the Spaniards as natural slaves. The latter interpretation asserts that Vitoria defends a pluralist and an egalitarian universal order. To understand the origins of the deductions made by Vitoria, and to explicate the limits of his arguments concerning universal law, I will start with examining the subject of the law in *Summa Theologica*. In this first section

of the chapter I will discuss the hierarchy of laws in Aquinas by focusing on the place of human law. In the second section, I will first present Vitoria's comment on the notion of law displayed in *Summa Theologica*, and then distinguish his own understanding of law in the third section. In addition, I will evaluate his attempt to limit the powers of the Pope and the sovereign (the king) in favor of the commonwealth, or the community itself. After discussing his conception of law and his effort to describe an autonomous domain for the commonwealth, I will introduce and evaluate Vitoria's mostly known *relection*, *On the American Indians (De Indis*, 1537-8) in a special section. In this special section, I will also respond Pagden's argument about the acceptance of natural slavery in Vitoria concerning the problem of Indians. Lastly, in this chapter, I will try to demonstrate certain incoherent points in his theory of universal law, and will make my own deductions by reading his commentaries on the conversion problem. At the last section, I will propose a general evaluation of Vitoria's understanding, and criticize Akal's argument that Vitoria was a defender of the pluralist and egalitarian universal order.

2.2 The Notion of Law in Aquinas's *Summa Theologica*

Starting with Aquinas (1225-1274) can be seen as inexpedient. However, it is clear that as a neo-Thomist figure of the rebirth of the Catholic thinking in the sixteenth-century, Vitoria makes use of Aquinas's arguments on the law to develop his theory. My aim in this section is to discuss whether the deductions and arguments of Aquinas provide a ground for Vitoria in his concern on the universality of laws, or whether this ground prevents Vitoria from constructing a coherent theory of universal law which cultivates the idea of human rights.

Aquinas's understanding of law presupposes a hierarchical scheme in which all laws are derived from the eternal law, or the *Supreme Reason* (Aquinas, 1953: 11). The Supreme Reason, for Aquinas is God himself, and God's law "is not distinct from Himself" (1953: 12). A crucial question occurs at this point: How can man have the knowledge of the eternal law? The answer is very clear for Aquinas that the eternal law is imprinted into man's mind by birth. Man, with his intelligence, is able to understand the eternal law partially. However, he cannot possess the knowledge of the eternal law thoroughly, with his limited intelligence. For Aquinas, "laws are established when they are promulgated" (*Decretals*, dist.4, quoted in Aquinas, 1953: 9). Therefore, also for the eternal law to be in force, promulgation is essential, and Aquinas solves the problem of the attaining by man of the eternal law by an answer that cannot be falsified. Because "all laws proceed from the eternal law" (1953: 33), in other words from God Himself; an unjust law, for him cannot be evaluated as law⁹. At this point one may ask: Would it not be unjust to obey the unjust laws? Aquinas's response is negative, and by rejecting disobedience against the unjust laws he continues to approve the Socratic position against the unjust rule and laws. However, he does not mention Socrates, and refers to the New Testament instead. In the New Testament, it is argued by Paul that "All power comes from God" (*Rom. xiii. I*, quoted in Aquinas, 1953).

In the law scheme of Aquinas divine law comes the second. The need for divine law is to teach man "how to perform his proper acts in view of his last end" (Aquinas, 1953: 17). From the perspective of Aquinas, since man has a natural inclination to participate in the eternal law, he cannot be aware of the eternal

⁹ Here Aquinas quotes the view of Augustine. Augustine says, "A law that is not just, seems to be no law at all" (1953: 58-72).

happiness by human or the natural law. For this reason, God has sent divine law to enlighten him about the eternal end and happiness. Divine law is made up of two parts, which were sent during different eras of the humanity. The Old Testament which was sent at a lower level of humanity, affects only *hands*. It means that the Old Testament, or Law has a power to direct man to the good, by aiming to change his observable behaviours with God's commands; like teaching something to a child. Whereas, the New Testament, which is the other source of divine law, and which was sent at a higher level of humanity, aims to affect the *mind* of the man. Therefore, it is superior to the Old one.

In the law pyramid of Aquinas the natural law comes the third. The natural law, in *Summa Theologica*, is defined as the “participation of the eternal law in the rational creature [i.e. man] ” (1953: 13). Man is aware of the natural law, in the same way with the eternal law. The natural law, he argues, is also imprinted into men's minds (1953: 9). Men's natural “inclinations to their proper acts and ends” (1953: 13), for him, proves the reality of the eternal, and also in particular, the natural law. Aquinas's understanding of the natural law does not contradict the original understanding of the natural law which has been developed by the Stoic philosophers of the Ancient Greece and Rome. Still in Aquinas, the natural law remains speculative, and he does not make any original contribution to the original understanding. Nevertheless, it may be argued that Aquinas presents the natural law with a Christian scab.

2.2.i Human Law in Aquinas

Let me first focus on the evaluation of the category of *human* by Aquinas, and then draw the limits of his arguments on human law under this title. For Aquinas,

man is a special creation of God, because he was created with *reason* to realize himself and God. Thus, he should firstly understand that this peculiarity of himself is result of God's grace. On the other hand, as Aquinas expresses, man has the good and evil inside. Good and evil are existent within the reason of God. Therefore, man has a chance to choose the evil or good with his reason. God created the good with evil, and the uniqueness of each of them is not preferable in Aquinas. Unlike all other beings or things, man has a chance to choose evil or good and determine his future. As a consequence, man, in his autonomous domain, can make laws that are not determined by the divine, and the natural laws in practice, for establishing the secular order. It can be claimed that every discussion about law in Aquinas inevitably causes mentioning of the perfection of God, because of his effort to found Christianity on the principles of Scholasticism.

The divine and the natural laws, for Aquinas, indicate only the general principles of the eternal law. However, the political rule cannot be established in a society with these general principles, because the particular problems of a society cannot be solved by general responds. In this context, rule in a commonwealth can be maintained with human law. Every community has a chance to make different secular laws to rule themselves depending on their special conditions¹⁰. Aquinas accepts that these conditions can change in time and new laws may be needed. Human law should aim the common good, and with the changes in the common good, the law should be changed.

In the case of obeying the rules, Aquinas states that, in as much as all power comes from God, and laws are directed to common good, people should respect the

¹⁰ See also, Wiser, 1983: 126.

laws without resisting. The lawgiver is also ruled by laws. However, a problem occurs at this point: Who has the power to force the king to obey the laws that he made? On the one hand, also the king, like all other men, has a *directive force* (1953: 74) in himself to obey the laws. On the other hand, in reality, he accepts that there is no coercive power to compel the king to obey his laws. In his own words “the sovereign is said to be ‘exempt from the law’ as to its coercive power” (ibid.).

In addition to the discussion on human law, Aquinas affirms that the infidels can also make just laws, and can be ruled justly. Secular law, for him, does not have to be included by divine law, but it cannot contradict the natural law. In this context, the infidels can make just laws by following the natural law. The aim of law is to make man good, therefore human law in general, or the laws of infidels can also make man good.

If I have to comment on Aquinas’s arguments on law, I should first point out his aim to base Christianity on the principles of Scholasticism. Otherwise, the modern reader of Aquinas cannot evaluate why he always mentions the perfection God in a subject on law. It is clear that Aquinas’s claims on eternal, divine and the natural laws remain speculative because of their reliance on faith. Therefore, discussing Aquinas’s faith and his aim are not included in the scope of this thesis. However, his claims on law demonstrate Aquinas’s hierarchical understanding of law. It is clear that by using an hierarchical understanding of law, no one can attain to his/her goal on the universality of laws, either Vitoria. Perhaps, Vitoria does not assume the hierarchical understanding of law, and he does not follow the Thomistic tradition in this respect. However, one should ask: Does Vitoria become a thinker (defender) of the universality of laws, by leaving aside *only* the hierarchical aspect of Aquinas’s theory of law? Also, does Vitoria remain as a neo-Thomist, though he

departs from hierarchical conception of law? I will try to respond to these questions in the next section.

Second, I should add that some of Aquinas's arguments on human law which command people to obey the tyrants rule without resisting, and his claim concerning the exemption of the lawgiver from the laws, cannot be accepted by a learned man who assumes the universality of laws. On the other hand, Aquinas's argument which asserts that the infidels, too can have just laws and can be ruled justly, can supply a possible ground for Vitoria concerning the subject of the laws of the infidels. However, Aquinas's arguments on human law still remain insufficient. Therefore, Vitoria should develop Aquinas's arguments on human law, and should direct them to a universal way due to his concern for the universality of laws. In the next sections, I will try to evaluate Vitoria's works through on the universal law, and I will clarify whether he is loyal to the universality of laws from a universalist perspective, or he still remains a neo-Thomist and cannot surpass the tradition of Aquinas about this point.

Let me now turn to Vitoria's comments on Aquinas on the subject of law.

2.3 Vitoria's Commentaries on Aquinas's Notion of Law

Vitoria discussed law by reading *Summa Theologica*, in the academic session of 1533-4, during his lectures. While examining the views of Aquinas in those lectures, he develops his own ideas on law, and demonstrates his separation from Aquinas. For this reason, starting with his lectures *On Law (De lege, 1539-40)*, will be beneficial for us to perceive the arguments of Aquinas from the perspective of Vitoria, and to state the points which Vitoria agrees and disagrees in Aquinas.

In these lectures *On Law*, Vitoria, firstly maintains, with reference to Aquinas, that law belongs to human's rational nature, or in other words *intellect*. He develops his ideas, like Aquinas, through this major deduction, however he comes up with different solutions in apparent opposition to Aquinas. Vitoria argues that human law, like divine law, binds in conscience. Therefore, man should respect human and divine laws in the same faith. For him, there is no crucial difference between divine and human laws. The only difference concerns the authors of them. The author of the former is God, the latter is God and man, however God is no less the cause of both laws¹¹. Human law also stems from God, and it binds as well as divine law in conscience¹². However, as Vitoria suggests, for Aquinas only the just human laws bind in conscience. From this conclusion, Vitoria infers a corollary: Like divine law, human law forces man to obey the law in respect of mortal sin¹³. This corollary indicates that Vitoria equates the violation of human law with the violation of the divine law. It can be argued that by this equation Vitoria surpasses Aquinas at this point, but remains within the scope of Scholastic thought by attributing a sacred sense to human law.

Furthermore, he accepts that some violations cause the mortal sins and some cause the venial (sins that can be forgiven or excused) ones. Indeed, the legislator cannot determine which violations cause mortal ones and which cause the venial ones. Only the immediate writer of the holy books, i.e. God, has a privilege to determine the degree of sinfulness. Therefore, he accepts that the civil laws not only

¹¹ "Divine and human law differ only in their authors; the first from God alone, the second from God and man. Therefore each is binding as the other; God is no less the cause of a law produced through secondary causes than He is of those which He produces by Himself immediately" (Vitoria, 1991: 175).

¹² "There is no difference between human and divine law in this respect" (Vitoria, 1991: 35).

¹³ "The common opinion of theologians, however, is that human laws can oblige in respect of mortal sin in their own capacity" (Vitoria, 1991: 177).

“oblige in the court of conscience (*in foro conscientiae*)”, but also “oblige in respect of guilt (*ad culpam*)” (Vitoria, 1991: 175). At this point, it can be claimed that Vitoria’s deductions about the subject of law demonstrate his effort to differentiate his understanding of law from Aquinas’s hierarchical ordering of laws. He also, unlike the Scholastic thought, recognizes a sacred place to human law, which results from his effort to persuade all the believers to obey the man made laws.

In his examination of the notion of law displayed in *Summa Theologica*, Vitoria agrees with Aquinas that only the legislator, or the king, has an authority to make laws. Every law directs the ruled people to the common good, and aims at making man good. However, the degree of the good that the legislator aims depends on the inclination of the legislator. For Vitoria, no private laws can be accepted, or permitted by the legislator, because private laws divide the power of the king¹⁴. On the other hand, as an exception, a husband or father can determine some precepts to rule his household.

In the case of the justness of a law in *Summa Theologica*, Vitoria claims that a law can be accepted as just, as long as it aims the common interest, even if it damages the individual interest. From his perspective, a law will become unnecessary, if the reason of this law is abolished. This means that if a law becomes unjust or unnecessary, or if the universal grounds of this law become unnecessary, then it should be changed or abolished. Vitoria, at many points, in his lectures, and *relectiones*, asserts that the civil laws should be appropriate with the universally accepted laws, i.e. *ius gentium*.

¹⁴ We will perceive in the next sub-title that power is unique like dominion; *dominium*, and cannot be divided because of being indispensable. For his arguments on *dominium*, see the next sub-title.

Another point that directly relates to the universality of laws is the promulgation of laws. If the laws are not promulgated, the society cannot prevent itself from the unlawful acts of the political power, and cannot demand the change of laws. The society can discuss the contents of the laws, and can ask for the change of them, and can also demand the adaptation of them in terms of the universally accepted laws, if the civil laws are exactly known. When Vitoria examines this subject in *Summa Theologica*, he argues that every law should be promulgated, and it should be done so in every province of a country to be binding. In addition, Vitoria discusses the binding aspect of a law for the visitors in a country. If the visitors settle in a country and become the denizens of this country, then the law of this country will also be binding for them. The commonwealth is a self-sufficient (*perfecta*) organization, therefore it should not permit any other rules in its borders. Vitoria adds that every commonwealth should make laws proper to its special conditions, because, for him, the difference of the laws in every country provide the societies to be ruled just. On the other hand, concerning the promulgation subject Vitoria also shows his loyalty to Scholasticism and Aquinas by mentioning the Indians as follows: “The barbarians break Christ’s law, but this is pardonable if they never heard anything about it” (Vitoria, 1991: 159). He argues that the New Law has been binding for every commonwealth since the incarnation of Christ. Christ’s propaganda of the Scripture is accepted by him as the promulgation of the Scripture. It can be argued that as a theologian, he does not oppose Aquinas on these issues, which concern the generally accepted dogmas of Catholicism.

In the case of the natural law, it can be argued that Vitoria’s understanding of the natural law does not follow Aquinas, and he rather relies on the Roman tradition. Therefore, it can be suggested that Vitoria’s conceptualization of the natural law rests

on a non-Christian foundation. In the Ancient Rome, the efforts of the Roman jurists for legitimizing the natural law have brought the “*ius gentium*”¹⁵; law of nations. Vitoria, like the Roman jurists, wants to realize the natural law, as *ius gentium*. He frames the *ius gentium*, as a law that will be established by a general consensus of the commonwealths. This law would not only rule the relations among the commonwealths, but it would also oblige them not to legislate a universally rejected law to rule their home affairs. In addition, he does not accept any exemption in obeying the natural law. In this sense, neither the Spaniards nor the Indians can merit an exempt in obeying the natural law. For him the natural law “*is invincible a person’s ignorance*” [emphasis original] (Vitoria, 1991: 160). He approves Aquinas in that the secondary principles of the natural law can be changed with the changing conditions. Like Aquinas, he classifies the principles of the natural law as first and secondary, however, he does not clarify the contents of these principles in an exact manner.

It may be argued that, one of the essential differences between Vitoria and Aquinas occurs when Vitoria evaluates the arguments of Aquinas on society (the commonwealth) and the sovereign. Vitoria evaluates the monarchy, with reference to Aristotle, as the best regime¹⁶, yet, he rejects the superiority of the *mixed* regime which was defended by Aquinas. For him, all the members of the commonwealth, including the king, are obliged to obey the common law. In this context, he rejects

¹⁵ The 2nd century AD., Roman jurist Gaius compares the civil law; *ius civile*, and *ius gentium*; law of nations as follows:

“Every people that is governed by statutes and customs observes partly its own peculiar law and partly the common law of all mankind. That law which people establish for themselves is peculiar to it. And is called *ius civile* (civil law), while the law that natural reason establishes among all mankind is followed by all peoples alike, and is called *ius gentium* (law of nations or law of the world) as being the law observed by all mankind” (*Gaius, Instit. I i*, quoted in Wollff, 1951:83).

¹⁶ The others are aristocracy and timocracy.

the view of Aquinas that the king is bound to law only with guiding force (*uis directiua*), and that there is no coercive power (*uis coactiua*) to direct him to obey the laws that he makes. He argues that the coercive power (*uis coactiua*) is also valid for the king¹⁷. The reason for this argument is explained in Vitoria's *relection On Civil Power (De potestate civili, 1528)* as follows: King had been also one of the members of the commonwealth before he was elected, and this process does not abolish the ties between the king and the commonwealth, therefore the law binds the king as much as the other members of the commonwealth¹⁸.

In this section, it has been demonstrated that Vitoria does not examine the notion of law on the same ground that Aquinas shaped. By differentiating the secular order from the spiritual one distinctly, he provides himself a ground to assert his original universalistic ideas on law. I will now discuss this attempt, in the new section.

2.4 Conceptions Shaping Vitoria's Theory of Universal Law

To understand the deductions of Vitoria on universal law, the modern reader should be able to forget his/her prejudices concerning the nature of law. Law, in modern political philosophy, is understood as the power that provides the rule in public or private domain within the borders of the territorial state. However, in Vitoria, law is accepted as the power that should govern the social affairs as much as the natural ones. His difference from Aquinas, at this point, rests on the refusal of the

¹⁷ "Although the king is over the whole commonwealth he is nevertheless part of the commonwealth. It is not as if the king of France made laws for us" (Vitoria, 1991: 181).

¹⁸ "The legislator commits an injustice against commonwealth and its other members if, being a member of the commonwealth, he does not share in its burdens, at least according to his person, rank, and dignity. Laws passed by the commonwealth bind everyone. Hence laws passed by a king also bind the king himself, even if he is the king. A king does not cease to be a member and part of the commonwealth just by becoming king" [emphasis mine] (Vitoria, 1991:40).

hierarchical ordering of laws. From his perspective, human, natural, divine and eternal laws cross each other in the Reason of God, and for this reason, it can be argued that every law comes from God. As a consequence, it may be defended that every distinct part of the eternal law merits the same respect, such as the natural law, and human law. As I will indicate, Vitoria's departure from this Thomist hierarchy had crucial consequences.

Such conception of law originates from the *idea of necessity*. For him, everything in the world had been created by God, therefore the existence and maintenance of every being depends on necessary causes. Nothing had been created by accident. Every single creature possesses its necessity in itself, and every being is also necessary for the development of the rule in the world. This rule, which indicates the perfection of God, is directly defined as *law* in Vitoria. The aim of man, being a part of *God's image*, is to be governed by laws which are established to dominate the *good* and *just* in the commonwealth, and in the world.

For him, the participation of man to this necessity will be apparent and meaningful if s/he obeys the rules and becomes a part of the law making process. The commonwealths can be the parts of this necessity by participating in the law making process of the universal laws; i.e. *ius gentium*. As it has been argued, the *ius gentium* has a special place in Vitoria's understanding of universal law. For him, "The whole world, which is in a sense a commonwealth, has the power to enact laws which are just and convenient to all men; and these make up the law of nations [*ius gentium*] " (Vitoria, 1991: 40). He comprehends the *ius gentium*, as a law superior to common law, or in other words it can be defined as civil laws that should be prepared by a consensus of all nations by genuine agreements. As stated in the previous

section Vitoria's contribution to the conceptualization of *ius gentium* depends on his effort to legitimize the *ius gentium* for all nations with "positive enactment[s] (*lex*)" (Vitoria, 1991: 40).

