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Change and Continuity in Nineteenth-Century Latin America

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Recent studies in Latin American history have increasingly rejected the periodisation inherited in the traditional historiography. In other words, the notion that the Wars of Independence (c. 1810 - c. 1825) represented a clear break with the colonial past has become both questioned and contested. Over the last two decades, as a result, there has been a marked shift in the analysis of independent Latin America which has gone on to stress and emphasise the continuities that linked the late colonial period with the first national decades. For example, for historians such as Jaime E. Rodríguez O. this key interpretative shift led him to define the years 1750 - 1850 as an "age of democratic revolutions"(*Mexico in the Age of Democratic Revolutions, 1750 - 1850*, Boulder: Lynne Rienner, 1994). Brian Hamnett, similarly, merged the late colonial period with the first half of the nineteenth century, in his recent history of Mexico, viewing the years 1770 - 1867 as ones that shared the themes of "destabilisation and fragmentation" (*A Concise History of Mexico*, Cambridge: Cambridge University Press, 1999). We have gone, therefore, from perceiving the triumph of independence as the beginning of a new political era to accepting that, instead, whilst it represented a watershed of sorts, it did not amount to an abrupt end of the political tensions, customs and traditions that characterised the late eighteenth century.

This relatively novel understanding of the nineteenth century can be appreciated when some of the main themes of the early national period are listed. For instance, Church-State tensions were as violent in the late colonial period as they were in independent Latin America. The assault on the Church that became a major pursuit of the Bourbons, in particular Carlos III (1759 - 88) and Carlos IV (1788 - 1808), was subsequently endorsed by the liberal factions of the nineteenth century. The federalist - centralist divide that was to account for the majority of revolts that surfaced with independence was one that was also explosive during the late colonial period. The system of intendants stemming from the Bourbon attempt to centralise power in the 1770s and the centralist tendencies of the 1812 Cadiz Constitution, provided the origins of much of the debate that would emerge subsequently in former Spanish America. The way regional elites clashed with each other over the extent to which power should be devolved to their provinces or retained in the capital thus replicated the ways in which their predecessors supported or opposed the *intendencias*. The economic divide that split factions between those who defended protectionist policies and those who supported free market economics, was also a major issue in the late colonial period. Although the 1808 constitutional crisis undoubtedly sped up the process by which the bid for independence became such a powerful force in the 1810s, the economic discontent of the Creole elites had reached breaking point as a result of the Spanish Crown's protectionist policies. The 1788 - 9 Minas Gerais revolt in Brazil erupted because of what was, albeit briefly, a parallel economic context. Likewise, the struggle between constitutionalists determined to curtail the power of the executive and *caudillos* or emperors in the case of Brazil (Pedro I, 1822-31 and Pedro II,1840-89) who preferred to adopt emergency powers, close down congress and rule by decree, was equally present in the late colonial period. The conflicts that arose between absolutists and those Masonic factions who endorsed the principles of the Enlightenment, the U.S. 1787 Constitution, the French Revolution and the Spanish 1812 Constitution were equally virulent in the late colonial period. In brief, the political, social and economic problems of the late colonial period did not end with independence, they developed, in a context wherein there was as much continuity as there was significant change. It is, of course, in the realm of justice and judicial institutions where issues of change and continuity can best be appreciated. Given that all changes were encapsulated in the laws that were passed and implemented following independence, a study of the individuals and institutions who were responsible for proposing and enforcing them is evidently all important.

Eduardo Zimmermann's collection of essays is a welcome contribution to the historiography. In many ways, it is surprising that, in comparative terms, so little has been written about the judicial institutions of nineteenth-century Latin America. Not only were lawyers fundamental because of their roles as interpreters and implementers of the legal system that came into being with independence, they became as well, as Zimmermann reminds us in the introduction, the main legislators and ministers of the independent governments. In other words, it is by studying the "interaction between the legal world and the wider political, economic, social and cultural processes" that we can truly begin to appreciate what the "transition from colonial status to independent nationhood" entailed (p. 1). This edition, which contains articles by some of the most outstanding specialists in the field, namely: Charles R. Cutter, Víctor M. Uribe, Linda Arnold, Thomas H. Holloway, Osvaldo Barreneche and Zimmerman himself, represents, therefore, a particularly compact and eye-opening revisionist volume, which places "particular emphasis on the continuities between" the colonial and the post-colonial phases.

