Invoking a World of Ideas

Theory and Interpretation in the Justification of Colonialism

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Abstract: In this article I want to draw upon examples from European settlement in the Americas, Australasia and South Africa in order to argue that modern colonisation and imperialism, despite considerable variation, drew upon a range of justificatory principles which constituted a background theory, or worldview, that was invoked in part or in its entirety in justifying the civilising mission which was viewed by its proponents as both a right and a duty. I begin by showing how the infamous 'Requirement' ('Requerimiento') of 1513 becomes intelligible as a performative utterance when connected to the constellation of ideas which makes it warrantably assertible, to use John Dewey's terminology. It is not so much about the land or its use in conceptual terms but instead about the larger value judgements the colonists were applying. It is contended that despite the variation in emphases and conclusions, and the different levels of discourse at which justifications are offered, the efficacy and veracity of colonial and imperialist justifications invoke the authority of the world of ideas in which the assertions alone have intelligibility.

Keywords: colonialism, European settlers, imperialism, John Dewey, the Americas, world of ideas

The Methodological Justification

The theoretical basis of the exercise undertaken in this article derives its efficacy from philosophical idealism, and the Pragmatism of John Dewey, who was himself influenced by idealism (Dewey 1938, 1941). The philosophies of history of R. G. Collingwood (1993, 1998, 2005a, 2005b) and Michael Oakeshott (1933, 1983), and the ontological hermeneutics of Hans-Georg Gadamer (1975, 1976) are particularly pertinent. What I am doing is a form of constructivism which embodies the basic idealist assumption that the known cannot be independent of the knower. We participate in social action, conceived in the broadest possible terms, by inhabiting a world of ideas, of which we may not be fully conscious, nor fully able to articulate, but which is neverthe-

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less invoked when statements are made in its idiom. We implicate a worldview, which may be capable of tolerating a wide variety of utterances, including the drawing of conclusions from the same premises that may be contradictory. The relationship between ideas and action is not causal, indeed the ideas may be invoked disingenuously, but the fact that they are invoked at all as moral justifications implies that actions may be constrained or modified by them (Frost 2008), as the example of 'The Requerimiento' below demonstrates.

A world of ideas possesses a relative degree of coherence without which very little would make sense, but which nevertheless harbours essential tensions (Kuhn 1979), which may eventually undermine its compelling character. The classic, but brief, statement to this effect, subsequently elaborated by Thomas S. Kuhn (2012) and Stephen Toulmin (1972) was given by R. G. Collingwood. He argued: 'the absolute presuppositions of any given society, at any given phase of its history, form a structure which is subject to "strains" of greater or lesser intensity, which are "taken up" in various ways, but never annihilated. If the strains are too great, the structure collapses and is replaced by another' (Collingwood 1998: 48, fn.). The most controversial aspect of the contention is that the modifications may not be consciously formulated.

The question of the truth of claims made in justification of colonialism is not at issue in this article. The American Pragmatist philosopher John Dewey argued that inquiry is the 'controlled or directed transformation of an indeterminate situation into one that is so determinate in its constituent distinctions and relations as to convert the elements of the original situation into a unified whole' (Dewey 1938: 104). The end, or purpose, of inquiry, then, is the 'resolution of an indeterminate situation' by what is warrantably assertible (Dewey 1941: 180). While describing his theory as a version of the correspondence theory of truth (ibid.: 178), Dewey rejected truth claims based on absolute, indubitable and incorrigible data. There are no epistemological givens, or foundations, on which to base a body of knowledge (ibid.: 172). Knowledge, he claimed, did not have nor require such foundations in order to be rational. The rationality of inquiry and its outcome, knowledge, rests on a self-correcting process by which we progressively achieve greater clarity about the epistemological validity of our starting point and conclusion, in the context of a community of inquirers, against which public exposure we attempt to clarify, refine and justify our claims. Knowledge, which is the objective of inquiry, is warranted by the meticulous use of the methods and norms of inquiry, which presuppose a social context against which the efficacy of warranted conclusions are justified, and which form the basis of future inquiries. With respect to understanding justifications of colonialism the question that must be to the forefront of our inquiries is whether the contentions articulated as justifications were warrantably assertible given the world of ideas being invoked.

Warranted assertibility is not in itself an account of truth, and relies upon a distinction between judgements and propositions. Judgements may be war-

rantably assertible, while it is propositions that are more likely to be subject to verification or refutation (Burke 1994: 157). 'Judgement', Dewey argued, 'may be identified as the settled outcome of inquiry' (Dewey 1938: 401). Propositions are grounded in the beliefs which result from inquiry, and may therefore be affirmed but not asserted. Any particular inquiry for Dewey is a self-correcting process in which some knowledge claims, norms and rules have to be taken for granted but none is indubitable or incorrigible, in so far as each may be criticised, revised or rejected in the cold light of further inquiry and experience.