Another essential conception, which has a key position in Vitoria's formulation of universal law is called *dominium*, which means the dominion or the ownership of the man's own body and possession. He also uses this word in the cases regarding the commonwealth and the political power, with a similar meaning. For both man and the sovereign, *dominium* emerges as an inalienable right, or in other words, as a right that is immanent to their existence. First, man possesses the *dominium* by birth and nothing, including the mortal sins, causes the loss of it. Therefore, being a heathen is not a reason for the loss of the *dominium* of man, or of the sovereign. In the case of the king, the material power of the commonwealth is possessed by the sovereign, or the king. Like the *dominium* in man, power is an inalienable right for the sovereign that will not be lost in any way. The commonwealth cannot abolish the legitimately constituted power by a popular consensus. Therefore, it has to elect a virtuous sovereign by depending on its own authority (*auctoritas*). Vitoria's arguments on the commonwealth and sovereigns are also accepted for the non-Christians. For him, non-Christians can also have just laws and legitimate sovereigns and can be ruled just. The sins of a non-Christian commonwealth or the sovereign will not cause the abolishment of the power, or the *dominium*, of non-Christian commonwealths (*res publicas*). It can be argued that all of Vitoria's arguments on law are also valid for the non-Christians, and this understanding results from his original perspective which evaluates the social facts from a universal standpoint.

2.5 Vitoria's Views on the Commonwealth, Political Power and the Pope

Having presented the essential points concerning law concept in Vitoria, I may now discuss his ideas on commonwealth, and the political power (the sovereign). I will clarify his attempts to differentiate the secular and temporal powers in accordance with his objective to develop the *ius gentium* with respect to the autonomous and sovereign commonwealths, or in other words: to define the commonwealths in terms of a universal community. My aim in this section is to discuss whether Vitoria attains a thorough understanding of the universality of laws, and whether his understanding is coherent, or not. Furthermore, I will demonstrate whether the points of incoherence weaken his deductions on the universality of laws.

I may begin with Vitoria's attempt to draw a definite line between the spiritual and temporal powers. For him, both powers are self-sufficient (*perfecta*)¹⁹ institutions, and therefore, none of them should intervene in each other's *dominium*, in principle. Otherwise, neither of these powers can be accepted as self-sufficient. The Gospel does not define a universal jurisdiction for the Pope over all cases in the world²⁰. Therefore, for him, the defense of the universal jurisdiction for the Pope will be groundless, and for this reason be invalid. The temporal power results from the commonwealth with the ordinance of God. In this process, the Pope has no function and "he gives no power to kings and princes, because no one can give what he does not have" (Vitoria, 1991: 85).

¹⁹ For this matter see also, van Liere, *Vitoria, Cajetan, and the Conciliarists*, 1997. Van Liere argues that Vitoria evaluates the civil society (people in *res publica*) as *communitas perfecta*, and moreover *communitas perfecta* has a right to defend itself against every power, including the Pope, in the world. The rebellion against the king or the Pope is a right of *communitas perfecta* when the condition of an extreme lawlessness or lawless act occurs.

²⁰ "The temporal commonwealth is self-sufficient (*perfecta*), and therefore cannot be subject to anyone outside itself, otherwise it would not be self-sufficient. The Pope has no power, at least in the

On the other hand, the Pope has some authority on the civil cases, in regard to the spiritual ends of the temporal things, as exception²¹. In the civil cases, which directly relate with the spiritual authority of the Church, the Pope can use his power and intervene in the temporal power and so, in the rule of the king. The Pope, for Vitoria, has a power to order the revoking of a law against the Faithful, and if the king does not obey the order of the Pope, depending on his own authority, Pope can revoke this law by himself. However, the authority of the Pope on some exceptional temporal cases is only accepted over the Christian commonwealths (*res publicas*). In respect to the Pope's authority on the temporal power, he asserts that Pope has an authority to depose a legal king over a Christian commonwealth in a radical case. If the king is heretic and cannot not be deposed by the commonwealth, or the commonwealth does not want to change such a king, then Pope can use his own authority to depose such a heretic king over the Christian commonwealth. However, in this case, first of all the Pope should order the commonwealth to depose its king. The Christian king, for Vitoria, has no jurisdiction over the judgment or the internal affairs of the Church, or the Pope. This deduction stems from the argument that the king has no power on spiritual cases²². The relationship of power between spiritual and temporal levels is an asymmetrical one. Therefore, the king cannot intervene in the domestic affairs of the Church Councils or the Church itself. It is clear that Vitoria's attempt to draw a definite line between temporal and divine powers, and also to supply an autonomous domain for the commonwealth, is weakened by his

ordinary course of events, to judge the cases of kings, or the titles of jurisdictions or realms, nor may he be appealed to in civil cases" (Vitoria, 1991: 87).

²¹ "In regard to spiritual ends, the Pope has plenitude of temporal power over all princes, kings, and emperors" (Vitoria, 1991: 92).

²² "Temporal powers have no expertise in divine law, which ought to be the guideline of ecclesiastical power. King has no authority over liturgy and spiritual actions" (Vitoria, 1991: 52).

claims which accept some crucial rights for the Pope on ruling of the commonwealth. In fact this approach challenges his universalistic understanding of law.

One of the essential points that Vitoria differs himself from the Scholastic and Thomistic tradition, is his effort to limit the king in governing. For him, contrary to Aquinas, the sovereign is not totally independent in governing. First, he is bound to the tradition of the commonwealth. Therefore, he cannot make any law which contradicts the tradition of the commonwealth. As argued before, the sovereign is also bound to laws that he makes. Such an emphasis emerges from the deduction that a man can be appointed as the king of a commonwealth, but even as a king he will still remain a member of the commonwealth. In addition, the sovereign is also dependent on the common sense of the commonwealth on the one hand, and the law of nations that is conceived as the universally accepted law or convention on the other. The sovereign should respect the maintenance of the common and the universal good. Otherwise, the other commonwealths can wage a just war to the unjust sovereign for the protection of the rights of the people in this commonwealth, or can wage a just war to maintain the universal law²³. Furthermore, if the reason of a law has been abolished universally, it must be abolished by the sovereigns in their common laws. From Vitoria's perspective, one may argue that if someone violates such law, he should not be punished. All these statements can be seen as an attempt to bring certain restrictions on worldly power. However, there occur certain shifts in his approach to his matter of restraining the kingly power.

If we follow the changes in Vitoria's mind, on the case of limiting the power of the king, in his *relection On Civil Power*, in 1528, he rejects the right of resistance

²³ This point will be examined in the section focusing on the Indians.

against the sovereign. After five years from the narration of this *relection*, Vitoria develops his ideas, and differs himself from Aquinas about this problem in his lectures on law. However, in this *relection*, he argues that the sovereign possesses the power by the ordinance of God. It means that all the sovereigns, including the tyrants, rule by the ordinance of God, and they cannot be changed with the consensus of the ruled people. For him, the commonwealth is not higher than the king, inasmuch as the law does not include a rule to appeal to the commonwealth against the king. Therefore, the commonwealth cannot abolish the legitimately constituted power by a popular consensus. In this sense, even if the sovereign becomes a tyrant, the commonwealth should maintain the obedience to the laws. In a remarkable passage he defends the necessity of such obedience in the following manner:

[The laws of tyrants are binding] when a commonwealth is under oppression by a tyrant and has no control of its own affairs, and can neither make new laws nor enforce those already passed, if it fails to obey the tyrant the whole commonwealth will be destroyed. Utility and respect are better served by obedience to a tyrant's laws than by disobedience to all laws (Vitoria, 1991: 42).

His rejection of abolishing the power in any case, originates from his argument about the establishment process of the commonwealth: In the establishment process, the commonwealth gives only its own authority (*auctoritas*) to the sovereign, and God gives the power (*potestas*) to the sovereign directly²⁴. For this reason, the commonwealth cannot take the power of the sovereign back, because power does not originate from people.

At this point I will show the development in Vitoria's understanding concerning resistance against the tyrant. In his lecture *On Law*, in 1533-4, he argues

²⁴ "Royal power is not from the commonwealth, but from God himself. The power of the sovereign clearly comes immediately from God himself, even though kings are created by the commonwealth" [emphasis original] (Vitoria, 1991: 16).

that if a king becomes tyrant, the commonwealth can dispose him by using its *right of self-defense*. He asserts that the commonwealth gives its power to king, however, “a king does not have all the power which a commonwealth has” (1991: 201). This means that, the commonwealth “has not transferred its direct *right of ownership (dominium rerum)* to the king, but only its *beneficial right (gubernatio)*” (Vitoria, 1991: 202). Furthermore, for limiting the power of king, he argues that the king has not the absolute power on everything in his kingship, particularly, on the right of possession of the individuals. For him, the king has the *dominium* of everything, but he does not possess the disposal of them. On the one hand, the king has the *dominium* of the *res publica* and the things that the commonwealth has, in principle. On the other hand, explicitly, he cannot intervene in the governing of the things that are at the disposal of the members of the commonwealth. Vitoria does not defend his ideas on this case in a consistent manner, with strong proofs and he gives only an example that the king cannot intervene in his disposal on his horse. It can be argued that his arguments on limiting the power of the king and accepting the resistance against the tyrant, remain insufficient, and he cannot provide a detailed picture of the rights of the commonwealth.

Vitoria, in one part of his double *relectiones On the Power of the Church (De potestate ecclesiae Prior, 1532-3)*, also compares the rights of the commonwealth and the king. There, he presents a claim similar to Machiavelli, but unlike him, Vitoria proposes to the commonwealth to try all the possible ways for the continuation of itself. A commonwealth, by depending on its right of self-defense, or the *dominium* of itself, including all the possible ways, can occupy cities, or elect new kings, if the existence of the commonwealth faces danger, and if the king cannot maintain the commonwealth. However, it is never clear on which bases and under

what conditions can the commonwealth use this right of self-defense. Paradoxically, if the commonwealth uses this right, it will mean abolishing the rights of the king, yet, if the king still rules, it will mean committing a sin for all the members of the commonwealth, because they share the unjust and sinful acts of the king. It can be argued that about this matter there is serious incoherence in Vitoria's argumentation.

There occurs another controversial point in this subject matter of dispensation (exemption) from the law. This arises when Vitoria recognizes a right to the king which makes it possible for him to grant dispensation from law to any member, or the members of a commonwealth (1991: 186-9). This dispensation binds the commonwealth in every condition, because the reasonable grounds, or the justness of the dispensation, do not affect the binding force of it. If the king grants dispensation on reasonable grounds, it does not cause any harm to the king. However, if he grants it against the common good, then the king will commit a sin. On the other hand, in his *relection On Civil Power*, he argues that the sins of the kings are accepted as the sins of the commonwealth. At this point one should ask: If any dispensation of the king procreates a sin, then will not this dispensation be invalid for the commonwealth? There is no clear answer to this question in Vitoria.

As a conclusion of this subject, it can be argued that, on the one hand, Vitoria gives the key concern to the commonwealth as the essential part of his understanding of universal law. On the other hand, he cannot develop coherent arguments for the supremacy of law, because he attributes central roles to the kingly power and the Roman Catholic Church. In other words, Vitoria, while asserting his ideas on the rights of the Pope and the king, weakens the autonomy of the commonwealth and his overall theory of the universal law.

2.6 A Major Problem Concerning the Universality of Laws in the Formulation of *Ius Gentium*: the Indians

Let me now examine Vitoria's mostly known *relection* which concerns the Indian problem in those years, called *On the American Indians*. Vitoria, in this *relection*, first discusses the question whether the Indians possess the true dominion before the arrival of Spaniards. Then, he discusses the legitimate and non-legitimate titles of the conquest, in terms of just law. He studies the content of the just law also in a special *relection*, as a continuation of the problem of the Indians called *On the Law of War (De iure belli, 1539)*.

A superficial reading of the *relection On the American Indians* will not supply the reason for the reader that why the theologians, and the academicians are concerned mostly with this *relection*. Thus, a detailed textual examination is needed. There are two general views on Vitoria's understanding of law, displayed in this *relection*. First view is locating the ideas of Vitoria into the tradition of *ius inter gentes* (international law). The defenders of this view argue that Vitoria determines the bases of international law²⁵, with his arguments concerning the universality of

²⁵ For a strong defense of this view, see Cemal Bali Akal, 1997: 23-88. There is another work which develops the same view, however it remains quite insufficient. Ruben C. Alvarado, *Vitoria's New World Order: The Great Commission and the Discovery of the New World*, 1992. The thesis of this article is that Vitoria transforms the *ius gentium*; law of nations, to *ius inter gentes*; international law. Alvarado claims that Vitoria founds his ideas on international law in his *relectiones* on *De Indis* [On the American Indians] . For him, Vitoria proposes in *De Indis* that, neither Christian king nor the Pope possesses a universal jurisdiction. Christian kings have jurisdiction only on their subjects, and the Pope has a jurisdiction only over Christian peoples in spiritual cases. Furthermore, the Spaniards cannot wage a just war against the Indians by informing about the mortal sins of them. For Vitoria, the Indians do not have to believe in Christianity, even it is presented in a peaceful manner. On the other hand the conquest of the New World would have been legitimized, if the Indians had violated the right of free communication or trade. For Vitoria, as argued in the article, it would be a violation of the natural law, if the local people reject the right of communication of the visitors, unless the visitors misbehave. Like some other writings on Vitoria, this article cannot explain the origin of the idea of free communication in Vitoria. It is clear that with the arguments above claiming that Vitoria transforms the *ius gentium* to *ius inter gentes* seems rather insufficient, because such view employs only the arguments made in the *relection* on the Indians. The origin of the right of communication cannot be found in this *relection* and the reader does not understand why Vitoria examines the right of communication in the context of the problem concerning the Indians. The origin of this right will be explained in following passages of this section.

laws. For the other view, Vitoria needs to be evaluated as a founder of the basic human rights with his arguments on the Indians, particularly with his conceptualization concerning the right of communication²⁶.

Before starting to discuss the content of this *relection*, I will first clarify the famous reflections of Aristotle on *slaves by nature*, because Vitoria seems to have been influenced by Aristotle's views on slavery to a great extent. Pagden, in one of his works²⁷ discusses the problem of natural slavery in Vitoria. He claims that Vitoria proposes that the argument of Aristotle needs to be applied in the problem of Indians. For Pagden, Vitoria states that the Spaniards should govern that "lower sort" Indians, until the Indians possess the whole intelligence and gain ability to govern themselves. When Vitoria discusses the question concerning "the dominion of the barbarians" (1991: 239), he firstly asks "whether these barbarians, before the arrival of the Spaniards, had true dominion, public and private?" (1991: 239). He responds the question in two ways. First, he argues that barbarians should be treated as slaves because they do not possess the *dominium*. However, he also argues from another angle that these barbarians are not legal (conventional) slaves but they are *slaves by nature* as Aristotle distinguished²⁸. He adds, with reference to Aristotle, that *slaves by nature* are *lower sorts*. The intelligence of the *lower sort* is limited compared with the civil man. Therefore, for benefit of the *slaves by nature* they should be governed by civil men and the civil men, in this respect, become the masters. For this reason, Indians should be governed by Spaniards.

²⁶ For this view see also Cemal Bali Akal 1997:55-7, "Human Rights and Respublica", and also Angelo J. DiSalvo, *Spanish Dominicans, the Laws of the Indies, and the Establishment of Human Rights*, 1993.

²⁷ Anthony Pagden, "1982: 57-108, under the title "From nature's slaves to nature's children".

²⁸ In *Politics*, Aristotle classifies the slavery as legal or conventional, and natural. For Aristotle the natural slaves have weak intelligence and they should be governed by the masters. However, the natural slaves can only be used in household, and they should not be used in production process.

Vitoria, on the other hand, presents the contrary argument in which the Indians are defined as “in undisputed possession of their property, both publicly and privately” (1991: 240). For attaining a just conclusion, he follows another path of argumentation. He claims that, for the doctors (theologians) of the Scholasticism, the Indians cannot be accepted as true masters, if they were “sinners (*peccatores*), unbelievers (*infideles*), madmen (*amentes*), or insensate (*insensati*)” (1991: 240), before Spaniards have arrived. At the end of this discussion, he argues that their religions, cities, magistrates, marriages indicate that the Indians “have some order (*ordo*) in their affairs which require the use of reason” (1991: 250). Again, turning to the defense of the first argument, the argument concerning the *slaves by nature*, Vitoria suggests that the relation of the master with this kind of slavery be not directly established. There should be some *civil* and *legal* conditions for the establishment of this kind of slavery. Yet, civil and legal conditions can exist only in the borders of a state. However, Indians were not the subjects of the Spaniards when the two communities have met. Although Vitoria classifies the Indians as *slaves by nature*, he argues that Indians have true *dominium*, and they cannot be “counted among the slaves” (Vitoria, 1991: 251).

Consequently, there occur five conclusions in this dispute. First, there was no legal and civil condition for proving the natural slavery of the Indians when the Spaniards have arrived in the New World. Second, Vitoria discusses the argument of Aristotle to identify the Indians, not to propose a solution for the problems in the New World that the Spaniards confront. Third, Vitoria rejects the argument, which conquerors use it to legitimize the conquest, that the Indians have not the *dominium* and they should be counted as slaves. In spite of their less intelligence, for him, “before arrival of the Spaniards these barbarians possessed true dominion, both in

public and private affairs” [emphasis original] (1991: 251). Fourth, although, he discusses the just titles of conquest, he never argues for a just title, which depends on the argument of Aristotle. Fifthly and lastly, Vitoria mentions the Indians as the subjects of a sovereign commonwealth²⁹.

In the introduction part of this *relection*, before discussing the Indian problem, Vitoria argues that the Crown (Spanish), or the ministers are not obliged to discuss the legitimacy of the conquest in those days. However, he declares his wish to question the legitimacy of the conquest because it has not been brought into any council by anyone. Indeed, we know that the legitimacy of the conquest was discussed by the Council of Burgos, and by some theologians in the New World. However, at the end of this *relection*, Vitoria argues that if the conquest does not depend on any just title, it should be ceased despite “the great loss of the Spaniards” (1991: 291). Another reason for this debate on the Indian problem concerns his conviction on the need for consulting the wise men in every problem. He argues that in doubtful cases people and also the king should consult the wise men that the Church indicates. He adds that, if an action is defined as unjust by the wise man, then the responsible one should obey the decision for his action to become just. In the

²⁹ On discussion concerning natural slavery, see also a comparative work of Capizzi Joseph E., *The Children of God: Natural Slavery in the Thought of Aquinas and Vitoria*, 2002. The article examines the arguments of Aquinas and Vitoria on natural slavery with reference to John B. Killoran and Stephen F. Brett. Capizzi, firstly describes the views of Aristotle on natural slavery, henceforth discusses the arguments of Killoran on Aquinas and Vitoria. Killoran evaluates Aquinas’s definitions on slavery as incoherent. This incoherence, for Killoran, arises from the attempt of Aquinas to unify the understanding of Aristotelian justice and the Christian faith. For Killoran, natural slavery contradicts with Christianity. He claims that Vitoria remains Thomist, while defending the rights of Indians. Vitoria’s interpretations on natural slavery, he argues, depend on Aquinas’s analysis on property. In Aquinas, property is not seen as natural but seen as something that does not contradict nature. Furthermore, in Aquinas, the right of possessing property stems from the faith that human was created in God’s image and thus possesses the “rational use of things for his development”. Capizzi, then, evaluates arguments of Brett. Brett evaluates the arguments of the 16th century Spanish Dominicans as invaluable, and particularly, blames Vitoria, and Domingo de Soto, for the inability to prevent the Indian slavery.

introduction part of this *relection*, he also asserts that the consultation authority of this matter is not the jurists but the theologians, because the problem is not directly related to human law, but to divine law. Lastly, he argues that the conquest is “neither so evidently unjust, ... nor so evidently just” (1991: 237), so that one may not question the justness or unjustness of the problem. It is clear that because he was a Dominican, Vitoria places the knowledge and discussion at the center of his understanding of law. Therefore, he hopes to attain the generally accepted principles concerning the principles of universal law after such disputes pursued by other learned people. It can also be argued that he does not intend to accept the ordinary people or the non-experts to explain their ideas on these issues.

