The present contribution arises from a remark made by Habermas with respect to two historical conditions that allowed for the appearance of human rights:

[O]n the one side, the internalized, rationally justified morality anchored in the individual conscience, which in Kant withdraws entirely into the transcendental domain; and, on the other side, the coercive, positive, enacted law which served absolutist rulers or the traditional assemblies of estates as an instrument for constructing the institutions of the modern state and a market society. The concept of human rights is a product of an improbable synthesis of these two elements. (Habermas, 2012, p. 83).

Habermas notes how these two elements had become independent in early modernity and, to begin with, developed along different paths (Habermas, 2012, p. 83). On the one hand, one result of Renaissance individualism and subsequent philosophy is the "internalized, rationally justified morality anchored in the individual conscience" mentioned in the above citation. This will be translated into a central principle of human rights: to protect individual autonomy as regards morality and convictions. In this way each person may – within the limits of due respect for other individuals – pursue a life of one's own preference. This protection of the individual's interiority is a central aspect of human rights and it is an essential part of constitutional rule. On the other hand – and this is the reason why Habermas speaks of an "improbable synthesis" – one consequence of the confessionalization of the state in the sixteenth and seventeenth centuries was that law, religion and morality were not open for discussion. All the subjects of a given monarchy were under the obligation to share the same faith and moral values, whereby no room was allowed for a subjectively reflected morality. Habermas's hypothesis is that the modern state with its robust legislating, judicial and executive powers needs to crystallize before human rights can be implemented as a legally binding element.

Modernity is, in Habermas's definition, the period that aimed at giving itself its normativity, that is, the period in history that has relied on human reason alone as a normative principle (Habermas, 1987). At the same time, Habermas's later thinking has abandoned the classical modern notion that human reason is self-founded. Instead he has turned to the idea that "when reason reflects on its deepest foundations, it discovers that it owes its origin to something else. And it must acknowledge the fateful power of this origin, for otherwise it will lose its orientation to reason in the blind alley of a hybrid grasp of control over its own

self." (Habermas, 2006, p. 40). In keeping with this, Habermas considers that the notion of human rights has – just as many other ideas of modernity – its origin in the Judeo-Christian tradition. The absolute worth of any person, its inviolable dignity is the secular translation of regarding the human being as created in the image of God (Habermas, 2006, p. 45; Habermas, 2012, pp. 89-90). In Habermas's words, the classical human rights declarations of the eighteenth century "betray their religious and metaphysical origins" (Habermas, 2012, p. 81).

In the evolution from absolutism to constitutionalism, one line that can be followed is that of the state's consistency vis-à-vis its alleged religious principles. The absolute confessional monarchy imposed – as the term clearly expresses – one religion to be followed by all its subjects. However, in spite of the strongly cohesive force of one common religion, the confessional state would prove to be an unstable construction – among other reasons because of its assimilation of religion as a kind of state ideology. Precisely because the Christian tradition emphasizes the absolute worth and dignity of the individual, the confessional monarchies could easily enter into conflict with their alleged moral and religious principles – as will be seen in the following.

It is important to clarify that there is a difference between what is meant by *right*in the medieval and early modern sense and what we today understand as civil/social/human etc. *rights*. In the scholastic terminology, *ius*(right) refers primarily to justice in the sense of what is just (*iustum*). This means the fair and equitable or the adequacy to the circumstances, for example the payment of a salary (Jacobsen 2011, pp. 152-153). In this sense, then, right is related to justice rather than to an individual, inviolable sphere. Conversely, the modern understanding of rights is the protection of the individual as regards the possibility of the state's intervention (Habermas 2012, p. 79; Jacobsen 2011). This idea can be traced back to Nominalism, or to Vitoria (Deckers 1991, pp. 166-188; Böckenförde 2006, p. 353-356), whereby the notion of an inviolable individual freedom appears at the beginning of the modern age. At the same time, the evolution towards the notion of human rights has also another genealogy, as has been shown by the Mexican theologian and philosopher Mauricio Beuchot. According to this thinker, Thomism is a key factor in the transition from *right* as justice to *rights* in the modern sense of the term. The Aristotelian-Thomist school considers that any society must be oriented towards the common good, and the common good requires a social justice in which every individual is

given its due as regards both material and spiritual goods (in keeping with the individual's age, health, capacities, etc.).[1] Such a social justice gives a dignified place to the individual in the totality of the community. However, a society that eludes the obligation to carry out such a distributive justice is an unjust society, and this was the wrong that was inflicted on the original American peoples when they became conquered and enslaved (Beuchot 1994, pp. 149-155).[2] From this perspective, then, the question of human rights emerges from a concern for a collectivity that has been deprived of what is its due in the social totality.

In this article the intention is to pursue one of the historical moments in the development that allowed for the emergence of human rights: the controversy that took place in sixteenth-century Spain concerning the status of the indigenous peoples of America. This historical episode presents the conflict between the confessional state and an egalitarian tradition of thinking which confers on the human being an inherent dignity and on human society a necessary demand for justice.[3] The main points of reference below are the Spanish Dominicans Bartolomé de las Casas (1484-1566) and Francisco de Vitoria (1483-1546). Concerning the question of statehood, reference will be made to Heinz Schilling and his development of the notion of the confessional state. State confessionalization can be regarded as a parallel colonial enterprise in relation to the one overseas because when the ruler determines the religion of the subjects, a conquest of interiority takes place. In this respect, the discussions carried out by las Casas and Vitoria are remarkable because the fact that these two thinkers defended what today would be called the rights of the native peoples of the Americas shows that religion – also at that historical moment – can provide a critique of the exercise of power.

