

Early Modern Controversies of Mobility within the Spanish Empire: Francisco de Vitoria and the Peaceful Right to Travel

What land so barbarous is this that we are barred the hospitality of the shore?"
Virgil's Aeneid (I. 539-540)

Beatriz Salamanca
University College London

Abstract

In his public lecture 'On the American Indians' given at the University of Salamanca in 1538-39, Francisco de Vitoria presented an unsettling defense of freedom of movement, arguing that the Spanish had the right to travel and dwell in the New World, since it was considered part of the law of nations [ius gentium] that men enjoyed free mutual intercourse anywhere they went. This argument has been seen on multiple occasions as a justification of the expansion of the Spanish empire. However, this research claims that the right to travel advocated by Vitoria was not intended to be interpreted in absolute terms, for it had to serve the purpose of bringing peace and unity among men, and could not contradict natural law. Vitoria's legacy is of enormous value as it initiated a long lasting discussion regarding the question of the grounds under which human mobility could be restricted.

Keywords: Freedom of movement, Francisco de Vitoria, Spanish Scholastics, Spanish empire, law of nations [*ius gentium*]

It is calculated that between 250.000 and 300.000 Spaniards travelled legally and illegally to Spanish America during this period, initiating an age that witnessed the import of millions of African slaves, and the reduction to a tenth of a native population initially estimated between fifty and sixty million (Newson, 2006: 143-152). These controversial encounters brought the issue of the circulation of peoples across frontiers to the peripheries of some of the discussions on the Spanish affairs in the Indies, mostly centered on doctrines such as the 'just war' and the 'natural rights' of the Indians. The principle of freedom of movement suggested hopeful expectations, promising to bring mankind together and strengthen the ties of fraternity. However, it proved to lead to polemic situations when those whose mobility was in question, represented a harmful threat or were for some reason undesired. This dilemma was present in the work of the Spanish Dominican theologian Francisco de Vitoria (1483/92-1546), who presented an unsettling defense of freedom of movement, by arguing that the Spaniards had the right to travel and dwell in the New World (Vitoria, 1991: 278).

Vitoria and his early disciples founded the School of Salamanca, also known as the Neo-Thomists or the Second Scholastics because of their close relation to the teachings of St. Thomas Aquinas. Vitoria's appeal to the right to travel was strongly linked to the Spanish Dominicans' ideal of a cosmopolitan world order which claimed the equality of all human beings by natural law. Their universalist principles applied to all, including the natives of the New World, whose rights to property and jurisdiction were especially recognized under this tradition, regardless of being considered infidels and 'uncivilized' (Vitoria, 1991: 239-251). Along these same lines there was a revival of the ancient roman doctrine of the law of nations [*ius gentium*], a set of laws assumed to be common to all societies, intervening on issues such as war, diplomacy, property, and particularly relevant here, the circulation of goods and peoples (Skinner, 1978: 153).

This text will focus on Francisco de Vitoria's defense of freedom of movement in the context of the doctrine of the law of nations, in an attempt to explore the grounds under which he considered that a traveler could be legitimately rejected or expelled from a community. I would like to suggest that the right to travel argued by Vitoria was not supportive of the expansion of the Spanish empire, in sharp contrast to those who have seen in Vitoria's support for open borders a justification of conquest and exploitation. I consider that a more detailed look at Vitoria's text is required, together with the study of some of his earliest works, where some of his insights on the law of nations could shed some light on the limits he explicitly or implicitly gave to the right to travel. Since my research is focused on issues of mobility in the early modern period, I will concentrate on Vitoria's discussion of the right to travel, leaving aside other equally polemic aspects of his doctrine, that have also unleashed fiery debates about Vitoria's involvement in imperial designs.