Ethical Issues on the Eve of Modern Colonialism: The 'Requirement' (*Requerimiento*)

The ethical issues raised by the Spanish encounters with American Indians had plagued enthusiasts and opponents of the Conquistadors since Spanish relations with the infidel began and was the continuation of a debate within the Catholic Church that had perplexed theologians throughout the fifteenth century. The status of the infidel with regard to private property rights and public sovereignty was a matter of moral and legal importance. Pope Innocent IV (ca. 1195–1254) had deemed the infidel capable of both dominion, that is ownership of private property, and of exercising public sovereignty but did not claim that either were absolute rights. The right of the infidel to dominion stood in a hierarchy of Natural Rights and could be overridden by the mission of the Church to propagate the teachings of Christ.

On the question of public sovereignty, Innocent IV determined infidels had the right to constitute their own governments, and rule themselves, but their souls were under the care of the pope in his capacity of Vicar of Christ. The sovereignty acknowledged was shared or divided in so far as the pope retained the right of political intervention should the infidel ruler violate, or allow his subjects to violate, the inviolable Natural Law. Christian missionaries must be allowed free access to the lands of the infidel, and remain unmolested in fulfilling their duty to God in preaching His word to all nations (Peters 2004: 63). Although the teachings of Hostiensis (ca. 1200/6–1271) before and John Wyclif (1320–1384) after Innocent's pronouncement denied the legality of infidel dominion on the grounds that they were not in a state of grace, the Council of Constance, in examining Wyclif's views, affirmed and developed the position of Innocent IV. In practical terms both sides of the argument ultimately justify colonisation on just war grounds (Muldoon 1979: 108, 141).

Towards the end of the fifteenth century emerged an added dimension, which was an extension of the obligation to propagate the faith, that of the responsibility of Christians to civilise primitive peoples and convert them. Together these responsibilities constituted the positive message that conquest

conferred both secular and spiritual benefits on the Infidel through Christian domination (Muldoon 1980: 311). The implications of these responsibilities were addressed by the Dominican Matí de Paz (b.1468/70–d.1519) and the eminent jurist Juan López de Palacios Rubios (1450–1524), a member of the Council of Castille. They were the authors of two of the earliest considerations of the ethics and legality of Spanish rule in the Americas, completed shortly after the *juntas* in Burgos, 1512 (Hanke 1935: 24). Both Palacios Rubios and de Paz agreed that Spain's title to the Indies was based exclusively upon the papal donation of 1493 dividing the Americas between Spain and Portugal (Hanke 1949: 29).

At San Pablo, the Dominican monastery at Valadollid, the document known as the 'Requirement' was produced at the request of king Ferdinand in response to considerable soul searching about the ethical and legal basis of conquest and enslavement of American Indians. Almost certainly composed by Palacious Rubios, the 'Requirement' detailed the history of the world from the earliest times, highlighting the establishment of the papacy and the donation by the descendent of St Peter, Pope Alexander VI, of the Americas to king Don Fernando of Aragon, and 'his daughter Doña Juana Queen of Castile and León, subduers of the barbarous nations' (Requirement 1513). The central part of the document required that the Indians, to whom it was proclaimed, acknowledge the superiority of the Church as Ruler over the whole world, and the delegation of the king and queen of Spain 'in his stead' as sovereign over their lands. Following from this they were to allow Christianity to be preached (Hanke 1949: 35). The remainder of the document warns of the catastrophic consequences for which the Indians themselves would be responsible if they refused to submit.

Because of the linguistic incomprehension between the New World and the Old, and the frequently cynical manner of its reading, the juridical act of ordering indigenous peoples to submit to the dominion of the king of Spain has often been ridiculed as 'absurd' (Cancellier 1993: 76; Faudree 2013: 183; Hanke 1949: 35). It was nevertheless a serious attempt by the Spanish government to conform to its legal obligations, demonstrable to other European monarchs, but particularly to the papacy on whose authority it acted, with respect to establishing the conditions of a 'just war' (Green and Dickason 1993: 190). The document implicitly invoked the constellation of ideas to which those of Pope Innocent IV belonged and not directly that of Hostiensis, as both Francisco de Vitoria, the eminent theologian in the University of Salamanca (1991: 259; Muldoon 1980: 312), and Las Casas (Muldoon 1980: 303) later contended. The 'Requirement' acknowledged that the Indians had the right of dominion, and of which they could not lawfully be deprived until it had been read to them. The justification underpinning acquisition was the responsibility of the Christian Church for the native peoples, and they in turn were obligated by natural law to permit missionaries to preach the Gospel to them (Muldoon 1980: 312). It was the fact that Indians had dominion and that the papacy had an established legal

lineage on the status of the infidel that necessitated establishing just cause by a witnessed reading of the 'Requirement'. In other words, its reading was a performative utterance, in J. L. Austin's sense (Austin 1972) without which the subsequent actions of the Spanish were illegitimate. The context of conventions invoked for uptake of the utterances contained in the 'Requirement' was not that of the American Indians, for whom the point or intention of the performative utterance was incomprehensible. It would not therefore fulfil the condition of uptake but instead was intended to invoke the world of ideas, or context of conventions which alone authorised and legitimated Spanish action, in the eyes of the papacy and Europeans alike, namely the whole theological terms of reference. The point of reading the documentation aloud in the presence of notaries was to perform the act of legitimation, authorised not by the American Indians but the Spanish monarchy and the papacy. It is only in this context that the 'Requirement'' was warrantably assertible.