The contribution is organized as follows: first appears a presentation of Schilling's ideas about the confessionalization of the state in Early Modernity; then follows a commentary on the thinking of las Casas and Vitoria as regards the Spanish colonization of the Americas; finally – in the conclusions – a perspective is drawn up to the present situation. The part on las Casas and the part on Vitoria are rather different. The reason for this is that the two were very different personalities with correspondingly different legacies. Las Casas was an erudite theologian with great rhetorical skills but, since his main interest was to obtain justice for the original inhabitants of America, he never wrote a systematic body of speculative texts (Beuchot 1994, pp. 71-72). His life and his texts form a continuum, and for this reason his works must be read in the context of his tireless advocacy for the Amerindian

peoples. Vitoria, conversely, was a professor of theology who worked in an academic setting his entire life, whereby he in this sense is a more conventional author.

The Confessional State

During the sixteenth and seventeenth centuries the modern territorial states emerged in Europe. As part of this process, the nobility, the Church, cities, military orders, etc. lost their autonomy and power while, conversely, the monarchy was strengthened. A modern state is generally understood as a geographically limited territory in which only one political authority has the power of legislating and using force (Morris, 1998).In Max Weber's famous formulation from 1919, "a state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory." (Weber, 2009, p. 78). Consequently, it was also at this historical moment – after the Peace of Westphalia (1648) – that international authority was restricted to territorial states. The monopoly on sovereignty over territory and domestic affairs also made the states the only significant actors in the international system of power relations.

As regards religion, absolutism incorporated it as a kind of ideology. This is the confessionalization thesis defended by, among others, Heinz Schilling (2008). The obligation of all subjects to share the same faith formed a homogeneous collective identity.[4] In addition, the state achieved power over the Church, something which was evident in the reformed kingdoms but was also a fact in the Catholic nations.[5] From a perspective that considers religion in opposition to modernization, this socio-political change should unequivocally be considered anti-modern, but it can also be seen as a qualification for the emergence of modernity:

My hypothesis is that decisive preconditions for Europe's turn onto paths of modernization were installed, not in opposition to the religious forces of confessionalization prevailing in that epoch, but closely intertwined with them, making the confessional approach epoch in Europe – namely the decades around 1600 – to be a "Vorsattelzeit der Moderne" ([pre-]saddling up for Modernity). (Schilling, 2008, p. 14).

The reason for this is that the religious and secular domains, that in Christianity are theologically separate, now became intertwined "but in a way that gave each of them

independence in its own sector or area of responsibility." (Schilling, 2008, p. 16). In turn this simultaneous interweaving and independence caused a transference from the religious to the secular: "Secularization frequently drew its decisive inspiration from the Christian religion and philosophy and was sustained by religious movements. Again and again, a religious dynamic was transported into the secular world, where it gave power and legitimacy to both political and social activities." (Schilling, 2008, p. 16).

As mentioned above with reference to Habermas, this is the historical background for the emergence of human rights. On the one hand, the dialectic mentioned by Schilling makes possible the transference of a Judeo-Christian idea to a secular sphere – as will happen in the eighteenth century with the human rights declarations. On the other hand, the strengthening of the state by means of religion would become a kind of Trojan horse carrying within it a moral concern that could be activated against the absolute monarchy – as happened with Bartolomé de las Casas and Francisco de Vitoria.

One consequence of the confessionalization of the state was that religious minorities had only a small possibility of being accepted. The ban on religious difference was clear in the case of Spain, where the *convivencia* (co-existence) of Jews, Christians and Muslims that had been possible during the Middle Ages stopped with precisely the emergence of the confessional state. In 1492 the Jews faced the ultimatum of converting or leaving the country. That same year the last Muslim dominion on the Iberian Peninsula, the Kingdom of Granada, was conquered by the Catholic monarchs, Isabella of Castile and Ferdinand of Aragon. In the capitulations written in connection with the surrender, the Muslim population was allowed to practise its religion, but a few years later, in 1502, this permission was suspended. Shortly after 1500, then, only Christianity was allowed as the official religion in what would become the kingdom of Spain.[6]

In this context it is noteworthy that theologians such as las Casas and Vitoria sustained that the Amerindian population should be allowed to maintain their original religions. This is remarkable in two ways. On the one hand, because the logic of confessionalization entailed that only one religion was allowed in the domains of a given monarch. On the other hand, because it would seem logical that one consequence of the assimilation of religious authority by the state would be to silence dissident voices. However, as will be seen in the following, this was not the case in the episode that will be commented upon below.

Bartolomé de las Casas

In 1510 the Dominican friars arrived on the island of Hispaniola (which today comprises the Dominican Republic and Haiti). They witnessed the treatment of the natives and decided to denounce it. In his *History of the Indies*, las Casas narrates that

[t]he Dominican friars had already pondered on the sad life and harsh captivity suffered by the natives on the island and had noticed the Spanish lack of concern for their fate except as a business loss which brought about no softening of their oppression. (…) They knew how new and scandalous it would be to awaken people from such an abysmal slumber, and after mature reflection they decided to preach from the pulpit and in public that to oppress Indians was to go straight to Hell. (las Casas, 1971, pp. 181-83).

