INTRODUCTION: Canon Law and its Practice in Colonial Latin America

The three papers included here, written by Ana de Zaballa, Pilar Latasa, and Gabriela Ramos, constitute a highly professional effort within the study of canon law in colonial Spanish America. These papers allow us to perceive how closely linked pastoral concerns, legal imagination, and judicial practices were during that period. To fully appreciate the importance of these four investigations, we must first briefly lay out the current state of academic studies in canon law in “las Indias Occidentales,” what today is generally called viceregal or colonial Spanish America.

The term ‘canon law’ refers to the proprietary and distinctive body of laws of the Roman Catholic and Apostolic Church, developed over the historical moments of the past two thousand years and across a panoply of regions. One of the most significant and intense developments of canon law occurred in viceregal Spanish America, where its trajectory was closely related to the establishment of the Church and reflected all of the region’s cultural density and institutional importance. Naturally, the body of canon law as exercised in Europe was not mechanically adopted in the New World. Instead, it underwent a process of adaptation that led to its distinctive features. That is, a complex process took place, starting with the reception of a religiously inspired and oriented legal system, going through a period of adaptation and modification, and ending with the creation of a specific body of laws for Spanish America. This development was enriched by both the ancient tradition and the social realities under which canon law was exercised, and aimed at the establishment of order and service.

Law (Ius) in colonial Spanish America was marked by plurality, as evident in three main aspects. First, there was the rule of four legal forms: statutory, customary, judge-made (this was case law, as known in the Middle Ages)
and doctrinal (scholarly commentary). Second, it was marked by the creation and implementation of this legal order by a wide variety of institutions and corporations, from the Spanish crown to the smallest Spanish, Indian, or Negro municipality, and from the powerful “Consulado” to the simplest confraternity in the Andes or on the central Mexican plateau. Third was the strong distinction between the law for temporal authority and the law for spiritual authority—canon law—which is the subject of our studies. Thus, the plurality of expressions and experiences of canon law posed no threat to the unity and coherence of jurisprudence, which derived from both the Ius Commune and the supreme legal authority of the crown.1

Overall, historical research into canon law, from the very first systematic studies conducted in the past century to the present, has presented significant achievements.2 The truth, however, is that despite all of these studies, we know very little about canon law as it was exercised in colonial Spanish America. Previous legal studies have focused on temporal legal authority and municipal law, but the systematic study of both canon and corporate law has been scant, or, rather, their systematic study started only a few years ago. Thus, we can state that a significant body of Spanish American law in those areas has not been researched.

It is worth noting that works dealing with colonial law only rarely focus on canon law. While some scholars sidestep the subject, others simply disregard it. They usually content themselves with mentioning in a rather unspecific way the Royal Patronage of the Indies, which hardly covers the whole of this topic. More thorough studies mention the provincial councils of the Catholic Church. To an uninformed reader—like most people resorting to these works for the first time—they give the false impression that canonical legal experience was a marginal one in New Spain and Spanish America in general.3 This misunderstanding becomes a matter of concern when we realize that in New Spain canon law was neither secondary nor parallel to the power of temporal


2. Since the pioneering works of Silvio Zavala, Rafael Altranira, Esquivel Obregón, and Ots Capdequi, there have been significant advances. Today, we have come to read and hear the names of Tau Anzósategui, Antonio Muro Orejón, José Luis Soberanes, Antonio Dougnac, Javier Barrientos, Andrés Lira, Faustino Martínez, and Paulino Castañeda, to highlight a few.

3. Without prejudice to the great quality of their authors’ work, we list here some examples of this approach: Antonio Dougnac, Historia del derecho indígena (Mexico: Instituto de Investigaciones Jurídicas, UNAM, 1994); M. del Refugio González, El derecho indígena y el derecho provincial novohispano: marco historiográfico y conceptual (Mexico: UNAM, 1995); Francisco Tomás y Valiente, Manual de historia del derecho español (Madrid: Tecnos, 2003); Guillermo Margadant, Introducción al derecho indígena y novohispano (Mexico: El Colegio de México, 2000).
law. Both bodies of law were of Roman and Catholic heritage, and they had been interacting with and influencing each other since the dawn of the Middle Ages in Europe, adapting to various cultural and political realities just as they later did in the New World.4

The most important research on colonial canon law has focused on the large provincial councils of the Catholic Church in Mexico and Lima. In regard to the former, we should highlight the names of Fortino Hipólito Vera, who worked in the late nineteenth century, and José Llaguno and Stafford Poole, both followers of the Jesuit Ernest Burrus who in the mid-twentieth century started academic research on the Third Council of Mexico (1585).5 And foremost, we should record the name of Alberto Carrillo, who in recent years has devoted himself to the study of this council and its impact on the establishment of New Spain’s society.6

