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Bartolome de Las Casas and the Tradition of Medieval Law
KENNETH J. PENNINGTON, JR.

As a defender of the Indians and an opponent of the methods used by the Spanish conquistadors, Bartolomé de Las Casas was as controversial a figure in the sixteenth century as he has been in the last four hundred years of historiography. Las Casas’ fight to preserve the freedom of the Indians has gained for him not only devoted admirers, but also angry detractors. Las Casas was not the only Spaniard who defended the Indians, but his efforts are the best known. He labored for fifty years before death finally halted the steady flow of polemics from his pen. However, he was not just a sheltered academician like Vitoria, but he actively championed the rights of the Indians by working and living among them in the New World.

In spite of Las Casas’ prodigious literary output, comparatively little is known about his life. Nonetheless, most of his writings have been printed, giving modern scholars easy access to his thought. The scope of his work is rather broad, for he wrote not only polemical tracts but also some of the first histories about the New World. Not surprisingly, this vast welter of works has led scholars to construct a number of conflicting opinions as to why and how Las Casas came to the principles that he used to buttress his ideas on church and state.

1. The Lascasian literature is enormous. Lewis Hanke is the most eminent of the historians to have studied Las Casas; he and Manuel Giménez Fernández have compiled a bibliography of 849 entries. Bartolomé de Las Casas 1474-1566 (Santiago, Chili: José Toribio Medina, 1984). Hanke has described the controversy which surrounds Las Casas in a bibliographical note in his The Spanish Struggle for Justice in the Conquest of America (Philadelphia: University of Pennsylvania Press, 1949), 197-199. The main argument centers around Las Casas’ role in promoting the “Black Legend,” and whether Las Casas encouraged the Spanish slave trade through his writings.


3. His historical works have been printed for centuries, and they are all in modern editions. Two of his most important polemical tracts have been edited only recently, Del único modo de atraer a todos los pueblos a la verdadera religion, edited by Augustín Millares Carlos (Paneco, Mexico: Fondo de cultura económica, 1942), and De thesauris in Pers, edited by Angel Lecanda (Madrid: Gonzalo F. de Oviedo, 1968).

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the prerogatives of the pope, and, most importantly, the rights of the infidels vis-à-vis a Christian society.

There are two widely held views concerning the content and sources of Las Casas' views: the first is that his thought was largely Thomistic, and the second is that he was purely an activist who did not have a coherent position. The most common opinion is that Las Casas received his inspiration from St. Thomas Aquinas and his school of philosophy. P. Venancio D. Carro is representative of this group when he writes, "Las Casas' ideas are fundamentally the same as Vitoria's, Soto's and the other theologian-jurists cited from the sixteenth and seventeenth centuries, which is the natural flowering of the principles of St. Thomas, the Universal Doctor of the Church." The most extreme formulation of the second position is by an anonymous writer who doubted Las Casas' sanity. More common, however, is Silvio Zavala's statement, "like an advocate trying to impress the judge with the weight of all the arguments in favour of his case, Las Casas . . . made use of various ideological expedients to protect the Indians from the consequences of the doctrine of natural servitude; particularly war, slavery and the encomiendas." Implicit in this statement is the thought that Las Casas used any argument at hand and that there was not any underlying coherence to his thought.