They composed a sermon in defence of the "Indians" – as the original inhabitants of America were called at that time – to be read on the fourth Sunday of Advent 1511 by Friar Antonio de Montesinos.[7]

Among those on whom this sermon made an impact was the young Bartolomé de las Casas, who was present at that mass. He would later become a Dominican friar, then bishop and, for posterity, be remembered as the most ardent defender of the native population of America. At that moment las Casas was a secular priest and colonist in the *encomienda* system that was established during the conquest. This quasi-feudal order meant that each colonist was *entrusted* (*encomendar*: to entrust) a number of natives. The colonist should care for their spiritual and material well-being, and in return they would work for him as bondservants. In practice, then, the Amerindians who were under an *encomienda*were not at all free men.

Since the Dominicans would not cease to protest against the treatment the original inhabitants were subject to, the governor Diego Columbus (the discoverer's son) and the *encomenderos* complained to King Ferdinand V, who regarded the Dominicans' protests as a direct questioning of his authority. Consequently, he ordered that neither "they nor other friars of their Order speak upon this matter or others similar, in the pulpit or away from it, in public or in private."[8] Furthermore, the Dominican provincial, Alonso de Loaysa, accepted the king's admonition and repeated to the friars the prohibition to speak about this

matter. In his admirable work *Las Casas. In Search of the Poor of Jesus Christ*, Gustavo Gutiérrez remarks the following as regards this conflict between the missionaries and state power:

While the historical and social context here is different from our own, we can only regard Loaysa's demand (and not the friars' preaching!) as an expression of the "captivity" of the Christian message. This, like many bishops and missionaries in the Indies, las Casas could not accept. Instead, the missionaries upheld the validity of the demands of the Gospel. (Gutiérrez, 1993, p. 37).

It is clear that, for the monarchy, the colonization process had priority over the missionary one, and that the revenue from the colonies was more important than a coherent religious practice. The forced labour of the natives was necessary for the extraction of gold – and thus everything else would be of secondary importance.

As a consequence of the protests, the king ordered the gathering of a council of theologians and jurists, the *Junta de Burgos* (*Council of Burgos*), in 1512. As an outcome of this council a set of rules were issued, the *Leyes de Burgos* (*Laws of Burgos*), which was the first legislative document regarding the Amerindian population.[9] Even if the *Leyes de Burgos* recognized that the native inhabitants were free subjects, at the same time the *encomienda* system became sanctioned and formalized. The consequence was, as Gutiérrez notes, that these laws in fact changed nothing, they only legitimized the oppression: "Thus the door was wide open for a reinforcement of the Indians' de facto slavery, at the same time that lyrical declarations about their freedom were being made." (Gutiérrez, 1993, p. 283).

One of the outcomes of the *Junta de Burgos* was the sadly famous *Requerimiento* (*Requirement*), written by the influential councilor Palacios Rubios as a consequence of Montesinos's question: "What authority did you use to make war against them who lived at peace on their territories, killing them cruelly with methods never before heard of?" (cited in las Casas, 1971, p. 184).Montesinos's question carried with it an accusation at a legal level because a just war can only be claimed on the basis of a previous affront. In order to respond to this, Palacios Rubios made use of the medieval theocratic political theory according to which spiritual power is different from but at the same time also superior to secular power. In consequence the pontiff must prevail over emperor and kings. While this

theory clearly works against the development of the sovereign territorial state, it was used on this occasion to legitimize the Spanish rule over the American territories. Given that the pope had granted the Spanish monarchs the dominion over these territories in 1493 with the Alexandrine Bulls, King Ferdinand V was their legitimate ruler.[10] Palacios Rubios, furthermore, asserted that the violation of natural law, the absence of legitimate political authority (due to unbelief), and opposition to the proclamation of the Gospel were sufficient causes to wage a just war. However, before an act of war could actually be carried out, an antecedent notification of these arguments must be made. Thus the *Requerimiento* was produced in order to read aloud to the Amerindians encountered by the conquerors.[11]

Given that the theocratic viewpoint at that moment was not at all a dominant one (as will be seen below, Vitoria will argue very clearly against it), and given that the idea of the pope having actual power over the monarchs went counter to the emerging territorial state, it is clear that this strange juxtaposition of royalism and pontifical theocratism was enacted merely to justify the Spanish dominion over the American territories and their inhabitants. Aware of the harm it caused both to the natives as well as to Christianity, las Casas could not accept this document. When commenting upon the *Requerimiento* in his *History of the Indies*, he exclaims:

The ignorance of the King's council is then manifest; I pray to God it is remissible – how unjust, impious, scandalous, irrational and absurd this injunction [the Requerimiento] was! I will not speak of the infamy it caused the Christian religion; I don't know whether to laugh or cry at the absurdity of the council, who believed these people to be under more obligation to acknowledge the King as their Lord than Christ as God and Creator, since one cannot be constrained to receive the Faith, and yet, to obey the King, the council used force. (las Casas, 1971, p. 196).

As las Casas (Beuchot 1994, p. 48) and (as will be seen below) Vitoria argued, it is a matter of natural law that each people has its own rulers. Unbelief is not a cause to lead a just war against another people since the Gospel must not be forced upon anybody. Here emerges the conflict between the missionary – who knew that evangelization has to be undertaken by peaceful means[12] – and the monarchy, which was eager only to accumulate power, riches and territories. The faith cannot be forced upon anybody, but the fact that force was used to acquire new subjects and territories reveals the inconsistency of the confessional state

because the monarchy did not act in keeping with the religion it adhered to.