The Limits of Vitoria's Defense of Freedom of Movement

Francisco de Vitoria defended the idea of freedom of movement in his public lecture '*On the American Indians*' given at the University of Salamanca in

1538-39, where he argued that the Spanish had free passage and were entitled to travel and dwell in the New World, as long as they caused no harm, since it was considered as part of the law of nations that men enjoyed free mutual intercourse anywhere they went. As he himself put it,

‘The Spaniards have the right to travel and dwell in those countries, so long as they do no harm to the barbarians, and cannot be prevented by them from doing so (...). Amongst all nations it is considered inhuman to treat strangers and travelers badly without some especial cause, humane and dutiful to behave hospitably to strangers. This would not be the case if travellers were doing something evil by visiting foreign nations. Second, in the beginning of the world, when all things were held in common, everyone was allowed to visit and travel through every land he wished. This right was clearly not taken away by the division of property; it was never the intention of nations to prevent men’s free mutual intercourse with one another by this division’ (278-279).

This right was part of what Vitoria conceived as natural partnership and communication, in which the Spaniards, regarded as neighbors, were entitled to enjoy free passage and trade, and could settle and become citizens (280). This implied that the Spanish ships were allowed to put in on any shore, and they could make use of any common property, such as the sea, the roads and the rivers. They had the right to appropriate things which did not belong to anyone, like ‘gold in the ground or pearls in the sea or anything else in the rivers’ (280). He mainly referred to the right to travel in the context of the Spanish going to the New World, but he also briefly mentioned the idea of free passage in the European context. In Vitoria’s words, ‘it would not be lawful for the French to prohibit Spaniards from travelling or even living in France, or vice versa, so long as it caused no sort of harm to themselves’ (278).

Vitoria probably had in mind that the Spanish were not mere travelers, a point made by one of his disciples, Melchor Cano (1509-1560), in which he sarcastically indicated how Alexander the Great was not precisely travelling. In Cano’s words, ‘it is unclear that the Indians have done any injury, unarmed and timid as they are, nor is it clear that they have ever acted in an inhuman way, especially since the Spaniards [have entered] not as travelers but as invaders –unless one were to label Alexander a traveler. For the Spaniards themselves wouldn’t endure this at the hands of the French’ (Cano, 1982: 579). Likewise, Domingo de Soto (1495-1560) disapproved of the way in which Vitoria seemed to have presented a doctrine that allowed one people to freely move around plundering the resources of others. Regarding whether it was licit for his compatriots to go from one nation to another searching for gold, Soto considered it to be so because the *law of nations* had not established a division over these things. However, he maintained that it was not completely licit if the inhabitants did not give their consent to others becoming owners of their resources, unless they had abandoned them. As the *law of nations* had established a division between regions, strangers could not make use of these

things without the consent of its inhabitants (Soto, 1968: 423).

Bartolome de las Casas (1484–1566) considered that closing borders was in fact required when peace and tranquility were at risk (Las Casas, 1958: 129). And the Jesuit Luis de Molina (1535-1600) considered that the wide scope of Vitoria's right to travel allowed entry to large numbers of armed foreigners, something that would not have been accepted among European nations. The Spanish themselves had actually expelled the Jews and the Moors from their land, and something like granting the French a right to free passage in Spanish territory could hardly have been conceived. Molina held that any sovereign state had the right to close its borders and deny goods to inhabitants of other regions, unless they were in extreme need. It was legitimate to deny entry to foreigners, especially if some harm, such as being conquered, was feared, meaning that newcomers could then be barred from the country's possessions, which were, according to Molina: 'the joint property of all its citizens' (Molina, 1947: 337). In this way, Molina assimilated the property of the individual to the property of the commonwealth, so that, in his own words: 'the country's common possessions over which the entire community has control are just as much its own belongings as the personal possessions of the individual citizens are their own belongings' (337). Thus, just as an individual could keep anyone off his property, so could a commonwealth, and the state could legitimately refuse commerce, harbor facilities and residence to strangers, without doing them an injury which would cause a just war. Hugo Grotius (1583-1645) also examined some of these questions and considered that the right of settlement was applicable, not only to individuals, but to entire political communities that had been displaced for some reason. Just as with any individual, communities were protected by the rule of hospitality, which he considered a moral requirement (Grotius, 2005: 447-448). The difficulties of this posture, according to Annabel Brett's interpretation, was that Grotius' hospitality allowed any community to move around and set up their own *imperium* (Brett, 2011: 200).