4. La teología y los teólogos-juristas españoles ante la conquista de América, 2 volumes (Madrid: Talleres gráficos Mariega, 1944), II, 314. "Las ideas de Las Casas son, en el fondo . . . las mismas Vitoria, Soto y demás teólogos-juristas citados del siglo XVI y XVII, que son floración natural de los principios de Santo Tomás, el Doctor universal de la Iglesia." He expands his views on Vitoria and Soto in the same work, I, 256. "Aun tropezamos con algunas supervivientes, inteligencia en retraso; pero la verdadera doctrina se impone ya pronto, con el renacimiento teológico-jurídico, que tendrá por capitanes a Vitoria y a Domingo de Soto. Este triunfo se debe, en primer lugar, al retorno a Santo Tomás en las Escuelas y Universidades." It has been conventional to view St. Thomas as being the dominant influence on these Spanish thinkers. Silvio Zavala has written in the introduction to Juan Lopez de Palacios Rubios, De las islas del mar Océano (Mexico: Fondo de cultura económica, 1954), lxix, "Sin embargo, la interpretación del poder pontificio como espiritual y ajeno a la potestad temporal directa, aunque con facultades de intervención en este dominio en lo que fuese necesario para el fin espiritual, se encuentra latente en los tratados de Tomás de Aquino, aflora con el español Torquemada en el siglo XV, y alcanza un desarrollo completo en Vitoria y Belarmino." Bernice Hamilton, Political Thought in the Sixteenth Century (Oxford: Clarendon Press, 1963), also stresses the Thomistic influence on Vitoria, Soto and others. She even goes so far to say that the idea the pope could not grant dominion over the infidels was a view which was more common among theologians than lawyers (p. 179, footnote 1). Yves de la Brière, La conception du droit international chez les théologiens catholiques (Paris: 1930) has placed emphasis on the role of Thomism in Vitoria's and Soto's thought. The idea that Aristotle and Aquinas were chiefly responsible for creating theories which limited papal power is the thesis of Michael Wilks, The Problem of Sovereignty in the Later Middle Ages (Cambridge: Cambridge University Press, 1965).

5. "La lecra de fray Bartolomé de Las Casas," Revista hispanoamericana de ciencias, letras y artes, 6 (1927), 284-290. For the diverse attitudes towards Las Casas over four centuries, see Lewis Hanke, "Interpretación de la obra y significación de Bartholomé de Las Casas, desde el siglo XVI hasta el presente," Búltín latinoamérica, (1949), 295-300.

Nevertheless, I should like to put forward a different point of view. Las Casas was not a pragmatic activist or a Thomist, but essentially a jurist whose ideas were based on medieval juridical theory. Just a glance at the analytical indices of Las Casas' printed works enables one to see how indebted he was to legal sources. In one of his last writings, De thesauris in Peru, Las Casas cited over twenty different canon and Roman lawyers, from Gratian to Panormitanus. In contrast, he referred to only four medieval theologians. Las Casas did not, moreover, use legal texts freakishly or hapazardly. To the contrary, he developed a central tradition of medieval legal thought in original and interesting ways.

Further, Las Casas was not unusual in this respect, but he was part of a general movement of adapting ecclesiological and canon law concepts to political theory. In this way, medieval legal thought helped to shape the fundamental political ideas of the sixteenth century. John Neville Figgis first explored how the theorists who created the doctrine of the divine right of kings based their arguments on canonical and ecclesiastical precedents, particularly the canonical notion of papal plenitudo potestatis. Since then, Ernst Kantorowicz, Brian Tierney, and Francis Oakley have done further work to clarify this process. Kantorowicz and Tierney have shown that medieval legal theory permeated many facets of the sixteenth century's political thought, while Oakley has pointed out that the conciliar writings of the late fourteenth and early fifteenth centuries, themselves based largely on the legal tradition, also had a significant influence on the writings of Jacques Almain, John Major, John Ponet, and Theodore Beza. So Las Casas' use of legal theory makes him an important figure in the mainstream of the development of early modern political thought.

The basic premise in Las Casas' position on the rights of the Indians is that legitimate secular power does exist outside the church. Las Casas insisted throughout his life that the Indians' dominium was legitimate and just, and that the Spaniards did not have the right to usurp the Indians' just title. From this basic principle sprung all the rest of Las Casas' ideas.

