*Gregory Marks**

LAW, THEOLOGY AND JUSTICE IN THE SPANISH COLONIES

The role of history, that is the systematic or critical account of past events, is important in shaping the response of the coloniser to the colonised, even at an early stage of the colonial process. Colonial law and policy in respect of the indigenous population quickly comes to be predicated, to a considerable degree, upon the prevailing view of the history of the particular colonial relationship.

We see this relationship between policy and history being played out in Australia today - the strident attacks on the so-called "black armband" historical view of the relations between the Aborigines and settlers, and the response showing the historical basis for apology and reconciliation. We have become all too aware of the importance of arguments about history in influencing popular sentiment about key policy and legal outcomes for indigenous people. Historians such as Geoffrey Blainey and Henry Reynolds are as least as important, in this sense, as the politicians and judges.

Arguments over historical interpretation are not simply interesting academic discourses - they represent fundamental struggles for moral and legal legitimacy in settler societies such as ours. If we are inclined to think there is something new in this, and that we are particularly unfortunate in Australia to have to suffer the tyranny of right wing discourse in history (and other disciplines such as anthropology), we may take some comfort to know that such struggles over the history of colonialism have all happened before. Bitterly fought public disputes over the legitimacy of conquest and settlement occurred in Spanish law, theology and colonial politics in the 16th century, when Spain was consolidating its hold over its newly acquired colonies in the Americas.

These 16th century Spanish disputes remain of relevance today. It is worth our time to examine the approaches to law and history then, not as a

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* Greg Marks is currently the Co-Ordinator of the ATSIC Legal Rights Policy Team. His first degree is in Economics and Sociology (UNSW). He has a Diploma in Education (Sydney University) and a Masters degree in International Law (ANU).

comfort to our present distress, but because the arguments which raged with considerable vehemence at the time raised issues which are very close to current concerns in the age of *Mabo*, *Wik* and the Ten Point Plan. The uses of history then bear a close resemblance to the present.

As James Muldoon has noted[1], one result of sixteenth century Spanish interest in the legitimacy of the conquest of the Americas was an extraordinary outpouring at the time of writings on political and legal thought that dealt with the various aspects of the conquest. In particular, the writings of two jurists-theologians of the time, Francisco de Vitoria and Bartolome de Las Casas, have drawn continued interest and controversy over the centuries. Vitoria and Las Casas have continuing relevance to the situation of indigenous peoples and more broadly to issues of human rights and international law.

The views of Vitoria have been seen as contributing to the development of international law.[2] In this view, international law and the rights of colonised indigenous peoples have been intertwined from the very beginnings of international law. As James Anaya has pointed out, "the subject of indigenous peoples is not new to this genre of law but has figured with varying degrees of prominence in the legal discourse and practice related to international law's evolution over centuries".[3] It is not surprising then to see that indigenous rights have re-emerged as a concern of the international community, even in the present era of a state-centred system of international law.

Although the assumptions of the 16th century Spanish writers about law and society differed markedly from those of today, the issues they confronted were similar to present concerns, and their analyses were clear forthright and well-informed. They can shed some light for us on current dilemmas; in this article, I will focus on Las Casas.

Who then was this Dominican priest, Father Bartolome de Las Casas? His work is not particularly widely known in English language circles, although this does seem to be changing and there appears to be growing interest. He is, however, a prominent figure in the discourse of the

1 Muldoon, *The Americas in the Spanish World Order: The Justification for Conquest in the Seventeenth Century* (University of Pennsylvania Press, Pennsylvania, 1994), p 29.

2 Scott, The Spanish Origins of International Law (1932); Nussbaum, *A Concise History of the Law of Nations* (MacMillan, New York, rev ed 1954).

3 Anaya, *Indigenous Peoples in International Law* (Oxford University Press, New York, 1996), p 9.

Spanish-speaking world, and one who, 500 hundred years after he argued for the rights of the Indians, remains a figure of considerable controversy.