The first recorded use of the 'Requirement' was at Darién in 1514, the year after it was written. Hernnan Cortes, for example, in his letters from Mexico makes reference to his use of the 'Requirement' between 1519 and 1526. On the submission of the former vassals of Mutezuma to the king of Spain, Emperor Charles V, Cortes is at pains to demonstrate that the appropriate procedures were followed. He says: 'All of this was said before a notary public, who set it down in a formal document, which I asked for, attested by the presence of many Spaniards who served as witnesses' (Cortes 1986: 99. Cf. 20, 21, 59, 71, 415). Sterner requirements, such as the presence of two ecclesiastic witnesses, were added in 1526. A harsher version threatening a war of fire and blood (*a fuego y a sangre*) was used in Mexico in the 1540s and the practice fell into abeyance after 1550s and was superseded in 1573 with regulations that strengthened the civil administration of colonial governance (Green and Dickason 1993: 190).

The efficacy of the 'Requirement' depended on the veracity of the claim that the papacy had temporal power over the whole world, and was therefore empowered to authorise Spanish kings to rule over the Americas. This was by no means universally accepted, and indeed vigorously contested by Vitoria (ca. 1483–1546), whose opinions were sought by both the pope and the emperor on matters of conscience and the legitimacy of rule in Spain. On the question of the pope's temporal authority Vitoria concluded: 'if Our Lord Jesus Christ had no temporal dominion ... then much less so does the pope, who is His vicar. ... It is certain that he does not have it by natural or human law. As for divine law, no authority is forthcoming' (Vitoria 1991: 260). Like Innocent IV, Vitoria acknowledged that the infidel had the capacity to own both public and private property and exercised recognisable structures of authority. Indians were, nevertheless, subject to natural law, and capable of discovering it, despite their initial 'invincible ignorance' (Vitoria 1991: 160, 237, 267–9). They were responsible for violations, which in certain circumstances constituted just cause of war, such as preventing the Spanish from

exercising their natural right to travel, communicate and appropriate those things, such as gold in the ground and pearls in the ocean, which had not yet become the property of the 'first taker' (Vitoria 1991: 231–92).

In essence, Hostiensis, Innocent IV, John Wyclif, Matí de Paz, Juan López de Palacios Rubios and Vitoria, despite variations of emphasis in their arguments, all invoked the same 'world of ideas' and ultimately conceded ample grounds for colonisation in acknowledging that certain violations of the natural law constituted just cause for war.

This 'world of ideas', with tensions and contentions regarding particular details and their implications, was shared by both Juan Ginés de Sepúlveda (1973) and Bartolomé de Las Casas (1992) in their famous dispute at Valladolid in 1550 over the question by what right the Spanish subjugated the American Indians and forced them into receiving the Gospel. The question addressed was the legality of the war waged against the Indians in order to subject them to the rule of the king of Spain before converting them to the faith (Hanke 1974: 67).

The Colonial Constellation of Ideas

The background worldview which the above ideas reflected and to which they contributed was invoked and interpreted by both colonial and imperialist adventurers alike and was shared by many of their critics, who contested some but not all of its implications. The background constellation of presuppositions comprised many elements drawn from diverse sources and times, but took shape most clearly in the sixteenth century. It may be summarised in the following terms: there is a hierarchy of civilisations, all of which are subject to natural law, the contravention of which gives just cause for war; the higher, that is Christian, has a duty to assist the lower and convert them; there are universal rights and duties for which peoples must qualify; and God gave the earth to men in common, requiring them to cultivate it effectively and efficiently. While the authority of the pope ceased to be invoked as a legitimating factor, the authority of God remained paramount.

From Vitoria to Vattel and on to Paul Kruger and David Livingstone this background informed their conclusions on the appropriation of native lands and the appropriate treatment of indigenous peoples. The universality of the natural law is simply an absolute unquestionable presupposition, to which all are subject irrespective of whether they have knowledge of it. If people such as the American Indians and the blacks of the Cape of Good Hope are so wild and inhumane as to live without law, that does not make the natural law any less law (Textor 1916 [1680]: I, 3). How these background assumptions are translated, or applied, in different circumstances varies considerably, and is somewhat contingent on those circumstances, but the veracity of the arguments depend on the constellation of ideas as a whole.