The issue of continuity is therefore a recurrent theme throughout the book. In the opening chapter, Cutter's study of the legal culture of Spanish America on the eve of independence helps us appreciate the extent to which *derecho indiano* was "an intricate legal system that proved to be adaptable to the peculiar needs of the diverse regions of empire". In so doing, Cutter dispels the often-accepted myth that the colonial judicial administration was "ponderous, tyrannical, arbitrary and corrupt" (p. 11). The flexibility Cutter demonstrates characterised the Spanish colonial legal administration, even in more peripheral zones (such as northern New Spain), forces us to review the idea that the colonial magistrates were guilty of "malfeasance, capriciousness or ignorance". Instead, what becomes evident is that justice was imparted remarkably fairly. Notions of *equidad*, which stressed the importance of the common good over personal gain, proved more important than what may have been thought to be the case, as magistrates preferred to exercise their *arbitrio judicial*

than abide by the inflexible tenets of any written *doctrina*. Evidently the corporatist spirit of the colonial legal system was to be increasingly challenged by the rampant individualism that was to characterise nineteenth-century liberal thought. Notwithstanding the fact that, because of this, many of the tensions of the nineteenth century would revolve precisely around achieving "congruence between new political paradigms and old social realities" (p. 24), Cutter's interpretation of Spanish legal culture confirms that independence did not represent the end of an anachronistic system. In fact, many of the so-called legal advances of the nineteenth century did not come about because they overthrew or replaced an unjust and antiquated order. In reality, they built upon a flexible system which was remarkably fair in its origins, and which, because of this, was deeply ingrained in the customs of, and widely accepted and uncontested in, nineteenth-century Latin American society.

Linda Arnold's study of the *fuero militar* in independent Mexico develops and complements Cutter's assessment of Latin America's corporatist colonial tradition. Again two issues emerge which must be noted. The first is the extent to which there was continuity, especially in the way that certain key institutions such as the army and the church retained their separate jurisdictions, acquired in the colonial period, for the better part of the nineteenth century. The second, and perhaps the most striking, is that these corporate jurisdictions, often depicted as privileges, were far fairer than has generally been acknowledged. Arnold, like Cutter, forces us to rethink our perception of those colonial judicial legacies that survived into the nineteenth century. As it becomes evident from her chapter, the army was not an irresponsible institution that used the fuero to avoid justice being meted out among its ranks, as it has been so often made out to be. In fact, "military, constitutional and ordinary jurisdiction case files reveal that judges applied jurisprudence not corporate biases when they decided guilt or innocence, determined liability, and issued definitive sentences" (p. 61). In the same way that Cutter demonstrates that the colonial legal culture was long-lasting because society at large found it was fair, Arnold proves that the *fueros* were not abolished until the late 1850s because "thousands of people [.] actively asserted agency [.] in corporate society. And some of those active participants in corporate society believed they would lose advantage were they cast adrift in the amorphous and violent public culture that the military tried so hard, yet failed, to contain throughout the early national era" (p. 61).

What emerges in all of the chapters is the apparent abyss that emerged between the utopian ideals of the enlightened liberal-minded Creole intellectuals (many of them lawyers) who took to the corridors of power with independence, and a social reality that could not change over night. Whilst Cutter and Arnold's essays point to a society in which corporatism was deeply rooted, so much, in fact, that any major changes in the legal system were generally resisted, Holloway and Barreneche's chapters highlight how pragmatical choices eventually triumphed over idealistic ones in Brazil and Argentina. In other words, in some cases continuity pervaded because the majority appeared to prefer corporatist practices, suffering from an acute and understandable misoneism (fear of what is new). In others, however, the actual problems that arose in attempting to implement certain legal reforms proved either too difficult to overcome or too dangerous, and were subsequently abandoned.

Holloway's chapter on the role of the Justice of the Peace in Rio de Janeiro (1824 - 41), provides a perfect example of how practical issues ultimately triumphed over matters of principle. Characteristic of the idealism of the liberal reformers who drafted the 1824 Constitution, locally elected lay judges (Justices of the Peace) were created in 1827, in a bid to break with the colonial practice whereby judicial authority emanated from the monarch. As was to become evident soon after, by having these "magistrates of police" popularly elected, the well-intentioned liberal reformers had inadvertently empowered the popular classes, in what was a particularly stratified and conflictive society, by allowing them to choose who imparted justice in their locality. Not surprisingly, the Justices of the Peace soon became popular leaders, playing a key role in the events that led to Pedro I's abdication. As a result, from 6 June 1831 to 3 December 1841, a series of measures were taken to restrict the power of the Justices of the Peace and to subject them to the authority of the appointed chiefs of police. By 1841, the 1827 law had been completely overturned and the local judicial system returned to what it had been in 1808, when the Portuguese Court moved to Brazil and established the General Intendant of Police.