In Australia we have seen his name, at least indirectly, in the news reports over recent years of the indigenous armed uprising known as the Zapatista movement in the Mexican state of Chiapas. The Zapatista resistance has been centred on the city of San Cristobal de Las Casas. The name of this city honours Bartlome de Las Casas, who was in fact the first Bishop of Chiapas. The current Bishop of Chiapas, Bishop Samuel Ruiz, is known to his enemies as the "Red Bishop" because of his outspoken and courageous support for the indigenous people of Chiapas state. Bishop Ruiz is in the line of clerical supporters and protectors of the indigenous peoples of central and south America which stretches back to Las Casas.

Bartolome de Las Casas was born in Seville in Spain in 1474. He is thought possibly to have been of *converso* descent. *Conversos* were Spanish Jews who had been forced to convert to Christianity - Vitoria was also a *converso*. It has been suggested that such *converso* origins may account for Las Casas's opposition, which we will discuss later, to the forced conversion of the Indians.

Las Casas's life and career were intimately bound up with the Americas. His father and uncles had sailed with Columbus and he had known Indians personally from a young age. He remained fascinated by Columbus, and composed an abstract of Columbus's diary (the only copy of the text we now have). He wrote extensively about Columbus in his own work, the *History of the Indies*[4], his important account of the history of the discovery and settlement of the Americas. Las Casas spent a considerable part of his long life in the American colonies and he attached considerable significance to the first hand nature of his knowledge of the Americas, which he contrasted with the ignorance of his doctrinal enemies. In the Prologue to his *History,* he notes the hearsay basis of the writings of other contemporary commentators on the history and society of the Indies:

> I see that some have written on Indian things, not those they witnessed, but rather those they heard about, and not too well - although they themselves would never admit it.[5]

4 de Las Casas; Collard (trans and ed), *History of the Indies* (Harper and Row, New York, 1971).

5 At p 5.

By contrast, Las Casas emphasised the depth of his own experience. He pointed out that: "I have roamed these Indies since about 1500. I have first hand knowledge of what pertains to my *History*; the profane, secular and ecclesiastical acts committed in my day, ...the customs, religions, rights, ceremonies and conditions of their natural inhabitants".[6]

This was not simply a matter of ego. It was Las Casas's objective to counter what he saw as the false history of the Indies by other writers, a history which provided the ongoing justification for waging war against the Indians, expropriating their lands and enslaving them. Las Casas was determined to show that the Indians were not savages or barbarians but rational humans who therefore should be treated with respect, and whose rights and autonomy could not legally or morally be interfered with by the Spaniards.

In order to do this, he had to confront an interpretation of the history of the Conquest which had, in a few short years, provided the basis for legitimising the destruction of Indian society. As Santa Arias states, Las Casas took on the role of historian *because* it legitimated his position as a spokesperson for a repressed community and served as a political instrument by which to denounce state policy and to advise the Crown.[7] She notes that to rectify the historical record he radically reinterpreted the indigenous culture and rewrote the history of the Conquest. As Las Casas states in the Prologue to his History:

> With truth alone moving me to write this book, it remains for me to assert that for many years the greatest and ultimate need for all of Spain has been the light of truth about all of the states of this east Indian sphere, the lack of which I have seen.[8]

It is his own experience, his own relationships with the Indians, and his acceptance by them, by which he establishes his authority in rewriting the history and ethnography of the Indies. And it is on the basis of this account of history that he endeavoured to identify the legal rights of the Indians as

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6 At p 11.

7 Arias, "Empowerment Through the Writing of History - Bartolome de Las Casas's Representation of the Other(s)" in Williams and Lewis (eds), *Early Images of the Americas: Transfer and Intention* (University of Arizona, Arizona, 1993), p 163 .

8 At p 166.

against the colonisers. As Las Casas said, "Jurists say that law is born from the true account of the facts".[9]

In a contemporary context, the connection may be seen between the renderingof history, in Las Casas's words the "true account of the facts", and the establishment of principles of law, in the High Court's *Mabo* decision of 1992[10] and the *Wik* decision of December 1996[11] relating to the possibility of co-existence of native title and pastoral leases.

