Consent, Voluntary Jurisdiction and Native Political Agency in Bartolomé de Las Casas’ Final Writings

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Introduction

Consent has historically played a major role in legal and political thinking. In both civil and canon law consent is seen as essential to validate juridical acts: it provides the foundation of legal and canonical obligations that range from private contracts to the administration of the sacraments. The great range of circumstances in which considerations of consent apply encouraged lawyers, theologians and political thinkers to speculate on the conditions in which it should be given, the situations in which it was necessary, and more importantly, whose consent was required.

Ingrained in the tradition of the *Ius commune*, consent appears frequently in the early writings and documents of the Americas, either embedded in historical narratives of the encounters between Indians and Spaniards or cited in the polemics on the legitimacy of Castilian rule in the New World. Among the many legal opinions, juridical tracts and historical accounts that touch on the subject during the sixteenth century, the writings of Bartolomé de las Casas present the most thorough examination of consent and also a reassessment of its implications in precedent texts.

In this article, I explore the nature of the arguments by which Las Casas theorized on the application of consent in the political discourse of the Americas. I maintain that his emphasis on the notion depends on his revival of voluntary jurisdiction, a Roman legal mechanism by virtue of which the juridical range of a magistrate’s authority could be expanded. On the basis of medieval jurists’ commentaries, Las Casas stretched the notion beyond its

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2 I use the expression *Ius commune* to refer to the Roman law and canon law that informed the juridical and philosophical discussions during the Middle Ages and Early Modern Period (see Manlio Bellomo, *The Common Legal Past of Europe 1000–1800* [Washington DC: The Catholic Univ. of America Press, 1995], xi–xiv).
traditional limits. Las Casas applied this civil-law device to his canon-law thinking and re-conceptualized the relation of Indian infidels with the Church: that relation, in his opinion, should take the juridical character of an adoption. In the later stages of his thought, Las Casas brought voluntary jurisdiction back to its original domain in civil law, arguing that this procedure was the only one by which the Spanish presence in the Americas could be legitimized. In both legal arenas, consent given freely and without fear by all potential subjects (of the Church or of the Castilian Crown) was the efficient element that would create voluntary jurisdiction over those subjects.

His conceptualization of voluntary jurisdiction marks a turn in Las Casas’ political thought during the final stage of his intellectual career. Las Casas had argued in his 1552 *Tratados* that the 1493 papal donation of the Indies represented the most solid ground to guarantee the legitimacy of Spanish rule over the New World; in his *De Thesauris* (1563) and the *Tratado de las doce dudas* (1564), he moved away from this position, denied that the Papal bull could grant political control to the Spanish kings, and argued that voluntary jurisdiction was the only valid source of legitimate rule over the Indians. By insisting on the importance of voluntary jurisdiction, Las Casas confronted a major trend in the debates on the affairs of the Indies, in which the *Ius belli* was usually invoked as a source of legitimization. Relying on its criteria, different intellectuals deployed different arguments to justify Spanish military interventions against the Indians according to the laws of warfare. In addition, the invoking of voluntary jurisdiction would enable native peoples to exercise their rightful power, which Las Casas strived to make irrevocable by the authorities of his time. Given that voluntary jurisdiction and consent are crucial elements that constantly appear in this political discourse, I propose that they should be included among the categories with which we read early colonial texts.

In order to demonstrate these statements, I will present this article in six parts. Since Las Casas’ treatment of consent and voluntary jurisdiction first appeared in his 1552 treatises and his 1550 *Apologia*, I will begin with an assessment of his views in these writings. The second section shows how the theory of natural law seconds the arguments of Las Casas, while the third introduces Las Casas’ notion of jurisdiction as a product of natural law and *Ius gentium*. The fourth section delves into the concept of voluntary jurisdiction and its major traits; the fifth addresses Las Casas’ criteria for the proper expression of consent. Finally, the sixth part explores the impact of Las Casas’ final political views in the polemics about the legitimacy of Spanish rule in the Americas.

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3 Influential intellectuals such as Juan López de Palacios Rubios (1450–1524) and Juan Ginés de Sepúlveda (1489–1573) relied on the *Ius belli*.

Las Casas’ Juridical Proposals in the 1550s

In 1552 Las Casas published in Seville eight short treatises that provided a foundation on juridical principles for all the writings he had penned in the past decades in his capacities as royal adviser, Bishop of Chiapas and defender of the Indians at court.5 Proceeding according to the principles of the medieval glossators of the *Ius commune*, Las Casas showed that his arguments were founded on a massive array of laws which he quoted for their rational, argumentative value rather than for their positive authority since the nature of his writings belongs first to jurisprudence aiming at influencing the Spanish legislation of his day. In addition, these legal references would show that his positions agreed with the *communis opinio* of many important legal and theological authorities.6

Collectively considered, the 1552 treatises present their reader with an interrelated sequence of juridical arguments advocating a reform of the situation in the Indies, whose status as a territory of the Spanish Crown will be illegal—so he implies in his treatise on Indian slavery—as long as the conditions described remain the same.7 Each tract supports the arguments of the others without diminishing its own independent readability, mostly by repeating lengthy passages of some tracts in others; for instance, Las Casas includes a Spanish version of his *Principia Quaedam* in his *Tratado comprobatorio* (*Tratados*, II, 1056–79).

The juridical argument unfolds as follows. In the *Brevísima relación de la destrucción de las Indias*, Las Casas intentionally omits the individual names of the conquistadors in order to focus on the unjust wars that Spaniards waged everywhere in the Indies. In his treatise on Indian slavery, Las Casas takes the implications of the *Brevísima* as a point of departure and examines the wars that led to the enslavement of many Indians whose *de facto* status as slaves cannot be justified by the *Ius belli* and, thus, is contrary to the basic legal tenet that asserts that freedom is a

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7 This permanent illegal condition follows from the charge that Las Casas brings against the owners of Indian slaves. In his treatise on this subject, he maintained that their human possessions were owned in bad faith, which in turn makes the situation suitable to be legally dismissed on a permanent basis according to the canon law rule ‘the illegal condition of possessing something in bad faith never expires’ (‘Possessor malae fidei ullo tempore non praescribit’) (Catholic Church, *Corpus Iuris Canonici* [New Jersey: The Law Book Exchange, 2000], r.2.V.13 in VI [my translation]). See Bartolomé de las Casas, *Tratados*, prólogos de Lewis Hanke & Manuel Giménez Fernández, transcripción por Juan Pérez de Tudela Bueso, trad. de Agustín Millares Carlo & Rafael Moreno, Biblioteca Americana. Serie Cronistas de Indias 41–42, 2 vols (México D.F.: Fondo de Cultura Económica, 1997), I, 563. Further references are to these editions.
priceless asset (Tratados, I, 557). At the same time, these wars produced the encomienda system, a colonial institution that granted Spaniards an allotment of Indian forced labour. As Las Casas demonstrates in his treatise on how to suppress the institution, the encomienda system had no valid juridical foundation, given that it violates the 48th rule of canon law, which decrees that nobody should enrich himself through the harm of others (Tratados, II, 739). In his role as Bishop of Chiapas, Las Casas included a confessional among his 1552 treatises so that he could exercise spiritual authority over the reforms that he was proposing. The central contention of the tract is that the repentant conquistadors should make a full restitution to the Indians as a condition for obtaining religious absolution on the basis of an important canon-law rule.

