

Legal and Cultural Authority in the New World: A postoccidentalist counter history

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Refereed paper delivered at
PASSAGES: law, aesthetics, politics
13–14 July 2006 Melbourne Australia

Available online via www.law.unimelb.edu.au/cmcl

Abstract

Latin American writers, such as Eduardo Galeano and Carlos Fuentes, have acknowledged that the continuing neocolonial subservience of the region stems from the initial contact at the point of Discovery and Conquest. The roles established at that point have ever since been supported by the discourse of Occidental history. However, the postmodern condition and its effects of Globalization and Tribalism permit us the cultural space to reappropriate history, and poststructuralist theoretical innovations, such as Michel Foucault's genealogical approach, give us a method for doing this. The present study attempts this, though on a modest scale. Through genealogical historical reconstruction it presents a counter-history that uses as its focal point the circumstances upon which the very claim to authority over the discovered lands was based. Rather than offering 'new' facts, the counter-history offers a deconstruction: a reorganisation of existing sources with a different emphasis. Denied are the implications of previous historians, and inherent in History itself, that Latin American inferiority necessarily flowed from the circumstances of discovery and colonization by the Spanish, and that the undertaking was fundamentally a pious one and therefore justified on Christian religious grounds. Particular attention is given to highlight the legal problems posed by a desire to profit from the discovery of land that was nonetheless already inhabited, with discussion of the legal grounds for claiming authority over the lands by the Spanish Crown, the status of the lands' inhabitants, and the relationship between the two.

Introduction

In postmodernity notions of collective identity continue to be shaped by representations of the past. In the Americas, the Discovery and Conquest of the New World have been seen by postcolonialist and postoccidental writer as continuing to shape Latin American identity, casting it in the mould of the loser. However, that mould itself was shaped by notions of history that justified the conquest within the broader context of a philosophy that saw history shaped by human progress. Now, concepts of history have seen the fallacy of viewing history as some force conforming to a teleological model. History can be retold. The present study will scrutinize only two aspects of the Discovery and Conquest of the Americas: the legal basis for Spanish authority over the discovered lands, and the status of the inhabitants of those lands. In so doing, the disciplinary lines that later scholars have observed will be deposed in favour of a Foucauldian genealogical approach that appreciates all cultural forms equally, and in fact gives voice to texts that in their time held normative weight. In undertaking this task, the following interrelationships will be evident: literature shaped by history, history shaped by law, and law shaped by literature.

History and the Postmodern condition

Jean-Paul Baudrillard has expressed the view that history ended with the postmodern condition, insofar as the reporting of events became such that 'history, meaning and progress were no longer able to reach their escape velocity' (1998, p.7; see also, Baudrillard 1994). In other words, historification became instantaneous and the legitimate historification of everything since has resulted in a lost appreciation for the historical *per se*. Baudrillard's examples are taken from contemporary events, such as the (first) Gulf War, but by way of contradiction, arising from the other face of globalization (Hall 1991, pp. 41-68; Giddens 1991), the less recent past still remains valid ground for the construction of validating narratives, this time with each narrative holding no greater status than any other (Huyssen 1989, pp. 1-9). Recognition of this confirms for Occidentals the well-observed Latin American experience that has seen alternative historical narratives embodied not only in histories *per se*, but also treatises, and in fictional works of such genres as historical novels, testimonial novels, 'novels of dictatorship', and indeed many novels that contain elements of magical realism (Kohut 1997). All of these express a profound sense of needing to reappropriate the historical voice. The need itself arises in reaction, directly or indirectly from the consequences of ongoing neocolonialism.

Postoccidentalism

Even though Latin American nations have enjoyed a long period of strict political independence, nonetheless conditions persist that see those nations' identities defined by the colonial relationship. Over a long period of time this condition has endured, and the characteristic colonial subservience has since extended beyond mother Spain to other European nations and the United States, creating those circumstances known as neocolonialism (Roa Bastos 1985, pp. 288-292). The scholar, Walter D. Mignolo (1998), has suggested that in such cases where study and critique is made of these circumstances within the Latin American context, that the phenomenon be termed,

‘postoccidentalism’ rather than postcolonialism, which more appropriately refers to British Colonial expansion.