In *Mabo*, Justice Brennan said of the terra nullius proposition which had informed earlier decisions:

> The facts as we know them today do not fit the "absence of law" or "barbarian" theory underpinning the colonial reception of the common law of England. That being so, there is no warrant for applying in these times rules of the English common law which were the product of that theory.[12]

In *Wik*, Justice Gummow said of the Mabo decision, "Thus, it was appropriate to declare in 1992 the common law upon a particular view of past historical events".[13] Justice Kirby stated that "in this case, the present must revisit the past to produce a result, wholly unexpected at the time, which will not cause undue collision and strife in the future".[14]

The uses of historical material, especially the reliance on the work of Professor Henry Reynolds and others in Wik, in determining that pastoral leases were *sui generis* and not intended to exclude Aboriginal interests, has been criticised, for example by Jonathan Fulcher. Fulcher argues that the approach in Wik is "to build a legal edifice on somewhat shaky historical foundations".[15]

Gummow J himself expressed some caution about the use of historical material in relation to such issues in Australia when he said in Wik:

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9 de Las Casas, *History of the Indies*, p 11.
10 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
11 *Wik Peoples v Queensland* (1996) 187 CLR 1.
12 *Mabo* per Brennan J at 39.
13 *Wik* per Gummow J at 182.
14 Per Kirby J at 230.
15 Fulcher, "Sui Generis History?: The Use of History in Wik" in Hiley (ed), *The Wik Case: Issues and Implications* (Butterworths, Sydney, 1997) , p 52.

> There remains lacking, at least in Australia, any established taxonomy to regulate such uses of history in the formulation of legal norms.[16]

As Las Casas understood, there is a close if problematic relationship between history and law, whether it is at the broader contextual level of establishing the moral parameters which, perhaps unconsciously, apply to the coloniser-colonised relationship, or at the level of specific inter-relation between historical fact and particular legal doctrine, as for example whether it had originally been intended that native title would be extinguished by the granting of pastoral leases.

It is difficult to imagine the Wik decision if there had not been a more general change in the understanding of Australian history to inform it. It seems that even the judges in the minority, that is those who found against native title on pastoral leases, were uncomfortable with the moral dimensions of the situation, although they did not feel able to bring together the moral and legal dimensions in their decision. Thus Brennan CJ observed, in deciding against the claims of the Wik and Thayorre peoples: "the principles of the law may thus be thought to reveal 'a significant moral shortcoming'"[17] which, he clearly hinted, was the responsibility of Parliament to rectify.

In Las Casas's case, he single-mindedly studied the question of the rights of the Indians over many years, with the intention of honing down to basic principles the welter of arguments surrounding the relationship between Indians and Spaniards. As he said:

> For forty eight years I have studied and sought to make clear the law; I believe, if I do not deceive myself, that I have penetrated to the pure waters of principle.[18]

As well as missionary priest, theologian and historian, Las Casas was a noted and controversial publicist and lobbyist. His influence with the Court reached its peak with the promulgation of the so-called New Laws of 1542 which purported to reform the administration of the Indies, overturning forced labour and restoring Indian civil rights and personal

16 *Wik* per Gummow J at 182.
17 Per Brennan CJ at 97-98.
18 Martinez, "Las Casas on the Conquest of America", in Friede and Keen (eds) *Bartolome de Las Casas in History* (Northern Illinois University Press, DeKalb, 1971), p 314.

liberty. However, these laws were never effectively implemented because of the strong reaction by the colonists.

In addition to his History and various other writings, Las Casas is known for the famous disputation with the leading Spanish humanist scholar, Juan Gines de Sepulveda, at Valladolid Spain in 1550-51. In the manner of the time, this disputation was an attempt to finally resolve the disputes which had raged in Spanish courtly and theological circles about the morality and legitimacy of the Spanish Conquest. It was called by the King, Charles V, and his Council of the Indies. Las Casas and Sepulveda were required to debate before 14 eminent jurists and theologians. Although the records of this disputation have been lost, we do have Las Casas's case, and his account of Sepulveda's principle arguments, from a Latin document translated and published in 1974. The title of this document is revealing of the tenor of the debate: "The Defence of the Most Reverend Lord, Don Fray Bartolome de Las Casas of the Order of Preachers, Late Bishop of Chiapas, Against the Persecutors and Slanderers of the Peoples of the New World Discovered Across the Seas".