All of these proposals for reform are based on the idea that the Indians had important legal rights that stood on a clear legitimate basis. Las Casas undertakes a demonstration of this legitimacy in a short pamphlet titled Principia Quaedam in which he argues for the Indian right to dominium or control over their own territory, jurisdiction or the power to make legal decisions, and political self-determination on the basis of natural law and the Ius gentium (Tratados, II, 1234–73). Finally, in the Tratado comprobatorio, Las Casas thoroughly glosses the 1493 Bull of Donation and discusses the limits of papal and royal jurisdiction, pointing out their compatibility with the natural, lawful jurisdiction of native communities and their rulers. In the context of this discussion, Las Casas introduces the concept of voluntary jurisdiction. After establishing that the Pope can exercise his spiritual jurisdiction over the temporal affairs of infidels in some cases, Las Casas affirms that this process must be based on voluntary jurisdiction, and he refers to his Latin Apologia for clarification (Tratados, II, 1147–53).

The Latin Apologia is a detailed rebuttal of Sepúlveda’s namesake Apologia that was published in Rome in 1550. Las Casas refuted each of

8 The original legal tenet comes from Roman civil law. See Corpus Iuris Civilis (Berlin: Weidmann, 1997), D.50.17.20.
9 See Silvio Zavala, La encomienda indiana (Madrid: Centro de Estudios Históricos, 1935), 1–20, 87; see also José de la Puente Brunke, Encomienda y encomenderos en el Perú. Estudio social y político de una institución colonial (Sevilla: Diputación Provincial de Sevilla, 1992), 13–22.
10 Corpus Iuris Canonici, r 48.V.12 in VI.
11 ‘Sin is not released if what has been taken away is not restituted’ (‘Peccatum non dimittitur nisi restituatur ablatum’) (Corpus Iuris Canonici, r.4.V.12 in VI [my translation]); Las Casas, Tratados, I, 537.
Sepúlveda’s arguments, in particular those that opened the possibility of stripping Indian authorities and individuals of their dominium on the basis of the communis opinio of the canonists that sanctioned papal intervention due to a magna causa, which in Sepúlveda’s views were the native communities’ idolatry and tacit approval of human sacrifice. Las Casas addressed the canonical understanding of these religious phenomena not in the Apologia, but rather in his later Apologética historia sumaria (1560).

Las Casas waited until the 1560s to return to the subject of voluntary jurisdiction in his De Thesauris and the Tratado de las doce dudas. However, before we examine his final conclusions on jurisdiction, it is necessary to analyse the principles of natural law from which his reflection on jurisdiction began in the Principia Quaedam (1552).

The Commitment to Natural Law

Las Casas was trained as a canon lawyer and his works amply demonstrate his expertise in the field. Canon and civil lawyers alike relied on an argumentative system that sought to base lines of reasoning on natural law. In the case of the canonists, the twelfth-century jurist Gratian had introduced natural law as the main source of the entire legal edifice in the opening canon of his Decretum, and the Justinian compilation Digestum Vetus in its opening section assigns a prominent role to natural law as well. Natural law was defined in this legal compilation as a set of principles with universal reach that should shape legislation but which had no binding power themselves. The body of canon law, though, introduced an innovation in the very conception of natural law and made a moral tenet—the so-called golden rule—the quintessential expression of natural law.

What is the link between this small set of principles or the golden rule and the elaborations of the jurists? They considered their chains of legal reasoning as attempts to show that natural law was the logical foundation of

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17 Corpus Iuris Canonici, c.7, D.1; Corpus Iuris Civilis, D.1.1.
18 Brian Tierney, Rights, Laws and Infallibility in Medieval Thought (Norfolk: Variorum, 1997), II: 629–33.
legitimate laws and legal procedures. This argumentative practice relates to the specific meanings of ‘nature’ and consequently of ‘natural law’ with which these jurists were familiar. As Bartholomew Brixiensis (1491) explains in his elaboration of Johannes Teutonicus’s gloss (c.1440), ‘nature’ could be understood in different ways, and his third and fourth definitions were associated with the application of reason, whose products in legal matters must be consistent with equity and with the natural precepts that are the sources of civil law. These other meanings of ‘nature’ complemented the first one, which pertains to the natural human ability to create similia from similia, thus imitating nature in its procedures. In other words, reason is the means by which one proceeds from principles of natural law to long juridical elaborations. This tradition influenced the core of the jurists’ thought; as Bartholus states. Las Casas’ works, including his late treatises, belong to this intellectual tradition. Within this broad interpretation of natural law, Las Casas outlines the steps that the interaction between Spaniards and Indians should observe if they were to proceed in accordance with the natural order from which their authority and rights had ultimately emanated. Briefly, he insisted that the king should order that Spanish priests should only interact with natives after local lords had been consulted and had formally accepted their presence. Upon obtaining this approval, the priests should manage the first encounter peacefully without causing any disruption among the natives, and should address them humbly. When explaining the purpose of their presence, the preachers should proceed slowly to the introduction of the Christian faith, and must succeed in obtaining the natives’ voluntary adhesion to the Church. Upon their acceptance, the priests should instruct the peoples on the papal institution granted to the Spanish kings in order to obtain their consent in accepting the Castilian monarch as their own. Thus, consent is required to accept the papal institution, which cannot be imposed by any


20 Bartholomew Brixiensis, in Decretum cum glossa ordinaria et additionibus Bartholomei Brixiensis (Venezia: Andreas de Calabria, 1491), ad c.7.D1.

21 ‘Art or skill is only as good as the degree to which it imitates nature’ (‘Ars seu artificiu[m] tanto est melius qua[n]to magis imitatur natura[m]’) (Bartolus de Sassoferrato, Opera Omnia [c.1339], Ius Commune, 5 vols [Frankfurt am Main: Vico Verlag, 2007], V, 67 [my translation]). This passage in Bartolus signals the usage of some Aristotelian language by the jurists. See Joseph Canning, The Political Thought of Baldus de Ubaldis (Cambridge: Cambridge U. P., 1987), 159–69. See also Fred D. Miller Jr., Nature, Justice and Rights in Aristotle’s Politics (Oxford: Clarendon Press, 1995), 40–45.

means. The final step deserves careful consideration as it affects the full extent of Las Casas’ political design.23

The culmination of this proposal would be a pact celebrated between the two parties regarding the nature of the Spanish government of the Indians. I will return to this essential point below. In supporting his ideas, Las Casas closely paraphrases Panormitanus’ interpretation of the canon In causis, De sententia et re iudicata, which commanded that proper juridical order and equity must always be observed in implementing sentences that the Pope pronounced.24 Panormitanus identified this as an order founded on natural law, and Las Casas concurred in this opinion. In trials, this order demands that the judge—the Pope as iudex omnium—summon all parties involved. Panormitanus, in turn, had based his opinion on Baldus’ comment on the Clementine Pastoralis, De sententia et re iudicata, in which Baldus shows that self-defence is a right that originates in natural law.25 Thus, the long deductive chain finally returns to the principle of self-defence, which is certainly a tenet of natural law.26 It is no accident that in his discussion, Las Casas expresses his commitment to natural law in the terms of Panormitanus’ elaboration on trials. Las Casas’ elaboration reflects the dialectical circumstances outlined in the Tratado comprobatorio: on the basis of his universal jurisdiction in spiritual matters, the Pope had created a dignity for the Spanish monarchs, but although the monarchs had accepted this appointment, it still needed to be validated by the infidels before they were legally subjected to it. Therefore, all parties needed to participate in the process, studying it and presenting their objections for consideration. Each party could and must exercise its jurisdictional prerogatives. For the sixteenth-century reader, the prerogatives of the Pope and the king must have been clear; perhaps not equally clear were those of the Indians. This is why Las Casas undertook a demonstration that their jurisdictional prerogatives were founded on natural law and Ius gentium as well.