The history of the European colonisation of non-European territories and subsequent policies of imperialism illustrate a general tendency, which appears in many different guises. The idea of universal rights, with correlative universal obligations, while intuitively emancipatory and liberating in language and principle, was in fact one of the most effective modes of argument in justifying the seizure of lands inhabited by aboriginal peoples. To possess universal rights required satisfying the criteria for doing so, and failure to discharge one's obligations in relation to those rights may result in their forfeiture.

The significance of the European encounter with the Americas was that it forced philosophers, jurists, theologians and politicians to interrogate the foundations of their convictions, and to ask questions that stretched traditional Natural Law and Natural Rights theories to the boundaries of the received paradigms. The conceptual turmoil cannot be overestimated. Who or what were these creatures resembling humans? What was the capacity of American Indians to qualify fully as members of humanity? How should they be treated, if indeed they had the capacity to comprehend and receive the word of God? If they had such a capacity, how was Christianity to be instilled in them: through education or by force? For the Spanish conquistadors the issue boiled down to that of when just war was permissible to force the Indians to submit to God, the king and the conquerors. For the ecclesiastics the issue was how could the natives be changed from what they are into what they ought to be (Hanke 1959: 8), exactly the same set of considerations that faced the Boers and missionaries in South Africa in the nineteenth century.

Given the depths of the depravity of American Indians, did they possess sufficient rationality and capacity to exercise property rights, or if they did not should they be considered natural slaves, on Aristotle's categorisation, able to understand rational commands but not able to formulate and execute them for themselves, that is lacking practical reason and requiring guidance from a superior?

For Francisco de Vitoria, the issue was one of by what right the Spanish ruled in the Americas, not about the jurisdiction of the pope or the Emperor nor of Roman Law. The Indian question for him was one of Natural Law and the issue of rights was not juridical, that is a matter of law, but one of Natural Rights (Pagden 1987: 80). Natural Law and Natural Rights were the universal standards employed by Europeans to judge what they encountered, and which enabled them to arrive at answers to the questions that raised the most fundamental moral issues. The universal standards could not be derogated; there could be no exceptions. Europeans generally accepted that there were Natural Rights, and that all humans had them by the mere fact of being human. The issue was whether non-Europeans met the qualifying criteria or fell short in some way of being fully human. Meeting the qualifying criteria meant that like every human they possess Natural Rights and participate in the universal community of humankind. On the surface this looks like the American Indians were being offered protections which safeguarded them from European violations.

Far from offering them unqualified protection, it presented a set of criteria from which deviation, as we saw, was a breach of natural law and constituted a just cause for war. There was much discussion about the circumstances under which just cause could be invoked, or about 'unnatural' practices that invited, or required, humanitarian intervention, but few Europeans would argue that there were no conditions that gave rise to the legitimate acquisition of territories, and dominion in the Americas, on the grounds of violations of Natural Rights by the Indians themselves against their own peoples or against Europeans.

The Centrality of Land

In all of the encounters the issue of land was at the core. Property rights, and how one qualified to have them, were therefore at the core of discussions of the relationship between Europeans and the rest of the world, as we saw with respect to the infidel. Various strategies were adopted to expropriate the land. Charles W. Mills argues that white settlers joined in expropriation contracts, creating societies where they believed none existed or at least not in any recognisable form (Mills 1997: 13, 24, 49–50; Mills 2003: 240–1). Carole Pateman extends this idea to talk about a specific form of the expropriation contract. This she calls the 'settler contract', which has principal among the components the right to husbandry, and the establishment of sovereignty where the natives were deemed insufficiently organised and civilised to conceive of it, let alone exercise it or enter into a social contract. The settler contract, strictly understood, excludes natives, as in Australia. In a modified form indigenous peoples are afforded certain concessionary rights and partially accommodated, as in English settlements in America (Pateman and Mills 2007: 35–78).

The settler contract incorporates a group of ideas that have in hindsight been called *terra nullius.* The Latin *terra* means land, earth or ground, and *nullius* means no one's, hence vacant or empty land, or at least not occupied by people recognised as capable of exercising ownership rights (Linquist 2007). This is the key point. Colonisers were not deluded about the fact that people lived on these lands. What made them empty or waste was that those people were deemed not to have appropriated it in the relevant way, because they somehow lacked the capacity or failed to exhibit the necessary signs (Banner 2005a: 1). A great deal has been made of this idea especially in relation to Australia, but it is also invoked in discussions of European appropriation of New Zealand and of continental America, including Canada, and certainly the Boers in South Africa claimed vast tracts of land were 'vacant'. The Cape Colony lawyer J. de Wet (1794–1875) noted in 1838 that the Dutch settlers in the Cape Colony 'did no more than dispose of barren, uninhabited and uncultivated land and make it their property' (cited in Du Toit and Giliomee 1983: 213). The doctrine of vacant or unoccupied lands, making them available for appropriation, was a central concept in formulating relations

between Europe and non-European territories, that is between the civilized peoples of Europe and the barbarous and savage societies elsewhere. The idea that land was unoccupied did not mean uninhabited, it came to mean under-used or uncultivated or under-cultivated, and in this respect it was an important consideration in Australia, and particularly in the partition of Africa. God gave the earth to man in common, and that which lay 'vacant' may justifiably be appropriated, as Vitoria contended in relation to land, gold and pearls that had not already been appropriated by the first taker.