In case the title of the work does not indicate sufficiently clearly where Las Casas's sympathies lay, let me quote what he has to say about the conquistadors in the Preface to the Defence:

> ....these brutal men who are hardened to seeing fields bathed in human blood, who make no distinction of sex or age, who do not spare infants at their mother's breasts, pregnant women, the great, the lowly or even men of feeble and grey old age...[19]

It should be noted that one of Las Casas's concerns was the genocidal nature of the Spanish settlement of the Americas, not just by wars but also as a result of the effects of enslavement.

The Defence provides the best means of understanding Las Casas's position on indigenous rights. I will now briefly outline Sepulveda's 4 main justifications to prove that war against the Indians was justified, and Las Casas's counter arguments as set out in the Defence. The first

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19 de Las Casas; Poole (trans and ed), *In Defence of the Indians: the Defence of the Most Reverend Lord, Don Fray Bartolome de Las Casas, of the Order of Preachers, Late Bishop of Chiapas, Against the Persecutors and Slanderers of the Peoples of the New World Discovered across the Seas* (Northern Illinois University Press, DeBalb, 1974), p 19.

argument revolves around the idea of barbarism. Sepulveda contended that the Indians were barbarians, and therefore, following Aristotle, natural slaves obliged by the principles of natural law to subject themselves to the Spanish.

The second argument was that the Indians committed crimes against divine or revealed law and against natural law. Alleged crimes such as idolatry, sodomy, cannibalism and human sacrifice not only justified intervention and punishment by Christians, but required it. The third of Sepulveda's arguments, allied to the second, is the contention that innocent (even if willing) victims of such practices should be rescued. Such intervention could then lead to subjugation. Fourth, and obviously a key argument for the times, was evangelisation - the contention that armed force may be used to propagate the Christian faith.

The first argument, that of barbarism, is of fundamental importance. It opposes the concept of the equality of mankind, the assumption underlying human rights. The accusation of barbarism was important in the establishment of the Australian colonies on the basis of terra nullius. The Select Committee of the House of Commons in 1837 described the "barbarous state of those people" to account for the fact "that their claims, whether as sovereigns or as proprietors, have been utterly disregarded".[20] However, the importance of the accusation of barbarism as the basis for expropriation and subjugation go much wider than the Australian experience. As Christopher Joyner has pointed out in respect of the Americas:

> "Despite the manifest inhabitation of the land by Indian tribes, European jurists conveniently reasoned that all Indians were barbarians and savages by instinct, and therefore incapable of self-government".[21]

Las Casas understood very clearly the nexus between the accusation of barbarism and colonial subjugation, and, characteristically, noted the self-serving nature of this view, despite its trappings of Aristotelian logic.

His response to Sepulveda was to flatly deny that the Indians fitted into the category of barbarians. This was a category which Las Casas argued only referred to truly wild, a-social, men living in forests and remote caves.

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20 *Wik* per Brennan CJ at p 40.

21 Joyner, "The Historical Status of American Indians Under International Law",11 *The Indian Historian* No 4, 30 at p 31.

True barbarians were basically freaks of nature, and the term could not be applied to whole societies, including those found in the Americas, without impugning the perfectibility of God's creation. As Las Casas said:

> 'Who, therefore, except one who is irreverent toward God and contemptuous of nature, has dared to write that countless numbers of natives across the ocean are barbarous, savage, uncivilised, and slow witted".[22]

Las Casas drew upon his close observation of Indian life, language and culture in opposing arguments based on the Aristotelian doctrine of barbarians as natural slaves. He linked the equality of the Indians as rational beings with the legitimacy of their laws and their capacity for self-government. Whilst Sepulveda argued that the Indians "are sunk in vice, are cruel, and are of such character that, as nature teaches, they are to be governed by the will of others"[23], Las Casas argued in opposition the basic equality of mankind in respect of the Indians, and the legal rights which flow from such equality.