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23 Finally, after having obtained their free consent and after they have voluntarily accepted the papal appointment of our kings, a treaty should be made with them that includes a pact on the type of rule to be executed and on the means by which they are to support our kings with taxes and services, with both parties taking an oath to insure the preservation of covenants and pacts and similar juridical agreements’ (‘Postremo habito ipsorum consensu libero et eiusmodi papali de Regibus nostris Institutione voluntarie acceptata, tractatus cum pacto, de modo regnandi, de tributis et de servitiis Regibus nostris exhibendis, cum prestatione iuramenti utriusque partis de conventione et pactis servandis et similia’) (Las Casas, De Thesauris, 142; emphasis added [my translation]).

24 Niccolo de Tudeschis, Panormitanus, Prima pars super primo decretalium (Venezia: Nicholas Jenson, 1477), ad c.19.X.27.2.


26 Corpus Iuris Canonici, c.7.D1.
The Narrative on the Emergence of Jurisdiction

Jurisdiction, in Roman law, is the duty that a magistrate has to pronounce the law and administer justice. The laws related to jurisdiction form a complex part of the Justinian compilation that addresses themes such as the limits of jurisdiction, its capacity to be transferred, and the interrelation of authorities. With different nuances, medieval glossators understood jurisdiction as something incorporeal—quoddam incorporeale in Bartolus’ words—that is, an attribute, a legal construct of public law founded on imperium.

Las Casas’ concept of jurisdiction takes full shape in his Principia Quaedam, the treatise conceived to serve the 1552 collection much as the rubric De Regulis Iuris relates to the body of canon and civil law, that is, as a collection of essential principles to be observed in all juridical matters. The Principia Quaedam established four principles essential to any discussion of the juridical situation of the Indians, of which the first pertains to dominium, the legal power over corporeal things, and the second to jurisdiction, the power to legislate and administer justice (Tratados, II, 1234–49). Las Casas maintains that these two notions are intrinsically related. It is clear that Las Casas depicts jurisdiction as the exercise of the ruler’s office in everything that pertains to consultation (consulendi) and guidance (regendi). By framing the principle of jurisdiction in the domain of natural law and showing that it is confirmed by the Ius gentium, Las Casas makes no distinction between infidels and Christians. From this point of view, all polities are entitled to the recognition of this legal attribute in their public dimension. Las Casas’ legal foundation for both concepts comes from the so-called law Ex hoc iure which recognizes, among the different institutions

27 Corpus Iuris Civilis, D.2.1.1.
28 Bartolus, Opera Omnia, V, 657. See also Albericus de Rosate, Dictionarium Iuris tam civilis quam canonici [Venezia, 1581] (Frankfurt am Main: Vico Verlag, 2009), sub Iurisdictio est potestas. Although ‘jurisdictio’ and ‘imperium’ were closely related concepts, the difference between them is a controversial aspect in the scholarship on the Ius commune. See Antonio Fernández de Buján, Jurisdicción voluntaria en derecho romano (Madrid: Reus, 1986), 41. Also Francesco Calasso, ‘Jurisdictio nel diritto commune classico’, in Studi in Onore di Vincenzo Arangio-Ruiz nel XLV anno del suo insegnamento, ed. Mario Lauria, 4 vols (Napoli: Jovene, 1953), IV, 423–43. For the original notion of ‘imperium’ as the supreme power in Rome that was progressively associated with other meanings, see James Muldoon, ‘Extra Ecclesiam non est imperium: The Canonists and the Legitimacy of Secular Power’, Studia Gratiana, 9 (1966), 551–80.
30 ‘The dominion of a single man over other men, just as it brings about the counsel and guidance that is otherwise known as jurisdiction, belongs to natural law and Ius gentium’ (‘[D]ominiu[m] unius hominis sup[er] alios homines p[ro]ut importat officiu[m] co[n]sule[n]di [et] dirige[n]di quod alias est iurisdictio: est de iure naturali et gentium) (Las Casas, Tratados, II, 1240) (my translation).
based on *Ius gentium*, the introduction of *dominia* and kingdoms, but more importantly, it states that these *dominia* are discrete.\(^{31}\) The civilian reading of this law interprets the foundation of kingdoms in tandem with the existence of jurisdiction, without which a ruler cannot exercise his office.\(^{32}\) Las Casas’ reflection, though legal in nature, is also historical, inasmuch as he projects the list of *Ius gentium* institutions onto a timeline on the assumption that peoples adopt essentially similar legal institutions as their societies become more advanced. Thus, the need to elect a ruler becomes crucial (*Tratados*, II, 1244).\(^{33}\)

The comparative nature of the *Ius gentium* allows Las Casas to generalize to all communities the extracts of the Roman history that appear scattered throughout the *Corpus Iuris Civilis* regarding the origins of the law, and he supports this generalization with the Aristotelian tenet that nature never fails to provide what is necessary (*Tratados*, II, 1241).\(^{34}\) Thus, if a naturally formed community needs a leader in order to survive, each such community will appoint one (*Tratados*, II, 1240–44). This election endows the leader with *imperium*, which, in turn, constitutes the grounds for jurisdiction. This synthetic narrative on the origins of jurisdiction projects on history the elements of the proposed definition, and it highlights the fact that *potestas* and jurisdiction lie primarily in the hands of the people, rather than in the hands of the ruler. In fact, it is the former who bestow jurisdiction on the latter. Las Casas situates his principles strictly in the natural sphere, which, at least in matters of natural law and *Ius gentium* such as the constitution of human power, has the same or perhaps an even higher juridical status than the sacred domain. Las Casas’ position harmonizes with the medieval principle that a monarch does not receive his authority solely from a divine source, but also from an act of the community.\(^{35}\) It is on this basis that Las Casas interprets sacred history. He maintains that Israelite kings, though divinely chosen, became natural rulers only upon the approval of the people (*Tratados*, II, 1244–45). In maintaining this position, Las Casas was taking his lead from canon lawyers; James Muldoon has shown that Innocent IV, for instance, read sacred history in a similar manner.\(^{36}\)

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31 *Corpus Iuris Civilis*, D.1.1.5.
32 Baldus de Ubaldis, *Commentaria omnia* (Goldbach bei Aschaffenburg: Keip, 2004), ad D.1.1.5 sub 9.
33 Las Casas maintained that different human societies develop along similar lines. He formulates his views by quoting a similar narrative by Cicero and by using the case of Spain as an example in his *Historia de las Indias* (see *Historia de las Indias*, intro. por Lewis Hanke, ed. Agustín Millares Carlo, Biblioteca Americana. Serie Cronistas de Indias, 3 vols [México D.F.: Fondo de Cultura Económica, 1951], I, 15–16.
34 See also *Corpus Iuris Civilis*, D.1.2.2.
Las Casas argued that this narrative of the emergence of *dominium* and jurisdiction, told from the perspective of natural law and *Ius gentium*, fully applies to the political formations of the Indies. Their rulers, under whatever indigenous titles, lawfully exercise their jurisdictional attributes that are a product of their legitimate sovereignty.

Thus, as the native systems of rule in the Indies are properly founded according to the principles of natural law, Indian polities have the rights accorded by this law, including that of self-defence. Those who attack them without a valid reason become *hostes* of the community as defined in civil law; that is, they are a public enemy against which a defensive war can justly be waged. Finally, jurisdiction and *dominium* are to be assumed in a state of liberty, which implies that Amerindian rulers do not need to recognize a superior. Therefore, no European authority can unilaterally claim jurisdiction over the Indian domains. This implication raises the problem of the limits of jurisdiction.