What lay behind the justification of appropriation, that is the 'moral' grounds for dispossessing the natives? Carole Patemen argues that one of the main justifications was the right to husbandry. If this is a right, what is the correlative obligation? There is no doubt that such a right has strong support in the Natural Law and the Law of Nations, which comprises elements of Natural Law, the customary practice of states, the opinions of philosophers and jurists, and case law.

To focus upon husbandry as a right, however, is to imply that the natives had a duty to allow settlement (from the point of view of the settlers), and to give up lands that were vacant, or not fully used. This correlation is certainly to be found in commentaries on the Law of Nations and Nature. It does, nevertheless, obscure the more fundamental driving force and justification for appropriating native lands. It is the application of a universal principle, against which savages and barbarians are judged to be deficient. It is a principle derived from the Christian natural law tradition. The Bible clearly imposes a duty on mankind to labour and cultivate the soil. In the Garden of Eden Adam is placed there to 'till it and tend it' (Genesis 3). Following the expulsion of Adam and Eve from the Garden of Eden, all of the peoples of the earth were obliged to cultivate the soil to maximise its productivity: 'The Lord God sent him forth from the Garden of Eden, to till the ground from whence he was taken' (Genesis 3). After flooding the earth for the wickedness of its inhabitants, God promised never again to destroy all living things: 'While the earth remaineth, seedtime and harvest' (Genesis 8). Noah himself became a 'husbandman' (Genesis 9). The Christian religion, then, portrays man's natural condition, before and following the Fall, as that of labour. It was an exclusive and restrictive definition of labour, namely cultivation or tilling the soil.

The Law of Nations, derived *a priori* from natural law and *a posteriori* from custom and the opinions of jurists, articulated the principles that were invoked by colonisers. John Locke, Christian Wolff and Emer de Vattel, for example, contended that people have an obligation to cultivate the land, and if they did not they had no right to prevent those who would. Locke argued, private property existed in the state of nature from the outset in that every person had a property in himself over which no one, because of the principle of natural equality, could exercise dominion without consent. God wills that we sustain and protect this property in ourselves by cultivating and appropriating the things of nature (Locke 1988: II, §26 and §86).

The labour expended by hunter-gatherers, deep-sea fishermen, bakers or craftsmen entitles them in the state of nature to what they have killed, gathered or made. When it comes to land, however, there is a change of emphasis. In the *First Treatise* Locke excludes certain types of 'labour' from affording a property title. Referring to the Bible, Locke recalls the curse placed upon Adam requiring men to labour because of their impoverished and destitute condition (Locke 1988: I, 144–5). Ownership and labour is now clearly associated with cultivation. Locke contends that: '*As much Land* as a man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his *Property*' (Locke 1988: II, §32, pp. 290–1. Italics in the orginal). The earth requires long and sustained labour in order to yield its fruits and make it productive. Mere occupancy or appropriation, that is taking possession, does not qualify. Land that is not cultivated is vacant or waste, and literally no man's land.

The implication of Locke's discussions of the American Indians is that they fall short of adequately discharging their obligations to God. They still live outside of political society in a state of nature and they fail to add to the common stock of mankind by improving the productivity of the land. In so doing they have no claim on vast territories in the Americas that 'lie waste'. By this Locke means more than land that is simply left barren. Land that was not efficiently utilised, and whose produce was allowed to rot, regardless of its being enclosed, 'was still to be looked on as Waste, and might be the Possession of any other' (Locke 1988: 295, §38).

Wolff confirmed that uninhabited lands may be colonised and appropriated because they are the property of no one. The nation appropriating the vacant land creates property rights in it and sovereignty over it. He acknowledged ownership and sovereignty by nations over the lands they actually occupied, even if those lands were waste and barren. Nevertheless, since every nation has a duty to perfect its condition, such land that lays vacant should be given to foreigners, or have it taken away (Wolff 1934: chap. III, §275–§292, pp. 140–52). Vattel suggests that: 'Every nation is obliged by the law of nature to cultivate the land that has fallen to its share. 'The cultivation of the soil … is … an obligation imposed upon man by nature' (Vattel 1834: book I, chap. vii, §81, p. 35).