In today's terms we are unlikely to see quite such blatant assertions of racial and cultural superiority as that put by Sepulveda. Instead, the barbarism argument becomes transformed into one of progress, development and national interest. As Falk has noted,[24] the nationalism of indigenous peoples becomes viewed from the dominant perspective as a primitive stage of human society which is an impediment to the modernising process of development. The fundamental equality of peoples, and the rights flowing from such equality, argued by Las Casas, nevertheless remain the issues of central importance.

Sepulveda's second argument was for the right of intervention by the Christian power in respect of practices such as idolatry and human sacrifice. Las Casas rejected the right of Christians to interfere, arguing that outsiders have no jurisdiction in such matters. Jurisdiction is tied to locality, and as the Spanish had no legal right to be in the Indies, they could certainly exercise no jurisdiction over the activities of the Indians, *even if* those activities represented crimes against God.

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22 de Las Casas; Poole (trans and ed), *In Defence of the Indians*, p 35.

23 At p 11.

24 Falk, "The Rights of Peoples (In Particular Indigenous Peoples)" in Crawford (ed), *The Rights of Peoples* (Oxford University Press, Oxford, 1988), p 17.

This argument is closely linked to Sepulveda's third argument allowing for intervention to rescue innocent victims. Here Las Casas showed his uncompromising support for indigenous autonomy, being prepared to mount a number of arguments as to why intervention would be improper. On grounds both of practicality and principle Las Casas insisted that intervention, beyond peaceful suasion, could not be justified. Las Casas's basic concern was for the rights of indigenous peoples to their cultural autonomy and integrity.

Sepulveda's fourth thesis was that war may be waged against pagans in order to prepare the way for preaching the faith. Las Casas opposed this fundamental justification for colonisation. He was strenuously opposed to forced conversions, as such conversions would not represent an expression of true belief. He again reiterated the natural sovereignty and independence of the Indians.

In summary, Las Casas saw native title or autonomy as defensible against European claims, whether based on the authority of king or pope, unless the title was voluntarily relinquished. The Lascasian doctrine represents something of a high point in the assertion of indigenous rights in law, at least until the modern era where claims for self-determination and de-colonisation have returned to the agenda.

In the end however, despite the claims of some modern writers who wish to idealise the achievements of Las Casas, he was not successful in altering the nature of Spanish colonial rule, and its highly destructive effects on the Indians. He knew this and died bitterly disillusioned with the way Spain governed the Indies. In particular, the achievements of the New Laws were short-lived.

This is often the way. We only have to look at the strenuous efforts to nullify the Wik decision in respect of native title rights on non-exclusive tenures. Or we can look at what happened after the decision of Chief Justice Marshall in the Cherokee Nation case[25] 1831 where Marshall enunciated the domestic dependent nations doctrine in respect of Indian tribes. The President, General Andrew Jackson, responded: "John Marshall made his decision, let him enforce it".[26] Jackson then ordered the forced removal of thousand of Indians from their ancestral lands and their

25 *Cherokee Nation v Georgia* (1831) 30 US (5 Pet) 1; 8 L Ed 1.

26 Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge University Press, New York, 1997), p 210.

relocation hundreds of miles away - thousands died in the ensuing forced marches.

Nevertheless, Las Casas's ideas have survived, and he has remained a source of inspiration to many, especially in Latin America. The wide view of indigenous rights advanced by Las Casas, encompassing economic and cultural considerations within issues of jurisdiction and sovereignty, has relevance to the claims advanced by indigenous peoples today. The bitter disputes which raged at the very beginnings of colonialism with the Spanish conquest of the Americas in the 16th century point us to the fundamental importance of the connection between law and history. This link remains as critical in today's Australia as it does in Chiapas State in Mexico, and as it did in Vallodolid in Spain in 1550.