Vitoria starts the *relection* by asking whether the Indians had true dominion before the Spaniards came to the New World, or not? He first responds the question affirmatively, as stated above. Then, he discusses if the sinners, unbelievers, madmen and insensate can be true masters. For him, the sinners and unbelievers, can have true dominion and “civil right of ownership [*dominium bonorum*] ” (1991: 241-4), and sins or infidelity do not impede the use of these rights. Despite the fact that heretics have true dominion, their civil rights can be limited by the king in a Christian commonwealth, in a case when the heretic is duly convicted. In this case the property of the heretic can be confiscated by the legal authority. Therefore, for Vitoria sinners and unbelievers, i.e. the Indians, can be true masters. At this point, he merely insists that because of their unbelief or their sins, Spaniards cannot prevent the Indians being true masters, and they cannot appropriate the lands and goods of the Indians either by relying solely on the argument that they are sinners.

Vitoria maintains his arguments by discussing the *dominium* of the irrational people. He argues that the irrational people cannot possess the true dominion,

therefore cannot be true masters. The rights of the irrational people are less than the rights of the slaves, and he states that the slaves have no rights. Vitoria, then, asks if the children and madmen can be true masters. He responds that the children, because of being part of God's image, like their elders, have the true dominion, and therefore the mastery. However, for him the true mastery of the madmen is not so clear, and jurists should solve the problem whether the madmen can be true masters or not. Consequently, he clarifies that the Indians should not be prevented from being true masters on the ground that they are madmen or children. He adds that the order (*ordo*) in their affairs, as explained above, indicates the possession of true dominion and mastery. However, their less intelligence originates from "their evil and barbarous education" (Vitoria, 1991: 250). Vitoria, as a conclusion, reconsiders the argument of Aristotle on *slaves by nature*. From this conclusion I may infer a corollary: It can be argued that if one reads only Vitoria's specific argument on this issue, one may get the impression that Vitoria will formulate the basic human rights with his arguments on this issue, but his examination of the Indian problem does not end at this point. Some commentators prefer to present only the positive ideas of Vitoria in terms of universal law, as if he cultivated a coherent positive attitude towards the Indians and universal law.

2.6.i. Unjust Titles of the Conquest

After discussing the dominion problem of the Indians, Vitoria develops his mostly discussed arguments on the just and unjust titles of the conquest. His aim is to evaluate the conquest in the light of law, and to examine his ideas which directly relate with the universality of laws. He firstly focuses on the unjust titles of the conquest. He states the question as follows: "By what unjust titles the barbarians of

the New World passed under the rule of the Spaniards” (1991: 251). The first unjust title is the acceptance of the emperor as the master of the whole world³⁰. For him, if a right exists, then it should stem from human, divine, or the natural law. In the natural law all people are accepted as free, and there is only one dominance, that is the dominance of the husband or father over the children or wives. In divine law, there is no canon which respects the universal empire of an emperor. Even if the Christ is accepted as the emperor of the world there are no words found in Scripture which agree with the transfer of this power to any worldly emperor. Perhaps, in human law the universal dominance of an emperor can be established as a law or enactment by an emperor. However, this law or enactment would mean nothing to the subjects of the other commonwealths, and would become invalid.

Second unjust title is the appropriation of the Indian lands on behalf of the Supreme Pontiff (the Pope). For Vitoria, temporal power of the Pope on world without any spiritual binding is not existent in divine, human, or the natural law. The Pope’s temporal power is bound with the cases that are directly related with the spiritual matters within the borders of Christian commonwealths³¹. In addition, if the Pope has this right, then the bishops would have the same right in their bishoprics as heirs of the Christ’s power in their own sense. At this point Vitoria affirms that Spaniards carried no right with them to appropriate the Indian lands.

After this clarification, Vitoria rejects the right of discovery concerning the New World as third unjust title. For him, the right of discovery is valid in the cases the discovered land has not been under the *dominium* of anyone. However, in this

³⁰ “*The emperor is not master of the whole world*” [emphasis original] (1991: 253).

³¹“*The Pope has temporal power only insofar as it concerns spiritual matters*” [emphasis original] (1991: 261).

case the discovered land has its owners and settlers, and therefore, cannot be discovered, or dominated.

Fourth unjust title is the refusal of the Christian faith after it is presented in a peaceful manner. Vitoria argues that Indians are not obliged to believe in Christianity if Christianity is presented with simple proofs by the immature missionaries. As a theologian he asserts that, if Christianity is introduced to the Indians with strong proofs, then the Indians are obliged to believe Christianity. If they do not believe, then they will commit a mortal sin. However, this sinful situation does not cause a declaration of war. At this point, Vitoria admits that Christianity has not been presented in a peaceful manner to the Indians, but with “provocations, savage crimes, and multitudes of unholy acts” (1991: 271).

The fifth unjust title for Vitoria, is assuming the sins of the barbarians as a reason for the conquest. From one angle, with the command of the Pope, a Christian king can declare a war to the Indians for their sins against the natural law, such as cannibalism, incest and sodomy. If the Pope has a power to change the king of a commonwealth because of their sins such as sodomy or incest, then Vitoria asserts, the kingdoms in Europe or the Christian kingdoms “could be exchanged every day” (1991: 274). About this matter Vitoria sounds very radical and even provocative.

The sixth unjust title is the change of the Indian kings by the voluntary choice of the Indians or barbarians. However, this choice is invalid because it is contrary to the rights of the sovereign that result from the power.

The last unjust title for the conquest is the definition of the conquest as a gift from God. He refuses this title by declaring that there occurred no sign or miracle for such gift. He adds that even if God wants to destroy the Indians, the people who destroy them will still be committing sin.

At this point I may argue that Vitoria's arguments on the unjust titles of the conquest seem appropriate to his attempt to formulate the basic principles of his original understanding of universal law. He qualifies the Indians as rational beings, and allocates a place to them in the universal community of human beings. However, through the examination of the just titles of the conquest, in many points he weakens this universality and inclusiveness. On the one hand, by prohibiting the violation of the right of communication among the commonwealths, he constitutes a strong basis for universality of laws. Yet, on the other hand, demanding this right to be applied in the Indian problem causes the annihilation of their culture, and brings the abolition of this right. This right would be applied among the European countries which have the same development levels in that era. However, if we project this deduction to our times, it can be argued that despite the positive content of the right of communication, it can be used (or, misused) by the developed communities, against the undeveloped communities to exploit them. In the case of the Indians, if the Indians reject communicating, or trading just because they did not know the meanings and the contents of these words, the Spaniards, by alleging this right, might wage a *just* war against them. To accept the validity of the right of communication for all the commonwealths, without any exemption, will cause the exploitation of the undeveloped communities by economically and politically powerful communities. Therefore, it might be argued that if Vitoria had re-described the right of communication for the favor of the undeveloped communities, for instance if he would have defended that free trade should not be comprised by this right, he would have presented a consistent manner on behalf of his understanding of universal law.

2.6.ii Just Titles of the Conquest

After examining the unjust titles of the conquest, Vitoria enumerates eight just title for passing of the New World “barbarians” under the rule of Spaniards. It may be argued that the contents of the first and the fifth of these titles can be accepted crucial from the universalistic standpoint. However, for Vitoria, the reason for the fifth just title is directly related with the *conversion* problem, therefore in this section I will only discuss the first just title in detail, and will discuss the fifth one in the next section.

The first just title, for him, is the prevention of using the right of *natural partnership and communication* by a commonwealth. It may be argued that, the right of *natural partnership and communication* probably originates from Vitoria’s understanding of human being. For him, nature had outfitted every species of animals with different abilities to maintain their lives. For example; an animal can protect itself by an ability to fly, or by poison in itself, or with its teeth, or paws that maintain the protection against the aggressors. However, man had been created without such abilities, except for the “reason and virtue” (1991: 7). With respect to human nature he argues that the naked reason and virtue in man cannot provide the protection for man, by themselves. Following the Aristotelian tradition, Vitoria qualifies the man as “social animal (*animal sociabile*)³²” (1991: 7). The vital needs of the *animal sociabile*, to lead a life in protection, are existent in society. The vital need of man in life is the *other people*. Man can develop his understanding or will only by *reciprocal sharing* with other people, to lead a protected life. The need for the *partnership* for man, therefore emerges as a natural right in Vitoria. However, for

³² Indeed in Aristotle the term was political animal (*zoon politikon*), yet Aquinas was the first figure who translated this term as social animal.

the partnership to be maintained in rule, an “overseeing power or governing force” (1991: 9) is needed. The overseeing power probably indicates the commonwealth, or the sovereign over the commonwealth. The need for governing force can be explained as follows.

For the establishment of *rule*, which is necessary for the maintenance of humanity, a governing force can define and realize the common good for the sake of multitude objectively. This governing force would be the sovereign, and with the sovereign over them, the multitude would become a *commonwealth*. If this deduction is to be applied to a world which is constituted of many free commonwealths, the *right of communication* will supply for each commonwealth with certain rights to communicate among each other. In this respect, the commonwealth needs other commonwealths to communicate and share its goods, services, and ideologies (political, or religious) for its maintenance.

As a conclusion, the violation of the *right of communication* causes a just war. However, Vitoria argues that the Indians can suspend the use of this right, if the visitors, in this case, the Spaniards, do harm to the Indians on the ground of this right. He also argues that this right includes the free trade among the commonwealths. For him, the right of free trade emerges from the law of nations (*ius gentium*), and if any human enactment (*lex*) prohibits the free trade, it would be invalid. If a child was born in the country of the Indians from a Spanish father and if s/he wants to be a member of the Indian commonwealth, then the Indians had to give the civil rights to this child that any Indian person possesses, inclusive in the right of *communication and natural partnership*. If the Indians rejected the exercise of the right of *natural partnership and communication*, without any just reasons, then the Spaniards could wage a just war against the Indians and the Spaniards could use

every way of war for the recognition of this right by Indians, including “conquering their (the Indians’) communities and subjecting them” (1991: 283). At this point, I may state again that the right of *communication and natural partnership*, can be evaluated from two perspectives which are both valid. First, by conceptualizing this right, Vitoria tries to remain coherent with respect to his understanding of universal law. Yet, second, this conceptualization legitimizes the conquest of the New World. At this point, it is not clear which perspective; universal or Scholastic one is dominant. It can also be argued that Vitoria’s definitions concerning the right of communication cannot provide a ground for the international law of today. The international law in the modern understanding organizes the relationship among the states, in particular, among the governments. However, Vitoria’s arguments concerning this subject, like the other subjects, are directly related with the commonwealths.

For Vitoria, the reason for the fifth just title is the “defense of the innocent against tyranny” (1991: 287). He claims that Spaniards, without the Pope’s authority, can prevent the Indians from killing the innocents. Spaniards could destroy the customs of the Indians, if they notice that the unjust killings result from the customs of Indians³³. From one angle this just title is also important in terms of the universal perspective on law, because it accepts that the commonwealths can intervene into the home affairs of a commonwealth if an evident lawlessness occurs. This viewpoint brings us to the acceptance of the supra-national law (*ius supra gentes*) of today. The supra-national law, in principle accepts that the states are not independent fully in

³³ For him, the origin of this right is the Scripture, which commands to love the neighbour.

governing, and they should respect and obey certain laws that are determined by them with a supra-national organization and its agreements.

The second, third and the fourth just titles are related to each other. The second one includes the right of Christian commonwealths to spread the Christian religion, or in other words: the application of *conversion*. The use of this right, like in the application of the other just titles, should be in a peaceful manner and should not cause any harm to the Indians. The content of the third just title is the protection of converted people. If the Indians force the converted Indians to turn to their old religion, Spaniards could intervene in the situation to protect the converted people. The fourth one includes the Pope's appointment of a Christian king to an Indian commonwealth, if the Christians become majority there.

The sixth just title is as follows: If the Indians with their king wanted to pass under the Spanish rule "by true and voluntary election" (1991: 288), this choice can be accepted as a just reason for the conquest.

And the last just reason is: If the Indian allies demanded help from Spaniards in a just war, Spaniards could help the allies and then "share the prizes of victory with them" (1991: 289)³⁴.

2.7 Vitoria on the Problem of Conversion

It can be argued that, as seen in previous section, Vitoria's position among the other views on universal law and Scholasticism of the Middle Ages, brings incoherent points in his works. His examination of the conversion problem will

³⁴ The eighth just reason for the conquest is "mental incapacity of the barbarians" (*On the American Indians, Q.3, A.8*). For Vitoria, for the sake and development of the Indians, wholly for their benefit, Indians may pass under the rule of the Spaniards. However, for him this title cannot be accepted as purely just.

provide details about his understanding of law. I will try to find whether he can construct an original perspective of universal law at the expense of incoherence, or he remained loyal to Scholasticism. In more specific sense I will question whether his ideas about the conversion of the unbelievers seriously damage his universalism. This is a crucial problem, because if someone defends the use of force in conversion, it is almost impossible to see him/her as a defender of universal law, or human rights.

The *relection On Dietary Laws, or Self-Restraint (De usu ciborum, sive temperantia)*, and the lecture *On the Evangelization of the Unbelievers*, concern the conversion problem. For this reason, content of this section will be directly related to these works. The lecture *On the Evangelization of the Unbelievers* was prepared during 1534-5, and the *relection On Dietary Laws, or Self-Restraint* was developed in 1537. The arguments of these works do not contradict each other, and the ideas in *On the Evangelization of the Unbelievers* are supported with new questions and explanations *On Dietary Laws, or Self-Restraint*.

In the lecture (*lectio reportata*) *On the Evangelization of Unbelievers*, Vitoria particularly focuses on the conversion problem. He makes deductions from the arguments of Aquinas and *Duns Scotus*. At the beginning of the work, with reference to Aquinas, he rejects *forcible conversion* and qualifies it as *evil* (1991: 344). Forcible conversion, for him, does not mean that the converted people believe their new religion sincerely. However, the rejection of the forcible conversion does not necessarily mean the rejection of missionary work. For him, the missionary work is part of the self defense right of the individual, and this right necessitates the acceptance of the dissemination of the “temporal” and “spiritual interests” (1991: 341) for an individual. This argument may seem quiet acceptable for the modern reader, however in reality, during the conquest, the missionaries coerced the Indians

to believe in Christianity by the help of the military forces. After accepting the missionary work as a right of self defense, he explains the harms of the forcible conversion. First, for him forcible conversion can “cause great provocation and unrest (*scandalum*) amongst the heathen” (1991: 342). Second, the forcible conversion may yield results contrary to the aim. For him, it can be argued that the forcibly converted heathens would be the carriers of hate against Christianity, therefore the “conversion would be empty and ineffective”(1991: 342).

Vitoria, then, while replying the arguments of Duns Scotus on conversion, examines the problem in two parts. First one is the conversion of the *subjects*, and the second one is the conversion of the *non-subjects* of a commonwealth which, in that era, indicated the Indians, or as Vitoria called them, *barbarians*. Vitoria, for the *subjects* of a commonwealth, accepts the forcible conversion which is practiced for the benefit of the commonwealth. Even before the conversion, the king has a right to prohibit the tradition, or rituals of heathens that are against the nature like fornication or sodomy³⁵, or those that are against divine law, like polygamy. This deduction stems from the argument that making the subjects *good* is one of the responsibilities of the king. For Vitoria, king’s power affects not only the temporal matters but also the spiritual ones. For this reason, recognizing the conversion of the heathen subjects as beneficial for the commonwealth, and for the heathens themselves is included in king’s power. However, for him, the conversion of the subjects should be lawful even in the case that force is used for the conversion. Then, one should ask: How can a conversion be lawful if force is used? Vitoria does not evaluate every conversion as lawful, and for him, the lawfulness of every conversion should be judged in itself.

³⁵ One should ask: Who defines the principles of the natural law? The answer will be probably this: The one who alleges the existence of the natural law or the one (power) who says the word.

While replying Duns Scotus, he argues that, inasmuch as the conversion does not cause harm for the heathen, and the unrest in commonwealth is avoided, the use of force can be accepted in conversion. It is clear in this problem that the rest in a commonwealth is preferable for Vitoria than advocating the right of the unbelievers, or in other words, advocating the rights of the minorities in a society. At this point, he seriously damages his universalistic understanding of law, and supports the requirements for the permanence of the state compared with the rights of individuals.

For the permanence of the state Vitoria also proposes expulsion as an alternative to conversion. If the heathens reject conversion they can be expelled by the king for the interest of the commonwealth. In this sense, if the heathens reject the conversion, and the king does not execute the expulsion on them, he cannot demand extra taxes from them, or dispose the heathens of their goods for the reason that they also “possess the true right of ownership (*dominium rerum*) over their property” (1991: 349). However, at the beginning of the settlement of heathens in a Christian commonwealth if the settlement of the heathens had been accepted due to extra taxes, these extra taxes would have been lawfully collected. It can be argued that all the claims that Vitoria makes for the Christian king is valid for a heathen king against the Christian minority.

The crucial problem occurs, for him, in the conversion of the barbarians as non-subjects of the Christian commonwealths. On the one hand, he argues that the Christian king, with or without the Pope, has no jurisdiction over the barbarians, or the Indians. In this sense, the conversion of the barbarians in every case, with or without force, would be unlawful. On the other hand, a Christian king can wage a war against the barbarians to defend the innocent. We perceive that there are many reasons for a just war against the barbarians. In this work Vitoria only mentions the

defense of the innocent. For him, if the barbarians continue their traditions against nature, like human sacrifice, anthropophagi, or euthanasia of the old and senile, the Christian king can wage a just war against the Indians to stop their unnatural rituals. It is important that he does not accept this kind of just war, not because these rituals are against the natural law, but because the Indians do harm the innocents. The subjects of these rituals are mostly the children, that is why, Vitoria calls *the defense of the innocent* as a reason for a just war. If every act against the nature like fornication, would be a reason for a war, the commonwealths in Europe would have to wage war every day. If the barbarians stop their unnatural acts, the war should be ceased at that time. On the one hand, it can be accepted as a right to defense the innocents in every society with respect to the understanding of universal law. On the other hand, describing the defense of the innocents in a speculative way, which informs about the natural and unnatural acts, alienates the suggestion from the perspective of universal law.

Indeed, for Vitoria, conversion that has been executed at the time of Augustine should be taken as a model for the new conversions. He argues that at the time of Augustine, the conversion was included in the responsibility of the Church and the converted people were made to wait for a while so that their faith became constant, and then they were baptized.

The *relection On Dietary Laws, and Self-Restraint* focuses not on the conversion problem, but on *anthropophagi* and *human sacrifice*. Vitoria in this *relection* firstly explains the most known sins of the barbarians by asking whether

eating human flesh (anthropophagi) is lawful, or not³⁶. He rejects the lawfulness of eating human flesh with reference to the divine and human laws. It is clear in Scripture that, “But flesh with the life thereof, which is the blood thereof, shall ye not eat” (*Gen.9:3-4*, quoted in Vitoria, 1991:208), God prohibits the man from eating his kind. The prohibition of the anthropophagi by every commonwealth indicates that eating human flesh is not lawful. Vitoria by using the same method curses the practice of human sacrifice. These practices in that era were seen as the worst mortal sins of the commonwealths. However, for Vitoria the barbarians are not bound with any law “except the natural” (1991: 214) law.

Then, Vitoria inquires whether to wage war on the barbarians for their rituals against nature is lawful. He maintains his views developed in his lecture on conversion. However, he does not mention the euthanasia of the old and senile when he enumerates the reasons for a just war in this case. Before answering the question, he explains the rights of Christian kings on their subjects on the spiritual matters. The Christian king can command the end of the rituals which are against the natural law and prevent the sins against divine law. For Vitoria, if the king is responsible for the goodness of his subjects in temporal and spiritual matters, then he “could compel them to accept the true religion” (1991: 222). In the strict sense, the king has almost an absolute right on his subjects in this case. It can be argued that the claims of Vitoria on conversion in this *relection* are stricter than the claims in the lecture on conversion. The crucial problem remains the same in Vitoria, and for this reason the answer remains the same; which is to defend the innocent, especially the children,

³⁶ The examination of anthropophagi in a detailed way by Vitoria results from the discussions that are made in that era in Europe. In that era the Indians are evaluated as cannibals as a result of the propaganda of the conquerors. Most of people approve the conquest of the Indians because of this propaganda. However, Vitoria does not believe these claims and argues that it cannot be true that every Indian society applies anthropophagi.

the Christian king can wage a war against the barbarians. The origin of this kind of just war is the argument that the people who apply the unnatural rituals “involve injustice (*iniuria*) to other men” (1991: 225) by practicing human sacrifice or cannibalism. If the barbarians stop executing these rituals, the war should be ended, and the barbarians should not be disposed of their goods. However, if a Christian is lawfully appointed as the king of the barbarians, he will possess all the rights that a Christian king has over his subjects. Therefore, the Christian king can compel the conversion of the barbarians without unrest, and in a tolerable manner.