In the works of numerous Latin American writers and commentators who might be termed postcolonial, or as explained, postoccidental, such as the Uruguayan Eduardo Galeano (1997), Jorge Mañach Robato (1950, pp. 144-149), Arturo Uslar Pietri (1974, pp. 207-215), and the Mexican, Carlos Fuentes (1990), the subservience characteristic of the postoccidental and postcolonial conditions is established at the very beginning of the relationship—from that moment when two cultures met there began immediately a process of negotiating identity. To Galeano, ‘Latin America is the region of open veins. Everything, from the discovery [of the Americas by Columbus] until our times, has always been transmuted into European—or later United States—capital, and as such accumulated in distant centres of power’ (1997, p. 2). Latin America has ‘specialized in losing ever since those remote times... Centuries passed and Latin America perfected role’ (Galeano 1997, p. 1). To Galeano, there is something in the way that inferiority is accepted that suggests Latin America sees as inevitable its loss to Spain’s crusading spirit. In fact, Galeano himself points to this crusading spirit as being the force to which Latin America fell victim, with inferiority a natural consequence of losing (1997, p.12). Such a view has been professed by others, before and subsequent to Galeano, explicitly and incidentally, such as the Chilean feminist writer, Gabriela Mistral (1924) and the aforementioned Carlos Fuentes (1990).

In attempting to comply with his own *dictum*, ‘we are what we do, specially what we do to change who we are’ (Galeano 1983, p. 190), Galeano has astutely recognized that the position of continued inferiority is the result of nothing else but history: a product of history, made by human beings and so, unmakeable by human beings (Galeano 1997). For this reason Galeano has rewritten Latin American history numerous times, most famously in *Open Veins of Latin America* (1972, 1997), and to a certain extent has closely scrutinized elements of the history and present of the former colonial master, in *Patas Arriba* (1998). However, in each case the circumstances and context of the Discovery and Conquest of the Americas is not considered in any great detail.

The Problems with History

In fact the former varieties of History (so-called, ‘upper-case’ history, or historicism) themselves were conducive to a view supportive of the Americans Indians’ subservience by enshrining their status within the logic of the various speculative philosophies that were employed: in the case of Christian messianic views of history, the conquest can be seen as the inevitable spreading of the religion; in the case of a philosophy of history based on logic, as in the case of Hegel (Körner 1969, p. 155) the result is that the relationship becomes justified within a larger paradigm by whatever logical explanation is given to the event—a clear result of circular reasoning; similarly, with the idea of History as progress, as professed by J.B. Bury (1920; see also, Pollard 1968), as with all other teleological varieties of history, the roles that were established with that initial contact are justified, their equivocality reasoned away, in terms of their being seen as merely one step towards an ultimate end. However, with recent evaluations of history, be they the tropological investigations of Hayden White (1973; 1987), the archaeologies, genealogies and problematisations of

Michel Foucault (1967; 1972; and 1973), the cultural work by the anthropologist, Clifford Geertz (1973), or the work of numerous other theorists, the former historicisms are no longer endorsed. Instead, history is seen more as memory, with its infinite varieties.

Deconstructing history

The context of the Discovery and Conquest provides much interesting material which when deconstructed draws attention to the accidental nature of the Discovery and Conquest. Rather than an inevitable consequence of Christianity's expansion, the Discovery is best seen as the accidental result of a dubious undertaking, and the Conquest, an ill-organized free-for-all undertaken by individual profiteers, overtly in breach of much Spanish law, but who nonetheless contributed to the royal Spanish coffers. The legal and governmental response that followed was a haphazard reaction to unforeseen occurrences; and two of those occurrences in particular: the actual discovery of land to the West and the presence of inhabitants on those lands.

From the beginning, Columbus' proposal was one that held such a speculative component that feasibility committees operating, firstly, on behalf of the King of Portugal, and then later the Spanish monarchs, both independently rejected it. It was rejected by the Kings of France and England as well, not on the grounds that it was believed that the world was flat—for this belief was not in actual fact prevalent, as popular history would have us believe. Instead, it was considered to be too speculative. The final successful application made to the Spanish monarchs, who in any case would not fund but only act as guarantor for the expedition, was based on dubious authority that grossly underestimated the distance to what was believed to be Asia (Parry 1979). That Columbus did this purposely is corroborated by his actions of falsifying the captain's log in regards to the distance travelled on the voyage (Rivière 1998). To some extent, it must therefore have been surprising when land was at last found, and at that point there arose a whole new set of complications.