South America constitutes quite an interesting case, for council tradition was not only more widespread there than in other parts of New Spain but also filtered down to local churches by means of numerous diocesan synods, which were almost unknown elsewhere in New Spain. (One exception was a synod meeting that took place at the Merida bishopric in the first third of the eighteenth century.) This rich tradition in South America has been studied in, for example, the pioneering work of Rubén Vargas Ugarte in the mid-twentieth century, and in the studies developed by Nelson Dellafererra and Thomas Duve.7

4. It should be noted that the great body of medieval Spanish legal tradition arose from the undeniable relationship between canonical legal thought, whatever its stage of development, and non-canonical legal thought. For a salient interaction found in Visigoth law, we can point to the seventh-century Liber iudiciorum, which emerged from the Eighth Council of Toledo, or to the thirteenth-century Partidas of Alfonso X, among whose sources one can find some of canonical nature. We also find instances of this lawmaking path in the statutory bodies of the Spanish monarchy, on both the American continents and the European peninsula. It is worth mentioning, following the logic of this analysis, the recent work of José Carlos Hesles: El vuelo de Astrea. Configuración jurídico-política de la Monarquía Católica (Mexico: Porrúa, UNAM, Facultad de Derecho, 2005).

5. Fortino Hipólito Vera, Colección de documentos eclesiásticos de México, o sea antigua y moderna legislación de la Iglesia (Ameacemca, Estado de México: Colegio Católico J. Siguienza, 1887); Vera, Apunamientos históricos de los concilios provinciales mexicanos y privilegios de América. Estudios previos al Primer Concilio Provincial de Antequera (Mexico: Tipografía Guadalupana de Reyes Velasco, 1893); Stafford Poole, The Indian Problem in the Third Provincial Council of Mexico (St. Louis: St. Louis University Press, 1961); José Llaguno, La personalidad jurídica del indio y el III Concilio Provincial Mexicano (Mexico: Porrúa, 1963).


Of course we cannot reduce canon law and its exercise to the work of provincial councils and diocesan synods, as important as those were. Although there have been advances on some fronts, the image of canon law history continues to be impressionistic to a large extent. Among the essential areas where study is needed are the developmental stages of the law; its provincial, diocesan, and parochial reach; and its relationship with universal Church law and the rich Spanish tradition, during both the High and Low Middle Ages. It is indispensable for our understanding to identify how canon law contributed to the formation of Spanish America’s legal tradition and to investigate its influence on New Spain’s social and legal institutions, as well as its unquestionable impact in the realms of ethics and aesthetics, so intertwined in that culture.

Likewise, we have just recently begun peeking into the judicial institutions in charge of enforcing canon law. Here I am referring not to the Holy Office, which is probably the most studied court from those times, but to the ordinary ecclesiastical courts connected to both bishoprics and archbishoprics that affected people’s daily lives quite directly. I also refer to tribunals pertaining to religious orders and congregations, including the sacrament of confession and episcopal visitations. However, it would be unfair to claim that there is a complete lack of research, since we do have some works we might consider as first steps.

We should also mention that scholars have recently undertaken studies of the relationships among the Indians, canon law, and the various institutions charged with exercising law in New Spain and, more broadly, in viceregal Spanish America. Efforts have focused on three main areas. First, there is the study of...
the relationship between Indians and canon law. Second, there is examination of 
the debates on “idolatry” issues at the various tribunals (ecclesiastical, tribunals 
held at the time of episcopal visitations, and civil). A third important area is the 
relationship of Indians with ordinary ecclesiastical courts in matters beyond 
faith conflicts.¹⁰

We must particularly insist on the need to study the close and varied 
communication between canon law and moral theology, as clearly indicated 
by the existence of a shared doctrine and the solid adherence of both to the 
the case-study and casuistic methods in both education and research. Each has 
several pastoral tools to be considered as well.¹¹ It would be good practice 
to look at the experience gained in related fields and to follow the examples set 
there by the best of the existing studies of the complex relationships between 
legal, theological, political, and pastoral matters. I refer here to the works 
developed by Harold Berman, James Whitman, Gillian Evans, James Brundage, 
and Kenneth Pennington, among worthy others, on Medieval Law history.¹²

In short, the appreciation of canon law in its unique and plural manifestations, 
as both emblem and vehicle of a specific culture, is still pending. A thorough 
understanding of this body of law would surely surprise us for its capacity, 
integrity, and comprehensiveness: we would find that it sought to treat of 
everything from small everyday troubles to the largest problems of an age. Such 
a study leads us to appreciate a basic fact of legal study: law is culture—and it 
creates culture.