Vitoria, lastly, argues that to be a lawful king, the Christian king should make laws, and appoint ministers for the interest of the barbarians to rule them just. For being just he should determine the penalties for every guilt, in terms of the quality of guilt. For him, “a law which prohibits perjury or simple fornication under pain of death, for instance, is not tolerable” (1991: 228). It is clear that the last point that Vitoria examines, that is the appropriateness of penalty to guilt, can be accepted as one of the principles of the universal law from a modern perspective. The law makers should aim to participate the guilty people to the society as soon as possible, and the penalties should not be applied to take revenge on guilty people but they should be applied for being educative. On the other hand, Vitoria’s general attitude cannot provide us coherent proofs to accept him as Scholastic or universalist. However, the incoherent points in Vitoria’s deductions seriously damage his universalism on behalf of law. Therefore, he cannot come to a point of thorough perspective of universal laws. I will make my comments clear in the following section.

2.8 Concluding Remarks

In conclusion, I may argue that, because he cannot go beyond the tradition of Aquinas, Vitoria was not able to develop coherent and strong universal views on rights and law. My claim is that because he remains Thomist and evaluates the law from a Scholastic perspective, even if he possesses a universal perspective of law, he cannot construct a thorough universal frame of law. It can also be argued that, if he had remained within the strict boundaries of the Scholastic thought of Aquinas on law, he would have never been able to develop his arguments on the universality of laws. Vitoria, by using the certain features of the Scholastic frame, asserts more complicated and detailed views on human law. On the one hand, Aquinas's arguments make possible a ground for Vitoria, in the sixteenth-century, to construct his ideas on law of nations (*ius gentium*), and therefore, the universal law. On the other hand, because of being neo-Thomist, his effort to incarnate the law of nations (*ius gentium*) has been limited with a frame on law that had been developed by Aquinas. The arguments of Aquinas cannot provide Vitoria a convenient ground for universal law. For this reason, the universality of Vitoria's arguments remain deficient in comparison with the notion of universal law that stems from the perspective of human rights. This is the case even he strongly strives to surpass Aquinas on the issue of universal law. His Thomist background, as a Dominican theologian, makes it possible for him to support hierarchical and partial views such as inequality of the individuals, and such arguments make it extremely difficult to find the origins of the idea of human rights in Vitoria. Because of this deficiency, to speak of human rights in Vitoria will not be so meaningful. It can be asserted that the first principle in human rights thought is the demand of the rights universally, without exception and any discrimination. However, Vitoria does not defend such egalitarianism.

Indeed, in the sphere of his arguments which depart from Aquinas, he could establish his original ideas on law, in particular, on law of nations (*ius gentium*). Despite following the general frame of Scholasticism on law that Aquinas formed, he did his best by developing the understanding of *ius gentium*, and by determining an autonomous domain for the commonwealth with respect to political power. As claimed before, Vitoria is not totally concerned with the relations of the commonwealths. He rather discusses the relations of the nations in the context of his own theory of universal law. In that context, his contribution should be accepted, because he successfully develops a defense of a form of state which is governed perfectly by law (*state of law*), and in which the ruling and the ruled people obey the just laws for their common good and regard the universally accepted laws for the development of humanity in their home affairs. However, we should not transfer his progressive views on state, into his judgments about the Indians, because these judgments contain arguments which seriously weaken his universalist perspective displayed in his thoughts on law. For example, although Vitoria calls the Indians free, he supports the slavery of them after a just war, or he proposes the slavery of the women, and children as a war tactic.

Furthermore, we cannot ignore his Scholastic views that weaken his universalist ideas. However, Cemal Bali Akal in his work on Spanish Golden Age claims that Vitoria defends a “pluralist and an egalitarian universal order” (Akal, 1997: 41). I think such sympathetic approach to Vitoria’s thought does not represent the complete picture. His demand for the state of law does not directly necessitate a pluralist and an egalitarian view. The ruling of a state by law does not necessarily mean that this state is ruled justly. If the common law is constituted on a ground of

unjust principles, then the state will be ruled unjustly. I will try to approve my claim with two examples.

First one is Vitoria's rejection of the equality of everyone in a commonwealth. In his second one of his double *relectiones On the Power of the Church* while discussing Luther's refutation of an institutionalized universal Church, he argues that "not all Christians are priests *nor they are equal, but there is an hierarchy* in the Church" [emphasis mine] (1991: 127). He asks a rhetorical question to substantiate his argument: "*How can the Church be a city*, if it has no magistrates or governors *nor any hierarchy of citizens, but equality*" [emphasis mine] (1991: 128). It is clear that Vitoria cultivates an hierarchical vision, and he even rejects the equality of the priests in the domestic rule of the Church by suggesting a hierarchical structure. While mentioning the women, he also claims that the women in the Church should be silent and if the women have any questions, they should ask their husbands at home, but not in the Church, or in any other public sphere. The woman is firstly, for him, under the rule of her husband or father, then comes the general law that she should obey. Still in the era of Vitoria, because of the identification of the public sphere with intellect, and hence, directly with man, there had not been a place or role accepted for the women in the public sphere and Vitoria does not try to overcome the conservative ideas of the men of the Middle Ages concerning women.

The second one is Vitoria's acceptance of *slavery* as a just institution. He does not reject slavery totally, however he demands the slavery to be brought to just way application. In his *relection On the Law of War* he accepts possessing slaves in a just war, and he argues that the Christians may also "lawfully enslave the women and

children of Saracens [Muslim Arabs] ” (1991: 318), in return for the injures and losses (1991: 318), incurred in a war against the pagans. In addition, in his letter to fray Bernardino de Vique (18 march 1546), as a respond to Vique’s question on Portuguese slave-trade, he states that he would “*do good business*” [emphasis mine] (1991: 334) and buy a slave “*without a qualm*” [emphasis mine] (ibid.) in two cases. First, in the case that the slave is possessed after a war between barbarians, and second, in the case that a man who waits for his execution in a barbarian commonwealth, can be qualified as a slave after ransomed by a Christian. It goes without saying that Vitoria does not reject slavery, and in this letter he only complains about the degrading and inhuman treatment against the slaves.

For another argumentation on the universal rights, which stems from the examination of the *other*, I will pass *beyond the line* and arrive in the New World with Las Casas in the third chapter of this thesis. In the following chapter, I will discuss the ideas of Las Casas, as another Dominican theologian and bishop. I will discuss what he presents us concerning the human rights in the context of the problem of the Indians. His angle is very different, because it rests on a strong defense of the Indians as the *other*.

CHAPTER 3

DEMARCATING AND PROTECTING THE *OTHER*: BARTOLOME DE LAS CASAS

3.1 Las Casas's Time and Works

Las Casas's works are directly related to his life. His life seems to be a good union of his actions and thought. For this reason, a detailed version of his life will supply crucial points to evaluate his works accurately for those who work on Las Casas. Unlike the chapter on Vitoria, here I will try to explicate Las Casas's life in a detailed and more comprehensive way, for the reason that he experienced all the affairs of the Indians firsthand and from the beginning.

Las Casas was born in Seville as a son of a merchant whose origin was Jewish, in 1484. His father's financial situation made it possible for him not to waste his time with farming, but to learn Latin. His father, with Las Casas's two uncles, went to the New World on the second voyage of Columbus. The father gave Las Casas an Indian slave as a gift in his return. However this slave was then released by Isabella, the Queen of Castille (Spain). Las Casas went to the New World for the first time with Nicolás de Ovando³⁷ in 1502 to administer his father's lands and Indian

³⁷ Ovando was sent by the Spanish Crown to reconstruct the authority of Kingdom and reorganize the feudal system there. The Indians in the New World were governed by a kind of feudal system called *encomienda* (land-concession). At the beginning of the conquest the aim of the Crown was the conversion and working of the Indians in *encomienda* system under the governance of the Spanish *encomenderos* (land-holders) who will be responsible for the social and economical wealth of the Indians, and also will be responsible to the Crown for the instruction of them to the Catholic faith. However the system immediately became a formal slavery system in which the labors and lives of Indians' were being exploited in farms, buildings and also in mines. Las Casas was one of the *encomenderos* in his first years in Hispaniola, however the sources argue that he had never become a typical *encomendore* who used the Indians as slaves without recognizing them any rights.

slaves in Hispaniola³⁸. To our knowledge, Las Casas was not interested in the legal and moral situation of the Indians and the legitimacy of the conquest in his early years in the New World. In those years he was, on the one hand, holding his lands, and on the other hand, travelling across the Indian territories as a provisioner in the Spain army to repress some Indian revolts. Four years later, he returned to Spain and went to Rome to be ordained as deacon, and to get a papal backing for a new voyage for the conquerors together with the brother of Columbus; Bartholomew Columbus. In Rome he was ordained as deacon, and after two years of studying Latin in Spain, he returned to the New World as the first ordained man, in 1510. The first Dominicans came to the New World in 1510, and Las Casas probably heard the sermons of Dominican Antonio de Montesinos who was concerned about the human problems of the Indians, and the terror and harm that they had been inflicted. Lastly, his witnessing of the Caonao massacre³⁹ caused him to dedicate his life to the struggle for the Indian freedom. At the beginning of his struggle he released his Indian slaves and participated in the Dominican sect by damning all the harms of Spaniards against the Indians and, by declaring the conquest as illegitimate. Las Casas then entered a Dominican monastery to write and collect reports about the conquest. His first piece was on the peaceful conversion and was titled *The Only Way of Attracting Everyone to the True Religion*⁴⁰, known briefly as *The Only Way*, and in the monastery he also started to write *History of the Indies*⁴¹. In 1535 and 1536 he took part in the Mexican Ecclesiastical Conferences and won success with his

³⁸ Small Spain -In the borders of Haiti and Dominic Republic.

³⁹ In Caonao, in Cuba, more than two thousand Indians were killed by the conquerors, and the survivors were held as slaves in 1513. Las Casas participated in this massacre as a priest in a conqueror troop.

⁴⁰ *Del única modo de atraer a todos los pueblos a la verdadera religión*, 1516. This work was not published until the twentieth century, and it had become known with manuscripts.

⁴¹ *Historia de las Indias*. Las Casas would enrich the work with new writings until his death.

arguments concerning the human condition of the Indians and their peaceful conversion. The representatives that were chosen by the conference committee were sent to Rome to present the conclusion declaration of the conferences to the Pope Paul III. The Pope was directly influenced by those arguments, and he announced the bull called *Sublimis Deus* in 1537. The bull recognized the Indians as free human beings, and prohibited the enslavement of them. However, the bull became ineffective in a few years with the declaration of the new edicts of the same Pope and Charles V. On the other hand, Las Casas did not cease his struggle and wrote *Brief Account of the Decimation (Devastation) of the Indies* to present to Charles V⁴². Charles V legalized the New Laws (*Leyes Nuevas*) in 1542 on behalf of the suggestions of the Council of Indians and Las Casas. The New Laws recognized the Indians as *free vassals* of the Crown and prohibited the slavery of them.

In 1544, Las Casas returned to the New World and was ordained as the Bishop of Chiapa in Mexico. To protect the Indians he wrote the *Confesionario* for the priests, to determine the principles of absolution⁴³. In this work, the absolution of the Spaniards in New Spain was directly connected to their action of freeing their Indian slaves and making restitution for the harms of the Indians, for the reason that the whole conquest was illegitimate. Both the conquerors and the administrators in

⁴² *Brevissima relación de la destrucción de las Indias*. This work was not prepared for common, however firstly the manuscripts, then the published version traveled across the whole Europe. With this work the Black Legend, which argues the cruelty of the Spaniards throughout the conquest, became the dominant thought concerning the Spaniards. For the significance of the Black Legend see, G. Cerio, *Were The Spaniards That Cruel*, 1991. In this article Cerio asserts that like the other invaders, the Spaniards also committed horrifying crimes. On the other hand, unlike the other European communities, specially the North, they did not drove the natives from their lands, and they accepted the integration of the Indians in their societies. Cerio accepts that this participation was maintained with so much pain, but argues that there was no participation occurred in the North America. For the integration of the Indians, the Spaniards, he argues, built schools, universities and hospitals which whites and Indians, along with some blacks, could make use of together.

⁴³ Forgiveness for sinning of a faithful individual before a priest through the confessions of him/her (faithful individual).

the New World reacted against him, and due to their propagation, some of the laws that protected the Indians were revoked. For this reason, he thought that his struggle had to continue in the center of the administration, and therefore, he returned to Spain. In 1550, he participated in a debate against *Juan Ginés de Sepúlveda*⁴⁴ in front of an academic jury (*junta*) which was composed of fourteen theologians in the leadership of Domingo de Soto who was closer to the views of Las Casas. The debate was convoked “to see how best to preach and spread the Catholic faith in the New World” (Carman, 1998: 195). Both of the participants presented their *Defenses (Apologia)* to the *junta*, however the *junta* did not make any decisions, and avoided declaring the winner of the debates, because of the pressure coming from the Crown and the conquerors. In 1564 while responding a priest, called Carranza, who asked 12 moral questions on the conquest of Peru, Las Casas gathered *Twelve Doubts (Letter to Carranza)*. In his response to Carranza he claimed that all the treasures of Peru and all other properties that the Spaniards gained from the Indian labor were *usurped*. Therefore, for Las Casas, the Spaniards had to restore all the things that they usurped from the Indians, and had to pay restitution for their harms, if they wanted to save the collective soul of Spain (Las Casas, 1955: 343-52). Las Casas then entered a Dominican monastery of San Gregorio in Spain. In this monastery he finished writing *History of the Indies* and wrote *Apologética historia*⁴⁵ for translating and interpreting his *Apologia*. He died in Madrid in 1566.

⁴⁴ In the second section I will point out a detailed information about Sepúlveda and his arguments concerning the Indians. In summary, he was a rhetorician and royal historian humanist who defended the legitimacy of the conquest and the slavery of the Indians by relying on Aristotle’s theory of natural slavery.

⁴⁵ This work was translated into English by Stafford Poole, C.M. under the full title of *In Defense of the Indians: The Defense of the Most Reverend Lord, Don Fray Bartolomé de Las Casas, Of the Order of Preachers, Last Bishop of Chiapa, Against the Persecutors and Slanderers of the People of the New World Discovered Across the Seas*. I will mention the work as *Defense* in the following sections.

After this quite detailed life story, let me introduce the content of this ongoing chapter briefly. This chapter aims to evaluate the general approach which stems from the interpretation of the arguments of Las Casas. From this general view, it can be thought that, Las Casas, constituted the theory of universal basic human rights, by his arguments on behalf of the Indians. I will try to discuss whether Las Casas constituted the basic human rights in a consistent manner, or he lacks the idea of human rights. In the first section, the common viewpoint of the Europeans and conquerors concerning the Indians and the advocacy of Sepúlveda will be explicated. Then, the attitude of the Spanish Crown and the Papacy will be presented in the light of the bulls and royal laws. In the following section, Las Casas's classification of the barbarians and his conception and defense of the Indians and their culture will be discussed. Then, Las Casas's arguments on the rejection of the war against the Indians and the defense of the just war of the Indians will be examined respectively. At this point the attitude of Las Casas against the heretics of the Faithful, Muslims and the Jews and his arguments concerning them will be discussed to present and explicate his arguments. In the last section, I will discuss the general perspective of Las Casas in the light of human rights. Furthermore, in the same section, I will try to explicate his views on war, Black slavery and human sacrifice, and his effort of contextualizing the canons of Catholicism with respect to his aim. I hope all these clarifications will supply certain crucial points to evaluate the arguments of Las Casas in the context of human rights.

3.2 Dominant Views On the Indians In the 16th Century Spain

The dominant views of the Spaniards should firstly be examined to understand the assertions of Las Casas concerning the Indians. Las Casas's

arguments concerning the affairs of the Indians are directly oriented against the common prejudices, and every one of his arguments aims to refute the negative views on Indians. Most of the Europeans in that era were grown up by the legends which portrayed that in the ocean there were some islands and lands in which monsters like human eating cannibals lived. At the beginning of the conquest, the information coming from the New World *supported* these legends. However, it is not to be doubted that, the stories reaching to Europe was distorted by the conquerors in a conscious way to justify their attacks against the Indians and to legitimize the exploitation of the New World. Their aim was not, as they argued, to spread Christianity, but to become richer with the treasures of the New World and also to use labor of the Indians. As far as it has been known, the Indians were employed with force in every working domain, such as gold and silver mines, fields of sugar cane and buildings. The views of the colonialists were evidently defended by Sepúlveda in his work *Democrates Secundus On Just Causes of War Against the Indians*⁴⁶. On the other hand, the attitude of the Crown and the Papacy was not so narrow-minded to reject the humanity of the Indians, for the reason that their views were affected by learned theologians and effective priests such as Vitoria, Las Casas, Domingo de Soto and Antonio de Montesinos. Therefore, the royal laws and the bulls of the Papacy gradually became the elements of balance between the supporters of the native rights, and the conquerors and their views in that era. Let me now introduce the assertions of Sepúlveda concerning the Indians.

⁴⁶ *Democrates Secundus sive de justis causis belli apud Indos*. This work was not published until twentieth century because it deeply annoyed the common sense. It contains totally humiliating and racist arguments about the Indians. For the summary of the book see Pagden, 1982: 109-18 "The rhetorician and the theologians: Juan Ginés de Sepúlveda and his dialogue, *Democrates secundus*", and Las Casas, 1974 (*Defense*): 11-6 "Summary of Sepúlveda's Position".

3.2.i The Indians are *Apelike* Humans: *Democrates secundus*

Sepúlveda in his dialogue *Democrates secundus*⁴⁷ (1544?/5) defends just war against the Indians basically relying on their natural conditions: he tries to discuss whether they are human or not? He firstly delivered his work to the royal censors to be checked for publishing. At this point the Council of Indians intervened in the process by arguing that the statements in the book might cause unrest among the Indians, and therefore, recommended the work not to be published (Marcos, 1947: 51-3, quoted in Pagden, 1982: 110). Sepúlveda, then, presented the book to the universities of Alcalá and Salamanca for the printing permission. However, both universities described the work as inconvenient for printing. The theologians of Salamanca particularly condemned the work not only because of its inconvenient tone, but also because of their discomfort about a humanist, writing on an issue which, according to them, interests only the theologians⁴⁸. Lastly, Sepúlveda omitted Aristotle's theory of natural slavery, and then published his work in Rome, in 1550, as *Apologia*⁴⁹.

Democrates secundus is a dialogue between Democrates and Leopoldo in which at the end Leopoldo accepts the superiority of the arguments of Democrates. The defense of Democrates concerning just war against the Indians rests on Aristotle's theory of natural slavery. Vitoria also in his *relection On the American Indians* asserts the same claims for the Indians. According to Pagden the provocative

⁴⁷ Sepúlveda was a famous rhetorician and royal historian who wrote his works on behalf of the Crown's wars. Before writing *Democrates secundus*, he wrote a book in 1529 to defend the crusade of the Crown against the Turks called *Ad Carolum ut bellum suscipat in Turcas*. There is another point which must be underlined is that Sepúlveda had never seen the New World.

⁴⁸ It is clear that the theologians of the Salamanca in that era were directly influenced by Vitoria, and they assumed the issue of the Indians as a subject matter under the monopoly of theologians, because they assumed that the affairs of Indians was an issue included in divine law.