Osvaldo Barreneche's chapter on the means by which the police force in Buenos Aires became more powerful than the judicial officials during the early national period offers a parallel account to that presented by Holloway for Rio de Janeiro. As is confirmed in both Uribe and Zimmermann's chapters, one of the most pressing problems faced by the independent nations was the marked lack of lawyers. There were simply not enough of them to actually implement the kind of far-reaching reforms many forward-thinking liberals had in mind. In the case of Buenos Aires, therefore, a pragmatical approach prevailed. The new governments avoided tackling this problem by training more lawyers (a policy that, as Zimmerman's last chapter points out, was only pursued once the Rosas era drew to a close in 1852). Instead the authorities preferred to increase the power of the police. Therefore, despite the attempts of judicial officials "to maintain and to expand their colonial spaces of power in the decades after Independence" (p. 91), it was the police and the military who became the main "givers" of justice. Police budgets were increased whilst judicial requests for assistance were neglected. By 1833, in fact, as one discontented judge noted, the police officers had become "truly judges usurping [legal] jurisdiction that used to belong to the magistrates" (p. 94). As Barreneche informs us, "in the long run, the judiciary was kept inside the courtroom, limiting its contact with civil society, while the police became the visible face of the penal system" (p. 95). As a result, at least until the late nineteenth century, what were originally meant to be transitional and pragmatic measures (i.e., empowering law enforcement agents with the responsibility of meting out justice whilst more lawyers were trained) became "a permanent feature of the system" (p. 103).

As becomes evident in Uribe and Zimmermann's chapters, however, there was more to this marginalisation of the judiciary than a pragmatical approach to the violent context of early nationhood. Lawyers were mistrusted by the emergent political forces of the day for clear political reasons. As Uribe's study demonstrates, there was nothing new about this. In the last decades of the colonial period the complaint that there were far too many lawyers was not actually based on fact. As Uribe shows, in comparative terms, the number of lawyers in Latin America was indeed far from excessive when seen alongside the number of lawyers existing in France, England and the United States at the same time. In other words, the complaint that there were too many lawyers was used by the Crown in order to justify its consequent marginalisation of the legal profession. The revolutionary tendencies of many lawyers were at the heart of the Crown's stand against them. As Uribe confirms, "alleged 'revolutionary' activities on the part of lawyers and other intellectuals, and their active role at abetting what today we may call an embryonic 'public sphere of civil society', were probably among the real reasons for containing the growth of this profession and moving to regulate training more closely" (p. 35). The major role played by lawyers in the Wars of Independence more than confirmed that Crown's fears. The death toll the Wars represented, moreover, further decreased their numbers. And, as is illustrated in Barreneche's study on Buenos Aires, little was done to increase their numbers given that the new rulers of Latin America feared them as much as the Crown did at the end of the colonial era.

Zimmermann's final chapter on the education of lawyers and judges in late nineteenth-century Argentina shows that this distrust of the legal profession, for practical and political reasons, only started to be

overcome after 1863. As a closer look at some of Juan Bautista Alberdi's writings shows, lawyers were not only viewed with suspicion because of their political tendencies, but because they did not contribute in a practical sense (like engineers, for example) to the much-desired modernisation of the new country. It was therefore only gradually, following the end of the Rosas era (1829 - 52) and the eventual triumph of a liberal project, that by 1872, a new generation of lawyers started to emerge, trained in constitutional as well as civil law.

Viewing Zimmermann's volume as a whole, it becomes evident that independence did not entail a clear break with Latin America's colonial past. The judicial institutions of Bourbon Spanish America and Portuguese Brazil were not replaced by entirely new ones. They developed and progressed. Many key aspects of the colonial legal order remained in place. So did many of the problems that affected the colonial legal system. In some cases these continuities were due to the often-ignored merits of colonial justice. The corporatism of late colonial Latin America did not die the day independence was achieved. It lasted, deeply rooted in society, until liberalism became truly hegemonic at the very end of the nineteenth century. In other cases these continuities were inevitable given that nationhood did not change the size and nature of the terrain. Communications remained poor, mountains and jungles did not disappear, and the practical problems of governing these vast and remote lands remained the same. The new governing elite made pragmatical choices in the same way that their colonial predecessors did. In brief, it took over a century for the colonial legal system of the 1750s to become the modern one of the late nineteenth century. Albeit short and succinct, Zimmermman's volume is both groundbreaking and inspiring. It is to be hoped that, motivated by this excellent piece of scholarship, more research into the nineteenth-century judicial institutions of Latin America will be undertaken.

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