

Justice and the Formation of the Andean Colonial State

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Another aspect of the violence that was part of the Spanish invasion of the Andes was the struggle among not only the crown and the Spaniards in the Andes, but also the natives, to define the benefits and the obligations, or perhaps more directly, the law, that would determine the distribution of power and authority in the territories baptized by the Spaniards “New Castile” and remembered by the natives as “Tawantinsuyu.” The conquest period in the Andes lasted for more than a half-century, and the power struggles that characterized the period were fought not only over the control of wealth, but over law and justice, and in particular, the relationship between Spaniards and Indians in the Andes. In this study, I will examine the efforts of members of both European and native societies in the Andes to develop a corpus of benefits and obligations that would apply to both, laying a foundation for the emergence of a common system. While the struggle to find common ground was eventually abandoned, the outcome was not predetermined, but was the product of competing political strategies and objectives.

The first struggle focused on the conflict over what might be defined as the justice of the Spanish presence in the Americas, a struggle over what might be called the conscience of the king. The struggle was conducted in the idiom of European law although the combatants were members of Andean native society as well as Europeans. The official justification for Spain’s claim to the Americas was the pope’s assignment of the responsibility for bringing the Christian faith to the newly discovered lands to the crown of

Castile. Yet it was not battalions of missionaries (although those were sent later), but armed bands organized as conquest companies that invaded the newly discovered lands, demanding plunder and service from the people they encountered and provoking accusations from not only Spain's enemies but also the theorists of the *ius commune*, or body of common law that was the product of the both Roman and canon law traditions. These jurists were trained in the net of schools in Italy, France and Spain, whose graduates became advisors in the courts of Europe. The critics of the behavior of the Spaniards in America accused the king of permitting the rape and plunder of the native Americans and ignoring the responsibility assigned him by the Pope. In response, a royal advisor and jurist drew up a formal document in 1512 that purported to cover the royal obligation. The document, called the *requerimiento*, drew on legal theories of just war and was supposed to be read aloud to the Indians who were encountered by the Spanish conquerors prior to an attack. After summarizing the Christian version of the creation of the earth and the coming of Christ, the reader informed his audience that God's vicar, the Pope, had granted the king of Spain dominion over all the world, and the Indians must therefore surrender to their new rulers. If they refused, the Spaniards would be justified in attacking them, and the Indians would be responsible for their own defeat.

Even at the time, contemporaries in Spain as well as America openly remarked on the hypocrisy of the document as a justification for the violence of the conquest. The Dominican Francisco de Vitoria, a respected authority on canon law, wrote to another member of his order that "[A]s regards the question of Peru . . . nothing that comes my way has caused me greater embarrassment than . . . the affairs of the Indies which freeze the very blood in my veins." (Pagden: 65). Vitoria's lectures at the University of Salamanca on the right of Spain to make war on the Indians were copied and circulated by his students,

becoming a key text in the commentaries on the justice of the conquest. Vitoria absolutely rejected the arguments that based the right of Spain to the Americas on the authority granted by the pope to Emperor Charles V, on the attribution of the Indians to the category of infidels, on the inability of the Indians to govern themselves, on the acts of the conquerors and even on an alleged election by the natives of the Spanish monarch as their sovereign ruler (Vitoria 1989: 75-97). He concluded that the inhabitants of America or, as he called them, the barbarians, could not legally be dispossessed of their lands and goods on the grounds of their infidelity because “it is wrong to rob either Saracens or Jews or any other infidels of their property; to do so is theft and robbery, the same as if it were done to Christians” (Vitoria 1989: 67).

Nor could the pope grant dominion to the emperor. The Pope exercised authority in this world only over Christians and not over infidels or barbarians, and since the Pope had neither temporal nor civil dominion in this world, he did not have a right to cede that dominion to any other lord. He concluded, therefore, that “when the royal expedition was dispatched to the Indian lands, it carried no authority to occupy their properties” (Vitoria 1989: 85). Vitoria insisted that conversion to Christianity was not a justification for war and conquest; it was not legitimate to attack or plunder people who lived in ordered societies subject to rulers whom they accepted, unless those rulers systematically oppressed their subjects. He concluded that the only justification for making war on another society that could be supported were self-defense, the protection of innocent people, or the alleviation of tyranny. Vitoria was a major figure, whose opinions were cited and who was invited to contribute to royal councils during his lifetime, although as will be seen, later generations erased his arguments while continuing to praise him.