⁴⁹ Las Casas complained not to be given a copy of *Democrates secundus* to him throughout the debates in Valladolid, but to have been permitted reading only the *Apologia* of Sepúlveda.

side of the work is not what the work argued but how it argued (Pagden, 1982: 111). In many parts of the work, the Indians are compared with the Spaniards in the way that “almost as monkeys are to men” (Sepúlveda, 1951: 33, quoted in Pagden, 1982: 117). For this reason, using similes like above strengthens the value of the arguments. Sepúlveda, in summary, argues that if the Spaniards want to be governed philosophically, they should assume the Indians not as human but as *homunculi*⁵⁰ that should be governed by the masters. In order to support his claims Sepúlveda describes two rules. In the *servile rule*, defended by the jurist Leopoldo, the slaves are defined as the war captives (Sepúlveda calls it *mancipium*). However, in the *herile*⁵¹ *rule*, defended by the philosopher Democrates, the slaves are defined, as Aristotle described, the lower sorts, and their mind is limited compared to men. From the foregoing it can be argued that in the former rule the slavery depends on law and force, yet, in the latter, the relationship between the master and the slave is accepted as natural. It goes without saying that Sepúlveda evaluates the slavery of the Indians as natural, and thus, necessary⁵². Therefore, the Indians must accept to be governed by the Spaniards for their own advantage of being governed by a superior community. It is clear that he supports all the colonialist affairs in the New World. However, one should suspect that if the Indians become equal to men in mind and soul, will the Spaniards be ceased their dominance in the New World? Sepúlveda does not subscribe to this viewpoint and, he argues that Indians will never become as normal men, and as “full citizens of a true republic” (Pagden, 1982: 116). Therefore,

⁵⁰ “...*Homunculi* were things created by magic, also unnatural biological origins, the persistent reference to animal symbolism, monkeys, pigs and beasts in general...” (Pagden, 1982: 117-8).

⁵¹ The word is borrowed from Plautus who used the word “to describe the highest and the lowest levels of the domestic hierarchy” (Pagden, 1982: 115).

⁵² For Pagden, Sepúlveda “regards the American Indian as a ‘natural’ slave who possesses some rights –similar to those of ‘free’ domestic servants (*ministri*) (Sepúlveda, 1951: 120) –but no freedom of personal action” (Pagden, 1982: 115).

they should always be governed by the Spaniards. At this point, it can be claimed that Sepúlveda aims the full exploitation of the New World and the enslavement of the Indians to be continued permanently.

It is clear that by emphasizing the inferiority of the Indians, Sepúlveda wants to construct a ground for legitimizing the wars against the Indians, especially in the case that if the superiority of the Spaniards is rejected by the Indians. Las Casas in his *In Defense of the Indians* (hereafter *Defense*) mentions the four reasons, of the just causes against the Indians in the section under the name of “Summary of Sepúlveda’s Position”. First reason of just war, for Sepúlveda as described above, is the rejection of the superiority of the Spaniards by the Indians. The Indians are obliged by the nature to obey the Spaniards who are superior in virtue and character. Sepúlveda uses the mind-body dichotomy and certain analogies such as animals to human beings, children to adults, to suggest that the nature commands the obedience of the imperfect to the perfect. If the Indians, once warned, refused the dominance of the Spaniards, then the Spaniards can wage a just war to establish this natural obedience. Second, the Indians must accept the Spanish yoke to be corrected for their sins against the natural and divine law, especially for their idolatry, human sacrifice and cannibalism. In the third place, the Spaniards can wage a just war against the Indians to protect the innocents which are killed in the native religious ceremonies such as human sacrifice⁵³. Sepúlveda claims that thousands of innocents are sacrificed every year. Therefore, the Spaniards should protect the innocents in the Indian territories who have been subjected to harm, because the canons of Christianity command saving the neighbours from the danger, as Vitoria argued.

⁵³ As discussed in the previous chapter, Vitoria also accepts the protection of the innocent as a just reason of war.

Lastly, Sepúlveda adds that the Pope Alexander supports the just war arguments against the Indians, with his *Inter caetera* bulls⁵⁴. From the foregoing it can be argued that Sepúlveda aims to legitimize the conquest of the New World, and he does not concern the contradiction in his arguments which claim the inferiority of the Indians and which defend the protection of the innocent Indians at the same time.

3.2.ii The Attitude of the Spanish Crown and the Papacy

At the beginning of the conquest the Pope Alexander VI declared the twin bulls of 1493: *Inter caetera* and *Eximiae devotionis* (known as *Inter caetera* bulls). The Papacy's policy during the conquest was the conversion of the natives in the New World⁵⁵. Until the bull of 1537, Papacy defended the use of force in conversion; with the new bull of 1537 it declared that only the peaceful conversion would be pursued. The *Inter caetera* bulls, in summary, granted all the lands and islands to Ferdinand and Isabella (Kings of Leon and Castille; Spain) which have been discovered in the Atlantic Ocean and not occupied by any other Christian governor before. The bull of *Eximiae devotionis* (May 4), replaced the *Inter caetera* bull (May 3), and drew a definite line in the Ocean. It argued that 100 leagues (miles) west from the Azores or Cape Verde islands was granted to the Kingdom of Castille⁵⁶. Therefore the sovereignty of Spain in the New World was determined absolutely with the new bull. The crucial point of the twin bulls for this thesis is their

⁵⁴ "The Pope with his decree and impartial judgment has declared the justice of this war, I am surprised that any pious man knowing this should be able to doubt the honest of this cause" (Sepúlveda, 1951: 80, quoted in Carman, 1998: 195).

⁵⁵ At this point one should suspect that Papacy assumed itself as a constitution that could donate the newly found lands and islands in the Atlantic Ocean to a Christian state, or states. It seems that this self-confidence of Papacy stems from its trust of possessing the universal power and judgment.

⁵⁶ The kingdoms of Castille and Leon became a unique kingdom under the dominance of Castille of Isabella.

acceptance of the forceful conversion. According to the *Inter caetera* bull, God will be pleased if the barbarous nations in the new found lands are “*overthrown*” and converted to the faith⁵⁷. Also it suggests that the kings have to “*subject*” and convert the inhabitants of the lands with respect to the Catholic faith and “*divine clemency*”⁵⁸. One should take notice of the twin bulls that they do not question the rights and freedom of the Indians, and do not regard the authority of the governing forces of the Indians in the New World. The Papacy changed its policy with the declaration of the bull of *Sublimis Deus*, in 1537, by the Pope Paul III. This bull prohibits the use of force or violence in the conversion of the Indians. It means that it refutes the war that is waged on behalf of the conversion. According to *Sublimis Deus* the Indians are rational and free human beings, for this reason they should not be enslaved and their property and lives should be protected⁵⁹. It is clear that this bull allows only the peaceful conversion in the case of the Indians and condemns the slavery and the forceful conversion, because it is against God’s will⁶⁰.

The general attitude of the Spanish Kingdom concerning the Indian affairs was recognizing the Indians as free subjects who had to work for conquerors to construct the Spanish colonies. In the latter phases of the conquest the Indians were assumed to be the *free vassals* of the Crown who had not to be enslaved. Needless to

⁵⁷ “That barbarous nations be overthrown and brought to the faith [*ut babare nationes deprimentur, et ad fidem ipsam reducantur*]” (Carman, 1998: 195).

⁵⁸ The Catholic kings “have sought with the favor of divine clemency to subject and bring to the Catholic faith the said countries and islands with their residents and inhabitants [*terras et insulas predictas illarumque incolas et habitatores, vobis, divina favente clementia, subiicere et ad fidem Catholicam reducere proposuistis*]” (Carman, 1998: 195).

⁵⁹ One passage from this text (*Sublimis Deus*) represents this positive attitude very clearly: “We command that the aforesaid Indians and all other nations which come to the knowledge of Christians in the future must not be deprived of their freedom and the ownership of their property, even though they are outside the faith of Christ. Rather, they can use, increase, and enjoy this freedom and ownership freely and lawfully. They must not be enslaved” (quoted in Las Casas, 1974: 101).

⁶⁰ For the bull to be applied correctly, the Archbishop of Toledo was appointed with the full authority in the New World.

say, the Crown emphasized its aim as the conversion of the natives of the New World to the Catholic faith. However, it can be argued that the Crown, unlike the other European communities, was concerned with the moral situation of the Indians since Columbus have returned to Spain with Indian slaves from his first voyage. The theologians too, compelled the Crown to consider the moral and legal dimensions of the conquest. The efforts of the theologians caused the Crown to convoke the Council of Indians, and owing to their advice the Crown made the Laws of Burgos (1512). These Laws recognizes the Indians as free human beings that should be converted. Moreover, the Indians should work for the conquerors for the establishment of the Spanish dominance in the New World, and if they reject, then they shall be compelled to work. Yet, on the other hand, the Indians should be paid for their work, and they should be provided with spare time for maintaining their social and private life, and lastly, the works the Indians do, should be tantamount with their physical capacity. Later in 1542, again in accordance with the advice of the Council of Indians and with the efforts of Las Casas, Charles V established the New Laws (*Leyes Nuevas*) on behalf of the Indians. With the New Laws, Indians were now seen as the free vassals of the Crown; in other words the Indians would possess the same rights in comparison with the Spaniards, in principle. The aim of these laws were firstly to prohibit the slavery of the Indians by reforming the *encomienda* system, because the *encomienda* system, on the one hand, legitimized the enslavement of the Indians, and on the other hand, it became an alternative authority in opposition to Crown. These bulls also aimed to abolish the *encomienda* system in time⁶¹.

⁶¹ For the significance of these laws see DiSalvo, 1993, *Spanish Dominicans, the Laws of the Indies, and the Establishment of Human Rights*, and Las Casas 1995, 248-53, "Selections from the New Laws of 1542".

The controversy over the legal statute of the Indians and their political and social situations did not, by any means, result from the Crown, but the conquerors and the administrators of the Crown who were accountable for application, and inspection of the laws. However, the negligence of the administrators in the New World caused the disobedience of the *encomendos* against the laws that prohibited the enslavement of the Indians, and as explained before, the *encomienda* system became a slavery system in a short period of time. Most of the Indians died because of the hard working conditions in mines, and the rest were killed by the conquerors in massacres. For example, in the Caonao massacre more than 2000 Indians, who welcomed the conquerors with foods and gifts, were killed and the rest have been slaved⁶². According to Las Casas, all the massacres and disobedience of the conquerors stemmed from “violent and blind and uncontrollable *greed* (y)” [emphasis mine] (Las Casas, 1995: 50) for getting richer.

3.3 His Classification of Barbarians Against Sepúlveda

First of all, it should be underlined that Las Casas is aware of the ambiguity of the concept *barbarian* and the scope concerning its meaning determined by the powerful. In responding to the argument that the Indians are natural slaves who should be governed by the Spaniards, he asserts that the Romans also defined the

⁶² For the significance of the killings, torture, inhuman behaviours and all other harm that done by the Spaniards, see Las Casas, *The Devastation of the Indies: A Brief Account*, reprinted 1992. When one reads all the descriptions of the killings, such as tearing to pieces of the Indians by dogs, or eating them by frying, killing the children by throwing them to the wall, s/he will understand the label of Black Legend used for Spaniards in that era in Europe.

Spaniards as barbarians before the Spaniards were conquered by them⁶³. However, as Las Casas argues, it is impossible to recognize or classify the Spaniards as barbarians, and as a consequence, the criterion of barbarian cannot be used directly for every foreign community that possesses a culture different from the Christian ones.

In responding to the arguments of Sepúlveda, Las Casas clarifies his classification of the barbarians, and needless to say, he separates the Indians from the other kind of barbarians, and defines a special category for them which renders the content of the concept insignificant. According to Las Casas, there are four kinds of barbarians, and the first kind is the “wickedest, worst, and most inhuman of all animals” (Las Casas, 1974: 29). The people included by the first kind do not possess reason, or any human virtue. Therefore, it can be argued that, like a wild animal, first kind of barbarians defend their interests through violence. He asserts that this kind of barbarians can be found in every community, for this reason, the conquerors who violate the social and political life of the Indians can be seen as a good example for the first kind. In his description of the second kind of barbarians Las Casas indicates the undeveloped primitive communities, with respect to the civic communities, who do not have any written languages, but verbal culture. He gives the English people as an example of this kind, and argues that they did not have any written languages, but

⁶³ Las Casas, by quoting the words of Trogus Pompey, claims that the definition of the powerful, i.e. the Romans, does not mean that the defined community is barbarian, i.e. the Spaniards. He also asserts that this definition also does not abolish the right of self-defense (just war) of the so-called barbarian community against the powerful community or communities. Trogus Pompey in his book 44, near the end, says that:

“Nor could the Spaniards submit to the yoke of conquered province until Caesar Augustus, after he had conquered the world, turned his victorious armies against them and organized that barbaric and wild people as a province, once he had led them by law to a more civilized way of life” (quoted in Las Casas, 1974: 43).

in time, they constructed their own written language. At this point Las Casas tries to employ an objective meaning of the concept barbarian. By citing the words of Apostle Paul, he explains that a man is barbarian to another, if they do not know the other's language⁶⁴. He also claims that the barbarian communities can also lead a settled life, and are able to possess some virtues of a civil life within its political and social organizations. Following Aristotle, he assumes that this kind of kingdoms are more stable, because their subjects are loyal to their kingdoms from heart, and therefore, they love and secure their kingdom more than the others. Third kind of barbarians are the natural slaves as Aristotle described, but Las Casas evaluates them as a community which does not possess any political, or social rule because of the "evil and wicked character" (Las Casas, 1974: 32) of the community members, and their barren region which makes them savage and stupid. For this reason, the natural slaves do not possess law, commerce, marriage or any other signifiers of the social, or political development. From his perspective, the natural slaves should be governed by the wiser for their benefits. The description of the forth kind implies Las Casas's prejudice against the non-Christian communities. According to him, fourth kind includes all the people "who do not acknowledge Christ" (1974: 49). Because they do not possess the true knowledge of divine law, the non-Christian communities cannot apply a thorough justice in their affairs. The reader might expect the same respect to be shown to the non-Christian communities as much as for the Indians. However, Las Casas's praise of the Indians, and his lifetime effort to protect them is a special attention which is not directly paid to the barbarian, or idolater, or

⁶⁴ Apostle Paul says: "If I am ignorant what the sound means, I am a barbarian to the man who is speaking and he is a barbarian to me" (*1 Corinthians 14 [11]*), quoted in Las Casas, 1974: 31).

unbeliever communities but only to the Indians⁶⁵. Therefore, he proves himself as an objective interpreter of the foreign cultures only in the issues concerning the Indians. In the following parts of this chapter I will develop my evaluation in a more comprehensive manner, arguing that there is serious ambiguity in his defense.

Considering the classification of Indians as barbarians, Las Casas evaluates the Indians as a special kind of barbarians who have rule and law. For this reason, he implies that the classification of the Indians as barbarians by Sepúlveda does not demonstrate that the Indians are barbarians who do not possess virtue or mind and who are not governed by any rules or laws, and should be governed by another developed community. For Las Casas, the Indians are not inhuman, ignorant or bestial. Rather, they cultivated friendship, and settled in great cities in which every aspect of a developed community, such as governance, law system, commerce, can be seen. They are truly governed by law and rule in a peaceful manner, and in many points they surpass the rule of the Spaniards (1974: 43-49). Perhaps, by describing the Indians as mentioned above, Las Casas aims to refute the argument of Sepúlveda which necessitates the subjection of the imperfect to the perfect⁶⁶. Las Casas rather argues that the Indians can be defined as barbarians, however this does not imply the dominance of the perfect Spaniards over imperfect Indians. The argument which

⁶⁵ Las Casas comments: "Neither the Greeks nor the Romans nor the Turks nor the Moors should be said to be exercising justice, neither prudence nor justice can be found in a people that does not recognize Christ" (1974: 51). He also asserts in the same page that, the Romans and the Greeks "through their foul and corrupt way of life and the other detestable acts practiced by unbelievers (which especially from and follow on superstitious opinions about divine matters) *they became like animals*, certainly anyone who has not been initiated into the Christian mysteries is considered barbarous and unfortunate"[emphasis mine]. Las Casas mentions the Turks and the Arabs in the same chapter, and defines them as "effeminate and luxury-loving people, given to every sort of sexual immorality". The general indicators of Las Casas's prejudice are the Muslims, especially the Turks. *Defense* includes many antagonistic claims against the Turks and the Muslims. For example, in responding to the argument of Sepúlveda who claims that before the missionaries come, a Christian army should invade the missionary region, he claims that armed troops do not fit for the conversion into Christianity, on the contrary they "are suitable for the pseudo-prophet Mohammed" (1974: 302).

⁶⁶ Sepúlveda in defending Spanish dominance on the Indians, asserts that the perfect Spaniards should govern the imperfect Indians.

compels the subjection of the imperfect to the perfect can be assumed only in the case that the perfect and imperfect are “joined by nature in first act” (1974: 48), such as the body and the soul. Therefore, only in the borders of a community the perfect, i.e. intelligent and morally developed man, should govern the imperfect, i.e. common people.

3.4 His Description and Defense of the Indians and Their Culture

“The Indies were *discovered* in the year one thousand four hundred and ninety-two” [emphasis mine] (Las Casas, 1992: 27). Las Casas’s very influential work, *The Devastation of the Indies: A Brief Account*, starts with this sentence. The cultures, rituals and the life styles of the *discovered* native Americans shocked the European invaders and then all Europeans in that era. However, the attempts for defining the Indians and their culture was, from the beginning, grounded on a wrong base⁶⁷. The definition of them was predominantly dependent on the prejudices of the Europeans. The Indians, as it has been argued before, were sometimes equated with monkeys. Such analogies for Indians caused the Europeans to ignore all the massacres against the Indians. *Beyond the line*, every cruelty done by the conquerors became legitimate from the perspective of the Europeans.

Las Casas was the first man who directed his strong arguments fully against the prejudices of the Europeans, especially against the Catholic Spaniards. At this point, there are two crucial issues that should be underlined. First, Las Casas does not describe the Indian culture objectively. Rather, he wants to reach a view, that is pragmatic, which can be recognized and accepted by the Europeans without feeling

⁶⁷ The defining process of the Indians started in a wrong way with Columbus’s identification of the native Americans as the *Indians*.

hatred against the Indians. Second, he introduces the Indians as a unified community in most of his works. However, as we know well, there were thousands of Indian tribes and three Indian Empires (Aztecs, Mayas and Incas) existed in that era in the New World.

Before Columbus and the Spaniards came, Las Casas argues, “the Indians had their own villages, own homes, own work to do, their own peace, that was their way, and they lived in paganism” (1995: 89). First of all, he portrays the Indians as free human beings who deserve the same respect in comparison with the Spaniards. Therefore, the Spaniards do not have any right of governing the Indians (1995: 243). By describing the human condition and culture of the Indians, he aims to prove that the Indians, like the European ones, possess mind and virtue and lead a regular, social, political and economical life, so they should not be led by another developed community. For attaining his objective, he supports all the cultural signifiers of the Indians, including cannibalism and human sacrifice. The description of the Indians and their culture by Las Casas aim to prevent the war against them. He aims to develop a counter-argument against the just war arguments of the conquerors and Sepúlveda. His description of the Indians in all of his works shows certain similarities, and it qualifies them as a special race which deserves the grace of God. Therefore, discussing the relevance of the idea of human rights to his works, requires examining his defense of the Indians and their culture in a detailed manner. I will first present his overall description of the Indians.

According to Las Casas, Indians are the people who possess the higher properties with respect to body, intelligence and morals. The physical and moral peculiarity of the Indians stems from God’s grace and also the lands and the climate that they are subjected to. The mentioned sources make the Indians intelligent and

calm in character and very talented in arts, in both of the liberal (language, architecture, painting, etc.) and mechanical (handicrafts) arts. He also argues that some Indian communities do not have a political rule, nevertheless they are morally mature. Furthermore, in the west and south coast of New Spain (Mexico), there are some extraordinary kingdoms established. There are large groups of people settled in these kingdoms, living under just political and social rule. They live in peace in a friendly atmosphere, and their towns are superior to the ones in Spain. In these kingdoms, the use of developed social and personal intelligence can be observed concerning liberal and mechanical arts. Like any other communities in Europe, the cities in the New World include the doctors, teachers, judges, artists and workers. Concerning these descriptions, one might suspect that Las Casas wants to equate the Indian communities with the European ones. However he is not comfortable about such equation. He rather asserts that the Indians constructed a civilization which is equal to the civilizations of the Greeks' and Romans', and adds that, in many points they surpass these civilizations. They also surpass the English and the French, and some groups in Spain⁶⁸ (1995: 201-221).