Recent scholars still accuse Vitoria of presenting an apology for imperialism, considering his arguments to be a contribution to the attempt to suppress the non-Western world (Anghie, 1996: 326). From Antony Anghie's perspective, the universal natural law defended by Vitoria was nothing more than 'the particular cultural practices of the Spanish, unilaterally taken to a universal level' (332). To Anghie, Vitoria's argument implied that the Indians could be legitimately disciplined and subjected if they did not follow the set of European ideals. Vitoria's main tool, he concluded, was the theory of the just war, so if the Indians refused the Spaniards entry in their cities, or expelled them once they were there, their behavior counted as an act of war that had to be redressed. Anghie thus quoted Vitoria: 'to keep certain people out of the city or province as being enemies, or to expel them when already there, are acts of war' (326). Anthony Pagden presented a similar argument, concluding that Vitoria's theory allowed the Spanish to wage a just war if the *ius peregrinandi* and the *ius predicandi* were not respected (Pagden, 1990: 87). As explained by Anghie, since Vitoria considered that depriving a man of his natural rights constituted an injury, and the vindication of injuries was a just cause of war, the Indians' refusal of free passage to the Spanish could be considered grounds for a just war (326).

Nevertheless, a closer reading of Vitoria's words reveals his underlying insistence on the idea that the travelling of the Spanish had to be harmless. He supported the idea of free mutual intercourse and hospitable behavior towards strangers, in the context of ordered and peaceful relations. His doctrine was not a campaign for the domination of one side over the other, but an expression of his sincere 'belief in equitable and isotropic relations between peoples', as Davis Boruchoff has recently put it (Boruchoff, 2015: 37). Vitoria's passages in defense of freedom of movement were almost always followed by the condition of not causing any harm, as when he explicitly warned: 'Amongst all nations it is considered inhuman to treat strangers and travelers badly without some especial cause, humane and dutiful to behave hospitably to strangers. This would not be the case if travellers were doing something evil by visiting foreign nations.' In any case, Vitoria concluded, any activity that causes no harm should be considered lawful. In his own words: 'All things which are not prohibited or otherwise to the harm and detriment of others are lawful. Since the travels of the Spaniards are (as we may for the moment assume) neither harmful nor detrimental to the barbarians, they are lawful' (278).

Assuming, as Vitoria did in a rather abstract and theoretical manner, that the travels of the Spanish were harmless, there is the question of whether it was lawful to resort to war if the right to harmless travel was denied. In this case it should be pointed out that Vitoria's treatment of the issue of war was not very systematic. On one hand, he seemed to permit the waging of war, since a refusal of free passage without due cause was an offence against the law of nations. If the Spaniards were denied what was 'theirs by the *law of nations*', said Vitoria, 'they may lawfully go to war' (282). On the other hand, Vitoria also insisted on referring to war as a self-defense tool that could only be used if the Indians effectively attacked the Spanish or persisted in 'replying with violence' (282). This seemed to suggest that war could only be made as a response to the Indians' acts of aggression, and in order to protect their own safety, or to avenge and redress an offence (Vitoria, 1991: 282, Tierney, 2007: 109). In this way, if the Spaniards were put under attack, after having demonstrated that they had come to dwell in peace and cause no harm, they could lawfully 'meet force with force' by defending themselves (Vitoria, 1991: 282).

In addition, as Vitoria pointed out, the context of the Indians' attacks had to be examined, since reasonable fears might have moved them to do so. As he put it, 'the barbarians may still be understandably fearful of men whose customs seem so strange, and whom they can see are armed and much stronger than themselves' (282). According to Vitoria, the Indians' fears made them innocent and their ignorance made war just on their side as well (Schroder, 2010: 163-173). This, according to Annabel Brett, implied that Vitoria could not have considered the Indians' eventual violation of the right to travel as an act of aggression, for their opposition to the Spanish entry could have been based on their vulnerable position and lack of equal force (Brett, 2011: 15).