7. De thesauris, 465-469. Hanke has noted several times that Las Casas was learned in the law, but he did not emphasis the fact. See Lewis Hanke, Bartolome de Las Casas: Bookman, Scholar, and Propagandist (Philadelphia: University of Pennsylvania Press, 1982), 15. Also Ernest Nys, '"Les publicistes espagnols du XVe siècle et les droits des Indiens," Revue de droit international et législation comparée, 21 (1889), 522-560.
Historical opinion has varied as to the novelty of Las Casas' claim that the dominium of the Indians was just. Figgis argued that it is a "thoroughgoing medievalism" to say that the dominium of infidels is unjust. If Figgis is right, then Las Casas' notions are original with the sixteenth century. Others, however, even before Figgis, had pointed out that there were two different strands of thought on this matter during the middle ages. The first held that the infidels' dominium was legitimate; the other denied that this was so. Both of these positions were first articulated by canonists. Pope Innocent IV maintained that the dominium of the infidel was just, while the canonist Alanus Anglicus, and after him, Hostiensis, asserted that there was not any legitimate secular power outside of the church. Although no one has systematically studied later canonistic thought, it has been fashionable to state that the communis opinio of the later canonists followed the views of Alanus and Hostiensis. One reason for this is that historians have noted that the first writers to justify Spain's New World conquests, Matías de Paz and Juan Lopez de Palacios Rubios, used Hostiensis' argument that since the coming of Christ, all legitimate secular power was transferred to the Christian faithful. Historians have assumed that Hostiensis' opinion was the one that the canonists generally accepted. However, later canonists did not adopt Hostiensis' conclusions; rather they preferred the moderate doctrine of Innocent IV.

Certainly, a few canonists did adopt Hostiensis' formulation of

12. Nys, "Les publicités," 552-553, noted that Innocent IV and Hostiensis took two different positions on this question in their commentaries on the Decretals of Gregory IX at X 3.34.8 (Quod super his). Since then this has been discussed by Walter Ullmann, Medieval Papalism: The Political Theories of the Medieval Canonists (London: Methuen, 1949), 129-137. Zavala, De las islas, lxxi-lxxiii, discusses Innocent IV, Hostiensis, and Zabarella as well as other theologians and polemists. See also his Political Philosophy, 25-27. Most recently, James Muldoon, "Extra ecclesiâ non est imperium, The Canonists and the Legitimacy of Secular Power," Studia Gratiana, 9, 570-579. Alfons Stickler published a gloss of Alanus which denied that the infidels have legitimate power. Alanus may have been the first canonist (ca. 1502) to take this position. "Alanus Anglicus as Verteidiger des monarchischen Papstums," Salesianum, 21 (1959), 561-562. Gloss to D.96 c.6 s.v. eureu "Non obstitit [obstret] hui opinioli quod ante fuerunt imperatoris quam pape, quia tantum de facto fuerunt et ius gladii non habuerunt, nisi illi tantum qui in verum deum crediderunt. Nec etiam hocie habent infidiles principes ut supra ostensum est ut xxriiili q.l. Set illud (e.39.)"
the problem. However, by the end of the fourteenth century, Innocent IV’s commentary on Quod super had become the communis opinio of the canonists. The earliest canonist to sustain Innocent’s position was Oldradus de Ponte. Oldradus wrote a consilium in the first decades of the fourteenth century in which he repeated Innocent’s arguments for the just dominion of the infidels. Peculiarly though, Oldradus did not even mention that Hostiensis had put forward a powerful counter argument. A bit later, perhaps the greatest canonist of the fourteenth century, Johannes Andreea, reproduced the commentary of Hostiensis in his own work on the Decretals of Gregory IX. However, Johannes’ stance on this issue is ambiguous. In his old age, when he wrote the Additiones to the Speculum turis of Guillermus Durantis, Johannes had changed over to the doctrine of Innocent IV. Panormitanus and Francesco Zabarella, the most significant canonists of the next epoch, rejected Hostiensis and followed Innocent IV in their commentaries on X 3.34.8 (Quod super his).


16. Oldradus de Ponte, Consilium (Romae: 1475), consilium 284 (unfoliated). “Tertio eadem ratione, qua non debemus Judaecos, et paganos, et Saracenos pacificos rebus suis spoliare, eadem ratione nec eorum habitaculis et ex terra natius priuare... Et quod possident, iure gentis possident, sine re, sine loca, sine iurisdictionibus et sic iuste, et justitia fori, non poli... sicut hoc clare tenet Innocentius... Item causa expulsionis Amororaecorum, Cananeorum, et Sarracorum ab eorum terris per filios Iesu, quod contra legem naturae, quod clamat unum Deum... Sed Judaei et Saraceni non sint idolatras, sed alias infideles, neque tales public hostes principum regentium Christianorum, ergo non debet expelliri.”