**Jurisdiction and Its Limits**

The legitimacy of the ruler's office springs from his acting within an established jurisdiction granted by the people. Without this granting of jurisdiction, there is no legal validity to his acts. But jurisdiction is bound to a certain discrete domain, be it spiritual, temporal, or of another kind. On this basis, Las Casas examines the disputed problem of the relationships between universal and local powers, a question that had been addressed by legal thinkers such as Bartolus and Baldus. Las Casas admits the universal jurisdiction of the Church in spiritual matters, the large jurisdiction of the emperor and the King of Spain, and also the jurisdiction of the Indian polities, but recognizes that each of them has its concrete boundaries and domains. In fact, in some cases the extent of one jurisdiction is limited precisely by the existence of another jurisdiction.

Thus, the universal power of the Church reaches all believers but is severely limited towards the infidels of the Indies. The jurisdictional reach of the king is even more restricted, since it is merely territorial, and has no claim whatsoever over the newly found lands. On the contrary, the Spanish king, unless he gains legitimate power over the Indies, is obliged to respect and preserve the natural *status quo* in everything that pertains to the privileges of the individuals and communities there.

Thus, each of these entities operates within a specific jurisdictional domain. On what grounds would the Spanish king be able to assert his control over the Indies? It was precisely this question that motivated Las Casas' discussion of the emergence of jurisdiction and natural law. In the

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37 Bartolus, *Opera Omnia*, ad D.49.15.24.
38 Bartolus, *Opera Omnia*, ad D.2.1.1 sub Iurisdiction an cohaereat territorio.
course of his career he answered the question in different ways, and his answer reached its fullest development in his late treatises in the context of his discussion of voluntary jurisdiction.

The Notion of Voluntary Jurisdiction

The discovery of the New World put in contact three jurisdictional entities, each of which was legitimate in its own right and had its own limits. As part of his efforts to establish a framework for their lawful interaction, Las Casas sets forth a juridical design that would keep intact their rights and privileges. He founds his design on the Roman-law concept of voluntary jurisdiction. This juridical concept developed around the law *Omnes, De officio proconsulis* included in Justinian’s Old Digest. The norm complements the notion of contentious jurisdiction—the jurisdictional territory in which a functionary regularly exercises his office—by extending the territorial reach of his power on the basis of the willing accord of the parties involved in a juridical act. The most important trait of voluntary jurisdiction is that it is exercised *inter volentes*: it is between parties that of their own accord request the intervention of a magistrate to establish or confirm a juridical relation between them that will last and bind the parties.

Thus, in the Justinian Digest, voluntary jurisdiction emerges as a legal tool conceived to extend the jurisdictional reach of either administrative or judicial officers. Medieval jurists elaborated on this key locus of Roman law and progressively transformed it into a tool to reflect on the various procedures to bestow authority, mainly (but not exclusively) on judges, while observing the many jurisdictional restrictions that applied to those officers due to the territorial nature of their regular jurisdiction. It is from these developments that Las Casas primarily draws his views on voluntary jurisdiction. The most important characteristic that made it suitable for application to the Americas is its dissociation from local and temporal constraints and its transcendence of citizenship. Voluntary jurisdiction is not confined to a discrete territory and could always be exercised, even during holidays.

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40 *Corpus Iuris Civilis*, D.1.16.2.
41 Baldus, *Commentaria omnia*, ad D.1.7.36, D.27.9.5.12.
43 See Innocent IV, *Apparatus ad quinque decretalium libros* (Venezia: Joannes Herbold, 1481), ad c.7.X.1.30; Bartolus, *Opera Omnia*, ad D.1.16.1; Baldus, *Commentaria omnia*, ad D.1.16.2.
45 Baldus, *Commentaria omnia*, ad D.1.7.36; C.3.12.7.
transcend citizenship; it is able to bind foreigners, as long as they had expressed their consent to be subjected to a local judge in affairs in which there is no dispute between the parties involved. However, voluntary jurisdiction applied to a limited range of legal actions, which were listed in the text of the law Omnes. These are the emancipation of sons from the pater familias, slave manumissions, and adoptions. These legal actions are the ones that Las Casas primarily has in mind when he mentions the institution. He indicates an additional set of actions suggested by the etcetera that corresponds to the later expansion of the reach of voluntary jurisdiction to include many other fields, all of which have in common the cession, transmision, or creation of rights on the basis of a previous agreement and the absence of a dispute. In fact, Las Casas exploits this etcetera to make room for his conceptual enlargement of the notion.

Through the work of late medieval and early modern Spanish jurists, the notion of voluntary jurisdiction had entered the Spanish legal tradition. The Siete Partidas and the Fuero real had legislated on the extension of the jurisdiction of some functionaries beyond their territories provided that there was ‘avenencia de las partes’, or consent of the participants. In explaining these passages, Spanish jurists turned to the notion of voluntary jurisdiction, invoked the customary law Omnes, the canon Novit, and stated that the requisite of consent must always be explicit and never tacit. In Alfonso Díaz de Montalvo’s gloss (1501) and Gregorio López’s comments (1555) to the Siete Partidas, voluntary jurisdiction preserved its Roman imprint, and thus it remained confined to the regulation of the office of judges, and consent was recognized as its activating device. All these precedents inform the tradition with which Las Casas was conversant, but his political imagination introduced an unexpected turn in the scope of the concept. Las Casas breaks the customary boundaries of voluntary jurisdiction and stretches it beyond its previous conceptual limits. In Las Casas’ view, voluntary jurisdiction emerges as the one principle that can and must govern the situation in the Indies and disentangle the jurisdictional challenge posed by

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46 Baldus, Commentaria omnia, ad C.8.48.1.
47 Corpus Iuris Civilis D.1.16.2; Bartolomé de las Casas, Apología, intro., trans and ed. by Ángel Losada (Madrid: Alianza Editorial, 1988), 482. Further references in the text are to this edition.
48 Buján, Jurisdicción voluntaria, 100. See also Paolo Venturi, La giurisdizione volontaria nel diritto processuale civile internazionale (Torino: G. Giappichelli, 2000), 2.
49 El Fuero Real de España diligentemente hecho por el noble Rey Don Alfonso noueno: Glosado por el egregio doctor Alonso Díaz de Montaluo. Assimesmo por un sabio Doctor de la Universidad de Salamanca addicionado y concordado con las siete partidas y leyes del reyno: dando a cada ley la addicion que conuenia (Salamanca: Iuan Baptista de Terranoua, 1569), 28v [ley 7, Lib. 1, Tit. 7]; Alfonso IX, Las Siete Partidas (Valladolid: Diego Fernández de Córdoba, 1587), 21r [Part. 3, Tit. 4, l. 7].
50 Montalvo, El Fuero Real, 28v [ley 7, Lib. 1, Tit. 7 sub En otra tierra]; Gregorio Lopéz, Las Siete Partidas, Part. 3, Tit. 4, l. 7 sub Sí non por avenencia de las partes.
the contact of the participating entities: the Pope, the Spanish Crown, and the Indian communities.

Las Casas’ elaboration of voluntary jurisdiction is far from being a simple apication of the Roman notion. He wrestled with the concept from 1550 until he formulated his final understanding of the principle in his De Thesauris (1563).