Authority to Claim Lands

Upon making landfall in the Bahamas, Columbus immediately set about claiming whatever lands he found for the Spanish monarchs, and recorded that none of the inhabitants ever objected to his declarations (Rivière 1998). He did this despite the fact that every distinct group of peoples had, according to their own laws and customs, their own legitimate rulers (Parry 1981). The question that arises, and which is of primary concern here, is: on what basis was there authority to do this?

Personally, Columbus was charged with claiming lands on behalf of the Spanish Crown, but the legal effect and status of doing so had not been pondered—perhaps a sign of the highly speculative nature of the venture. Ultimately, and officially, the authority to rule over lands discovered in the New World was based by the Spanish monarchs on the Papal Bulls of 1493, in particular the one known as the *Inter Caetera*, in which the Spanish-born Pope granted to Spain all lands to the West and the South, along with all their rights, jurisdictions and appurtenances, provided such lands were not already ruled by a Christian Ruler. Naturally, all lands found in the New World did not have Christian rulers, and so according to the Bull they were viable additions to the Spanish Crown.

However, any argument that the Papal Bull held authority was itself founded on a dubious legal basis: the doctrine of universal papal dominion, both in temporal and spiritual matters. This doctrine is most often associated with Henry of Susa, or Ostiensis, and was very much a product of its time, imbued as it were with the spirit of the second and third crusades, and most contradictory and most telling, is that the doctrine of universal papal dominion was not supported in Spain itself. Although it was widely acknowledged that the Pope held spiritual authority, as early as St Augustine's *The City of God*, the distinction was made that he did not have temporal authority. Augustine's view was later supported by numerous others, including the Italian writer, Dante Alighieri, in his treatise on monarchy, *Monarchia* (1314). In Spain, the Pope enjoyed little by way of special treatment. In the Kingdom of Castile, Alfonso X's *Las siete partidas*, or the *Seven Books of Law*, an enormous codification of Spanish law undertaken in the 1250's and 1260's and very much in force during the time of the Discovery and Conquest, stresses the temporal-spiritual divide. In ranking emperors above kings, *Partida II, Título II*, law 1 clarifies:

Empire is a great dignity, nobler and more honoured than any other that Man may hold in the temporal world. With regards to the Emperor: all within the empire are to obey his command: and he is bound to obey no one, but for the exception of the Pope with regard to spiritual matters. (My translation) (Alfonso X 1258-1265)

It is unsurprising, therefore, that the Spanish legal theorist, Francisco de Vitoria, subsequently rejected the doctrine (Parry 1981). Additionally, when Spanish-led troops sacked the Vatican, a little later, in 1527, Charles I's apologist, Alfonso de Valdés clarified that it was nonetheless justified because the Pope had been meddling in temporal affairs, and just as Emperors' and Kings' actions come within the Pope's spiritual jurisdiction, then so too, does the Pope's behaviour, when he participates in temporal affairs, come within the Emperor's temporal jurisdiction (De Valdés 1956).

Nonetheless, there was still an additional basis in the Bull for authority for the Spanish monarchs to extend their rule over the new, non-Christian lands: the missionary imperative: the papal command to bring Christianity to the Indians. On this basis the extension of Spanish 'protection' to the new lands was not only permitted but required. However, it left open the possibility for other European monarchs to do likewise. The only counter-argument being that as the task was entrusted specifically to the Spanish kingdom, it was therefore somehow exclusive. Additionally, it was unclear whether it extended to usurpation and imposition of Spanish rule? Ultimately, the Spanish legal theorist, Francisco de Vitoria, gave the opinion that: (1) the Bull, since it dealt with spiritual matters of a missionary nature, applied to other Christian (ie: European) princes, and so did entrust the Spanish monarchs exclusively with the task of conversion; (2) however, the Pope had no authority over non-converted Indians, who could not be forced to convert; and (3) the Indians could not justly be invaded, unless they first transgressed rules of *jus gentium* (an early species of International law formulated by Vitoria, different from the Justinian concept, and later adopted by Grotius) (Parry 1981). Nonetheless, the Spanish monarchs clung to the authority of *Inter Caetera* in granting them their own, exclusive authority to explore and rule the new lands to the West. The exclusivity was presumably the principal attraction of this course of action.