18. Johannes Andreea, Additiones ad Eudem Durantis, Speculum turis, 3 volumes (Venetiis: 1585), III, 488. Additione De Judaeos et Saracenas. “Vili quaemad solen- nias scripta septem rationibus consideraudia, quon praecepse pacificos infideles de suis terris absque legitima causa non debent expellere... Alias ives habeo, quas non sunt ex hoc ovili schilicet ecclesiæ... Successor ergo Petri habet illas pascere et defendere, ergo non impugnare, vel laedi permittere... Item eoelum coeli domino, terram autem dedit filius hominum, ergo negandum eis non est, quod ius humanæ societatis concedit.”

19. Panormitanus (Nicho Tedeschi), Commentaria, seu lecturae in quinque libros decretalium, 5 volumes (Lugduni: 1581-1585), VI, fol. 177v. “‘Innocentius multum exquisite tractavit hic istam materiam et primo conclusit quod infideles iilicte tenent dominia et principatus et alia bona quia Deus subiecit orbem rationabili creature nec inter homines distinctix postea supervenit ius gentium et habitum locum illud.’ Francesco Zabarella, Il Ritual di Roma (quintum) decretalium, 5 volumes in 3 (Lugduni: 1557-1558), III, fol. 181r. ‘Hic premisiea que sunt memoriter notanda quod premissem questionem, dicit Innocentius quod dominia, possessiones et iurisdictiones ilicite sine peccato possunt esse apud infideles. Hec enim non tantum pro infidelibus sed pro qualibet rationabili creatura facta sunt...’ From the beginning of the thirteenth century on, it was
A consilium that the Bolognese lawyer, Dominicus de Sancto Germaniano, wrote at the beginning of the fifteenth century shows how thoroughly Innocent's doctrine became a part of the canonistic tradition. Dominicus concurred with Innocent's opinion that the dominium of the infidels was just. He commented further that the letter of Alexander II which seemed to give a basis for constant war against the infidel must not be interpreted universally, but that this decretal applied only to those lands which had been once subjected to the Roman Empire. Following Oldradus, Dominicus said that the Saracens were not idolators, and that if they lived in peace with Christians, they could not be expelled from their lands. At the end of the consilium, he gave a detailed refutation of Hostiensis' arguments because, as he said, no other canonist had yet done so. Dominicus concluded that the infidels' dominium is just and can not be taken away as long as they do not fight against Christians. As we shall soon see, Las Casas reached the same conclusions.

Although Paz and Palacios Rubios did hark back to the tradition of Hostiensis, the Spanish canonists of the late sixteenth cen-
tury continued to agree with Innocent IV that the infidels’ *dominium* was just. An example of this is the illustrious sixteenth century canonist, Didacus Covarruvias a Leyva. In a work which was dedicated to Phillip II, Didacus wrote a *consilium* entitled *De bello adversus infideles*. Here he concurred that the *dominium* of infidels was legitimate.27

So much for the canonists. It is clear that when Las Casas began his defense of the Indians, he could draw on this authoritative source for support. There were, however, theologians who declared that the infidels’ *dominium* was legitimate, and it may be asked why Las Casas did not use this tradition. There seem to be two reasons for his choice. First, Las Casas used legal sources because they would carry more weight than the speculations of the theologians. Secondly, the theological tradition was more mixed than the canonistic tradition. Theologians did not reach a clear-cut decision on the justness of the *dominium* of infidels until the time of Vitoria.28 St. Thomas Aquinas, although he acknowledged the justness of the infidels’ *dominium*, was closer to Hostiensis’ position than to Innocent IV’s when he said that the infidels could lose their *dominium* over Christians by reason of their infidelity.29 Innocent IV was much more moderate. He maintained that the pope could take away the *dominium* of an infidel prince who governed Christians only for a *magna causa*. Innocent thought that the pope could act if the prince seriously oppressed the Christians under him.30 Theologians who wrote after St. Thomas took various