In spite of the *Leyes de Burgos* and the monarchy's clear standpoint, the natives' advocates would not stop from arguing their case. Battles were won and lost. In 1530 Charles V, king of Spain and emperor of the Holy Roman Empire, prohibited the enslavement of the Amerindian population in a decree that had very little effect in the colonies and was subsequently revoked in 1534. During this period las Casas's influence reached to the Vatican, since Paul III's papal bull *Sublimis Deus*(1537) was considerably influenced by him (Parish, 1992; Gutiérrez, 1993, pp. 302-8). This document declared that the Amerindians were rational beings, completely human, that they were to be free from slavery, that they should be allowed to own property and that their evangelization must follow the peaceful method of preaching and good example. The bull was followed by a papal letter condemning the greediness of those who mistreated the native peoples and declaring the automatic excommunication of whoever oppressed and enslaved them.

Another important event in this dispute was Charles V's approval of the *Leyes nuevas de Indias* (*New Laws of the Indies*) in 1542. These decrees abolished the forced labour of the native population, and thus substantially restricted the *encomiendas*. But when these laws were to be implemented in the New World, serious conflicts arose. The most notorious one was the uprising in Peru, where Gonzalo Pizarro (brother of Francisco Pizarro, the conqueror of the Inca Empire) led a rebellion in the course of which the viceroy was killed. A new viceroy arrived to Peru and Gonzalo Pizarro was arrested and sent to Spain to be judged for his uprising.

However, the outcome was that the *Leyes Nuevas de Indias* were never in fact implemented in the American colonies. Furthermore, Charles V revoked an important part of these decrees in 1545. As a reaction to this, las Casas, who since 1543 was bishop of Chiapas (what today is southern Mexico and Guatemala), wrote a proposal that is interesting with respect to the present discussion. Together with two other bishops, Valdivieso and Marroquín, he presented a document to the *Audiencia de los Confines*, the council representing the Crown in Central America. In this document he argued that the natives should be transferred under ecclesiastical jurisdiction so that their political self-determination could be restored.[13] Experience had proven to las Casas that the state would – in spite of its putative Christian identity – give priority to its expansion and

enrichment rather than to Christian principles. As can be imagined, this proposal was rejected by the council.

The colonists and adherents of the conquest found in the humanist Juan Ginés de Sepúlveda (1490-1573) a spokesman who could argue their case. Sepúlveda was, according to the Argentinian philosopher Enrique Dussel, the "father of modern political philosophy" (Dussel, 2007, p. 195-99) because he was the first to formulate the idea that superior nations have the right to dominate inferior peoples in order to raise the latter to a more civilized stage.[14] Given that Dussel's notion of modernity is closely connected with the European colonial enterprise, he regards las Casas as the first critic of the modern project. Dussel considers that through this expansion a new world-system appeared in which the Europeans understood themselves as the masters in military, economic, scientific and cultural respects.[15] This strongly Eurocentric world-system negated the otherness of the indigenous American peoples and of the African slaves. Against this background the figures of Sepúlveda and las Casas appear as representatives of, respectively, the Eurocentric and excluding paradigm, and the thinking that acknowledges alterity. Dussel sees in las Casas the most radical sceptic of the civilizing pretensions of modernity and thus also an example for the twenty-first century. (Dussel, 2007, pp. 199 and 206). Las Casas's acknowledgment of the original inhabitants of the Americas led him to his activism, so to speak, against a state power that negated the Amerindians' dignity by enslaving them and depriving them of their cultural and political autonomy.

In 1550 Charles V brought the *Consejo de Indias* (*Council of the Indies*) together with a committee of theologians and jurists to discuss the positions of Sepúlveda and las Casas. This debate, the *Controversia de Valladolid*,took place during the years 1550-51 and its outcome was unequivocally favourable to las Casas. However, the summary of the discussion reads:

Finally, after much debate, the (commission) judged that the expeditions, which in Spanish we call conquistas, are evil, unlawful, and unjust and, therefore, ought to be altogether outlawed in the future. However, concerning the allotments, which are called repartimientos[16] in Spanish, they made no decision because there was still rebellion by some of the oppressors in the kingdoms of Peru and other provinces were in a state of confusion. (las Casas, 1974, p. 9).

Thus the commission did not recommend giving freedom and political self-determination to the Amerindians – which was las Casas's position – but it nonetheless condemned the conquest unequivocally. It is plausible to assume that state interests weighed too heavily to allow any changes as regards the American possessions. The Spanish crown was immersed in armed conflicts on the European continent and in the Mediterranean, and was highly dependent on the capital flow from the Americas. Once again the two logics, that of state interests and that of the missionaries, collided in a clear way. Following Gutiérrez, it is possible to assert that for las Casas

it is a matter of the rights of the individuals, indeed, but also – let us repeat – of the Indian nations vis-à-vis the Western Christian countries that had undertaken the conquest and occupation of the Indian continent. What is at stake is not only individual rights, but, especially those of a whole people: here, their right to require that their religion, however mistaken it be, be respected. (Gutiérrez, 1993, p. 206).

Here Gutiérrez touches upon the double aspect – collective and individual – of the human rights. Since the Amerindians were rational beings – rationality being one primary facet of human dignity – it was unjust to impose Christianity upon them. Las Casas considered that the Christian faith was the most valuable good that could be given to the indigenous peoples, but he also believed that they had the right to remain in their paganism. It would be unjust as regards the native's rationality to deprive them of their faculty of judgement with respect to religion. Similarly, he also rejected the argument that a just war could be fought upon the Amerindian peoples on the grounds of the human sacrifices some cultures carried out (las Casas, 1974, p. 234). In this way, the conquest of America was unjust because it negated the autonomy and idiosyncrasy of the indigenous cultures.[17] In the *Lascasasian* perspective, then, the subjugation of America had nothing to do with neither civilization nor religion but with a simple will to power. The oppression of the native peoples was perceived as an injustice because of the egalitarian Christian tradition he belonged to. This perspective called for the resistance against state power that las Casas embodied.