FOCUS ON CANON LAW IN MARRIAGE AND PASTORAL 
ORIENTATION

¹⁰ Ana de Zaballa Beascochea, Nuevas perspectivas del castigo de la heterodoxia indígena en la Nueva España, 
siglos XVI–XVII (Vitoria: Universidad del País Vasco, 2005); Zaballa, Índios, derecho canónico y justicia eclesiástica 
en la América Virreinal (Madrid, Frankfurt: Iberoamericana, Vervuert, 2012); Jorge Traslosheros and Ana de 
Zaballa, coords., Los indios ante los foros de justicia religiosa en la Hispanoamérica Virreinal (Mexico: Instituto de 
Investigaciones Históricas, UNAM, 2010).

¹¹ Of course, the relationship between law and moral theology is not limited to canonical matters, but includes 
the entire breadth of the legal world. All problems in colonial Spanish American society had legal, theological, and 
moral implications. For illustration, we can mention the works cited above by Carrillo, Llaguno, and Poole, as well 
as those of Benedetta Albani, "Sposarsi nel Nuovo Mondo. Politica, dottrina e pratiche della concessione di dispense 
matrimoniali tra la Nuova Spagna e la Santa Sede, 1585–1670" (PhD diss.: Università degli Studi di Roma Tor Vergata, 
2009); Andrés Lira, “La dimensión jurídica de la conciencia: pecadores y pecados en tres confesionarios de la Nueva 

¹² Harold Berman, La formación de la tradición jurídica de Occidente (Mexico: Fondo de Cultura Económica, 
2001); James Whitman, The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial (London: Yale 
University Press, 2007); Gillian R. Evans, Law and Theology in the Middle Ages (London: Routledge, 2001); James 
Brundage, La ley, el sexo y la sociedad cristiana en la Europa medieval (Mexico: Fondo de Cultura Económica, 2000); 
The three papers presented in this issue address the need for research that I have described above. They consider the development of canonical doctrine in relation to marriage, which reflects some of its most critical areas: the basic social institution of marriage, its close relation with pastoral orientations for Indians and Spaniards in New Spain and Peru, and its role in providing opportunities for agreement and negotiation between Indians and the Church in the Andes on the occasion of episcopal visitations. In short, the studies address canon law and its practice: the ways in which it connects to everyday life, pastoral orientations, canonical discernment, and institutions dispensing justice. Along the way, the authors demonstrate the central role of canon law in creating New World culture.

Ana de Zaballa’s paper, “Promises and Deceits: Marriage among Indians in New Spain in the Seventeenth and Eighteenth Centuries,” deals with this topic in quite an original way. Zaballa distances herself from the foundational evangelization of the sixteenth century, imbued as she finds it with the “disappointment of missionaries, whose providential dreams had led them to believe they could create a new and reformed Christianity in New Spain, and takes us into the less dreamy reality of the seventeenth and eighteenth centuries.

Zaballa’s research proposes an original method, more appropriate for exploring the reality of canon law creation and implementation than many others. In lieu of approaching the process as it came down from council decrees to ordinary people, she follows that path in reverse. She uses 28 pastoral writings printed during those two centuries, wherein parish priests from both regular and secular clergy in the Ecclesiastical Province of Mexico portrayed their experiences. These texts highlight the different approaches and personalities of the secular and the regular clergy, as well as their common concerns. Her paper focuses on Indian marriage and the various appreciations, contributions, and advice that parish priests gave to their contemporaries and to future colleagues. As the priests did so, they were acting within the canonical regulations that granted Indians some privileges and limited others. In summary, Zaballa skillfully presents in detail the pastoral concerns as they were dealt with by judges and canon lawyers and grew to form a rich doctrine, focused on addressing the concrete needs of the parish people.

At the same time, Zaballa poses, through the power of her findings, a unique challenge to those who abuse the Indian resistance argument by seeing every local confrontation as the outcome of attempts to civilize them. Her research shows that many conflicts were handled in much more ordinary, familiar, and less agitated ways. A case in point is the efforts of Indians and their parish priests to comply with Church law and to solve their disagreements about one
of the most important institutions of the social order—marriage. Although it is true that basic rules were applicable to all believers, it is undeniable that Indians worked on their own behalf in trying to enforce their unique privileges. As Zaballa rightly points out, “The Indians themselves did not particularly press for respect for local habits, but, as is widely known, the notion of doing so was rather a Tridentine doctrine supported by Mexican councils and reiterated in guides to the sacraments.” Pastoral practice informed the canon law configuration of marriage, generating a legal dynamic that, in turn, served that very pastoral practice. Far from being passive spectators, Indians engaged actively in this process.