The Apologia and the Tratado comprobatorio advanced the final proposal for the jurisdictional structure that Las Casas envisioned as the only one that could grant the Castilian monarchs legitimate power over the Indies. Reasoning on ecclesiastical principles, Las Casas proposes in his Apologia that voluntary jurisdiction was the only type of jurisdictional power that the Church could exercise over ‘purely negative’ infidels (see below) such the American Indians (Apología, 482). In order to arrive to that conclusion, Las Casas focuses first on refining a distinction among different types of infidels that he drew from Thomas de Vio Cajetan, the authoritative commentator of Aquinas’s Summa. Cajetan had distinguished between infidels that are de iure and de facto subjected to Christian rulers, those subjected de iure but not de facto, those in the opposite situation, and finally those with no subjection to a Christian authority either de iure or de facto. This last category consists of what Cajetan calls purely negative infidels; that is, infidels to whom the Christian faith has never been preached, such as the American Indians. Over this type of infidels, the Church cannot claim actual jurisdiction, be it spiritual or temporal, but there is a potential legal jurisdictional procedure that can be established due to the Church’s universal mission. In order to conceptualize in legal terms the type of intervention that the Church is allowed to practise among these infidels, Las Casas borrowed the notion of voluntary jurisdiction from Roman law and defined it for his readers. Las Casas clarifies that this jurisdiction is not exactly voluntary jurisdiction but a similar construct. This distinction signals his realization that he is dealing with canonical affairs that are of a different nature than those of the civil arena, despite the common language crafted by canon and civil lawyers that he is taking advantage of in his adaptation of the notion. With this distinction in mind, Las Casas applies the concept of

51 Thomas de Vio Cajetan, Apparatus, in Saint Thomas Aquinas, Summae Sacrae Theologiae S. Thomae Aquinatis, doctoris angelici, ad romanum exemplar diligenter recognita, ad marginem adscriptis locis, quae ab auctore citantur: cum commentariis R.D. D. Thomae de Vio Cajetani, cardinalis S. Syxti (Hildesheim: Georg Olms Verlag, 2000), ad 2.2.66.8 ad 2.

52 ‘This jurisdiction is called voluntary jurisdiction, or is considered to be similar to voluntary jurisdiction, because infidels, who have never professed our faith, should not be compelled by the Roman Pontiff to do so; they should instead be exhorted and invited peacefully and graciously’ (‘Dicitur autem voluntaria jurisdictio haec vel similis voluntariae, quoniam infideles, qui numquam fidem sunt professi, compelli non sunt a Romano Pontifice sed adhortandi et invitandi pacifice et gratiosè’) (Las Casas, Apología, 482) (my translation).

53 The shared language was a standard practice that Las Casas was familiar with from Baldus’ and Innocent IV’s texts, among others. See Gabriel Le Bras, ‘Innocent IV Romaniste. Examen de l’Apparatus’, Studia Gratiana, 11 (1967), 305–26 (p. 320).
voluntary jurisdiction to his canonical elaboration on the relations between the Church and infidels, which is in itself a contribution to canonical thinking, since in the long tradition of canonical elaboration, this solution had not been proposed. Implicit though not stated in Las Casas’ formulation, the Church-infidel relation would take the legal form of an adoption, so that through peaceful invitation the newly converted Christian becomes a voluntary adopted child of the Church. In Roman law and later legal systems, adoptions are among the main juridical acts protected by voluntary jurisdiction.

At this stage of Las Casas’ thinking, voluntary jurisdiction appears as a device drawn from civil law but mainly applied by Las Casas to the field of canon law. This transfer effected a radical change in the nature of the notion. He thus endowed voluntary jurisdiction with a spiritual dimension that it did not have before, given that it regulated the inclusion or exclusion of members of the Roman institutions of the familia or the cession of rights. This new spiritual dimension of the notion implies that the consent required to activate this canon-law voluntary jurisdiction should be obtained according to the parameters of persuasion set for the peaceful and free conversion into Christianity that Las Casas stipulates in his writings (Tratados, I, 236–43).

The Tratado comprobatorio (1552) moves voluntary jurisdiction back to the realm of civil affairs, but its arguments remain highly canonical since Las Casas, when citing the notion, refers the reader to his Apologia for further clarification (Tratados, II, 1147–51). In his late tracts, Las Casas insists in that this jurisdiction was the only one that the Pope could transfer to the Spanish kings due to the fact that it was the only one he could exercise legitimately over infidels (De Thesauris, 444–45). Thus, the Spanish Crown had to proceed according to the stipulations of voluntary jurisdiction by creating peaceful conditions for the friars to obtain the baptismal consent that would incorporate the converts to the Church’s jurisdiction and then to the Crown’s. This statement indicates how Las Casas’ proposal begins transitioning from canon to civil law. But in the 1560s, Las Casas further elaborates on voluntary jurisdiction, introducing a major break from his 1550 views pertaining to the juridical effects of baptismal consent. In his Tratado comprobatorio and Treinta proposiciones he had maintained that the potential royal jurisdiction would become an actual jurisdiction by virtue of administering baptism to the Indians.54

In this scheme, the consent given at the moment of baptism immediately carries the political consequence of entering the Crown’s jurisdiction. This is evident in the language at the end of the proposition, which seems to imply

54 ‘Todos los reyes y señores naturales, ciudades, comunidades y pueblos de aquellas Indias son obligados a reconocer a los reyes de Castilla por universales y soberanos señores y emperadores de la manera dicha, después de haber recibido de su propia y libre voluntad nuestra sancta fe y el sacro baptismo, y si antes que lo resciban no lo hacen ni quieren hacer, no pueden ser por algún juez o justicia punidos’ (Las Casas, Tratados, I, 483).
that the Indians could be punished and compelled to be subjects to the Castilian king if they refused to accept his rule as an automatic political effect of having been baptized.

In his reassessment of voluntary jurisdiction toward the end of his intellectual career, Las Casas became keenly aware of the potentially negative impact of his formulation and in the text of his De Thesauris he corrected his previous statement from his Treinta proposiciones and his Tratado comprobatorio as well.55 From the point of view of his own revisions, the later stage of Las Casas’ thinking can be interpreted as an effort to clearly separate the effects of voluntary jurisdiction on the relationships that the Church and the Spanish Crown will establish with the Indian communities. In the theoretical realm, the expression of Las Casas’ own evaluation of his earlier writings impacts the specifications needed for the requirements to obtain consent and its political implications in a way that fully situates the notion of voluntary jurisdiction back to its origins in the civil law. In this final formulation, consent in its capacity to set in motion all of the procedures of voluntary jurisdiction becomes the essential element in this reassessment of his project. But what are the juridical sources, specifications and implications of consent in Las Casas’ arguments?

Voluntary Jurisdiction and the Politics of Consent

Voluntary jurisdiction is the foundation that supports the entire edifice of Las Casas’ final proposals; he moves it back and forth from civil to canon law and back again, but in all of its forms it requires the consent of the parties involved. Canon lawyers, civil lawyers and other thinkers had reflected on this concept and its requisites many times in the history of the legal tradition. In his own reasoning about these matters, Las Casas privileges the juridical vein out of his desire to influence and participate in the lawmaking processes related to the Indies.56

Consent appears early in the Roman Corpus Iuris Civilis, particularly in laws related to contracts. Consent is required for any form of agreement;

55 ‘We want this passage to be understood in the following manner: that before and after baptism, if they do not want to recognize our kings as supreme rulers, there is no judge in the world endowed with the authority to punish them for this reason, as stated in the 19th proposition. In fact, among their natural faculties, they have the right to consent to, or dissent from, the Papal donation in any situation, that is before or after their conversion’ (‘Intelligendum tamen, hoc passum sic volumus, uidelicet, quod tam post baptismum quam ante, si nolunt Reges nostros recipere in principes supremos, nullus est iudex de mundo qui potestatem habeat illos, hac de causa, puniendi, prout determinatum reliquitur in suprema posita conclusione et eius probatione. Quoniam in sua facultate naturali habent ius consentiendi uel dissentientiendi sepe dicto institutioni papali, in utroque statu eorum, uidelicet, uel ante uel post suam conversionem’) (Las Casas, De Thesauris, 300) (my translation).

without it, there is no possible contractual obligation. As Baldus puts it, the substance of a contract consists of consent. Consent should be given with no essential defects due to fear, fraud, or force, which would invalidate and automatically revoke its effects. In sum, consent is the basis from which a ‘natural equity’ arises, as the Roman jurist Ulpianus states. In adoptions—the procedure that informs Las Casas’ original application of voluntary jurisdiction—the requirement of consent originates in two passages from the Old Digest and the Justinian Code that the jurists transformed into the main loci through which they reflected on consent. Symptomatically, the authoritative opinions that Las Casas marshals in support of his arguments point toward that section of the Roman law (Tratados, II, 747). Before writing his final tracts, Las Casas had incorporated the notion of consent into his arguments, anticipating in his handling of the notion part of his final theoretical approach but without integrating consent into the mechanism of voluntary jurisdiction. He had invoked consent in his 1552 rebuttal of Sepúlveda and also in his 1552 recommendations for the reform of the encomienda (Tratados, I, 271, 745).