Freedom of Movement as a Law of Nations

The freedom of mobility defended by Vitoria and other members of the Salamanca School was grounded in the idea of a universal human community

and was legally backed by the law of nations. In effect, Vitoria maintained that the right to travel was valued among all nations, all of them considering the mistreatment of strangers to be inhuman. Nevertheless, from Vitoria's account it is unclear whether this duty of the law of nations towards strangers was part of the natural law, or rather a human positive consensus (Vitoria, 1934: cxi). I consider that Vitoria's lectures on Aquinas' *Summa Theologica*, delivered in the academic session of 1533-4, are determining in this regard, since they presented a broader and slightly more extensive view on the law of nations. In his commentaries to question 57, article 3, on whether the law of nations could be distinguished from natural law, Vitoria offered an explanation that placed the *law of nations* closer to a promulgated positive human law, derived from the 'common consensus of all peoples and nations' (Vitoria, 1934: cxi-cxii). As he stated, things that were of natural law were 'equal and absolutely just', like the natural law precept that stated: 'because no wrong is done to you, you do no wrong to another' (Vitoria, 1934: cxi), or 'avoid giving offence to those among whom one has to live' (Aquinas, 2002: 118). In contrast, the dealings of the law of nations were to be considered as a 'certain disposition of things with relation to a third just thing' (Vitoria, 1934: cxi), in other words, the precepts of the law of nations were to be conceived as a means for something else, which according to Vitoria, was peace and concord amongst men. These precepts, which included issues like the immunity of ambassadors, the treatment of captives of war, and the regulation of private property, did not have equity of their own, but only as they were employed to fulfill peaceful aims (Vitoria, 1934: cxi). In Vitoria's words: 'that which is not in itself just, but is derived from human statute firmly established in reason, is called law of nations, so that on its own account it does not imply equity, but on account of something else' (Vitoria, 1934: cxi). The law of nations' regulations about war or diplomacy were to be considered as good in a relative manner, since they were to be judged depending on whether they aimed to bring peace and preserve natural law. I would like to suggest that these general features of the law of nations can fill some of the gaps that Vitoria left in his defense of the Spanish right to travel. As with the immunity of ambassadors, the right to travel was part of the law of nations and as such, had to serve the purpose of bringing peace and unity among men. If the travelers were a large group of armed foreigners, they could not claim a right to travel, since the harm it entailed would violate the natural law.

Concluding Remarks

As part of the law of nations, the Spanish right to travel could not be taken in absolute terms, for it had to serve the purpose of bringing peace and unity among men, and could not contradict natural law. In this way, the right to travel was not in itself just or unjust. Instead, it was its aims which could be judged either way. In addition, Vitoria explicitly observed that the right to travel was only valid if the Spaniards caused no harm, a condition that has been underestimated by his critics. Vitoria's defense of peaceful travel was not precisely influential on the policy makers of his time, and the disastrous historical outcomes of the Spanish affairs in the Indies led to misleading readings of his doctrine. Concerned as he was with the formulation of a set of theoretical just titles by which the realities of his time could eventually have

been legitimized, he presented his arguments in terms of principles and not facts. Again, only actual facts would prove that the Spaniards' right to travel had gone beyond the limits established in Vitoria's formulation. However, his legacy is of enormous value, as a long lasting discussion was then initiated regarding the question of the grounds under which human mobility could be restricted. Under Vitoria's argument it was clear that this freedom was not absolute, but the controversial character of this case demonstrates how difficult it was and still is to address the issue of the movement of peoples across frontiers.

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Biography

Beatriz Salamanca is a PhD student at the Department of Spanish, Portuguese, and Latin American Studies at UCL, where she also did my MA in the History of Political Thought. Before joining the PhD, she worked as a teaching assistant in the Department of Law and Political Science at Javeriana University in Colombia.

BEATRIZ
SALAMANCA