Vattel was quite clear that occupancy was not enough: 'The law of nations will, therefore, not acknowledge the property and sovereignty of a nation over any uninhabited countries, except those of which it has really taken actual possession, in which it has formed settlements, or of which it makes actual use' (Vattel 1834: book I, chap. xviii, §208, p. 99). It was lands considered to be in common, over which everyone in the world still exercised use rights, that were designated unoccupied or uncultivated, that is vacant or waste land, not because there were no inhabitants but because, in Vattel's famous phrase, they roamed over them. He claimed that 'erratic nations' who have 'unsettled habitation' in vast regions cannot really be deemed to have taken 'true and legal' possession (Vattel 1934: book I, chap. xviii, §209, pp. 100–1). There

was a distinction to be made, then, between the use of the land and ownership, between occupation and possession.

It is the duty imposed by God upon humanity of self-preservation which requires making the earth productive and bountiful. The more efficiently this is done the better. To optimise productivity of the soil and fulfil one's duty to God requires the development of techniques of cultivation, and just as importantly the establishment of civil society, or sovereignty, to ensure good governance and security in order to protect oneself from harm and to cultivate in safety.

To judge indigenous peoples against the universal obligation to cultivate or exploit the land to its optimum meant that they fell short of their moral duty in a number of respects. These ideas were entwined with an increasingly more formalised conception of stages of civilisation, each having a distinctive form of subsistence and relationship with the land attached to it. This stadial theory of modes of subsistence, articulated most fully by the thinkers of the Scottish Enlightenment such as Dugald Stewart, Adam Ferguson and Adam Smith, became a presupposition of discussions about land rights that also referred extensively to the Law of Nations, and to American case law. In a series of conjectural histories exploring the relation between progress and decadence these thinkers broadly agreed that societies develop through four stages. These are hunting and gathering, pastoralism and nomadism, agricultural and ultimately commerce. In respect of Scotland, following the Act of Union in 1707, they conceptualised changes in Scotland in terms of the transition from an agricultural to a mercantile society. Adam Smith, for example, used farming, or cultivation, as evidence of civilisation (Pocock 2005: 51–2).

Hunters and gatherers were merely parasitic of the land, while rudimentary agriculture that exhausted the nutrients in the soil and required abandoning one location for another, while fulfilling the obligation to a greater degree, still fell far short of efficient exploitation. In this respect cultivation becomes the only recognised form of labour that fulfilled the religious obligation. It is the fact that land is not cultivated that makes it no man's land or *terra nullius*. In other words, a certain type of labour was deemed synonymous with civilisation.

Thomas Arnold (1795–1842), the headmaster of Rugby School, perfectly exemplifies this attitude: 'so much does the right of property go along with labour that civilized nations have never scrupled to take possession of countries inhabited only by tribes of savages – countries which have been *hunted over* but never *subdued* or cultivated' (Arnold 1831: 157. Italics in the original). This emphasis on cultivation was used in South Africa by the famous explorer and missionary David Livingstone to argue that the Boers failed to meet the criteria for the rights of ownership. He was hostile to the Boers because they had fled the Cape, with criminals and other disreputable Englishmen, in order to escape English law. The Boers abhorred the abolition of slavery upon which their economy relied, and continued to force the natives into unpaid labour, justifying the practice on grounds of humanity and justice:

'we make the people work for us, in consideration of allowing them to live in our country' (Livingstone [1857] 1859: 30).

Using some of the arguments for colonisation developed by John Winthrop, the seventeenth-century lawyer and Puritan Governor of the Massachusetts Bay Colony, and Emer de Vattel, the eighteenth-century Swiss philosopher and jurist, in 'The Transvaal Boers and Slavery', written in 1858, Livingstone referred to a 'divine charter' for colonisation in Africa. The divine charter gives precedence to cultivation and the development of commercial enterprise, which he invoked to justify his own venture to open up a route into the interior of Africa. The Boer Trekker settlements in the Transvaal were illegitimate, as far as Livingstone was concerned, because they were not agriculturalists but nomadic cattle farmers, little different from the native Africans. Unlike the British the Afrikaans did not promote the more efficient and intensive cultivation of the Transvaal soil and therefore had no Divine or human sanction.[1]

Similar justifications were given by the Dutch in South East Taiwan where they appropriated the lands of the aboriginal peoples in the seventeenth century. They seized lands that were not under cultivation by villagers, subdued the natives and brought them under the rule of the East India Company. They encouraged Fujian settlers from mainland China to consolidate the Dutch settlement by giving them oxen and tools for farming, taxing the proceeds and granting trading licenses. The Aboriginals resisted but were defeated. The Dutch attempted to civilise the 'Indians' or 'blacks' who they claimed were in violation of natural law, by imposing Christianity and expelling many of the heathen religious leaders from the villages. Hunters and gatherers, such as many of the American Indian tribes, and paradigmatically the Australian Aboriginals, fell far short, but even those peoples who practiced agriculture such as the New Zealand Māori could be accused of inefficient production because of their crude farming implements and tendency to exhaust the soil and move on to new areas of cultivation. Native peoples, then, were morally derelict in failing to fulfil their obligation to God in making the earth bountiful, and of failing to establish civil societies to ensure efficient exploitation of the soil.