Las Casas had already applied consent in his 1552 treatises, but the distinctive character of Las Casas’ final writings consists in the legal foundation that he provided to the notion. Coherently with the sources he had employed throughout his career, Las Casas built his reasoned support for consent on the basis of the *Ius commune*. In referring to Las Casas’ reliance on medieval canon law, Kenneth Pennington has keenly observed that Las Casas invoked the canon-law principle, ‘What touches all must be approved by all’. This rule is inextricably linked to the requirements of consent; its reach was subjected to many interpretations. I would like to add to Pennington’s observations my own to the effect that Las Casas takes the maxim directly from Baldus’ reflections on adoptions, and consequently he places it in the larger framework of voluntary jurisdiction. Through Baldus,
Las Casas is able to specify whose consent is required and in what situations. In an interrelated series of comments that are Las Casas’ primary source in this matter, Baldus maintains that consent from an individual is required in every legal action that results in a loss of authority for that individual.\(^{63}\) There Baldus refers to another of his comments for clarification on what to do in a situation in which many individuals lose a right or privilege. In this case, Baldus’ treatment of consent distinguishes situations in which the matter at stake pertains to many as members of a corporate body (\textit{pluribus ut collegatis}) from situations in which the matter pertains to many as private individuals (\textit{pluribus ut singulis}). In the first case, the consent of the majority, acting in representation of the whole, suffices; but the same does not hold true in the second case. Situations of this special type arise when the majority needs to decide against what has been communally agreed or when they want to legislate contrary to existing laws or impose a new constitution. In these cases, every single individual must give his consent.\(^{64}\) In support of his opinion, Baldus cites the canonical thinking of Pope Innocent IV and his commentary on the canon \textit{quum omnes}.\(^{65}\)

Las Casas’ detailed account of his sources confirms his intention to base his proposals on representation and consent on the \textit{communis opinio} of the jurists. This learned opinion was a strong support for the validity of his arguments. In fact, even Baldus’ observations were a \textit{notanter}, that is a restatement of a position commonly held by other intellectuals, and he specifically cites Pope Innocent IV.\(^{66}\) In this light, Pereña’s accusing Las Casas of plagiarizing and fraud is nonsensical; it ignores the main trait that links Las Casas’ ideas with their theoretical framework and also ignores his profound innovation in the application of consent and voluntary jurisdiction.\(^{67}\)

As his citations of his sources reveal, Las Casas draws his understanding of consent from medieval canon law, and he retains the distinction between acts of the community as a whole and acts that required individual consent. The language that Las Casas applies originally comes from the commentaries on the regulations for the political regime of medieval Italian

\(^{63}\) Baldus, \textit{Commentaria omnia}, ad D.1.7.7.
\(^{64}\) Baldus, \textit{Commentaria omnia}, ad C.5.59.5.
\(^{65}\) There the canonist, relying on the Roman law \textit{per fundum}, states that ‘\textit{Si aliquid est commune pluribus non ut collegiatis sed ut singulis non valet quod fit a pluribus nisi omnes consentient siue simul siue separatim}’ (Innocent IV, \textit{Apparatus}, ad c.6.1.X.2) (my translation).
\(^{66}\) Baldus, \textit{Commentaria omnia}, ad C.5.59.5; ad D.8.3.11.
\(^{67}\) Pereña et al., \textit{Estudio preliminar}, in Bartolomé de las Casas, \textit{De regia potestate o derecho de autodeterminación}, intro., trad. & ed. por Luciano Pereña, J. M. Pérez-Prende, Vidal Abril and Joaquín Azcárraga (Madrid: CSIC, 1969), ix –clvii (p. cxiv) Further references are to this edition.
city-states and ecclesiastical chapters, whose juridical personae had a recognized legal status. It follows that in his discussion of Indian communities Las Casas attributes to them a similar status. The *Apologética historia sumaria* (c.1560) paves the way for the full application of these regulations for consent; there Las Casas, after having charted all the political formations of the Indies, concludes that most Indian polities govern themselves with a monarchical regime. This conclusive identification of the Indian political regimes was an essential prerequisite for Las Casas’ later advocacy for the necessity of seeking the Indians’ consent. Thus, in the case of the Indies, all the individuals need to concur in consenting to the rule of the Spanish monarchs, since the establishment of a new jurisdictional structure will be legitimately accomplished only through voluntary jurisdiction, and matters as delicate as freedom and tributary burdens are at stake (*De Thesauris*, 197, 209). Clearly the consent of any legitimate ruler or corporate body in power would not suffice, given that the newly proposed jurisdictional organization entirely replaces the previous customary pattern created by natural law and *Ius gentium*. Therefore, every single individual in a given polity in the Indies must offer his consent in order for the change to Spanish rule to be made lawfully. The *Apologética historia sumaria* supports this same conclusion since it includes a long reflection on the ability of Amerindians to use their rational powers and advocates for the full political right and power of native Americans to participate in this juridical procedure and decide whether to grant their consent or not (*Apologética historia*, 1:72–140 [Caps. 23–41]).

Las Casas’ precisions about consent and the requirement that the consent of every individual in an Indian polity be sought should be seen in part as a refinement of Francisco de Vitoria’s (1538) reflections on the subject. Vitoria, in theorizing on the grounds on which Spanish monarchs could exercise legitimate rule over the Indies, had indicated the necessity of the public approval of the Indians. But Vitoria had only considered necessary the approval of the majority, maintaining that it sufficed for the appointment of rulers even against the opposition of the minority. Las Casas’ insistence on the involvement of both the majority and the dissenting minority complements Vitoria’s observations in the text of his *Relectio*, which are

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68 Pennington, ‘Bartolomé de las Casas,’ 157–58.

69 ‘En todas estas Indias universalmente, si no fue en muy pocas provincias o cuasi ningunas, las cuales nombraremos a su tiempo si Dios quisiere, no tuvieron otra especie de principado y gobernación sino, de las tres susodichas [monarquía, aristocracia o república], la primera, conviene a saber, la de uno que es rey o reino, la cual es la más natural y entre todas la más excelente y semejante a la que el padre rige y goberna a sus hijos’ (Las Casas, *Apologética historia*, 2:211 [Cap. 197]).

not thoroughly conversant with the juridical tradition on consent that Las Casas made use of.

Thus, the consent of all individuals acting in the interest of the common good becomes the unique legal tool able to grant legitimate rule in the Indies to the Spanish monarchs, but this consent has yet to be given. Thus the history related in the Brevísima gains a new legal dimension. Las Casas originally conceived the tract to show that Spanish military incursions have no characteristics of a just war; but following his elaboration on consent, the text makes it clear that the proper conditions for the granting of free consent never took place in the Indies. On the contrary, the entry of the Spanish into legitimate Indian domains, characterized by violence and the spread of fear, count as major impediments for the granting of consent, and therefore they invalidate any possible claim that the Indians had accepted the rule of the Crown. In addition, the strict separation between the civil and canonical implications of voluntary jurisdiction invalidates the political effect of the papal Bull of Donation: the papal decree does not grant the monarch a *Ius in re* over the Indies, but only a *Ius ad rem*. In other words, there is no authority in the Pope to make the Spanish monarchs natural rulers. Therefore, consent emerges as the only element capable of legally grounding the situation, and the power of granting or withholding it lies exclusively in the hands of the peoples of the Indies. As we will see, Las Casas designed this juridical framework to be put to work in a very specific situation, which leads us to pose a final question: What is the context of this theoretical proposal?