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27. *Opera omnia* in 1 (Antwerpiae: 1588), I, 497-499. “Sed nihilominus sit in has re conclusio, quam veriorem esse censeamus, bellum adversus infideles ex eo solum quod infideles sint, etiam auctoritate Imperatoris vel Papae iuste indici non potest . . . nam infidelitas non privat infideles dominio, quod habent iure humano . . . ergo infideles ex eo quod infideles sunt, nec volunt Christi sidem suscipere, minime omnino dominium rerum, nec provinciarum, quae obtinent, iureque humano habuerunt: quo sit, ut ex hae causa bellum adversus eos a Christianis etiam auctoritate publicae indici iuste non valeat: quam conclusionem in specie veram esse censeat Innocentius et Cardinalis [Francisco Zabarella] in dict. cap. Quod super his. . . .” With this said, Muldoon’s statement that “the canonists may have been too narrow in outlook to deal adequately with the complex issues of the Spanish conquest,” seems a bit unfair. “A Canonistic Contribution to the Formation of International Law,” *The Jurist*, 18 (1968), 265-279 at 278.

28. On the Spanish theologians of the sixteenth century see Hamilton, *Political Thought*, 61; 120-123. The wide audience that the theologians like Vitoria received has been primarily responsible for obscuring the fundamental contribution of the fourteenth and fifteenth century canonists.

29. *Summa theologiae*, 2.2.10.10. “Ideo distinctione fideliem et infidelium secundum se considera non tollit dominium et praetationem infidelium supra fideles. Potest tamen iuste per sententiam vel ordinationem Ecclesiae, auctoritatem Dei habentis, tale ius dominii vel praetationis tolli; quia infideles merito sua infidelitatis meretur potestatem amittere super fideles, qui transferentur in filios Dei.” St. Thomas’ doctrine that an infidel prince would lose his power over Christians because that power was transferred to the sons of God is very similar to Hostiensis’ theory.

30. *Commentaria super libros quinque decretalium Gregorii II*, 2 volumes in 1 (Francofurti: 1570), fol. 430v. “Tmo si male tractarent Christianos, potest eos privare per sententiam jurisdictonis et dominio, quod super eos habet, tamen magna causa debet
stances. Aegidius Romanus, William of Cremona, and Wycliff had denied that the infidels' *dominium* was legitimate. In contrast, John of Paris, James of Viterbo, and Thomas of Strassburg agreed with the canonists. Interestingly, ideological considerations did not play a role in this discussion. Augustinus Triumphus, one of the most radical proponents of papal plenitude of power, was rather moderate on this issue. On the other hand, Hus' and Wycliff's doctrine that, if one did not have grace, one could not exercise legitimate *dominium*, effectively denied the legitimacy of the infidels' rule. It is not surprising then, that Las Casas used the canonistic commentaries while excluding the theological tradition. He did use theologians to supplement his argument, but he did not base his ideology on theology.

A particularly interesting exposition of Las Casas' ideas is found in a work of his last years, *De thesauris in Peru*. Las Casas wrote *De thesauris* in 1565 when he was ninety-one years old. In spite of his advanced age, he wrote a clear and vigorous defense of the Indians in this treatise. *De thesauris* contained the same canonistic arguments that Las Casas had used previously in his fight with royal bureaucrats and in his debate with Sepúlveda, which was his most renowned encounter. Sepúlveda had attempted to employ Aristotle to prove that the Indians were suited only for slavery and that Spain's claims to title in the New World were just. To counter this argument, Las Casas did not quote the relevant texts from St. Thomas to establish that the Indians' *dominium* was legitimate. Instead, he supported his contentions with the standard canonistic citations.

Although Las Casas relied entirely on canonical texts in this critical situation, he also used them extensively to sustain his other arguments. The method that he employed is rather interesting. Often he would cite a canonical legal maxim that he had taken from a particular case in canon law, and then he applied this maxim to the problem at hand. Las Casas did not, however, just repeat the arguments of the canonists, but he skillfully adapted them to a novel situation. The men of the sixteenth century were faced with an unfamiliar set of circumstances. New Lands had been opened to Europeans, and the European monarchs were claiming these lands as their own. The