Francisco de Vitoria

Francisco de Vitoria is a central figure of the Spanish Renaissance. His work can be divided into three categories: a) lectures from ordinary courses, that is, commentaries to the

Sententiarum liber IV by Peter Lombard or to St. Thomas Aquinas's *Summa Theologica*; b) the *Relectiones*, which are extraordinary lectures read at the end of a term; c) *varia*, which counts his epistolary work and some verdicts on moral and theological issues.

Vitoria sets out a universalistic vision of law since he conceives of the world as one *commonwealth*(*respublica*) governed by a common law, the *law of nations* (*ius gentium*). Vitoria considered human society as natural as any living organism: "The clear conclusion is that the primitive origin of human cities and commonwealths was not a human invention or contrivance to be numbered among the artefacts of craft, but a device implanted by Nature in man for his own safety and survival." (Vitoria, 1991, p. 9). Correspondingly his *law of nations* is derived from natural law but enacted by the commonwealth of the world: "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." (Vitoria, 1991, p. 40). This idea is what has earned him the title – even if modern scholarship is divided as regards this claim – as the father of international law (e.g. Barcia Trelles, 1928; Scott, 1934).

Two of Vitoria's *Relectiones* mention the question of the New World and the subjugation of the native peoples of the Americas. These lectures carry the titles *De Indis (On the American Indians)* from 1539 and *De iure belli (On the Law of War)* from that same year. However, as only *De Indis* treats the question of the conquest in depth, this text will be the focus of analysis here. The *relection* consists of an introduction, three discussions, a conclusion and three replies. In the first discussion the issue is whether the Amerindians had political authority before the Spanish conquest. After this, follows a discussion of the illegitimate reasons (the "unjust titles") that could be argued for the Spanish dominion over the indigenous peoples. Then follows an analysis of seven or eight legitimate grounds ("just titles") that could be given for the subjugation of the Amerindians: "There are seven irrelevant titles, and seven or perhaps eight just and legitimate ones." (Vitoria, 1991, p. 252).

In the *relection*'s first discussion Vitoria states that it is a universal issue that a people governs itself. Any community may constitute itself with its rulers, institutions and laws, and this is not lost by diversity of religion or by sin because "Aquinas shows that unbelief does not cancel either natural or human law, but all forms of dominion (*dominia*) derive from natural or human law; therefore they cannot be annulled by lack of faith." (Vitoria, 1991, p.

244). He furthermore dismisses the idea that a sort of tutelage of the Amerindians could be justified because that would presuppose that they were irrational and incapable of organizing their societies. On the contrary, the inhabitants of these nations possess the use of reason since

they have properly organized cities, proper marriages, magistrates and overlords (domini), laws, industries, and commerce, all of which require the use of reason. They likewise have a form (species) of religion, and they correctly apprehend things which are evident to other men, which indicates the use of reason. (*ibid*., p. 250).

The conclusion Vitoria arrives at is that the Amerindians were the true rulers of their societies before the arrival of the Spaniards. This poses a problem as regards the legitimacy of the conquest, which then will be discussed in the rest of the *relection.*

In the *relection*'s second discussion, Vitoria discards seven illegitimate reasons that could be alleged to justify the conquest of the Amerindian countries. These *unjust titles* are: (1) because the emperor is the sovereign of the whole world, (2) because the pope has authority over the whole world, (3) by right of discovery, (4) because the natives refuse the Christian religion, (5) because of the Amerindians' sins,[18] (6) by voluntary choice induced by ignorance or fear,[19] (7) by special gift from God.

Of these titles the most interesting in the present context is the second one. According to the above-mentioned theocratic theory the pope, as the vicar of Christ, has the authority to legitimise the occupation. To this, Vitoria responds that if Christ did not have temporal or worldly power, much less can the pope as his vicar have it (*ibid*., p. 260). In addition, the pope does not have spiritual jurisdiction over non-Christians, as can be inferred from St. Paul: "For what have I to do to judge them also that are without?"[20] Furthermore, and in contrast to the confessionalization process, Vitoria rejects that the Conquest could be legitimized as an occasion to bring the Gospel to the indigenous peoples because he considers – in line with many other theologians – that nobody should be forced to convert to Christianity. This part of the *relection* concludes that the conquest of America cannot be legitimized on these grounds, and the discussion of the *unjust titles* significantly finishes with a passage from the Gospel: "'For what is a man profited', says the Lord, 'if he shall gain the whole world, and lose himself, or be cast away?'".[21] In this way Vitoria alludes to the

conflict between religion and state interests, suggesting that they may diverge.

In the last part of *De Indis*, Vitoria discusses the reasons that might legitimize the conquest and domination of America. These *just titles* are: (1) if the Spaniards were prevented from the right to travel and dwell in the native's countries "so long as they do no harm to the barbarians" (Vitoria, 1991,p. 278),[22] (2) if the Amerindians "obstruct the Spaniards in their free propagation of the Gospel" (*ibid*, p. 285), (3) "the protection of converts" (*ibid*.p. 286) would be a legitimate cause if some of the Amerindians had converted and their rulers wanted to force them back to idolatry, (4) a "papal constitution of a Christian prince" (*ibid*. p. 287) could be claimed if a large number of the original inhabitants had converted, (5) "in defence of the innocent against tyranny" (*ibid*. p. 287) if tyranny or tyrannical laws inflict damage on innocents, (6) "by true and voluntary election" (*ibid*. p. 288), that is, if the inhabitants of these countries voluntarily decided to accept the Spanish king as their ruler, (7) "for the sake of allies and friends" (*ibid*. p. 289), that is, if a given nation asks the Spaniards for help because they have suffered an affront and thus have the right to wage a just war against another nation, finally, (8) "mental incapacity" (*ibid*.p. 290). This last reason is, however, only added "for the sake of the argument" (*ibid*. p. 290).