In the Andes, the position ably articulated by Vitoria was shared by a faction of the clergy, in particular the monastics sent to the Americas to convert the natives to Christianity, as well as others that included royal officials and even some of the Spaniards who had taken part in the events of the conquest in the Andes. Against that position stood the Spaniards who had taken part in the conquest of the Incas, receiving *encomiendas*, or grants authorizing them to collect tribute from the members of Andean society in recompense for their military services to the crown. The *encomenderos* economic and social preeminence was challenged in 1542 by royal orders that were a direct attack on their economic and social position. In the Andes, the efforts of the faction that consisted of the conquerors to convince the crown to rescind the orders led to open revolt, finally ended by the dispatch to Peru of Pedro de la Gasca, a priest-diplomat armed only with full authority and a set of unspecified pardons and orders carrying the royal signature. La Gasca offered the Spaniards an opportunity to back down without surrender, and most of them took the offer, deserting the rebellion.

But while royal authority was formally restored, the *encomendero* faction remained strong, and La Gasca, with the aid of royal officials and clerics sympathetic to the Indians, moved to reduce the appropriation of goods and labor from the Indians case by case rather than taking on the faction as a whole. In response to petitions from the natives elites, the *audiencia* court scaled back the tribute paid by the subjects of particular native elites "little by little and one by one, with new information, reducing the tributes for one Spaniard [vecino] at a time and not for all." [Documentos relativos a don Pedro de la Gasca y Gonzalo Pizarro, I: 506-7] The royal lawyers were further reinforced by an order from the crown ordering the Audiencia of Lima to amend the tribute "when it was excessive . . . because in the first tributes . . . they were ordered to give more than they could." The

native elites were encouraged to petition for the reduction of tribute, and the result was a flood of appeals to the *audiencia*. Juan Polo de Ondegardo described the process, noting that " . . . the tribute was barely set when many [people] assured [the *kurakas*] that if they were oppressed by the tributes, they could get them lowered; and since some of the people who said that were the ones who would do it, it didn't take much for the Indians to believe them, particularly when they saw that the first plaintiffs got the tributes lowered by simply asking and without any other formality. . ." (Polo, "fueros," quoted by Sempat, 183).

For a decade and a half, between 1545 and 1560, the native elites, allied with crown officials and reform clerics, not only managed to reduce tribute assessments; they proved to be remarkably adept at deploying the arguments of theologians and jurists like Vitoria for their own ends. Vitoria had argued that the Incas as well as the local elites, were argued that the Incas as well as the local elites, should be dealt with as natural lords, who could not legally be dispossessed of their authority by the Spaniards who had invaded their lands. The elite in particular applied concept of natural lords to themselves, arguing that since they had accepted the king and Pope as their overlords, they could not be deprived of their legitimate authority over their native subjects. (Vitoria 1989: 72-3; Chamberlain 1930). In a petition submitted by reform clerics together with members of the Andean elite, the petitioners asked the crown to restore the rights of the native elites "following the ancient customs of the Inca rulers, for in those consists our preservation," and further asked the crown to recognize their privileges as natural lords, "according to natural law . . . which they held and enjoyed in the time of their Inka kings . . . and that they hold and enjoy their inheritances and entailments, because they should not be deprived of their traditional authority [*generosidad*]" (cited in Morales 1985: 79).