33. Las Casas, *De thesauris*, 88. "Per ea quae communiter omnes canonistae determinant in e. Quae in ecclesiis, de constit. seclitae papam non posse privare infidelis suis dominij et iurisdictionibus quemadmodum nee christianus. Et signaner Innocenti in e. Quod super his, de voto, quam sententiam tenent etiam theolog i stockiores juris naturalis, et alibi latissime scriptus."
canonists had dealt with the legitimacy of rulers who were outside of Christendom during the middle ages, but they were then concerned with a hostile enemy, the Saracens. The situation in the New World was much different, for now the Christians were the exploiters and conquerors. This raised the moral question of whether it was just to conquer pacific non-Christians. Las Casas had to use the canonistic tradition in a situation that the canonists had never envisioned. His skill at doing this is evident in the section of his treatise where he attempted to prove that the pope could not give the temporal jurisdiction of the Indians to the Spanish kings.

Las Casas began this section of De thesauris by quoting the legal maxim which had originated in the private law of the Romans: *Quod omnes tangit debet ab omnibus approbari*; what touches all must be approved by all. *Quod omnes tangit*, from its humble beginnings in Roman private law, had become an important concept in the legal history of the middle ages. The canonists first used this principle to define the legal relationship between a bishop and his chapter of canons. Later, they introduced the maxim into ecclesiastical government where it supported the rights of the lesser members of the ecclesiastical hierarchy to have a hand in the governing of the church. And it became an important theoretical basis for the conciliar movement. Moreover, by the beginning of the fourteenth century, kings all over Europe were summoning representative assemblies of their noblemen, clergy, and townspeople. When they did, the reason that they often gave for calling such assemblies was, "what touches all must be approved by all." Thus *Quod omnes tangit* became part of the theoretical basis for parliament. In *De thesauris*, Las Casas used this maxim for yet another purpose. He observed that this principle had been developed to regulate the affairs of a bishopric; therefore, he went on, if one applied this principle properly, it would also be dangerous and undesirable if a prince or a bishop were given to an unwilling people. Nor, he added, should a king be given to a free foreign people. Consequently, Las Casas concluded, the pope can not give the infidels a new king without their consent. It follows then that the pope can not grant the Spanish king dominiun in the New World without the consent of the


35. Las Casas, *De thesauris*, 202-204. "Ubi populus vocatur non ad eligendum tamen ad consentiendum electioni praelati per illam regulam iuris: Quod omnes tangit, debet ab omnibus approbari, cum suis concordantibus. Lib. 6 et glossa in c.1 62 dist. Notant a contrario sensum quod si populus non vult consentire electioni facta non per collegium, potest electio irritari. . . . Si ergo episcopus dari non debet invitia populi ne plebs invita episcopum contemnet vel odiat longe minus rector vel rex temporalis populo libero extraneo, gentili et infidel, propios habenti et naturales reges non recognoscentes superiorem. . . ."
Indians.\textsuperscript{36} Las Casas used \textit{Quod omnes tangit} in a manner which was reconcilable with the way that it had been used in the past, but he adroitly applied the maxim to a novel situation.

A striking aspect of this argument, aside from its canonical basis, is the premise that Las Casas used: that all the rules which are valid in the ecclesiastical polity ought to be valid in the secular polity. Although not many political theorists would agree with that premise today, during the middle ages the church was a progressive body which was often ahead of the secular sphere in legal theorizing about its structure. As mentioned above, within the last few years ecclesiastical and legal historians have become aware of how many of the legal theories that the canonists had developed to regulate the church were applied to the secular state to help form the ideological framework for monarchical and constitutional government.\textsuperscript{37} Rather remarkably, Las Casas enounced this very idea in his treatise. One may argue, he said, from the practices in ecclesiastical institutions to what ought to be done in secular institutions. Further, he added, it is a good argument because St. Jerome used it. Therefore, because consent is required in ecclesiastical institutions, it ought to be necessary in secular institutions.\textsuperscript{38}

In stating this, Las Casas described a phenomenon which had been taking place for three centuries in medieval Europe.