It is remarkable that Vitoria discusses these seven or eight just titles in a hypothetical way. This hypothetical procedure indicates uncertainty as regards the validity of the arguments in the specific context. It is striking that Vitoria abstains from concluding on the arguments given as *just titles* in relation to the actual conquest. He lists them as hypotheses without asserting whether they in fact apply in the specific situation.

An example is the second just title, if the other peoples "obstruct the Spaniards in their free propagation of the Gospel" (*ibid*.p. 285). To this, Vitoria remarks that this is a hypothetical case that is unlikely to have happened during the actual conquest: "All that I have demonstrated is that this method is lawful *per se*. I myself have no doubt that force and arms were necessary for the Spaniards to continue in those parts; my fear is that the affair may have gone beyond the permissible bounds of justice and religion." (*ibid*. p. 286).

In the same way the other just titles are listed as possibilities that would apply if they were the case – but he does not assert that reality is in keeping with what he mentions as justified causes for the conquest. In addition, Vitoria mentions situations that evidently were not the

case, as in the following passage with respect to the just title "of natural partnership and communication" (*ibid*. p. 278): "Since these travels of the Spaniards are (as we assume) neither harmful nor detrimental to the barbarians, they are lawful." (*ibid*, p. 278).[23] Given that at this moment, in 1539, Bartolomé de las Casas's writings and denunciations were widely known (furthermore Vitoria was a Dominican just as las Casas), and the conquests of Mexico and Peru had been consummated, it is a claim against well-known facts to state that the Spaniards had arrived to the New World without causing harm to the indigenous peoples. The parenthetical interpolation "as we assume" should thus be taken as a purely speculative presupposition without relation to reality. The same is the case when Vitoria, under the same title, discusses how the Spaniards should act when arriving to the indigenous peoples' territories:

My fifth proposition is that if the barbarians attempt to deny the Spaniards in these matters which I have described as belonging to the law of nations (ius gentium), that is to say from trading and the rest, the Spaniards ought first to remove any cause of provocation by reasoning and persuasion, and demonstrate with every argument at their disposal that they have not come to do harm, but wish to dwell in peace and travel without any inconvenience to the barbarians. (*ibid*. p. 281).

This passage makes clear how Vitoria's discussion is not based on facts but should be regarded as a theoretical reflection – given that the reality of the conquest diverged ostentatiously from this description.

In addition to this disturbing split between the historical facts and the assumptions taken in the *relection*, a closer look at the possible eighth just title only underscores the hypothetical aspect of this discussion. In the first place, Vitoria discusses a theme that he had already been through in the same *relection*. In the first part of *De Indis*, "On the dominion of the barbarians", he considered that the Amerindians "are not in point of fact madmen, but have judgement like other men." (*ibid*. p. 250). At that moment he, furthermore, asserted that the Amerindians "have properly organized cities, proper marriages, magistrates and overlords (*domini*), laws, industries, and commerce" (*ibid*. p. 250). However, now, in the discussion of this last uncertain title, he sustains that "they have neither appropriate laws nor magistrates fitted to the task. Indeed, they are unsuited even to governing their own households (*res familiaris*); hence their lack of letters, of arts and crafts (not merely liberal,

but even mechanical), of systematic agriculture, of manufacture, and of many other things useful, or rather indispensable, for human use." (*ibid*. p. 290).

The difference between the discussion of the Amerindians' *dominium* in the first part of the relection, and that of the possible eighth legitimate title in the second part lies in the fact that the latter considers the possibility of a temporary tutelage for the good of the original inhabitants. The question in the former was whether they had power over their own territories (to which Vitoria answered that they did have). In any case, the hypothetical quality of this eighth title is all the more manifest if we bear in mind that it is a position that had been discarded two years earlier by Pope Paul III in the bull Sublimis Deus (1537).

After this , Vitoria moves on to the conclusions, which are also hypothetical:

The conclusion of this whole dispute appears to be this: that if all these titles were inapplicable, that is to say if the barbarians gave no just cause for war and did not wish to have Spaniards as princes and so on, the whole Indian expedition and trade would cease, to the great loss of the Spaniards. And this in turn would mean a huge loss to the royal exchequer, which would be intolerable (*ibid*. p. 291).

Vitoria thus finally acknowledges the actual political situation in relation to the speculations that he or others might carry out, that is, he seems to realize that nothing that he could write would significantly change the Spanish rule in the New World. This interpretation throws a self-ironic light on the words at the end of the introduction: "In conclusion, I should regard it as something not unprofitable and fatuous, but an achievement of considerable worth, if I were to succeed in treating this question with the seriousness which it deserves." (*ibid*. p. 238).

At the end of the *relection* he furthermore adds three "replies", of which the first two argue in favour of withdrawing from the conquered territories whereas the last one argues against it. The first reply maintains that Spain could leave the dominion of the New World without fear of losing benefits because trade would be just as lucrative as possessing the territories in question: "Look at the Portuguese, who carry on a great and profitable trade with similar sorts of peoples without conquering them" (*ibid*. pp. 291-92). What reason could Vitoria have had to add this comparison with Portugal if not because he considered that this is how

Spain should have acted towards the societies encountered in the New World?