Spanish autochthonous law and custom

In fact, there was another basis, in Spanish law and custom, for the exercise of Spanish authority over the new lands, and if any legal authority was in the Spanish monarch's minds when originally Columbus set sail, possibly it may have been this. It was based on the Spanish concepts of authority to rule and what constituted just rule. Quite simply, if it was shown that the Indians' rulers failed to meet the requirements of a good Christian king, then those rulers could be deposed in favour of another Christian ruler, namely the Spanish monarch or monarchs. Naturally, as non-Christians, the Indians rulers would of course fail to meet the most fundamental of those requirements. It was a legal basis, however, that offered Spain no exclusivity—any Christian ruler would suffice—, and so suggests that the seeking of the Papal Bull was an afterthought reaction to the surprising discovery of lands fit for conquering and exploitation, and worthy of seeking exclusive rights over.

The argument in question was quite simple and could be based on much political and cultural authority that pre-dated the Papal Bulls by many centuries, having developed over the previous millennium. Indeed, one can find authority not only in Spain but elsewhere, such as in the writings of St Thomas Aquinas, *On Kingship*. In the case of Spain, it begins with the Spanish concept of Christian Kingship that was developed during the rule over the Iberian Peninsula by the Germanic Visigoths, and during the subsequent Moorish invasions and occupation from 711 onwards. The concept is evidenced in only a handful of strictly 'legal' documents, and primarily just in two: the *Visigothic Legal Code*, later called the *Fuero Juzgo*, and the aforementioned *Seven Books of Law* of Castile. The *Visigothic Code* (649-652) likens the role of king or ruler to that of the head's role on the body, and therewith all the features of consciousness and decision-making: it must guide the body, keep it safe from harm, and direct it towards proper nourishment and health (Book II, Title I, Law IV). That the king adhered to these principles was crucial to his ongoing reign, for in Visigothic societies, rulers were elected and held the position only for so long as the populace were content. A similar concept is evident in the later *Siete Partidas* (*Seven Books of Law*) of Alfonso X. Generally scrutiny in this matter focuses on the Second of the seven books, on the provisions on rulers, overlooking the equally important first book that considers questions of power and authority. Instead, the two must be read together, as must all provisions be reconciled. So, whereas it is stated that the King or Emperor stands vicariously in God's place on earth (Partida II, Título I, law V), the 'Head' metaphor of the previous Visigothic Code reappears (II, X, I-iii), and even stipulated in numerous provisions are the qualities that a ruler must exhibit (for example: I, I, XI).

Beyond this, it is to the literature that one must resort, to treatises and tales that nonetheless held some normative value over monarchs in their instruction on how one should rule. This is important to note, for constitutional norms and powers should not be read according to a modern view, but rather it should be understood that, formerly, cultural and religious norms themselves held sufficient authority to hold constitutional weight, and as such potential sources of constitutional power are to be found in all manner of cultural forms. The concept that emerges from a study of Spanish cultural forms that comment upon rulership is one that reinforces the notion of a ruler who holds his or her position by virtue of the consensus of his people, whose position is