**The Intellectual Dialogue: Consent and Its Representation in the Americas**

There are three major interconnected consequences of Las Casas’ effort to introduce voluntary jurisdiction as the only legitimate formula for establishing power relationships and juridical status in the Indies. The first impacts the core of the polemics of possession related to the legitimacy of Spanish power in the New World; the second relates to the long discussion on the perpetuity of the *encomienda* system which predates the beginning of Las Casas’ intellectual career; and the third relates to how the restoration of consent challenges the argumentative implications of some historical versions of the conquest and, at the same time, opens new venues for interpretations of and writings about the same events.

Since the king began to convene ‘juntas’ of Spanish intellectuals to consult on the status of his newly acquired domains (1512–13), the polemics of possession for the Indies had relied on the *Ius belli* to support the Spanish Crown’s claims over the Americas. The *Ius belli* criteria inform the core of

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arguments from the early writings of Matías de Paz (1512) and Palacios Rubios (c.1512–14) to Sepúlveda’s tracts (1548–50) and the various opinions that favoured the interests of the encomenderos in their pursuit to obtain their encomiendas in perpetuity from the Crown for their services in a just war of conquest. In all of these cases, the central element was the search for a just pretext for the war; otherwise the system of encomiendas would be imperilled. For instance, Palacios Rubios, arguing on the basis of the papal donation of 1493, accepted that Spaniards could legitimately wage war against the Indians if the natives refused to accept the authority of the Spanish king when they were informed that the pope had universal dominium over the world and he had entrusted the Indies to the Spanish monarch. By subscribing to the theory of the universal power of the pope, Palacios Rubios sought to strengthen the power of the king. The papal donation occupies the central place in his theory. Years later in 1550, Juan Ginés de Sepúlveda also intervened in the polemics and sought to justify the rule of the Spanish Crown by means of the theory of the just war. Sepúlveda legitimized the war against the Indians by stating that it was not intended to force conversions but rather to eliminate obstacles that could interfere with the efforts of the preachers by eradicating idolatry and crimes against natural law. This claim was central to the position of the encomenderos who from Mexico to Peru actively sought perpetuity for their holdings, arguing that they deserved perpetuity for their services to the Crown in the conquest. They believed that they had fought in a just war in which they had legally and rightly participated.

Las Casas addressed this position in his 1552 publication, which demolished the arguments that the conquest had been a just war. Many passages in his treatises, in particular the Brevísima relación de la destrucción de las Indias, demonstrate that there was no just cause for a war against the Indians. On the contrary, natural law supports the Indians’ right to self-defence, and thus it was they who had the right to attack the Spaniards. Las Casas also sought to circumscribe the presumptive reach of the papal Bull of Donation, arguing in many books that the Pope did not have the jurisdiction to impose a ruler on the infidels. But Las Casas did not limit
his intellectual efforts to dismantling the grounds for martial intervention; he replaced the just war model entirely with a new one based on voluntary jurisdiction and consent. This intellectual achievement is his major contribution to these polemics and it informed both his proposals for new legislation and his interpretation of the historical process of the conquest.

Las Casas applied his arguments on voluntary jurisdiction to the discussion of the perpetuity of the *encomiendas*. According to his arguments, the standing of the Spanish kings in the New World depended on the consensual approval not merely of native lords, but of all of the Indians. Every individual must exercise his share of political power. If obtained, the consent granted to the Spanish Crown would not imply a *carte blanche* for the Crown or the cession of all Indian rights. Instead, new consultation would be required for any measure that would involve the taking away of privileges from people or the imposition of servitude on them or easements on their possessions. Therefore, consent emerges as a very limiting factor that would prevent the monarch from exercising more power than that which the community had entrusted to him. On these grounds, the possibility that the king might sell his jurisdiction to a third party, in this case the *encomenderos*, without the consent of his people, is discarded (*De regia potestate*, 152). For such a sensitive argument based on the construct of voluntary jurisdiction, Las Casas again marshals laws and juridical opinions that ban the king from selling or otherwise disposing of his jurisdiction; it would be a crime of *laesa maiestatis* inflicted by the sovereign himself against his jurisdiction, an asset that does not belong to him personally but to the Crown. The legal opinions that Las Casas quotes confirm the necessity of the vassals’ consent for the lord to sell or transfer fiefdoms in the civil realm, and the chapter’s consent for the bishop to dispose of ecclesiastical property in canonical legislation. In mounting his case, Las Casas made even heavier use that usual of the *communis opinio* of the jurists, doubling the number of authorities that the *encomenderos* would quote in their petitions. More importantly, Las Casas places great emphasis on the public aspects of the issue that were purposefully obscured in the mass of opinions put forward by the *encomenderos* when attempting to buy perpetuity from the Crown with *merum* and *mixtum imperium* included. The arguments of the *encomenderos*


76 The *encomenderos* often quoted juridical opinions in their petitions in favour of perpetuity. They not only cited the many contemporary advisers who wrote to the king in support of their cause such as Juan de Matienzo in his 1562 report; they also quoted favourable opinions from Domingo de Soto and Francisco de Vitoria, although without precise bibliographic citations. For Matienzo, see *Relación de lo que en suma contienen algunos [...] de cartas scriptas a su magestad por diversas personas en lo que toca a la materia de perpetuidad* (c.1564). Vitoria and Soto are mentioned in a 1562 opinion by licenciado Ramírez de Cartagena (AGI, Indiferente General, legajo 1530, 200, 276).
represented a turn towards the strength of the private sphere, thus weakening the Crown and creating a juridical absurdity. Las Casas’ argument revolves around the fundamental premise that jurisdiction as an asset of the Crown belongs to the public sphere and cannot be sold or transferred to private hands since it is exercised on free vassals (De regia potestate, 104). But above all, Las Casas’ theory on consent and the necessary involvement of every individual fully enables the political participation of the natives. Las Casas argued using the juridical language he had inherited from the Middle Ages, and expanded and adapted this legacy to the new historical context and left it ready to be used by individuals and communities in claiming the restitution of their rights. The case of the Jalisco cacique Francisco Tenametztle (1547) exemplifies the practical expression of these efforts. Viceroy Antonio de Mendoza incarcerated Tenametztle on charges of rebellion and had him deported to Spain to be sentenced. In seeking justice before the Council of the Indies, the Mexican lord sustained his defence with the language that Las Casas was crafting. Tenametztle argued that his flight from his town and apparent rebellion against Spanish authority was an act of self-defence in reaction to the unjust war waged on him by Nuño de Guzmán. He demanded restitution of his seigniorial status on these grounds, expressed his consent to recognize the authority of the Spanish kings, and promised to cooperate in peacefully attracting Indian communities to the faith, as long as these peoples remained under the direct jurisdiction of the Crown and were never subjected to the encomienda.