From the foregoing presentation it can clearly be understood that Las Casas recognizes the Indians a special place among all human communities. All of his exaggerations about them and their culture, can be evaluated accurately by connecting them into his aim of protecting the Indians, from the killings and all other harms. At the end of his book *The Only Way*, he defends that, by following Cajetan in his interpretation of Aquinas's *Summa Theologica*, (*Secunda Secundae*, q.66,

⁶⁸ Las Casas wants to be trusted for all of his observations about the superiority the Indians. In his *The Only Way (Del único modo, DUM)*, he says "I have seen all this with my own eyes, touched it with my own hands, heard it with my own ears, over the long time I passed among those peoples..." (1995: 203).

art.8), neither the church nor the Christian rulers can wage a just war against the pagans or the barbarians who have never heard the name of Christ, or have never lived under the Christian rule, by relying on an argument that their rules are not legitimate. According to Cajetan “divine law does not invalidate positive law”, for this reason the non-Christian communities can also possess the legitimate rulers and authorities, whether they are governed by monarchy or republic. As a consequence the spread of Christianity across the mentioned communities can be just only if the peaceful way of missionary is chosen (*Doce dudas*, Second Principle, 3rd par, quoted in Las Casas, 1995: 205).

3.4.i His Refutation of the Just War Against the Indians: Las Casas versus Sepúlveda

Las Casas has written the *Apologia (Defense)* to refute the arguments of Sepúlveda in front of the Council of Indies in 1550. Towards the end of his life, as mentioned before, to translate (into Spanish) and interpret the *Apologia*, he wrote the *Apologética (In Defense of the Indians)*⁶⁹.

I will try to explain this refutation directed against the arguments of Sepúlveda by examining the latter work. Sepúlveda’s first argument which causes war against the Indians concerns the inferiority of the Indians and their classification as barbarians who are natural slaves. With his own classification, Las Casas refutes Sepúlveda’s first argument and recognizes the Indians as barbarians who do not need to be governed by another superior community. His portrayal of the Indians and their culture also help him to reject Sepúlveda who had argued for the subjection of the imperfect to the perfect.

⁶⁹ As I have declared above I will mention the work as *Defense*.

Sepúlveda, with his second argument, defends the acceptance of the Spanish yoke by the Indians for their punishment of their sins against the natural as well as divine law. Las Casas responds that in civil and divine law, the ignorance excuses the guilt. He means that the Indians are not committing the sins knowingly. They are not aware of the content of the sins that they commit. Las Casas, in responding to the claim of the Pope Innocent IV, who argues that the Pope has a right to punish the pagans who worship idols if they only know about the natural law (1974: 123-6), asserts that the ignorance also excuses the commitment of the sin even if they know about the natural law. Narrowing down Innocent's statement, he explains that the Indians are not guilty of worshiping idols, because they are not conscious of the sin they commit, and they do not have a chance to find the truth by asking someone in their community. At this point, he rejects the argument that the existence and uniqueness of God is self-evident, and thus the idolaters are guilty of rejecting God (1974: 129). According to him, if God wants to be known, he will be known by his grace. Therefore, to know God can be possible in two ways. First, God can send a prophet, and second, a man can attain the knowledge of God by thinking. However, in the second case without God's grace a human being cannot attain the knowledge of God by only thinking. In both ways, God desires to be known, and then his entity becomes known. Also for the Indians one cannot argue that they are conscious of worshiping the idols, and in fact, they are worshiping their Gods. For this reason, they cannot be accused⁷⁰. Furthermore, the Indians, like the Christians, have their priests, bishops, temples and all the other constitutions of their religion, and their religion is protected and maintained by the political order. For this reason, following

⁷⁰ "The ordinary and ultimate intention of those who worship idols is not to worship stones but to worship, through certain manifestations of divine power, the planner of the world, whoever he may be" (Las Casas, 1974: 132-3).

the canons⁷¹, Las Casas maintains that the Indians cannot be blamed for obeying their religion which is defended by either their common law, or rule. Indeed, Las Casas's attitude towards the idolatry of the Indians seems quite objective.

Las Casas's main standpoint in responding Sepúlveda's second argument is to prove that the Indians are outside the jurisdiction of the Church. The canons of Catholicism, and together with the tradition of the Church command not to judge non-Christian peoples—in particular, the peoples outside the Christian communities—are emphasized by him. Following Aquinas⁷² he argues that the pagans or unbelievers who have not been baptized and became Christian are outside the spiritual jurisdiction of the Church. From his perspective, all the sins that the Indians commit are related with the spiritual, but not with the temporal jurisdiction of the Church, which has been particularly entrusted to the Apostle Paul by Christ, and which includes the universal jurisdiction over humanity in potential⁷³. He also discusses that the Church, or the Christian princes never forced their subjects to believe in Christianity, or punished them because of their religious convictions. At this point Las Casas gives the Saracens (Muslim Arabs), and the Jews as examples for the unbeliever subjects of the Christian communities. He claims that the Saracens worship a pseudo prophet, and their certain religious ceremonies are contrary to the natural and divine law, yet they are not punished by the Pope or the Christian princes. Their punishment concerning their religion does not belong to the jurisdiction of the Pope or the Christian princes, but rather is subjected to God, and

⁷¹ “For whoever follows public law is not considered to be in error or to make a mistake” (*Romans I[III]*), quoted in Las Casas, 1974: 130).

⁷² “The Church does not have the right to pass spiritual judgment on unbelievers who have in no way whatever accepted the Christian faith, that is, pagans and Jews, but may pass a temporal judgment when they commit some crime while living among Christians and are punished by the faithful with a temporal judgment” (*Summa Theologica, II-II, q.10, a.9*, quoted in Las Casas, 1974: 150).

⁷³ This point will be discussed in detail in the following paragraph.

as a result they are not subjected to any human law in this matter (1974: 154-7). One should argue that if the deportation of the Saracens and Jews (from Spain) is considered as an exception, the claim of Las Casas will be accepted as valid.

In his second refutation, to defend the above argument Las Casas rejects the Pope's authority which concerns the punishment of the unbelievers, and recognizes the full authority of Christ on the unbelievers, and particularly on the ones who have never heard about his religion. He argues that all power is possessed by Christ in this world and heaven. However, Christ has two powers which are actual and habitual (potential) respectively. The former is used by him through his incarnation, and also he entrusted this power to the Apostle Paul, which was then possessed by the Church. The actual power does not include the judgment over the pagans because the Christ never judged the pagans in this world. The habitual, or the potential power of the Christ is particularly entrusted to Church, and it includes the judgment over pagans. However, this power cannot be used by the Church in this world, and it will be used personally in the Judgement Day by Christ. From this conclusion Las Casas infers a corollary: The Pope does not possess the power which can judge and punish the pagans who are not the subjects of Christian princes, or who live in Christian lands (1974: 140-57, 334-7). On the other hand, if a pagan voluntarily accepts the judgement of Christ (be baptized and become Christian), he will enter the judgment of the Pope only potentially, because the Pope has not an actual power which extends his judgement on Christians who are living outside the Christian lands, or in other words, who live under the pagan or unbeliever rule actually. The power of the Church also remains potential in this issue, because the canons command that the people should be subjected to their governors even if they are pagans (1974: 309-12). One might suspect that his effort to protect the unbelievers against the judgment of

the Pope or against the Christian princes is directly related to his aim of protecting the Indians. Therefore, he tries to defend only those arguments which directly protect the Indians, so he is not concerned of the unbelievers, or of the pagans who live under the Christian rule. By employing the criterion of *never heard about the Christ*, it is clear that, he indicates the Indians, and this shows his parochial attitude with respect to the Indians. As will be seen in the following parts, Las Casas's outlook attributes such privilege to the Indians and this outlook would cause certain tragic solutions for the unbelievers, and especially for the heretics of Christianity.

The third argument of Sepúlveda which justifies just war against the Indians is supporting the war for evangelization. Sepúlveda argues that before the missionaries come, the Christian military troops should go and *prepare* the Indians for their conversion. It means that the path should be cleared for the missionaries by the armies. Sepúlveda also accepts the use of force and violence in conversion of the unbelievers. In responding to this argument, Las Casas claims that there is no horrible crime worse than demanding the preaching of the Gospel *in the first time*⁷⁴, in all the other ways excluding the way that Christ established; “that is in a spirit of brotherly love” (1974: 96). It is clear that Las Casas blames Sepúlveda for committing the worst sin, and proposes that the words of Sepúlveda must be considered invalid. In canon law it is commanded that “do not force who do not want to listen” (quoted in Las Casas, 1974: 173). Therefore, especially those unbelievers

⁷⁴ He means that the heretics or the unbelievers such as Jews and Muslims, are not defended by the scope of this proposition, because they had been previously asked to be converted as Christians. For this reason, especially for the heretics and for the unbeliever subjects of Christian communities the violence and force can be accepted, for Las Casas, in the conversion of the mentioned people. He also suggests that, as will be discussed with a detailed way, if the heretics construct a new community, the Christian princes can wage a just war to re-convert them.

“*who have never had the teaching of the truth*” [emphasis mine] (ibid.)⁷⁵ should not be forced to hear the canons or the teaching of the Gospel. On the other hand, if the pagan ruler does not accept the peaceful preaching of the Gospel in his territory, he “can be forced by war to let the Gospel be preached in his jurisdiction” (Las Casas, 1974: 170).

Furthermore, in his third respond against Sepúlveda, Las Casas aims to show that the Indians, unlike the Turks, do not know the content of the missionaries’ preaching. They kill the missionaries without knowing that they are preaching the Gospel. He defends that the conquerors, with all their harms to the Indians, blaspheme the name of Christ. Because of them, the Indians evaluate Christianity as the religion of all evil things. For defending themselves they kill the missionaries. For all these reasons, to wage war against them for preaching the Gospel can not be accepted as right. Yet, if the peaceful way is chosen, the Indians are converted very easily (1974: 168-75, 285-9). On the contrary the peaceful preaching of the Gospel was not chosen by the preachers who were “surrounded by a troop of soldiers, or rather thieves” (1974: 288).

The last argument of Sepúlveda is to accept the protection of the innocent as a just reason for war⁷⁶. At the beginning of his defense against Sepúlveda’s last argument Las Casas seems to accept the validity of the argument, and therefore, the power of Church’s universal jurisdiction in this case. He claims that the Church, in order to prevent innocents from the injuries, or to defend them against the commitment of human sacrifice and cannibalism, “can exercise actual coercive

⁷⁵ Indeed, Las Casas’s all arguments for protecting the Indians rests on this brief description. One should suspect that this description grounds a basis for the punishment of the unbelievers, or the heretics that *have had the teaching of the truth*.

⁷⁶ Vitoria also defends the protection of the innocent as a reason for just war.

jurisdiction over any unbelievers” (1974: 185-6). One might suspect that Las Casas contradicts his assertion above, which recognizes the universal jurisdiction of the Church over unbelievers only as potential, but not actual. However, he will not let this jurisdiction to become concrete. To attain his goal he firstly argues that individuals, too have an equal right to defend the innocents against the harms, and if the Pope gives this right to a Christian prince or an individual, the other princes or the individuals will become unauthorized in this matter. Las Casas aims to hold the intervention in minimum degree in this issue, because he knows well that, this right can be used for the legitimacy of the conquest against the Indians. Second, related to the protection of the innocent, he maintains by following the canons and Church fathers that, if having goodness causes evil, the goodness must be avoided, and with his words “the good must always be omitted lest the evil should result” (Las Casas, 1974: 203). He clarifies that in war many innocent persons can be destroyed by the armies. For this reason, if the war is waged to protect the innocent, more people than the rescued ones will die throughout the war, and the war will be alienated from its original aim. To avoid the unexpected solutions or harms, the war in this issue, for Las Casas, should not be waged, or if there is obligation, it must be delayed for a while for the correction of the situation. He lastly proposes that the Christians should let the killing of some innocents because killing some innocents is better than the destruction of a whole community or kingdom (1974: 185-207).

It is remarkable that in his rejection of Sepúlveda’s last argument, Las Casas tries to legitimize the commitment of human sacrifice and cannibalism. Once again, he wants to show that the use of the Pope’s authority is invalid on behalf of the Indians. First of all, he argues that human sacrifice is a sin, yet on the other hand, he asserts that the executors of these practices are innocent due to their respect to God.

Almost all human communities in history pursued the similar practices⁷⁷, because in every religion the individuals feel obligatory to devote their worthiest thing to God⁷⁸. In fact, in the issue of the Indians the executors of the religious rituals are not sacrificing themselves but the children, or other people. However, for Las Casas this argument does not refute his assertion, because, for him, since the innocents are sacrificed against their will, every man owes more than his life to God. Although sacrificed people do not show their explicit will, it can be accepted that they are already owe their life to God by birth, and therefore they “*are obliged to give their blood and their life whenever God’s honor demands it*” [emphasis mine] (Las Casas 1974, 235). He also says that the human sacrifice shows the loyalty of the executors to their religion and their community, because most of these rituals are made for the protection and maintenance of the communities. Therefore “*whoever sacrifices men to God can be drawn to this action by natural reason*” [emphasis mine] (Las Casas 1974, 234), and cannot be accused of being loyal to their religion and their community. Concerning the cannibalism, Las Casas argues that if the human flesh is eaten out of necessity and without aiming to eat it, for instance, for committing a religious ritual, and if the innocents are not killed (1974: 219-244), then the natural law will allow the eating of human flesh. For this reason, cannibalism cannot be judged as a sin. Lastly, as stated in the beginning of the paragraph, Las Casas explains that the Pope does not possess any right to judge such applications, and God is the only judge concerning the human sacrifice⁷⁹.

⁷⁷ The commitment “of human sacrifice since the ancient history of pagans and Catholics alike testifies that almost all peoples used to do the same thing” (Las Casas, 1974: 222).

⁷⁸ “Since we cannot give adequate thanks for so many favors, we are obliged to present what seems to us to be the greatest and most valuable good, that is human life (Las Casas, 1974: 234).

⁷⁹ “ If they offend God by these sacrifices, he alone will punish this sin of human sacrifice” (Las Casas, 1974: 242).

From the foregoing, it is clear that Las Casas is trying to protect the Indians against possible injuries with his counter-arguments. However, accepting the arguments of Las Casas from the perspective of human rights seems impossible. One should argue that defending the rights of the Indians should not include the defense of human sacrifice, or portraying such practices with an admiration. The way chosen by Las Casas, which is almost obsessed by the defense of the Indians in every condition, leads to the above solutions, and this way clearly indicates that he is not much concerned about the universal rights of the individuals, but rather preoccupied with the protection of the Indians against the claims and aggression arguments of the colonists. One may not easily accept that he is on the right way in his defense, because he never argues that the Indians, like all the people in this world, have rights, but rather he asserts that the colonists do not have any right to intervene in the Indians, or wage war against them. Since he always maintains an offensive position arguing the unjustifiable situation of intervention and harm. It may be argued that such parochialism precludes him from developing an idea of basic human rights, from the perspective of human rights, he rather remains chauvinistic, because he demands the rights not for everybody but only for the Indians, and therefore his way carries him not only to the recognition but also the exaltation of human sacrifice as a practice to be permitted.

3.4.ii His Defense of the Just War of the Indians

Las Casas, in his defense of the Indians, suggests that the Indians can be converted to Christianity easily due to their calm and peaceful characters. Nevertheless, they need a long time to change their religions. As a priest he evaluates the conversion of the Indians on behalf of Christianity. According to Las Casas, the

conversion of these *noble savages*⁸⁰, i.e. the Indians, will strengthen Christianity, due to the superior character of the Indians in comparison with most Christians in Europe. Yet, on the other hand, the Indians are ignorant of the Spanish, i.e. Christian, culture, tradition and language. For this reason, they need a long time to understand and accept the Spanish culture and religion. In the issue of conversion, Las Casas only accepts the peaceful conversion for the people who have firstly met the preaching of the Gospel and Christ's religion. He asserts that if the Christians use this peaceful way for the conversion, the Indians will embrace Christianity "very willingly" (Las Casas 1974, 255). The same way should be followed for persuading the Indians to stop their rituals of human sacrifice and cannibalism. It can be argued that Las Casas is aware of the difference between the culture of the Indians and the Spaniards. For this reason, to prevent the Indians from applying these rituals, he proposes to the Spaniards, firstly learning the Indian languages to establish communication, and then living among the Indians for many years to understand their cultures (1974: 212-25). On the other hand, it can be claimed that Las Casas's suggestions do not aim at understanding cultural difference of the Indians, but rather he aims the conversion of Indians in the most possibly peaceful and suitable way.

Las Casas is aware of the actual situation in that era, and he is also aware of the reality that he cannot fully protect the Indians only with his arguments against the colonists and colonialists such as Sepúlveda. For this reason, to protect the Indians, lastly, he accepts the just war of the Indians against the conquerors. He asserts that when the Spaniards did not follow the above mentioned ways for the conversion, and they conquered the Indian territories with the armed troops. He narrates that when

⁸⁰ The *noble savage* figure in that era in Europe was mostly constructed through the descriptions of Las Casas concerning the nature and character of the on Indians. However, Las Casas himself never used this phrase.

the conquerors enter a village or a town, they kill the men, rape the women, took the treasures and lastly burn the land (1995: 170). For this reason, if the Spaniards behave in this way, the Indians can wage a just war against them by exercising their right of self-defense. They are bound “to defend the worship of their gods and religion” (Las Casas, 1974: 244) with all arms and power they possess. They can wage a just war against the communities wanting to destroy them and like all human beings they are “capable, rational, courageous” (Las Casas, 1995: 170) enough to fight against the conquerors. Las Casas in *History of the Indies* demonstrates that the Indians won many fights and wars against the Spaniards, however the Spaniards then returned with more arms and soldiers and killed the rest.

3.5 Las Casas versus the Unbelievers and the Heretics

Las Casas’s approach to the heretics of Christianity and to the unbelievers, i.e. the Jews and the Muslims alike, is not as sympathetic as his approach to the Indians. He does not evaluate the heretics or the unbelievers as the *other*, and rather he qualifies them the people who possess completely wrong believes and traditions, and defines them the enemies of the Christian Europe. Las Casas’s bigoted attitude on behalf of the Indians shows itself intensely in his arguments concerning the heretics and the unbelievers, because he simply takes the common prejudices against them granted in that era. Interestingly, with respect to the protection of the Indians, he defends the punishment of the heretics and the unbelievers regarding the same practices, for which he argues, that the Indians should not be judged and punished. Let me elaborate on this point of double standard in his thought comprehensively.

Considering the unbelief, first of all, he claims that “the unbelief of Jews and Saracens is much more serious and damnable than the unbelief of idolaters” (Las

Casas, 1974: 78). From his perspective, worshipping idols includes less sin, because “at least in the case of Indians” (ibid.), they have not heard of the teaching of Christ, therefore they do not have any chance to find the truth. On the other hand, the Jews and the Muslims have been informed of true faith, i.e. Christianity, but they rejected changing their religions. For this reason, their belief is more sinful than worshipping idols. Las Casas implies that if the idolaters or the Indians become aware of the content of Christianity exactly, and then if they do not change their beliefs, like the Jews and the Muslims alike, they will be responsible for an equal degree sin. It can be argued that he does not accept the probability of truth outside Christianity. From the foregoing it should not be understood that Las Casas somehow defends the paganism or idolatry. He only defends the special conditions of the Indians. His parochial outlook makes him defend the particular rights of certain idolaters or pagans, i.e. the Indians, who have never heard of the name of Christ. For this reason, one should not think that Las Casas defends the rights of the pagan or idolater subjects of the Christian communities. He rather defends homogeneity and absolute dominance of the Christian kingdoms. In his respond to Sepúlveda’s interpretation of Alexander VI’s *Inter caetera* bulls, he asserts that the Pope’s wish for the *suppression* of the barbarians in Granada (in Spain) and his supporting words to the Catholic kings, cannot be extended to the case of the Indians, because the Pope directly indicates the Moors (Muslim Arabs and Berbers) of Granada who are “in comparison with other barbarians were the most dangerous enemies of the Christian state” (Las Casas, 1974: 362). The Moors and the Saracens, from his perspective, are living inside the Christian communities, therefore their existence in these communities should be considered as a threat for Christianity, however the case of

Indians does not show any similarity with the Moors, and thus, the Pope's words on Moors cannot be extended to the case of the Indians.