The adoption of part of the judicial principles of the Spaniards by the members of the native Andean elite did not, however, go only one way. Royal officials in the Andes during the second half of the sixteenth century quietly the practices of the defeated Inca state into its judicial procedure. Royal officials in the Andes soon learned to depend on the administrative and management skills of the Inca bureaucracy to cope with the immense task of re-directing the flow of the surplus generated by Andean society to Spain as well as of resolving disputes over the distribution of the wealth in the new kingdom. By the mid-1550s, native elites in conjunction with Spanish lawyers presented—and won—an increasing number of court cases seeking remuneration for plunder as well as for excess tribute paid to Spaniards. In a major suit brought by the Indians of Sakaka in 1572 for the restitution of excess tribute, the information presented to the court consisted largely of declarations by the cord-keepers (*chinukamana* in aymara) whose evidence was accepted without challenge by the court in La Plata and upheld in an appeal to the Council of the Indies in 1581 (Platt, 2003: 237). Spanish authorities accepted information provided by Inca cord-keepers in the preparation of official documents, playing an important role in the emerging structure of the colonial state, and the Spaniards openly recognized the contributions of the Andeans. A Spanish official in 1589 commented that while the natives had quickly learned the Spanish language as well as its music, its instruments, and its [arabic] numeric system, “in reality they do not use [arabic numerals], nor do the crown authorities [*corregidores*] allow them to give or take anything according to our counting and numerals, but rather through these quipos. . . .” (quoted in Salomon 2004: 112-13).

Not only did royal authorities in the Andes incorporate the *kipu* into the judicial process, with the approval of the crown; the settlement of local differences among members of Andean native communities were turned over to the members of the native

elite in an effective recognition of their claim to local jurisdiction as natural lords, even if crown officials later denied that recognition. In 1581, Martín de Enríquez, Toledo's successor, received a royal order asking for information about "the customs and practices followed by the natives of the land in the government and the conduct of disputes in the time of their heathendom." (Levillier 1925: 268) [The probanza is contained in the AGI, Lima, 30, ff. 165-175v, and was published in Levillier, 1925, vol. 9: 268-288] The order noted that the natives "have learned how to litigate [in the Spanish manner], and since disputes are decided according to the use and customs followed during the time of their heathendom," information was needed in order to correctly adjudicate disputes involving members of Andean society. The information was collected from both Spaniards and Inca elders in Cuzco, and remitted to Madrid and apparently forgotten, although native elites continued to settle community disputes according to Andean traditional practice (Levillier 1925: 268)

There may have still been a possibility in the 1560s for the emergence of a joint system of authority in the Andes, despite growing fear among some of the reform clerics that the overt adoption of Christianity by the Andean elite did not automatically the conversion of the native population as a whole. This is suggested by the negotiations between Lope García de Castro and the Incas in Vilcabamba that resulted in an agreement that provided for the Inca's acceptance of Spanish rule and his withdrawal from the jungle location in return for the Spanish recognition of the Inca's right to property and revenue and the celebration of a dynastic marriage that would effectively establish a restored Inca dynasty, recognized by the Spanish crown, in the Andes (Yupanqui 2006: xiii). The agreement, drafted in 1565, constituted a recognition by the Spanish crown of the Inca—

and by extension, the native elites, as natural lords whose authority over their subjects was a serious challenge to the *encomendero* faction in the Andes.

The Spaniards affected by the events of the early part of the decade fought back, with protests, letters to the crown, and finally, in 1555, a last short-lived rebellion whose leader insisted to the crown that he "took action because he saw the liberties [taken by] the Indians and saw that there was no consideration for [the *encomenderos*], although they were the conquerors of all Peru. And the reason for this was the friars and the lawyers, and their desire to squeeze the land dry." [CDIAO: 565; quoted in Morales, 184] . Yet despite the apparent eclipse of the *encomendero* faction, the crown's urgent need for silver from the mines of Potosí and shifts in royal favor toward the clerical reformers undermined the judicial progress of the Andean elite. Officials in the Andes complained that the reform clerics were defying their authority and trying, as the officials put it "to appropriate the right to govern the natives," openly inciting people against them and against the *encomenderos*, and even refusing to absolve the officials in confession unless they supported the clerics (GP, Nieves: 396). The clerics responded by insisting that while the laws decreed by the crown were just, the authorities "seem[ed] to have been instructed to govern in a manner exactly opposite to what the laws command." (Sempat, Morales: 77). Finally, in 1568, the crown and a specially chosen group of advisors debated the turmoil in the Andes and concluded officially that

. . . under the guise of protecting the Indians and favoring and defending them, [the Religious] have interfered with matters affecting Justice, government, and the State, seeking to interfere with [the state's] right and dominion over the Indies." (quoted in D. Ramos: 20)

Further debate was forbidden and the clerics were told to shut up and return to their monasteries. In the words of Domingo de Santo Tomás, “there is [was] no remedy now but heaven.” (Letter from Sto. Tomás, cited in Morales: 77).