Strategies were pragmatic, of course, and use of the idea of waste land, *terra nullius*, was one such strategy to take possession of lands that were not under cultivation. Even the Māori who were deemed to occupy a higher level of civilization than the Australian Aboriginal, and were designated agriculturalists and acknowledged to own the land they cultivated, and, unlike the Australian Aboriginals, deemed to have a capacity to alienate it, nevertheless failed to meet the conditions necessary for the full exercise of the universal rights enjoyed by civilised nations. They were rudimentary agriculturalists who had not developed plough technology. They moved on to new lands when the soil was exhausted. The fact that they were not hunters was used, paradoxically, to argue that the Māori did not need as much land as American Indians over which to roam in search of game, and that their proprietary rights should be restricted to that land which they actually cultivated, and not extended to the

full extent of that which they claimed (Hickford 2006: 123). The Crown was to exercise Eminent Domain over the remainder and assume sovereign responsibility, which it claimed in relation to the North Island in the wake of the Treaty of Waitangi of 1840, on the ground of cessation, and over the South Island on the grounds of Cook's 'discovery' or 'first sighting' of 1769–70.

Insufficient exploitation of the full potential productive capacity of the land was deemed a dereliction of duty to God and remained the central idea throughout the imperialist era. It underpins justifications of European Trusteeship in Africa in the latter part of the nineteenth century. The Dual Mandate was based on the principle that the exploitation of African resources was to be for the mutual benefit of the industrial classes of Europe and the peoples of Africa. It entailed an obligation of trusteeship which was enshrined in international law by the Berlin Conference 1884–1885. In Lord Lugard's terms this relationship is one based on the familiar assumption that God gave the world to men in common and that it is by natural right the inheritance of mankind. Africans, unable to appreciate the value of the resources under their feet, had no right to prevent others from exploiting them. Lugard asks: 'Who can deny the right of the hungry people of Europe to utilize the wasted bounties of nature, or the task of developing these resources. ... a "trust for civilisation" and for the benefit of mankind' (Lugard 1965: 617). The obligation assumed by European powers at the Berlin Conference entailed taking charge of the internal affairs of African territories thus effectively collapsing the distinction between a colony and a protectorate, with the express intention of more efficiently eradicating slavery from the continent. These self-imposed duties of the higher civilisations to nurture the lower towards maturity gave them the self-endowed right to acquire jurisdiction without having to pretend that it was ceded by treaty with peoples who were deemed not to understand, and to which the idea was alien to their way of thinking (Bain 2003: 67).

Consent was not necessary because Africans, like the Aboriginals of Australia, were not considered to have fully developed rational faculties because of their childlike nature. In relation to Africans, but not in relation to Australian Aboriginals, Europeans assumed an obligation to act as guardians and trustees until they matured. The assumption that Aboriginals did not own land or have a sense of being bounded by territory was doubted by many during the early years of occupation and after. Aboriginal tribes certainly associated themselves with territories and took their names from them, but more surprising they parcelled some of the land to individuals who were able to pass it on by heredity, and who 'punished those who trespassed on it' (Banner 2005a: 14).

Many jurists and philosophers in the Natural Law and Natural Rights traditions simply would not accept such a concept of ownership qualifying for the protection of universal rights, because the obligation to make the land as productive as possible was not being fulfilled. In other words Aboriginals were not farmers. It was also an exaggeration to suggest that the American Indians

did not engage in agriculture. Colonists frequently reported agricultural activity throughout eastern North America, and it was well known that parts of what is now North Carolina had extensive cultivated fields, as is evidenced by a late sixteenth-century drawing by John White of Indians, permanent structures and cultivated plots of land. It was the growing acknowledgement that Indians farmed the land that contributed to the recognition of their right in property (Banner 2005b: 38). They were therefore deemed to be able to alienate it, and what was once taken by the sword was taken by pen. In the Transvaal and Orange Free State, occupied land, Kruger boasted, was acquired by purchase from the natives, in contrast to the despicable brutality of the English.