Second, on the one hand, Las Casas condemns the war concerning the Indians and does not accept any just reasons for war against the Indians. On the other hand, concerning the issue of the unbelievers he defends three basic reasons for the punishment of them which cause the waging of just war. First of all, it should be noted that in these three cases the universal jurisdiction of the Church which is habitual⁸¹, i.e. potential, becomes actual. In the first case if the unbelievers are “maliciously, knowingly, and insultingly blasphemous toward Christ, the saints, or the Christian religion” (Las Casas, 1974: 165), the Church should not ignore these acts, and immediately “should take up arms against them” (ibid.). Nevertheless, if the pagans blaspheme against Christianity not because of their hatred towards Christianity but because of the Christians—it is not to be doubted that he implies the Indians—; they cannot be evaluated as blasphemous⁸². In the second case, if the unbelievers either the ones who live in Christian communities, or the ones who live in a territory which was once dominated by a Christian kingdom, worship the idols or commit a sin against the nature, the Pope can exercise his universal jurisdiction on them (1974: 116-22). Subsequently, if the unbelievers who live in territories “which were formerly under Christian jurisdiction” (Las Casas, 1974: 125), inflict harm on Christians in the borders of their kingdoms, “the Pope can deprive such unbelievers of their kingdom” (ibid.) by a just war. On the contrary, concerning the universal jurisdiction of the Pope, Las Casas argues that the Pope cannot apply his jurisdiction

⁸¹ A right that had been inherited from Christ.

⁸² With respect to this distinction between negative attitude towards the Christians and Christianity, he says: “If, however, pagans speak blasphemously about the Christian religion not out of contempt and hatred of religion but out of anger toward Christians by whom they have been maltreated and injured, that is, with lawful cause, such persons are not blasphemous” (Las Casas 1974, 165).

over unbelievers who have never heard of the name of Christ (1974: 117). The last case is qualified as the self-defense war. He maintains that if the unbelievers “invade the land of Christians and harass the Church” (1974: 151), the Christians can wage a just war against them to protect themselves. Moreover, he defends that without looking for any just reasons the Christians can wage war against the Turks and the Saracens and can invade their territories, because these two communities are always waiting for attacking the Christians⁸³.

Las Casas’s most antagonistic attitude is against the heretics of Christian religion. It has been explained that he rejects the use of violence and force in the conversion of the unbelievers, or the pagans who have not been converted yet. For him the conversion of the heretics and the conversion of the unbelievers, who neither have heard of the content of the Christian faith, nor possessed any information about it; are two different issues in which the principles of Christianity should be applied in a distinguished manner. He does not accept any heresy in Christianity and never shows any sympathy to the heretics. His standpoint originates from the understanding that evaluates the baptism as a promise of acknowledging the Christ’s authority and the Church’s jurisdiction immediately. For this reason, the heretics should be compelled to keep their promise and return to Christianity by the help of every force including the civil power. He argues that the Church during the first phases of its establishment did not intervene in the heretics. However, after Christianity was embraced by the major communities and by the kingdoms, the

⁸³ “In the case of Turks and Saracens, the Church has learned from very long experience to consider as a condition totally fulfilled the fact that they are always ready to attack the faith and unsettle the Christian people; therefore it rightly and always has the power to invade them” (Las Casas, 1974: 336).

Church began to use the power of the Christian rulers “*for punishing and forcing heretics by laws and arms*” [emphasis mine] (Las Casas, 1974: 306-7).

The antagonistic attitude of Las Casas concerning the heretics shows itself clearly in his interpretation of the parable: “Force them to come in”, which is from Gospel. He interprets the parable for the heretics and the pagans separately. Concerning the pagans and even concerning the unbelievers such as Jews and Muslims, he argues that “ by that parable [Force them to come in] Christ wished to signify not external but persuasive violence” (Las Casas, 1974: 271). He means that the people who do not know the Christian faith yet, should be forced with the gentle words and meek attitudes of the Christians. He asserts that the Christ intervenes in the conversion process and forces the unbelievers internally and helps them to be converted as Christians. Therefore, the mentioned parable implies the internal force, not the external one, for the people who are firstly converted. He claims that Christ assumes only the peaceful conversion, for this reason the preachers of the Gospel should not appeal to force *for the first time*. On the other hand, he argues that if someone promises to do something, he should do it. Otherwise he will commit a sin. Regarding the issue of the heretics, they are presented as to have damaged their promises, so they must be compelled to keep it⁸⁴. Following Augustine, he adds that, in the conversion of the heretics, the mentioned parable should be interpreted as: using external force and violence for their conversion⁸⁵. Furthermore, he argues that

⁸⁴ By citing a parable which suggests the baptism as an acceptance of obedience, from the Gospel, Las Casas aims to legitimize the use of force in the conversion of the heretics. In Gospel it says: “Once you have given your complete obedience, we are prepared to punish any disobedience” (2 *Corinthians 10 [6]*), quoted in Las Casas, 1974: 309).

⁸⁵ Following Augustine, concerning the conversion of the heretics, he says: “the parable (Force them to come in) (Las Casas, 1974: 307)” is interpreted as to mean “external and physical violence is clear” (ibid.). Therefore, contrary to the case of Indians, he accepts the use of force in the conversion of the heretics to maintain the homogeneity of the Christian communities.

the rebellion against the eternal kingdom of God is more serious than the rebellion against the secular kingdoms. Therefore, the Christian rulers and the Church “not only compels heretics to return to fold but also lawfully punishes them *with terrible penalties*” [emphasis mine] (Las Casas, 1974: 311). Lastly, he qualifies the heretics as “the worst of men and most harmful to whole Church, *since they destroy harmony*” [emphasis mine] (ibid.).

From the foregoing it can be argued that Las Casas, as being a man of God, determines his main standpoint within the confines of protecting and strengthening the Christian religion. He establishes his arguments on the Indians, heretics, and the unbelievers; the Jews and the Muslims, who are all located within these conceptual boundaries. From his point of view, the attitude which injures Christianity worst is departing from Christianity, in other words; the heresy, because the heresy injures the Christians in a bad manner. From his angle, which was shared by other theologians of the time, heresy was the worst sample for the Faithful and the other people who will be converted. For this reason, he argues that the heretics should be punished with the worst punishment, and he evaluates the war against them as just. Together with use of force and violence in their conversion. Considering Judaism and Islam, Las Casas thinks that the communities included in these two religions do not change their religion, and the Muslim and Christian communities always fight among each other due to the historical experience among them. For him, to protect Christianity, Christians can wage war against them, and the effort which is wasted for their conversion is null and void. Yet, on the other hand, the Indians have not heard of the preaching of Christianity, and Las Casas defends, because of their calm character, they might accept Christianity “very willingly”. Hence, they should not be punished even for their worst sins; and for strengthening the universal family of

Christianity, the peaceful way of conversion, contrary to the case of the heretics, should be applied to the conversion of them.

3.6 Concluding Remarks

Regarding all the arguments of Las Casas, I may argue that to present Las Casas, unlike Vitoria—including the inconsistencies in his theory concerning especially his universalism—, as a founder of modern political thought and, in particular, human rights, seems to be extremely difficult⁸⁶. First of all, it should be noted that Las Casas's parochial outlook concerning the Indians does not let him to construct a coherent point of view, because such outlook prevents him from developing a comprehensive theory of human rights with the exception of a pragmatism concerned with protecting the Indians against every argument that might cause harm on them. He always stands on a defensive position and he does not work on a theory which asserts the universal freedom and equality of human beings. One should also argue that he does not have a consciousness of the universal rights of humanity. He merely aims to prove the validity of an ambivalent position: that is the Indians with their beliefs and acts, are not threatening the Christian communities,

⁸⁶ For the contrary arguments see Akal, 1997: 104-51, also Alker, 1992, *The Humanistic Moment in International Studies: Reflections on Machiavelli and las Casas*. Alker asserts the understanding of Las Casas as the origin of the modern humanistic thought. He claims that the modern thought, and therefore, the modern humanistic thought is in crisis. For this reason, he proposes the examination of the origins of the idea of human rights for constructing an alternative humanistic theory which will answer the crises of modernity and human rights thought in our times. By comparing the humanism of Machiavelli with the humanism of Las Casas, he aims to show the relation between the modern humanistic thought and Las Casas's humanism. Las Casas is evaluated as a pioneer thinker of multicultural humanism who focuses on human dignity, whereas Machiavelli is evaluated as an advocate of the *real politik* in favor of the state. Machiavelli, with his state-centered and practical ideas, is called *republican* or *civic humanist* and Las Casas with his defense of human rights, is presented as *universalistic humanist*. Also, Machiavelli is assumed to be the prophet of the imperialism of European states and their political system around the world. On the other hand, by following Hanke, Las Casas is presented as the man who trusts universal freedom and equality of the humanity. Lastly, according to Alker, Machiavelli and Las Casas use the art of rhetoric -rhetoric, in both thinkers shows itself as a historical narrative- to maintain an effective and fluent language.

yet at the same time their conversion will strengthen the Christianity. In summary, I argue that Las Casas does not resist in a strong manner the negative prejudices that are built against the Indians, because he is not standing on an intellectual ground that makes the universal rights possible to formulate, but rather aims to demonstrate the possible acceptance of the human conditions and rituals of the Indians by the Christians, especially for the Catholics of that era. For this reason, his original intention of asserting the rights of Indians, must be searched in this pragmatic and one-sided support provided by Las Casas, rather than in his consciousness of universal human rights. His arguments, which can be evaluated as valid from human rights perspective, somehow become insignificant due to his pragmatic position. Therefore, he is incapable of constructing a coherent theory which defends the Indians among others, and it is clear that defending the rights of Indians by classifying them as barbarians, or praising and exalting the human sacrifice can not be evaluated as a legitimate way of defending their rights of them. It should also be noted that I am not underestimating the struggle he has given against all possible and actual violations done by Europeans, but I am arguing that Las Casas can not construct a coherent political thought with the central notion of basic human rights.

First, as demonstrated before, the Pope Alexander VI with his *Inter caetera* bulls accepts the forceful conversion and subjection of the natives and inhabitants of the New World, i.e. the Indians, by the Spanish Kingdom. At this point Las Casas does not choose a way of arguing that the Pope can not have jurisdiction over the Indians, or he can not donate the new found lands to the Spanish Crown, in other words he cannot possess a universal jurisdiction. He rather prefers claiming that the Pope does not accept the forceful conversion, even the Pope has declared it clearly. Las Casas attains his aim by contextualizing and decontextualizing the meaning of

certain words in the bulls⁸⁷. For instance, he maintains that the intention of the Pope cannot not be the subjection of the Indians, or the acceptance of forceful conversion on them. However the bulls explicitly advise the kings of Castille and Leon (Isabella and Ferdinand), to “subject” (*subiicere*) the Indians and convert them as Catholics⁸⁸. Las Casas argues that this subjection must not be achieved by war, because the Pope cannot command or advise the subjection of the Indians with force. He explains that the Pope is the vicar of the Christ and he should follow the way of Christ in this and other issues. He insists that, rather than the words “the intention of the speaker must always be taken into consideration” (1974: 359). For this reason, even if the Pope uses the word “subject” in his case, his intent should be narrowed by the Christ’s words and practices. It is clear that in the Gospel, Christ proposes only the peaceful conversion. Consequently, Las Casas infers that the word “subject” must be understood as the conversion achieved through meek and gentle preaching, therefore peacefully⁸⁹. From this conclusion I may infer that Las Casas does not try to resist

⁸⁷ For the significance of Las Casas’s interpretation on *Inter caetera* bulls, see Carman, 1998, *On the Pope’s Original Intent: Las Casas Reads the Papal bulls of 1493*. The article defines how Las Casas contextualizes and decontextualizes the meaning of some words in those bulls. Carman asserts that Las Casas interprets the bulls appropriate to his aim of protecting the Indians. For Las Casas, the word ‘subject’ (*subiicere*), in the bulls, should not be understood as ‘subject’ but as ‘prepare’ (*disponere*). Las Casas defines his interpretation on this word by giving reference to the canonical law that “the reality is not subject to speech” but speech to reality. Therefore, traditional (dictionary) meaning of the word ‘subject’ is invalid in terms of the context of the bulls. The reality that the speech subjects, for Las Casas, is as follows: Indians are not subject to the Christian sovereigns and they should be prepared for the faith in a peaceful manner. Neither canon law nor Christ orders teaching of faith with violence and every act of the Pope (edicts or attitudes) is predetermined by canon law and Christ. Consequently, Las Casas, with his contextualization and decontextualization of the words in those bulls, claims that the bulls support the teaching of faith not with violence but with peace, because they should prohibit the forceful conversion to conform with the rule of Christ.

⁸⁸ The bull advises the sovereigns of Spain to subject the Indians and convert them as Catholics, with the words that demonstrates the Pope’s perception of himself which accepts the universal sovereignty of him. “After the manner of your royal predecessors of honored memory, you [Ferdinand and Isabella] have proposed with the help of the divine mercy to make the aforementioned continents and islands, as well as their natives and inhabitants, *subject to yourselves and lead to them to the Catholic faith*” [emphasis mine] (quoted in Las Casas, 1974: 351).

⁸⁹ “Therefore let us restrict the word ‘subject’ so that it is understood as meaning that subjection that will be born of the meek and gentle preaching of the divine word. ‘*Subject must be taken in this sense, even if its literal meaning be opposed to this interpretation*” [emphasis mine] (Las Casas 1974, 360).

categorically the subjection of the Indians either with peace or force. At the end of the subjection or the conversion process, the Indians would become typical Christians, and it is clear that Las Casas would never reject the conversion of them. For this reason, he never questions the validity of the bulls and he does not ask: How can the Pope donate the continents and lands and their inhabitants to the Crown? His standpoint never allows him to ask and answer such questions. Thus, it can be argued that Las Casas does not cultivate a vision of the universal rights of human beings, or the Indians, because he merely aims to save the Indians from harm. This position may be welcome as a humanitarian outlook, but it is not adequate to construct the human rights.

Second, it has been discussed that, for the protection of the Indians Las Casas defends and even exalts the human sacrifice. Another controversial point in his defense concerns his presentation of human sacrifice as a ritual not alien to the Christian belief, once again with the background motive of protecting the Indians. Unlike Vitoria, he does not present the Indians as an equal member of the universal family of communities in which every community has rights and responsibilities over the others. He rather chooses a pragmatic way. Therefore, one can not argue that he ponders the possibility of basic rights of human. Concerning the foregoing case he tries to prove that human sacrifice is not totally contrary to the Christian tradition. He presents three examples to prove his claim. First, he asserts that God commanded Abraham and his descendants to sacrifice some animals, such as sheep (1974: 233). Second, he argues that the incarnation of the Christ can be evaluated as the sacrificing of the Christ by God for the salvation of the humanity⁹⁰. Third, God is the

⁹⁰ “God the Father offered his only son Jesus as a sacrifice to death for the salvation men, nevertheless we can say that *he would do no injustice to anyone in any way if he had commanded him to be offered in sacrifice*” [emphasis mine] (Las Casas, 1974: 239).

possessor of every creature and everything, and he may command the offering of every life, however “because of his limitless love for the human race” (Las Casas, 1974: 240), he only once commanded “Abraham to sacrifice his only son Isaac” (Las Casas, 1974: 239) for himself. For this reason, “*that is not altogether detestable to sacrifice human beings to God*” [emphasis mine] (ibid.). One may easily see the strategic nature of his argumentation which is merely aiming to defend human sacrifice practiced by the Indians.

Third, Las Casas on the one hand, included in the case of conversion against Sepúlveda, argues with reference to Chrysostom that there is no “natural difference in the creation of men” (1974: 249), therefore everybody deserves the same respect and should be converted with the gentle and meek words. Furthermore, while interpreting the bulls of Alexander VI, he asserts that “Now *war*, which Homer says *is sent from hell, is the wretched and pestilential of all things* under heaven and is utterly opposed to Christ’s life and teaching” and adds “except when unavoidable necessity forces one to it” [emphasis mine] (1974: 62). Yet, on the other hand, it has been demonstrated that Las Casas accepts the use of force and violence, rather than the gentle and meek words, in the conversion of the heretics. Furthermore, he evaluates the war as just which aims to convert the community which was once Christian⁹¹. It is clear that to substantiate his arguments aiming to defend the Indians he relativizes the issue of just war.

⁹¹ Las Casas while rejecting the interpretation of Nicholas of Lyra about the abolition of the idolaters in Promised Land (in Deuteronomy, Old Testament), says that “We hardly deny this [Lyra’s interpretation] as it reads in that passage, but we understand it to be true only *when a nation worships idols after embracing the faith*. Indeed, if they are warned and told to stop those impure sacrifices and their sacrilegious worship, *yet refuse to repent and acknowledge the truth, then it is just to wage war against them*” [emphasis mine] (Las Casas, 1974: 107).

Furthermore, let me discuss Las Casas's views on Black slavery which is still controversial, because we are not sure to what extent he defended the enslavement of Black people. Las Casas, at the beginning of his struggle in 1516, tried to get a license to bring Christianized Black slaves from Spain, thinking that the conquerors "would allow the Indians they held to be set free. With this promise in mind, the cleric Las Casas⁹² got the king to allow the Spaniards of the islands to bring in some Black slaves from Castile, so that the Indians could then be set free" (1995: 160). He thought that the Black slaves were held justly by the Christians as the war booty from the Muslims of North Africa. These slaves were only used for the household and they possessed some rights which did not include the "freedom of personal action" (Pagden, 1982: 115), in Spain. Yet, Las Casas did not have any relation with the slave trade from Africa to America that was practiced widely in that era. It has been known that the slave trade from North Africa was started with the license of the Pope to the Portuguese in 1450. After the conquest of the New World, enslavement of the Black Africans was carried out by the Portuguese from African Guinea (North Coast of Africa) to America. It is clear that Las Casas did not defend the slave trade of the Blacks, and towards the end of his life he acknowledges that there is no difference between the slavery of the Indians and Africans. He judged himself with the following words:

The cleric [Las Casas]⁹³, many years later, regretted the advice he gave the King on this matter—he judged himself culpable through inadvertence—when he saw proven that the enslavement of Blacks was every bit as unjust as that of the Indians. It was not, in any case, a good solution he had proposed, that Blacks be brought in so Indians could be freed. And this even though he thought that the Blacks had been justly enslaved. He was not certain that his ignorance and his

⁹² Las Casas in his *History of the Indies* mentions himself as 'He' (cleric Las Casas) when he talks about the past events, but as 'I' when he talks about his emotions.

⁹³ See the footnote 92

good intentions would excuse him before the judgment of God (1995: 160-1).