The man chosen to implement the shift in royal policy was Francisco de Toledo, the fifth viceroy of Peru, who arrived in the Andes convinced of the need to eliminate any and all challenges to the rights of the crown. Barely a year after arriving in Peru, Toledo embarked on his famous inspection of the viceroyalty, during which he collected testimony from native witnesses intended to demonstrate that the Incas were tyrants whose rule was therefore illegitimate. In 1571, he wrote a letter to the crown, arguing that the information he had gathered proved that the definition of the Incas as natural lords was “one of the detrimental ideas that have impeded the proper governance of this land,” adding that he had become aware of this while still in Spain and regarded it as an “important truth” that the king should apply to the kingdom.

Toledo reinforced his argument with other documents, in particular a history of the Incas that he commissioned Pedro Sarmiento de Gamboa to prepare, and a legal opinion, or *parecer*, attacking Bartolomé de Las Casas as having perpetrated a false idea of the nature of the Incas and the native elites that had been part of the Inca state. The author of the *parecer* insisted that “the cause of this lie [attacking the legitimacy of the crown’s right to Peru] was Bartolomé de Las Casas, for having maintained and taught that the Incas were legitimate lords, and the *caciques*[native elites] were natural lords.” (Anónimo 1995: 114). Neither Toledo nor the author of the *parecer* attacked the respected jurists, among them Francisco de Vitoria, who had challenged the right of the crown to rule the Andes; they reserved their vitriol for Las Casas, who was roundly condemned for having written without ever having been in Peru (true), or informing himself about conditions there (false).

The author of the *parecer*, as well as Sarmiento de Gamboa, heaped praise on Toledo for having revealed the truth to the crown, which was that the Inca had been one of the greatest tyrants on earth, together with the native elites, both of whom had been foisted on the natives shortly before the arrival of the Spaniards who freed them from tyranny.

Toledo, a man of action, also moved to eliminate any threat from the Incas in the future. He sent a small army to Vilcabamba, which destroyed the place and brought back the Inca and the natives with him back to Cuzco. The Inca, Tupa Amaru, was subjected to a quick trial and beheaded in the main square. The others captured in Vilcabamba were condemned to punishments that ranged from whippings to execution, and other Incas in Cuzco who had no proven contact with the people who had not recognized the sovereignty of the king in Spain were accused and sentenced to exile and the confiscation of their properties, a sentence that was eventually rescinded in part. Finally, Toledo attempted to eliminate the descendents of Huayna Capac, the last Inca prior to the invasion from Spain, by marrying Beatriz, the only remaining recognized descendant, to Martín García de Loyola, leader of the expedition sent to eliminate Tupa Amaru, to whom she would have been married according to the terms of the capitulations agreed to in 1565. Toledo explained his action to the crown in a letter in which he noted that García de Loyola had agreed to the union because “he wanted to serve Your Majesty by marrying this Indian to ensure that there would be no further pretensions not uncertainty [in Peru] since he, as well as I myself intend that they move to Spain” (Levillier, 1924: 483).

Toledo’s elimination of the Incas is a tale of the rejection of existing concepts of law and justice, the rewriting of existing political agreements together with military action and forced marriage—all justified by the interests of the crown. In fact, it would not be excessive to describe Toledo as one of the early architects of the principle of the absolute