The second reply adds to the first one "that royal revenues would not necessarily be diminished" (*ibid*. p. 292) if Spain allowed the indigenous peoples to rule their own territories because trade would continue and the Crown would maintain its income through the taxes put on the mercantile exchanges. However, the last reply turns to the question of the converted Amerindians and argues that "once a large number of barbarians have been converted, it would be neither expedient nor lawful for our prince to abandon altogether the administration of those territories." (*ibid*. p. 292). In this way Vitoria gives, *in extremis*,a concrete reason for the Spanish crown to maintain its possessions. At the same time, it is also clear that this last reply does not in fact represent a legitimation of the conquest but is rather a *post festum* acknowledgment of the state of things. In addition, Vitoria does not argue that a *status quo* should be maintained. He asserts that it would be wrong "to abandon altogether" these territories, thus entailing that a degree of political self-determination should be given to the Amerindian peoples.

Vitoria's conclusion parallels that of the *Controversia de Valladolid*(referred to above) a decade later. The conquest cannot be justified, but *Realpolitik* has its own logic. In this way, Vitoria's position is in line with las Casas's in the sense that Vitoria – in spite of his ambivalences and speculations – argues the logic of religion and human dignity, not that of conquest and enrichment. It is remarkable how Vitoria upheld that the appropriate and just would have been the autonomy of the Amerindian societies; in this way he implicitly declared the conquest to be illegitimate. In support of this interpretation, a sequel to Vitoria's *relections* can be mentioned.

De Indis was read in January 1539, and *De iure belli* in June that same year but, despite Vitoria's indirect way of expressing himself, in November 1539 Charles V wrote a letter to the prior of St. Stephen's Convent in Salamanca, where Vitoria lived. In it the king of Spain and emperor of the Holy Roman Empire wrote that he had been informed that "certain religious masters of [your] house have lectured upon and treated in their sermons and law courses Our holdings in the Indies." He asserts that this is "harmful and scandalous", and demands that all "writings that they have in their possession concerning this" must be sent to him. Finally, he also commands that in the future "without Our express permission they neither treat nor preach nor dispute upon the abovementioned, or cause any document

touching upon it to be printed."[24] This letter makes the mentioned conflict between religion and colonization explicit, and shows – in spite of state confessionalization – a clear contradiction between the logic of the state and the logic of missionaries and theologians.

Conclusions

In the above a clear separation or, rather, a confrontation has been shown between the colonization enterprise, carried out by the absolute monarchy, and the missionary impulse. It must be acknowledged that the Spanish crown for the most part regarded the missionary activities as an essential part of the colonization process (Reinhard, 2016, pp. 376-80). Nonetheless, had it not been for the missionaries' understanding of the Amerindians as their neighbours in the Christian sense, the conquest of America would have been unquestioned.

From this perspective, las Casas and Vitoria appear as precursors of human rights advocacy, since it is clear that the first combat that had to be fought in this respect was against the absolute monarchies. In turn, once constitutional rule was established then it would be the state that would safeguard human rights principles – precisely that state apparatus that had been constructed by the absolute, confessional monarchs. Bartolomé de las Casas and Francisco de Vitoria may represent an initial moment as regards the development that would lead to the establishment of human rights as a legal principle. The confessional state colonized its subjects' interiority in a parallel way as it colonized other peoples, but – as has been shown in the above – at the same time religion appeared as a critical voice able to liberate the souls of the individuals from state interests.

Subsequently, the idea of human dignity would become "the conceptual hinge which connects the morality of equal respect for everyone with positive law and democratic lawmaking in such a way that their interplay could give rise to a political order founded upon human rights, given suitable historical conditions." (Habermas, 2012, p. 81). This moment had not arrived yet, but if las Casas and Vitoria are taken as examples of the subversive potential of religion, then a clear logic emerges as to why a later political thinker such as Thomas Hobbes considered that religion must be put under the competence of secular power. Hobbes's intention was to prevent religion from playing a role in the political sphere (which is the ideal for most present-day Western states). The theologian has a moral and hermeneutical authority that may contradict secular powers – and at times even state

interests both at national and at international levels. The intention behind the integration of religion within the state was to create a collective identity, to assure the loyalty of the subjects, and at the same time to subordinate religion to the state. Subsequent history has shown that the "best" solution is to marginalize religion altogether.[25]

The idea of the natural community of all humans is clearly related to the Judeo-Christian tradition since one of the latter's basic tenets is that the entire human race has God as its origin. This idea of kinship is in marked contrast to the Hobbesian tradition which envisages the human being as a solitary individual, always in latent or open conflict with others. It is very symptomatic in this respect that Vitoria, in *De Indis*, asserts that "it is against natural law for one man to turn against another without due cause; man is not a 'wolf to his fellow man', […] but a fellow." (Vitoria, 1991, p. 280). This last citation prefigures and rejects the Hobbesian idea of permanent war or conflict as the state of nature. The difference between the two thinkers is that Vitoria is guided by a paradigm that regards humanity as naturally engaged with itself as a collectivity, whereas Hobbes belongs to a more nihilistic and individualistic horizon that focuses on the individual's fight for survival as the primary human condition.