Las Casas also used ecclesiastical legal theory in other key instances. One of the most delicate problems that he faced was what Pope Alexander VI's bull of 1493 gave to the Spanish kings. Did this bull give the Spaniards the right to \textit{dominium} in the New World, or did it just give them the right to propagate the faith?\textsuperscript{39} Las Casas thought that Alexander's donation only gave the Spaniards the privilege to propagate the faith; however, in \textit{De thesauris} he indicated that the Spanish could gain a just title if they were able to obtain the consent of the Indians to Spanish rule. Las Casas used the same legal phraseology that the canonists had developed for episcopal elections.

\textsuperscript{36} \textit{Ibid.}, 206. Ange non potest [papa] eis dari rex novus nisi ipsi populi et quorum juri detrahitur voluntarie consenserint. Si ergo requirir necessario quod gentes illae principesque illarum consentient electioni vel institutioni de regibus nostris Hispanicarum factate per Papam in dominos universales orbis illius, cum negotium sit gravissinum et valde onerosum utope contra regnorum illorum naturalem libertatem ac servilem deterioremque status omnium incolarum et regum seu magistratum suorum conditionem, et propter eam maxime odiosum: manifestum est oportere ad hoc eius modi consensum libre praeustent."

\textsuperscript{37} Kantorowicz, \textit{King's Two Bodies}, and Tierney, "Medieval Canon Law."

\textsuperscript{38} Las Casas, \textit{De thesauris}, 202. "Postest addi alia confirmatio per argumentum ab institutionibus ecclesiasticis ad saeculares, quod est bonum argumentum quia eo utitur Hieronymus. I ad Corinthis, 10 et in multis alijs locis ec Ecclesia usa est. Sed in ecclesiasticis institutionibus requirirr consensus et approbatio populi. Ergo ita oportet esse in saecularibus."

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He contended that the papal grant gave the Spanish king *ius ad rem* and not *ius in re*. Just as a prelate did not have a complete title (only *ad rem*) to his benefice or bishopric until the title was confirmed (to *in re*), the Spanish king had only a title *ad rem* to the Indies. He conceded that the Spaniards could obtain a title *in re* if the Indians consented to the Spanish claim of *dominium*. 40

It was imperative, of course, that Alexander’s donation not be construed as giving what its words indicated literally: *cum omnibus illarum dominii et jurisdictionibus*; with all their dominions and jurisdictions. Las Casas read what the canonists had to say about papal rescripts, and he concluded that the pope could not have meant what he said. The pope could not, after all, grant letters which prejudiced a third party, and the privilege of one party could not usurp the right of another. Concessions and privileges are to be made without injury to another party. 41 He observed that it would be absurd if the pope had actually taken the Indians’ *dominium* away; all he gave to the Spanish was the right to preach the faith. 42

These examples could be multiplied, but those that I have given here show that in the most crucial segments of Las Casas’ argument, he based his conclusions wholly on legal theory. Las Casas found a tradition in the writings of the medieval canonists which was ideally suited to his purpose; even more important is that through his knowledge of legal sources (which is amazingly broad when one remembers

40. Las Casas, De thesauri, 280-282. “Sic est de regibus nostris: habent nempe eleccionem sive institutionem papalem, et sic titulum et jus ad regna illa, quod regnum nemo christianorum de mundo habet. Sed adeo restat illis aliius potentius et principialis jus obtinentium, sicut consensus populorum et regum suorum ut ratam habeant dictam papalem institutionem, recipiendo eos universales dominos et principes supresimos, tradendo eis libere regnum illorum possessionem; quatenus jus acquirant in re reges nostri id est plenum consequantur potentiam et exercendi jurisdictionem suprema et quae sunt supremi principis et regiae ac imperiali auctoritate reservatar, ut ex dictis manifeste apparat. Ergo quandiu populi et habitores praefati cum regibus suis libere non consenserint et caetera, tantum habuerunt reges nostri titulum et jus ad regna illa, non autem in regnis illis (id est), nullum exercendi jurisdictionem ut gerendi se pro supremis principibus habent facultatem... Sic de catholici regibus nostris, quia donec populi praefati et reges eorum consensum sine plica vi aut metu praestiterint, rite aut recte jus in regnis illis, id est exercitium regiae potentatis (nisi jus ad rem et solum titulum) non habebunt.” For the development of the concept *ius ad rem*, see Robert Benson, The Bishop-Elect: A Study in Medieval Ecclesiastical Office (Princeton: Princeton University Press, 1968), 142-143.