The Implications

The first encounters of Europeans with American Indians and later Australasians were characterised by the belief that higher civilisations were encountering lower. This initially was filtered through the myth of the three sons of Noah – Japheth, Shem and Ham – who inherited the continents of Europe, Asia and Africa respectively, forming a hierarchy of peoples, which was extended to the new worlds, each being designated its place: the Americas above, and Australia below Africa. Hanke argues that 'if the Indians were considered barbarians, almost anything could be justly done to them by Spaniards. ... even in this twentieth century, the excuse given by Peruvian upper classes for their harsh treatment of the Indian is that they are animals, not men' (Hanke 1935: 12–13, fn. 26). With regard to Australia, for example, accounts of travellers and explorers, which came to inform much of the later anthropological literature of the nineteenth century, portrayed Australian Aboriginals as non- or less than human, and, if human, occupying such a low point on the scale of civilisation that they could barely be treated with civility. They were largely considered to be vermin, so primitive that they were completely incommensurable with humanity, with no apparent signs of civilisation and better exterminated than enslaved. This view was common enough, even as late as 1930. In that year it was still felt necessary to present the case for why Aboriginals were human (Bennett 1930). Take also the example of South Africa. Nothing incensed Paul Kruger, the President of the Transvaal, more than the suggestion that blacks or the Kaffir were the spiritual equals of the whites. 'They are not men', he exclaimed, 'they are mere creatures. They have no more a soul than a monkey has' (cited in Holmes 1900: 65). For the Boers, the native question was both religious and political. The editor of Paul Kruger's memoirs reminded the missionaries: 'South Africa has room for only one form of civilization, and that is the white man's civilization' (Kruger 1902: 41, fn. 1). The Fundamental Law of the Transvaal Republic included a prohibition on admitting 'equality of persons of colour with white inhabitants, neither in State nor Church' (cited in Holmes 1900: 74). Charles T. Bunce commented in

1900: 'The Boers had always considered the negroes as inferior beings, created for their especial benefit as slaves' (Bunce 1900: 152). 'Coloureds', however, appear to have been redeemable. Even Paul Kruger ostensibly subscribed to bringing civilisation to them. In his inauguration address of 1888, he directed some of his remarks to the 'coloureds' of the republic: 'You have a right to the protection of the laws of this Republic. Whether you make use of the opportunities given you to acquire civilisation depends upon yourselves' (Kruger 1902: 41, fn. 1, cited by Schowalter, the German editor).

Conclusion

What I have tried to show is justifications of colonialism and imperialism, despite an apparent disconnectedness, drew their veracity from a powerful background 'world of ideas', which incorporated and tolerated essential tensions which allowed for differing conclusions from the same premises. I began by articulating the theoretical basis for understanding justifications of colonialism and imperialism in this way, and went on to illustrate that the veracity and intelligibility of the 'Requirement' was best understood in these terms. It is the 'world of ideas' generated by the constellation of assumptions that make the stray remarks of colonialists and apologists for colonialism and imperialism intelligible, and render remarks such as those of Arnold, Kruger and Lugard warrantably assertible. Natural law and the law of nations, uniquely the product of the Western political experience, were conceived to be universally applicable, and from which local variations, at least in terms of fundamental beliefs, were regarded violations. Implicit in this way of thinking was a scale of civilization that was invoked to determine to what extent those who did not belong to the higher on the scale, may exercise universal rights, for which certain qualifications had to be met. Universal rights, which have the potential to liberate, are more often than not transformed into special rights, and used to subjugate rather than protect and empower those very people who are most in need of them. Universal obligations were used to indict indigenous peoples of neglecting their duties and in many respects giving just cause for war. I have shown that such rights and duties are embedded in a background theory that explains why colonisers believed that what they were doing was morally laudable, rather than reprehensible. I have illustrated this with reference to the universal right of property ownership, and the associated right of husbandry. These rights entail obligations, which Europeans claimed, both explicitly and implicitly, were not being effectively discharged by certain categories of non-Europeans in dereliction of their duty to God to make the land as productive as possible, and to do so most efficiently within political societies affording the appropriate rights and protections for the maximisation of effective production.

European encounters with the American Indians and Australian and Austronesian Aborigines are perfect illustrations of how abstract doctrines, with

their universal principles were translated into concrete practical prescriptions for occupation and appropriation of lands. Even Francisco Vitoria, the Spanish theologian, a defender of the American Indians against most of the common justifications for considering them incapable of exercising property rights, because they were insane, immature, irrational or irreligious, still required them to discharge their obligations under natural law. Failure to do so left the door wide open with regard to just war. To give just cause provided the opportunity to seize property by the just title of conquest (Vitoria 1991). Three centuries later Leslie Stephen, while dubious about the methods of the English and Spanish in America, makes it clear that twenty million civilised whites are preferable to one million red savages populating the continent (Stephen 1892: 166).

Despite the so-called positivist revolution in international law during the late nineteenth century the Law of Nations formally embraced a scale of civilisation, comprising savagery, barbarism and civilisation with rights that inhere in the higher, inaccessible to the lower because of some impediment correlative with the stage of human development a people had so far attained, or which may congenitally prevent them attaining, thus disqualifying them from the enjoyment of universal rights. Positivist international law, which sought to overcome the ambiguity and imprecision of natural law, emphasised sovereignty and statehood as qualifying principles, which allowed them to distinguish between civilised and uncivilised peoples, with international law regulating the conduct of civilised states (Anghie 2005).

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Note

1. I am indebted to Camilla Boisen for this reference. In a sequel to this article Camilla and I argue that understanding the bewildering variety of justifications of land acquisition requires distinguishing between core and operative principles. 'Core and Operative Principles of Justification', forthcoming. I would also like to thank Camilla for her useful comments and suggestions for improvement of this article.

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