Today, at the other end of the historical process that enthroned it, the territorial state is challenged in a number of ways. Present day multi-ethnic and multi-cultural societies find a considerable difficulty in integrating the many different groups that inhabit the present-day *civitas*. In a parallel way, today relations between states follow to a large extent purely contractual rules, with no reference to any foundation of shared values or notions.[26] Human rights are often seen as the secular basis upon which a universal, international order can be founded. At the same time, it is possible that, in the process of searching for a global *Gemeinschaft* (in a *Tönniesian* sense), a set of shared values might be reached if, rather than avoiding religion, the religious traditions were acknowledged as a common basis.[27] Religion might convey a relationship based on a sense of kinship and justice that in turn would compel the states to cooperate with a greater degree of commitment than the Western tradition of the social contract – and in this way a universal acknowledgement of human rights might be catalysed.

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Endnotes

[1] This idea of social justice also is at the base of the present social doctrine of the Catholic Church, and it builds on the idea that justice, rather than wealth or economic growth, is the key factor for the common good.

[2] Beuchot draws this Thomistic line from St. Thomas Aquinas' definition of justice to Vitoria's reflections on social organisation in his "De potestate civili". Belonging to this same tradition, las Casas takes the most specific consequence of this thinking in his writings when he denounced the subjection of the Amerindian peoples.

[3] In Spanish a long series of scholarly contributions exist that relate las Casas and

Vitoria to the human rights question, but – to my knowledge – the notion of the confessional state has not been included in this discussion until now.

[4] "[C]loselyconnected with the emergence of the confessional culture and its impact on early modern state formation was its influence on the rise of political identities and nation building. In almost all the countries of Europe, and among almost all the peoples, the formation of a confessional and cultural-political identity was closely connected in time and content. This connection shaped profoundly, and still shapes, the cultural and political profile of the individual nations of Europe." (Schilling, 2008, pp. 20-21).

[5] The creation of state-churches in the Protestant countries was mirrored in the Catholic nations by the transference of ecclesiastical powers to the monarchy. In Spain the *patronato real*entailed that the king in many respects became the highest ecclesiastical authority in the territories under his rule.

[6] At that moment the future Spain was a personal union of the kingdoms of Castile and Aragon.

[7] The sermon is reproduced by las Casas (1971, pp. 183-84).

[8] Cited in Gutiérrez (1993, p. 34).

[9] *The Laws of Burgos of 1512-1513.* Trans., with an introduction and notes, by Lesley Byrd Simpson, San Francisco: John Howell, 1960.

[10] Cf. *Italian Reports on America, 1493-1522. Letters, Dispatches, and Papal Bulls*, Repertorium Colombianum vol. 10, ed. Geoffrey Symcox, Turnhout: Brepols 2001.

[11] las Casas reproduces the *Requerimiento* in his *History of the Indies* (las Casas, 1971, pp. 192-93)

[12] Las Casas's first work, *De unico vocationis modo*, has precisely as its main argument that conversions must be attained by peaceful persuasion and not by violent means.

[13] This document is commented on by Gutiérrez (1993, pp. 317-19).

[14] Although not in the same way, the notion of natural servitude, borrowed from Aristotle and applied to the natives, was used by the Scottish theologian John Major as early as 1508 (he was the first scholar in theology to address the question of the Indies), cf. Beuchot 1976. Similarly, Palacios Rubios used it as an argument during the *Junta de Burgos*.

[15] Dussel follows in the wake of Edmundo O'Gorman's seminal work *La invención de América* (1958) [*The Invention of America*] in the sense of regarding the European conquest of the Americas as a central element of modernity.

[16] A *repartimiento* differs slightly from an *encomienda*but the conditions for the natives are the same.

[17] Gutiérrez also notes las Casas's ability to put himself in the position of the natives. This becomes clear when las Casas questions whether the thinkers who legitimize the oppression of the Amerindians would approve the inverse situation: "I in no way think that John Major himself would tolerate a situation so impious and brutal if he were an Indian." (Cited in Gutiérrez, 1993, p. 87).

[18] This title alludes to the native's paganism and human sacrifices.

[19] This argument is clearly directed against the *Requerimiento*.

[20] 1 Cor. 5: 12, cited in Vitoria(1991, p. 260).

[21] Matt. 16: 26; Mark 8: 36; Luke 9: 25, cited in Vitoria (1991, p. 277).

[22] This right to travel and trade would become an important theme for later theorists of international law.

[23] Translation modified. Pagden's and Lawrence's exemplary edition and translation reads "as we may for the moment assume", but neither the critical edition of *De Indis* in the

Corpus Hispanorum de Pace, nor Getino's facsimile of the first two printed editions of this relection, nor the German bilingual edition (1997) allow for anything else than "as we assume" since they all read "ut supponimus".

[24] The letter appears in Vitoria (1967, pp. 152-53). The cited extracts appear in translation in Gutiérrez (1993, p. 348).

[25] William Cavanaugh (1995, pp. 397-420) has argued that the modern territorial state in fact was interested in eliminating the link to the religious institutions since they precisely represented a potential source of contradiction.

[26] It is understandable that some cultures see in the current way of organizing international society a repetition of the colonial justification from Sepúlveda onwards, namely, that the superior cultures have the right and even the obligation to impose their civilization upon less "developed" groups. Once again the West appears as the part that sets the rules of the game.

[27] This is proposed by Scott Thomas (1999). The present contribution shows an example of how the religious tradition is not in contradiction with human rights (in fact it lies at their origin). Furthermore, recent history of human rights confirms this because the influence of the Latin American countries and, through them, the doctrine of the Catholic Church, in promoting the Universal Declaration of Human Rights of 1948 is another example of how institutionalized religion can play an active role in advancing human rights (cf. Glendon 2001; Jacobsen 2011, pp. 338-39).