one of obligation to guide his people along the proper path, ensuring them a good and peaceful life, and that his rule remains valid provided that this is done and that consensus remains. It was a concept that arose out of necessity and pragmatism and continued in such circumstances: firstly, as a product of the Germanic tribe of Visigoths, and then in the circumstances of Christian opposition to the Moorish invaders: rulers were sought that could best guide the people. This is evident in the legends and poems of the first leader of Castile, Fernando Fernán González (d. 970), whose rule was chosen and preferred by the inhabitants of Castile above that of the King of León (Márques-Sterling 1980), and, in the case of the kingdom of Aragón, the mythical *Laws of Sobrarbe* (*Fueros of Sobrarbe*), still cited today, claimed that the rule and creation of law existed before any man was proclaimed king. With time and the campaign of reconquest of the Spanish peninsula from the Moors, kingship gained a Christian pastoral component, similar to that described by the Italian, St Thomas Aquinas. Shortly after the Discovery and before many of the issues over rulership of the New World became patent, Erasmians, including Erasmus himself in the *Education of a Christian Prince* (1516), written for the young Spanish king, Charles I, affirmed this aspect of rulership. Similar to Thomas Aquinas, Erasmus held central the onus on the King to help guide his people towards and along the proper path to salvation, and in his faith and behaviour he had to be exemplary. So the King, or ruler, had to be not only a ruler, but a good Christian for that matter. If he failed in his role as a good Christian King, his authority, and therefore his rule, was invalid, and so, tyrannical. As a tyrant, therefore, the non-Christian ruler could be quite validly usurped or deposed. On this basis, the Spanish Crown could have claimed to have been 'liberating' the New World inhabitants from their tyrannical rulers. The argument could have been made that only under Spanish rule could the Indians be shown the true and proper path. However, there were limits to this, for the better view was that the Ruler was to show others the proper path—not to force them to follow it, for that would not allow the subjects to exercise sufficient free will, characteristic of Catholicism as opposed to Protestantism, to choose the right path of their own volition and therewith be saved—this question of Free Will was a question that was to concern Erasmus and Martin Luther a great deal (Erasmus 1999).

Bartolomé de las Casas and the Welfare of the Indians

In fact, it was a concept of rulership similar to this (see Parry 1981) that helped Bartolomé de las Casas to argue for better treatment for the Indians during the Conquest. De las Casas argued that, as the King of Spain owed the aforescribed duty to all his people, he had in fact, defaulted by not acting to curb the behaviour of the Conquistadors, and therefore could be disobeyed or deposed. De las Casas also agreed with Thomas Aquinas' view that the free exercise of reason (ie: free will: cf. Erasmus 1999) was, by Natural Law, attributable to the Indians, and so they could not be forced to convert to Christianity. He denounced the Ostiensian doctrine also. It is acknowledged that the publication of Las Casas' views probably has some part to play in Charles I's New Laws of 1542, that took away the most important of the *Conquistadors* 'rights', that of *encomienda* (Parry 1981).

Conclusions

The Discovery and Conquest of Latin America established roles of dominance and subservience justified by historical views that saw the relationship as somehow a logical progression of History's path. Inherent in such a justification is an endorsement of the inequality of those roles. However, upon further scrutiny, it becomes evident that the Discovery was every bit a surprise for the Spanish monarchs, and resulted in an *ad hoc* scramble to procure exclusive rights over the lands on a legal basis that was at best extremely tenuous. Moreover, the desire to profit from the Discovery and subsequent Conquest saw the Spanish rulers breach the very conditions that supported their authority to rule. This leads to a complete contradiction of any Christian historical view of the Discovery and Conquest as an extension of Christianity, for in each case, Christianity was offended against: the treatment of the Indians contravened the writings of many of the Church's foremost figures and scholars; as was the case with the Bull purporting to convey authority.

The Conquistadors have gone down in history as driven, ruthless men who nonetheless saw importance in spreading the Christian faith, for much is made of their seeking out non-Christian peoples, but when that fact is placed alongside an acknowledgment that the finding of non-Christian peoples was a contingent factor in the Conquistadors' being able to justify seizing the foreign lands, then the connection with economic profit becomes patent. Similarly, the link to material benefit is seen with relation to Columbus' own desire to seek out non-Christian lands. So too, must this have been the case originally with the Spanish monarchs themselves.

The Discovery and Conquest of the Americas was not, as is commonly considered, an extension of a 'crusading spirit' (Fuentes 1990) that saw the final conquest over the Moors in Spain, and the expulsion of the Jews from Spain in the same year (1492), but rather a speculative undertaking carried out in the hope of profit. Far from an inevitable stage in the expansion of Occidental Christian Society the events were themselves fortuitous, based on Columbus' own misrepresentations. In the early, yet pivotal, years they led to an unplanned, poorly directed approach to managing the new lands on the part of the Spanish monarchs, that was shaped more by the original interests of profit, with little understanding of the full consequences of Conquest, and little care for legal authority and obligation.

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