Consequently, it can be argued that to read Las Casas as a defender of the aboriginal rights that is still problematic in some countries, such as the USA, Australia, Canada and Mexico, will be appropriate in the context of his defense of the Indians⁹⁴. Las Casas does not ever try to challenge his missionary position of Catholic priest and in many points remains the defender of the conservative arguments of Catholicism. For this reason, claiming that he is the defender of the basic human rights, or that he believes in the universal equality and freedom of humanity seems to be distorting with respect to his main intention and the standpoint⁹⁵. As a consequence, it can be argued that Las Casas did not have a concern for discussing the rights of the subjects of Christian or non-Christian communities. It should also be admitted that he is not happy at all with the convictions of the heretics and unbelievers, and he is rather looking for the homogeneity of the Christian communities. Therefore, to draw a parallel between the

⁹⁴ For a supporting view, see Starkloff, 1992, *Aboriginal Cultures and the Christ*. The article presents the political and theological views of Las Casas, as an example of a Christology that respects aboriginal cultures. For the article, Las Casas symbolizes the return to Christ and to the origins of Christianity. As the article argues, Las Casas's respectful Christology, is constructed not for the Indians but for the European imperialists to prevent their massacres. Las Casas sanctifies the Indians and their religious rites, such as human sacrifice, to protect the Indians against the unimaginable violence of the European conquerors. The article, moreover, argues that Las Casas grounds his ideas with respect to the *natural rights* and in regardless of religion. It can be seen that the article evaluates Las Casas as a model for a universal Christology, to extend Christianity towards the aboriginal communities.

⁹⁵ For a supporting view, see Smith, 2002, *Las Casas as Theological Counteroffensive: An Interpretation of Gustavo Gutiérrez's Las Casas: In the Search of the Poor of Jesus Christ*. Smith rejects the reading of Gutiérrez on Las Casas which presents him as a ground for liberal theology today. Smith argues that presenting Las Casas in this manner is not a step forward but rather a backward move for the maintenance of liberal theology. He explains that the liberal theology was firstly theorized for the poor majority in Latin America. For this reason, even if the theology does not depend on non-Marxist theory, it will need another theory or paradigm which can solve the political, social and economic problems of the poor majority. It is clear that canons of Christianity do not include a total solution for all these problems. From this conclusion he asserts that an historical quinquennial figure cannot be presented as a ground for the liberal theology, and Las Casas can only be evaluated as a figure who can be defended by Vatican against the liberal theologians. Thus, finding a similarity between liberal theology and the arguments of Las Casas can be seen as a part of counter-offensive project against the liberal theology.

development of the idea of human rights and arguments of Las Casas seems rather an anachronistic assertion which might distort the content of human rights, because as we know today, demanding the rights for particular communities, such as circumcision of women, includes a danger of distorting the content of universal human rights with respect to some cultural rights.

CHAPTER 4

CONCLUSION

In this thesis, the views of Vitoria have been presented and discussed by examining his theological and political works which can be evaluated as a serious attempt for developing the first secular and comprehensive theory of universalistic law. As it has been noted, the crucial aim of this thesis, concerning the arguments of Vitoria, is to evaluate whether or not his universalistic viewpoint, resting on a Scholastic-Thomist ground, can attain the idea of human rights of our times. Also, Las Casas's theological and anthropological writings on behalf of the native inhabitants of America, (i.e. the Indians) have been evaluated in the light of human rights thought. Concerning Las Casas's defensive approach, I aimed to discuss whether the comprehensive and defensive examination of the *other* from a Catholic and deeply theological ground, can provide us a perspective to establish the basic premises of human rights. Here, I will try to articulate my conclusions concerning the thoughts of these two effective and learned figures of the sixteenth-century Catholic Spain.

First, it has been argued that one of Vitoria's crucial efforts to formulate a universalistic perspective implies the rejection of the hierarchical understanding of Aquinas in regard to law. It has been noted that Aquinas's pivotal role in Catholic tradition depends on his arguments founding the Scholastic conception of law, which relies on a hierarchical system unified and finalized by the eternal law. The eternal

law, or the law of the Supreme Reason, i.e. God, is the unique law that all the other laws subordinate. However, human beings are not fully informed of this law and, for this reason, they should follow the divine and natural laws to participate in the eternal law. Aquinas presents Catholicism as the true divine law that people should obey. Hence, the natural law is conceptualized by Aquinas as a set of principles to which all the peoples in the world, including the non-Christians, should adapt their common laws. It is clear that the content of natural law cannot contradict the basic principles of divine law for the Christian commonwealths. Also, as it has been demonstrated, the identification of the content of natural law, and the adaptation of the principles of the divine law to the actual human problems is directly determined by the theologians of particular religions. It would be fair to add that, Aquinas affirms the autonomy of the Christian and non-Christian rulers in law making process, but on the other hand, his Scholastic doctrine does not let the Christian rulers establish a law which is contrary to the canons of Catholicism. The arguments of Aquinas provided the Catholicism with a Scholastic frame. I wanted also to demonstrate that if Vitoria had been maintained the path of Aquinas without reservations, he would have not been able to develop a universal law freed from the ideal of the universal union of the Catholicism claiming the consolidation of the all communities under Catholicism.

Second, it should also be underlined that the originality of Vitoria's theory of universal law stems from a point of view that incorporates the issue of law, with the context of the social and political affairs of a commonwealth, and also the context of the relations among the commonwealths. He evaluates every kind of social, political, cultural and economic affairs, as being necessary and immanent to this world. The meaning of these affairs is determined through their participation in the universal

law. According to him, there are the divine and natural laws in the world, however the people can participate in the universal wisdom by making law for ruling their own commonwealths, and also for organizing the relations among the commonwealths. Vitoria does not cultivate an hierarchical understanding of law, and this departure from Aquinas allows him to assume that all human and divine laws are equal in practice, before God. The non-hierarchical conception of law is built on the *idea of necessity*, and it enables human beings, to share their abilities and knowledge for the maintenance and development of humanity, because they have been created by God, and God would not create anything unnecessary, and particularly the man has been created in God's image. According to Vitoria, if the societies are made up of people and the world of commonwealths, then the people in societies and the commonwealths in world should *share* their values among each other. The development and maintenance of a community depend on the people who share their social values and abilities among each other, and also with other communities. For him, the idea of necessity compels people to establish and maintain the worldly peace, or one may say, the universal order which can be determined by universal laws. It is clear that Vitoria's universalistic understanding of law has a different ground in comparison with today's non-theological universalism which originates from the moral understanding of human rights with the central notion of autonomy.

Third, it has been argued that Vitoria's second attempt to formulate his universalistic understanding of law is a re-conceptualization of the term called *dominium*. *Dominium* means the ability to have sovereignty of man's own body and possessions, but Vitoria broadens the content of this concept, and gives the concept a meaning which includes the people in commonwealths, and the sovereigns as well as the individuals. The importance of *dominium* as a term lies in his insistence that we

should see the participation of the non-Christian communities into the universal order as a necessity. For him, the non-Christians, and all the other unbelievers can have *dominium*, and consequently, they can rule their communities with just laws. The justness of a law is not related to the religion or beliefs, but is related to the virtue and wisdom of the law-makers. Considering the above definitions, Vitoria clarifies one of the principles of his universalism: The Christian and non-Christian commonwealths can establish common laws to rule their home affairs, however they cannot make any law that contradicts the universal law. The universal law, for him, is formed by a major consensus of the commonwealths with genuine agreements. Yet, he is not able to explicate the establishing process or the content of the universal law. He only wants to define the basic principles which supply a ground for the universal law.

Fourth, it has been discussed that, for the maintenance of the universal law and principles, Vitoria formulates a limited understanding of sovereignty which recognizes an autonomous domain for the people in commonwealths. He asserts, in conscious opposition to Aquinas, that the sovereign of a commonwealth is not independent in governing. First of all, the sovereigns should respect the traditions of the commonwealths and also the universal law. He argues that when a law is universally accepted, or abolished, it should also be accepted, or abolished by the sovereigns of all particular commonwealths. The sovereigns should also respect the property rights of the individuals because every individual has *dominium* by him/herself. Subsequently, the sovereigns should not violate the common laws by depending on their powers. They are limited not only by higher principles, but also limited in issuing a law that abolishes the existence and the maintenance of the commonwealths. At this point, it should be reminded that the limitation of the

sovereign power and the recognition of rights of the people in commonwealths, remain insufficient in practice, because Vitoria cannot identify any institution that will compel the sovereign to obey the universal laws, or to respect the rights of the people in commonwealths. For this reason, it has been argued that without the institutions protecting the rights, the recognition and guarantee of the content of the rights will remain relative in practice.

Fifth, it has been argued that to develop his universalistic understanding of law, Vitoria clarifies the relations among commonwealths comprehensively. He qualifies the relations among the commonwealths as relations that are supposed to be realized among equal powers, and defines these relations as *ius gentium*; law of nations. It has been stated that this concept has been firstly used by the Roman jurists to demarcate, first the relations between the Roman Empire and the other commonwealths, and secondly to define the common law of all commonwealths. Yet, the concept is fully developed by Vitoria for formulating one of the basic principles of his universalistic law. He clarifies the relations among the commonwealths under a unique principle called *natural partnership and right of communication*. According to him, universal peace and order in the territorial borders of a commonwealth should be maintained by the sovereign. The sovereign is qualified as a governing force by Vitoria who is responsible for ruling the reciprocal sharing of the individuals that is necessary for the individuals to maintain and develop their social, cultural and economic lives. In the universal arena, the governing force is determined by him as the formal agreements which are established by the consensus of the commonwealths. Furthermore, the first principle of these agreements should be the acceptance of *natural partnership and right of communication* as the basic ground of consensus. This principle makes it possible for

all the Christian and non-Christian commonwealths to respect the universal rule, and assigns them a right to intervene into each other's interior affairs by just wars. It can be argued that for him, the development of the humanity is based on the use of rights that are made on behalf of the universal principles. Therefore, if a sovereign prevents the relations among the individuals of other commonwealths and his commonwealth, he will be compelled by the other commonwealths to let the relations be initiated, and to supply the possibilities for the establishment of such relations. This legitimate compulsion is explicated by Vitoria under the concept of *just war*. The above principle does not only guarantee the possibility of the free relationships between the commonwealths, but it also allows the commonwealths to defend the innocents who have been inflicted harm in a particular commonwealth. If the children are killed in religious rituals of a commonwealth, then all the other commonwealths should compel this commonwealth to cease such rituals, and if they continue to apply these rituals, the other commonwealths can wage a just war against this commonwealth by relying on the universal principle, which foresees the *defense of the innocent* by every commonwealth.

Sixth, it has been examined that reaching a fully developed theory of universalism from Vitoria's works has certain difficulties, because his examinations possess many incoherent points, and some of his arguments directly weaken his universalistic arguments. First of all, it has been discussed that, according to him, the Catholic Pope has an authority to intervene in the political power of the Catholic sovereigns in some cases which have spiritual relevance. In other words, if a case is directly concerned with the divine law, then Pope may use its power to intervene in the case. On the contrary, the Catholic sovereigns have no authority to intervene in the interior affairs of the Papacy, and also the General Council of the Papacy. Such

viewpoint works against the equality principle defended by him in the context of universal law.

Secondly, when he applies the right of just war to the issue of the Indians of his era, it brings certain tragic results for the Indians. Vitoria discusses the content of the right of communication in his two *relectiones* on Indians. Therefore, one may suspect that if the Indian tribes in that era are concerned, it will be found out that the principle of natural partnership and the right of communication will mean, in practice, the legitimacy of the exploitation of the New World by the European communities. According to Vitoria, the rejection of the right of commerce by the Indians is a reason of a just war for the Europeans, against the primitive Indian tribes who have no idea about the meaning of commerce. It is not to be doubted that he was aware of the peculiar conditions of the Indian tribes, yet, he is not concerned with the problems that may be created by this inequality. In this way, he justifies indirectly the exploitation of the New World, and all the massacres that have been done during the process of the conquest by *just wars*.

Thirdly, Vitoria does not articulate any principles concerning the human rights. It has been discussed that he did not possess an hierarchical understanding of law and he evaluated the existence of human beings as necessary. Yet, these two points are not enough for him to formulate the basic human rights from his understanding of universalistic law, because he lacks a pluralist and egalitarian point of view. Therefore, he is not able to discuss the basic human rights. Indeed, Vitoria assumes the superiority of the priesthood over the other members of a commonwealth, and he also assumes the superiority of members of the General Council over the other members of the Church in the hierarchical understanding of society and the Church. This insistence on the essential rules of Catholic belief leads

him to defend also the inferiority of the women in society. Lastly, it has been explicated that the most disturbing assumption of Vitoria concerns the qualification of slavery as a valid practice. The *just application* of slavery is the only concern in the universal order that he foresees. Consequently, it may be argued that defending the universality of laws is not enough for the learned man to formulate the basic human rights, because if the basic principles of the universalism are formulated from a non-pluralist and a non-egalitarian perspective, it will lead to certain results that cannot be accepted from the angle of universal human rights.

Vitoria's epistemological roots in the theological debates, and the influence of the Greek philosophers and the Roman jurists are apparent in his arguments on law. This is also the case in his treatment of actual problems, such as the Indian affairs. As a Dominican theologian, he remains loyal to the Thomist tradition with a sincere effort, and wants to develop the philosophy of law which has been originally constructed by Aquinas. His contribution on this matter can be defined as: to incarnate and discuss the question of universal law, by considering not only the Christian communities but also all the existing commonwealths of the world. Certain concepts that he revised, and the original point of view on the content of law seems to have helped Vitoria in distinguishing himself from the theory of Aquinas, and also from the Scholastic and Thomistic perspective on law. Despite the fact that he was not able to construct a coherent universalistic theory of law that includes the human rights, his contribution to the philosophy of law should not be ignored.

From my examinations of Las Casas's works, first of all, it should be argued that his approach cultivates a much narrower perspective in comparison with Vitoria's detailed theoretical endeavour. Las Casas can be qualified as the first learned man who conceptualized and discussed the *other* in a comprehensive way in

the history of political theory. However, contrary to the known, his approach is far away from building a ground for the basic human rights. This is most apparent in his assertions that are made to defend the Indians against the harms of the conquerors in that era during the exploitation process of the New World. The insight of Las Casas's arguments reminds us the outlook called *cultural relativism*, rather than the idea of human rights. My claim underlines the parochial view of Las Casas on behalf of the *other*, i.e. the Indians. The other is not evaluated impartially in Las Casas, and the description of the Indians and their culture remain strongly relativistic, because they are described pragmatically to protect them from killings. It may be asserted that if he had examined the Indian culture objectively, most probably, he would have been able to develop the basic human rights. Perhaps, it may be argued that cultural rights for certain communities can be formulated only within the universal scope of human rights and the case of Las Casas shows us that, without such scope, the idea of particular rights or group rights might lead us to a kind of parochialism and a privileged status which is attributed only to certain human communities. What seems to be paradoxical is that Vitoria's universalistic perspective is closer to a defense of human rights than Las Casas's parochial assumptions which seem to be an attempt to defend the human rights. The logical development in Vitoria's original theory, would have probably carried him to the idea of human rights. Yet, on the contrary, Las Casas, by exaggerating the cultural autonomy and parochial humanity of the Indians, becomes a cultural relativist rather than a theorist of human rights. At this point it can be argued that, without a universalistic scope, encountering the other, no matter how the observer is good-willed, does not let the observer to formulate the basic human rights.

Second, Las Casas's approach can be understood as an approach against the antagonistic and what can we call today *racist* (if one is allowed to apply this terminology) attitudes of the Spaniards and the other Europeans against the Indians of the sixteenth-century. His attempt is limited with the aim of rejecting the claims that contain *racist* prejudices about the Indians, and for this reason, he is unable to develop a universalistic notion on human rights. Indeed, it will not be an exaggeration to argue that he was not able to defend the Indians with the arguments claiming the superiority of them. In his works, Las Casas mostly uses the canons of Catholicism to determine his stand, and tries to demonstrate that the religious rituals and cultural features of the Indians are not necessarily against the concept of natural law and the rules of Catholicism. The religious rituals such as anthropophagi and human sacrifice, provoke deep hatred against the Indians in that era in Europe, and the conquerors of the New World and their supporters among the learned men and theologians used this deep hatred to legitimize the killings of Indians and the conquest of the New World. Against the antagonistic attitude of Europeans, the modern reader expects Las Casas to reject these arguments from an objective point of view which evaluates the rituals of such communities in the light of a universal rights of human beings. However, he locates himself to a pragmatic viewpoint which is devoid of a coherent social or political theory. His whole endeavour is to protect the Indians. Furthermore, Las Casas does not even defend cultural relativist approach in a consistent manner, because he does not defend the autonomy of the Indians including the issue of conversion. At many points, he argues that if the conversion of the Indians is made peacefully, the missionaries will reach to satisfactory results.

Third, it has been clarified that the way Las Casas chooses is far away from protecting the Indians upon a concrete ground. As a Catholic priest, he prefers to

demonstrate, with examples from the holy books, that the rituals of Indians such as anthropophagi and human sacrifice are not antagonistic to the Catholic religion, therefore, the war against the Indians cannot be evaluated as just. It has been argued that his pragmatic position is determined with the claims against the arguments of the other side. In responding to the arguments of Sepúlveda, he accepts the barbarian characteristics of the Indians, yet, on the other hand, he claims that the Indians are a special kind of barbarians whose minds and virtues are more developed than the Ancient Greeks and Romans and many other European communities of that era. However, oddly enough, he also suggests that the Catholic Europeans should convert the Indians into Catholic belief. For this reason, it has been explicated that to find a coherent defensive argument on behalf of the Indians in Las Casas's works is difficult.

Fourth, it has been demonstrated that the most important inconsistency in Las Casas occurs in his views on the heretics and unbelievers. He does not carry his sympathetic position, reserved for the Indians, to portrayal of the heretics and unbelievers. In the issue of unbelievers, he maintains that only the people who have not heard the name of Christ, i.e. the Indians, should not be punished by the Christian sovereigns, but all the other unbelievers, especially the Jews and the Muslims, deserve to be punished by the Christian sovereigns because of their beliefs, for the sake of protecting the Christians and, Christianity. Thus, his major concern is not about the basic principles of human rights, but with a religious concern, he only aims to protect the Indians by relying on Catholicism, and by demonstrating that the beliefs of the Indians are not alien to Catholicism. However, such standpoint does not enable him to evaluate all the commonwealths and their cultural and religious beliefs impartially, and it is clear that such partial viewpoint cultivated by Las Casas

jeopardizes the universality of the human rights. His arguments on heretics are directly related with the canons of Catholicism. Therefore, for both Las Casas and Vitoria the heretic subjects of a Christian commonwealth should be punished and be forced to believe in the dominant canons and religious precepts of Christianity.

Consequently, it seems that neither Vitoria nor Las Casas cultivates a universalistic perspective of human rights. True, in terms of the legitimacy of laws, Vitoria defends that certain high standards for legitimacy for the national law is necessary to be recognized by universal law. However, defending the universalization of laws does not necessarily contain of the basic human rights. You know, in a hypothetical dialogue, I may claim that if Vitoria had followed Las Casas's endeavour of protecting the Indians, he would have reached the idea of human rights. For this reason, it can be argued that Vitoria is closer to the perspective of human rights. This fact demonstrates itself evidently, in their interpretations of the papal bulls. On the one hand, Vitoria rejects the universal sovereignty of the Pope, therefore indirectly refutes the validity claim of the *Inter caetera* bulls which donates the New World to the kings of Spain of that era by the Pope Alexander VI. On the other hand, Las Casas does not discuss the validity claim of these bulls. He is solely concerned with the subjection of the Indians to the kings of Spain in a peaceful manner. It is also clear that Vitoria defends, in many points, the establishment of universal law, whereas Las Casas defends the prohibition of the killing of the Indians. One cannot ignore the significance of these attempts from the perspective of the development of human rights. Yet, the arguments that Vitoria and Las Casas assert are not adequate for grounding the basic principles of human rights from a universalistic perspective. One may suspect that if the background of certain arguments defending the universality of laws (i.e. the arguments of Vitoria), and if

the origin of other arguments which aim to prevent a group of people from harms (i.e. the arguments of Las Casas), depend on hierarchical or inequitable assumptions, then, such arguments will inevitably bring results that cannot be accepted from a universalistic perspective of human rights. One should also state that presenting the views of Las Casas and Vitoria as an early foundation for the universalism of human rights, is not only an anachronistic approach, but more important, it may bring an illusion about what human rights are about. We should argue that, at least in the context of two thinkers of the 16th century, the idea of hierarchy and partial/relativistic standpoint concerning certain human communities works to a great extent against the principles of human rights thought.

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