state, who set what he regarded as the interests of the crown—predecessor to the modern state—above the principles of law and justice argued and fought over during the first half-century following the invasion of the Andes from Spain. In many ways, Francisco de Toledo's actions in the Andes could be said to mark a shift in what we might call the prehistory of the state in the Andes. For his efforts to rewrite the arguments over the justice of Spain's claim to rule were ultimately successful, not because of superior arguments advanced by judicial theorists, but by ignoring the original opinions of theorists they claimed to respect and crediting them with the opinions they had rejected. A case in point is contained in the highly respected legal commentary of Juan de Solórzano Pereyra, author of the major commentary on colonial law, the *Política Indiana*. Solórzano devotes the first four chapters of his work to the topic of the legal right of the crown to rule the Americas. Throughout his discussion, while he includes Vitoria among the authorities he cites, he completely fails to mention Vitoria's insistence on the natural rights of all people, Christian or heretic, to the lands they inhabited. Instead, Solórzano insists that the Spaniards were called by God to conquer the Americas, adding that He had granted the riches of the overseas territories to Spain in recompense for Spain's services to Him in the reconquest of the Iberian Peninsula from the Muslims. He describes the conquest as a just war, in which the Spaniards freed the American barbarians of America, particularly the inhabitants of the Andes, from a tyranny "in which the invaders turned themselves into kinglets, oppressed them and subjected them to untold impieties and cruelties, without their having anyone to come to their aid" (Solórzano 1930: Lib. I, cáp. ix, párrafo 35).

Solórzano goes on to conclude that the end justified the means, and that a war that may appear unjust is justified if its purpose is the introduction of Christianity. He comments further that the natives were so backward that they needed the presence of the

Spaniards “by virtue of their being so barbaric, uncivilized and rustic that they barely merit the name of men, and require those who, by taking control of their government, protection, and instruction, reduce them to a life that is human, civil, social, and organized, so that they become able to receive the Faith, and the Christian religion” (*Ibid.*, cáp. Ix, párrafo 19). Solórzano even credits Vitoria with these arguments by including his name among the authorities he includes in support of such statements. In this fashion, he erases the history of the struggles of the long tradition of juridical argument and debate that underlay the efforts of reformers, together with members of Andean societies, to forge a judicial system that respected not only native but European traditions.

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References

ANÓNIMO [1571] (1995)

El anónimo de Yucay frente a Bartolomé de Las Casas: estudio y edición crítica del Parecer de Yucay. Cuzco: Centro Bartolomé de Las Casas.

CHAMBERLAIN, ROBERT S. (1930)

“The Concept of the ‘Señor Natural’ as revealed by Castilian Law and Administrative Documents,” *Hispanic American Historical Review*, vol. 19: 2, pp. 130-137.

LEVILLIER, ROBERTO, ed (1924)

Gobernantes del Perú, cartas y papeles, siglo XVI. Vol. III. Buenos Aires: Biblioteca del Congreso de Argentina.

-----, ed. (1925)

“Indormación hecha en el Cuzco, por orden del Rey y encargo del Virrey Martín Enríquez acerca de las costumbres que tenían los Incas del Perú, antes de la conquista española, en la manera de administrar justicia civil y criminal.” *Gobernantes del Perú, cartas y papeles, siglo XVI* (Buenos Aires: Biblioteca del Congreso de Argentina, pp. 268-288.

MORALES, FRAY FRANCISCO DE (1985)

“Las rentas reales, el buen gobierno y la hacienda de Dios: el parecer de 1568 de fray Francisco de Morales sobre la reformatión de las Indias temporal y espiritualmente,” *Histórica*, vol. 9: 1, pp. 75-130.

PAGDEN, ANTHONY

The Fall of Natural Man. The American Indian and the Origins of Comparative Ethnology. Cambridge: Cambridge University Press.

PLATT, TRISTAN (2003)

Article In *Writing Without Words.* Dumbarton Oaks.

RAMOS, DEMITRIO (1986)

“La crisis indiana y la Junta Magna de 1568”, *Jahrbuch für Geschichte von Staat, Wirtschaft und Gesellschaft Lateinamerikas*, vol. 23, pp. 1-61.

SALOMON, FRANK (2004)

The Cord Keepers: Khipus and Cultural Life in a Peruvian Village. Durham: Duke University Press.

SOLÓRZANO Y PEREYRA, JUAN DE [1647] (1930)

Política Indiana [edición facsimilar]. 5 vols. Madrid/Buenos Aires: Compañía Ibero-Americana de Publicaciones.

VITORIA, FRANCISCO DE (1963)

Las Relecciones de Indis y De Jure Belli de Francisco de Vitoria, O.P., fundador del Derecho Internacional, edición y nota preliminar de Javier Malagón Barceló. Washington, D.C. : Unión Panamericano.