42. Ibid., 100. “Faledum est omnino Summum Christi Vicarium in praedictis apostolicis litteris et decreto praefatiae institutionibus, concessiones sive donationes ad reges nostros catholicos, per eandem institutionem, concessionem, etc., privare Reges et dominos naturales illius orbis suis regalis dignitatis, dominii et jurisdictionibus... Deus et eius Vicarius intendunt, sicut praedicationi Evangelii et Fidei dilatatione et cultus divini plantationem, et animarum conversionem et salutis conducere sive convenient.”

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that he was not a professional lawyer), he was able to construct a defense of the Indians which was solidly grounded on the centuries-old authority of the law.

By constructing his arguments in legal terms, Las Casas was able to bring enormous pressure to bear on the Spanish government which led eventually to the famous clash with Sepúlveda. Even the Emperor Charles V realized that he was not "above the law," and that he had to justify his titles in the New World. Although Las Casas' place in the canonical tradition of the late middle ages has never been fully appreciated, Lewis Hanke has remarked that "this thorough knowledge of the law which Las Casas came to acquire must help to explain the fact that few of his contemporaries chose to meet him on the field of theory." This is true, but it can be taken a step further. Certainly, in terms of the law, Las Casas' arguments—that the dominium of the Indians was just and that the Spanish kings could not take that dominium away without a just cause—were unimpeachable. Las Casas' opponents could not debate with him on these points because Las Casas had the results of three centuries of legal opinion on his side.

Las Casas' appeals to ecclesiastical law caused Charles V to re-examine Spain's claim to a just title in the Indies. It is obvious that in Catholic Spain, in the middle of the sixteenth century, the influence of the ecclesiastical law was not altogether minimal. One may not say that canon law had more than a moral coercive force in the secular sphere, but it is well to note that even those who wished to defend Spain's title, men like Paz and Palacios Rubios, used a canonist to support their polemics. On the other hand, Las Casas' later opponents, like Sepúlveda relied entirely on Aristotelian political philosophy. Doubtlessly, if Las Casas had used only philosophical speculation in his challenge, he would have gone unnoticed and perhaps unheard. It is a tribute to the vitality of the canonical tradition that Charles V had to take heed of a movement which was inimical to the aims of his government.

This also suggests a further thought. It has been noted that Spain was the only colonial power in which the question of the just titles arose. The other colonial powers at this time, the English and the Dutch, never had the same interest in the rights of the natives. The sources that Las Casas used suggest a reason for this. Stimulated by the crusades, the ecclesiastical law had had to develop theories which were preliminary to a nascent international law. As we have seen, the theories evolved at that time have a rather liberal, modern ring. Their concern for the autonomy and liberty of foreign peoples is still an issue today. The Roman lawyers and those who studied the

43. Although there is no evidence that he received a law degree, it is fairly certain that Las Casas studied law at the University of Salamanca. Cf. Wagner, Las Casas, 4.
44. Hanke, Bartolomé de Las Casas: An Interpretation, 42.
various national laws did not concern themselves with this issue. Thus
when the reformation came to England and the Low Countries, the
“popish” law was destroyed or at least rendered ineffectual. Con-
sequently, even if there would have been someone, a Las Casas, in
England or Holland, he would not have had an authoritative source
with which to support his case. Although it is perhaps stretching a
point, the plight of the American Indians today may, in some meas-
ure, be traced to the destruction of three centuries of legal phi-
losophizing in the sixteenth century.

Therefore, one may agree at least in part with the statement that
“under the fire and brimstone of his invective there existed a closely
reasoned structure of political thought based upon the most funda-
mental concepts of medieval Europe.” However, these concepts were
not universal, but were part of the medieval legal tradition that the
canonists had developed. Las Casas’ novelty lies in how he applied
these canonical theories to the multifarious, complex problems which
the discovery of a new continent raised. It was not only with emotion
and humanitarian ideals that Las Casas tried to alleviate the plight
of the Indians, but also with the logic of the law.

45. Ibid., 36.