Pilar Latasa looks southward to offer another look at canon law through the lens of marriage: “‘If they remained as mere words’: Trent, Marriage, and Freedom in the Viceroyalty of Peru, Sixteenth to Eighteenth Centuries.” Her research brings attention to the three major events of the millennial synod tradition of the Catholic Church, through which were constituted some of the most critical elements in canon law, as reflected in its doctrines concerning marriage. Latasa interconnects the Council of Trent, Peru’s provincial councils, and the numerous diocesan synods that shaped the unique nature of the Peruvian Church among its counterparts elsewhere in New Spain. The array of documents she has consulted is remarkable, and includes the pastoral tools and resolutions developed by ordinary ecclesiastical courts. This is profound and complex research.

The core of Latasa’s paper is the Church’s continuous advocacy of free choice in marriage. Marriage represented a sacrament and an unbreakable civil contract—thus it could not be nullified, forced, or disregarded. According to canonical regulations, marriage had to take place in public, with no impediments, before a priest and witnesses. It had to be preceded by a series of public inquiries, and could be celebrated only after obtaining the uncoerced consent of both parties, even if that meant confronting parental or other traditional authority.

Latasa’s paper deals with the dilemma of freedom in three dimensions of concern to the councils and synods: the exercise of force or coercion to prevent a marriage, the integrity and unity of the matrimonial home (that is, the couple’s freedom to live in marriage), and the duties and responsibilities that marriage entailed. As such, it might well become a model for research not only on marriage but on any other area of society in which canon law is put into play. Like Zaballa, Latasa is careful to highlight the development of a diverse and rich canonical tradition that serves pastoral projects. To us as historians this path becomes a research method in itself.
In “Pastoral Visitations: Spaces of Negotiation in Andean Indigenous Parishes,” Gabriela Ramos questions the deeply rooted prejudices that have been at play concerning the relationship between Indians and the Catholic Church. Her questions demonstrate that she is inspired to employ sound historiographical methods; systematic, precise and imaginative research; and deft handling of source material. Ramos reviews both broadly and in detail the pastoral visitations that took place throughout the seventeenth century, particularly those conducted by the archbishops Bartolomé Lobo Guerrero, Hernando Arias de Ugarte, and Pedro de Villagómez. To study the transcendent important of this pastoral tool—considered also an arm of justice—Ramos not only examines the effect of these visitations on canon law in Peru, but also compares them to visitations in the Spanish, French, and Italian worlds. She demonstrates clearly that they were a pastoral and judicial resource of the utmost importance. Visitations were encouraged by the Council of Trent and served as a powerful trigger of ecclesiastical reform on both sides of the Atlantic.

Ramos’s broad research ranges from the great decisions of pastoral strategy to the most concrete aspects of doctrine in daily life. She deals with the tabernacle where the Blessed Sacrament is kept, the most valued space within the Catholic Church—the place whose existence reflects the dignity of the temple, its guards, and the community. Ramos ends with a thought that seems highly provocative:

“The inhabitants of the Andes encountered in the pastoral visitation a space that did not exist strictly for the purpose of silencing their voices—through it they learned and accepted the forms and channels of authority that the Church offered. Perhaps more important still: within the context of the pastoral visitation, they did whatever was within their grasp to employ what they had learned to negotiate their own inclusion and visibility.”

CULTURE, CANON LAW, AND CHURCH HEGEMONY

As stated a good while ago by Harold Berman and Christopher Dawson, the foundation and development of Western civilization cannot be understood separately from the legal and religious matrix in which those events occurred, insofar as they are closely linked to canon law and its exercise by the Roman Catholic and Apostolic Church. In fact, they are the two metaphors that bring it support, sense, and meaning. Likewise, we can say that the
shaping and development of viceregal Spanish America as part of Western culture— with its Spanish, Indian, and African particularities—was closely linked to the establishment of the Catholic Church and its cultural and institutional impact. As to that Church, one of its most important expressions was the shaping and development of a distinctively colonial canon law in which pastoral concerns and legal imagination, enriched by a millennial tradition, intertwined in the most diverse ways. The three papers included here present important insights into that great historical statement.

I want to close by expressing my grateful acknowledgment of the leadership of Ana de Zaballa, Thomas Duve and Alberto Carrillo, who have encouraged the study of Spanish America’s canon law with boldness, methodological strictness, and the gathering of a wide and judiciously selected array of sources. The initiative and generosity of each has inspired researchers on both sides of the Atlantic who have devoted themselves to investigating the shaping and development of canon law and its justice courts, from the remotest places in Spanish America to the specialized bodies of the Holy See. The studies I have just introduced constitute one of the many outcomes of this enriching and nourishing exchange.

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