Las Casas’ juridical arguments regarding consent coincide with his effort to persuade the native lords in Mexico and Peru to make a counter-offer to the king and buy their freedom. The native lords signed a power of attorney in Lima in January, 1562, appointing Las Casas, Domingo de Santo Tomás, and Alonso Méndez as their personal representatives before the royal and papal courts to advocate for their rights. Through these three Dominican
legates, the caciques presented a counter-offer that would pay more than the encomenderos, provided that the sum that they understood the encomenderos were paying was accurate. In light of the theories defended in De Thesauris, Tratado de las doce dudas and De regia potestate, the importance of this power of attorney lies in its function as a pact that the people offered voluntarily to their ruler in order to actively participate in their own government. The Crown thoroughly evaluated this counter-offer that weighed against the others and certainly influenced Philip II in his final decision to not grant perpetuity. This is the type of practical effort previewed in Las Casas’ political theory, which also impacted on legislation.

The third major effect of Las Casas’ writings on consent and voluntary jurisdiction was the change they caused in the interpretations of and indeed in the very act of composing historical narratives of the conquest. One example of this can be seen in the interpretation of events described in Hernán Cortés’ second letter. According to that conquistador, the Aztec lord Moctezuma recognized his own (Moctezuma’s) foreign status and his not being a natural lord of Mexico. Upon Cortés’ persuasive arguments regarding the supreme power of Charles V, Moctezuma willingly transferred his rights over his Mexican possessions to the Spanish emperor. In addition, Moctezuma summoned the local rulers subject to his former jurisdiction and persuaded them to offer to Charles the same obedience they had been giving him (Moctezuma) up to that moment. Consent is very present at the core of the episode: Cortés represents Moctezuma and the native lords giving their consent to Spanish dominion. But there is no mention of any consultation of or consent being given by the people. Cortés published his letter some forty years before Las Casas conceived the final stage of his thoughts on voluntary jurisdiction, and the intellectual dialogue that Las Casas reshaped resulted in a later interpretation of the 1524 historical

80 See Marvin Goldwert, The Struggle for the Perpetuity of Encomiendas in Viceregal Peru, 1550–1600’ (thesis presented to the Faculty of the Graduate School of the University of Texas) (Austin: Univ. of Texas, 1958), 70–83.
82 Hernán Cortés, Carta de relación (Zaragoza: George Coci Alemán, 1523), 10v.
83 ‘Y después de algo sossegadas sus lágrimas respondieron que ellos lo tenían por su señor y hauían prometido de hazer todo lo que les mandasse y que por esto y por la razón que para ello les dauá que eran muy contentos de lo hazer. E que desde entonces para siempre ellos se daúan por vassallos de vra Alteza. Y desde allí todos juntos y cada uno por sí prometían y prometieron de hazer y cumplir todo aquello que con el real nombre de vra Majestad les fuesse mandado como buenos y leales vassallos lo deuen hazer y de acodir con todos los tributos y servuiços que antes al dicho Moteeçuma hazían y eran obligados y con todo lo demas que les fuesse mandado en nombre de vra Alteza: lo qual todo pasó ante un escribano público y lo assentó por auto en forma’ (Cortés, Carta de relación, 13v–14r).
narrative in which this transfer of power is argued to be illegitimate due to the absence of popular consent.

Let me elaborate on this. In Cortés’ version, Moctezuma dies soon after the transfer of power when he is hit by three stones that some Indians unintentionally threw at him while he attempted to dissuade his vassals from extending the siege against the occupied city of Tenochtitlán. In about 1575, when Alonso de la Veracruz was annotating Las Casas’ writings on voluntary jurisdiction in order to incorporate them into the final version of his academic relectio titled De dominio infidelium, he found the passages about the right of the people to resist their king and wrote in a marginal note to Las Casas’s text: ‘very remarkable that if a king or another lord should want to submit to another king, the people could contradict him and protest, as it happened in Mexico to king Moctezuma and because of which he was stoned publicly by his people’.84 There is a conceptual distance that mediates between Cortés’ original narrative and Veracruz’s 1575 gloss. Veracruz no longer read the passage with the eyes of Cortés; instead, he abandoned the interpretation of the episode as an accident and considered that it was an act of popular resistance against a king who had lost his people’s trust by exceeding the legitimate rights of his office. Veracruz’s interpretation was made possible by the placement of voluntary jurisdiction and consent at the center of the debate about political power in the Americas, which was one of the most important accomplishments of Las Casas’ intellectual career.

But his contribution did not remain confined to the marginal notes of manuscripts. Although his most mature and carefully reasoned defence of voluntary jurisdiction remained unpublished in Las Casas’ manuscripts, his influence spread through various channels, and intellectuals incorporated the notion into their works in different manners and with different reaches. Using the earlier version of Las Casas’ arguments included in the Tratado comprobatorio, Garcilaso Inca de la Vega wrote his Comentarios reales (1609) representing the Inca expansion from Cuzco to Quito and Chile as a systematic, often repeated act of acquisition of voluntary jurisdiction from the peoples incorporated into their empire.85 Using as sources manuscript copies of the De Thesauris or the Tratado de las doce dudas, Alonso de la Veracruz discussed voluntary jurisdiction and its implications in his final version of the lessons he had delivered at the newly founded University of Mexico in 1555, and in 1615 Felipe Guamán Poma de Ayala was able to argue in support of his rights by incorporating the principles of the Tratado de las doce dudas into his Nueva Corónica, where he represented different

84 ‘Valde nota[n]dum quo et si rex vel alius dominus vellet se subicere alteri rege, populus posset contradicere et reclamare sicut in Mexico contigit de Moteçuma rege et ob id a suis cor[am] lapidibus interfactus’ (Veracruz, in Las Casas, De Thesauris; manuscript held at the John Carter Brown Library [c.1565–1575], Codex –Sp.5, 47v [§ 12]).

instances of consent. Beyond these cases, the principles of consent and voluntary jurisdiction as formulated by Las Casas shaped the language in which the justice of the conquest of Philippines was discussed. In his writings on this subject, Bishop Domingo de Salazar dismissed the pretext of just war and emphasized the importance of the consent of the Filipino communities. Further, Las Casas’ principle of consent entered legislation, for it appears in the ordinances that Philip II issued in 1573, which insisted that Indian communities had to be persuaded rather than compelled to enter into agreements with the Crown. Although the legislation did not fully embrace Las Casas’ views, his proposals were certainly considered and influenced the framing of the ordinance.

Thus the principles of voluntary jurisdiction and consent impacted on debates regarding the Indies in different ways. Through Las Casas, consent and voluntary jurisdiction entered the constellation of criteria with which early modern intellectuals conceptualized the organization of government in the Indies, and the relationship between the Church, the Spanish Crown and Indian communities. His final political proposal based on these concepts of voluntary jurisdiction and consent was the radical extreme opposite to the theory of the just war that had dominated the debate on the Indies before Las Casas’ intellectual contribution. In this light, for modern scholars, the legacy of Las Casas points clearly to the need to include consent and voluntary jurisdiction among the categories with which texts from the early colonial period are read and discussed. Las Casas’ innovation consisted of restoring this Roman notion, installing it in the realm of canon law, endowing it with a spiritual dimension, and finally bringing it back to the realm of civil law in order to stipulate the need for comprehensive representation of the natives to decide political matters in the Indies. Voluntary jurisdiction and consent are the focus of Las Casas’ final writings and also the theoretical ground that enables the political participation of the natives. Many colonial thinkers of the following generations took this lead and adopted the proposal in various ways in their books.

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87 Lewis Hanke, *Cuerpo de documentos del siglo XVI sobre los derechos de España en las Indias y las Filipinas* (México D.F.: Fondo de Cultura Económica, 1943), 130.
88 Colección de documentos inéditos relativos al descubrimiento, conquista y organización de las antiguas posesiones españolas de América y Oceanía sacados de los archivos del reino y muy especialmente del de Indias. Tomo XVI (Madrid: Imprenta del Hospicio, 1871), 186.