

Restitution in Land Markets and Social Exclusion of Indigenous Peoples

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SUMMARY

It has been estimated that there are 250 million indigenous peoples living in more than 70 countries. Indigenous peoples have a particular relationship with the land and their natural environment, which can be viewed as part of their cultural patrimony as well as their means of economic support. The land provided them with both physical and spiritual sustenance. The relationship that indigenous peoples have with the land has been under threat since the development of the European Empires from the 16th Century. The latter brought the colonisation of the indigenous peoples' lands and the commercial exploitation of the natural resources these contain. These processes have continued in the successor States that have replaced the European Empires. The consequences for the indigenous peoples have often been their marginalisation in society and their social exclusion.

In recent decades there have been movements by indigenous peoples in a number of countries to recover their lost lands and patrimony. The paper makes use of case studies from Chile and Canada, and includes findings gathered from fieldwork conducted in the latter part of 2004 in these countries. The case studies represent different situations in which restitution has been implemented as an appropriate policy response to past land expropriation. In Chile the land reforms of the 1960s and 1970s, brought about by democratically-elected governments, were reversed by the Pinochet government after its seizure of power and the beneficiaries of these reforms were brutally treated by the military regime. The latter also expropriated the property of those it considered to be enemies of the State. Post-Pinochet, Chile has faced claims for restitution by indigenous groups seeking to recover land lost during and since colonisation took place. The latter has challenged the Chilean Government. This further raises the question as to whether such claims can be accommodated within the legal and political processes or whether they should be regarded as challenged to the very existence of the State.

The situation in Chile can be compared, in part, with how aboriginal groups have sought to recover property and their landed patrimony in Canada. High profile legal cases, often starting on apparently unrelated issues, have challenged whether the Canadian Government has the power to exclude indigenous peoples from the exploitation of natural resources and whether it has adhered to the treaties made with indigenous peoples in the past. An analysis of both cases enables comparison to be made between the experiences of aboriginal groups under British and Spanish colonialism and how they have fared under the different types of legal system the successor states have adopted.

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1. INTRODUCTION

Restitution has been previously defined as the process by which land and other property that was forcibly removed from its owners is restored to them or compensation of equivalent value provided (Grover & Flores-Bórquez, 2004). Land is forcibly removed from its owners in a variety of circumstances, including, colonisation, nationalisation, and war. Central to this paper is dispossession associated with colonisation, which resulted in land possessed or controlled by indigenous peoples or over which they had free access being granted to colonists for farming or the exploitation of natural resources. Indigenous peoples often resisted colonisation and dispossession and were frequently driven off their land or confined to reservations. The consequences of this action are significant, not least because of the number of people affected and that the process of colonisation has not ended. The World Bank estimates that there are over 250 million indigenous peoples, comprising more than 4 per cent of the world's population, living in over 70 countries (Davis, 1993).

Encouraged by the success of the US Civil Rights movement in ending segregation in the Southern States in the 1960s and 1970s, indigenous peoples in a number of countries have taken steps to seek to recover land and access to natural resources. This paper focuses on the contrasting experiences of two countries, which were subject to different colonising influences; Chile, which was colonised mainly by Spain, and the provinces of Canada's Atlantic coast, where the dominant colonial influence was Britain. It examines how dispossessed and socially excluded indigenous peoples have sought to regain access to the land and natural resources they once controlled. The Canadian Mi'kmaq historian, Daniel N Paul, has argued that there are parallels between the expropriation of property by Communist governments in Eastern Europe and the colonisation of Canada and has drawn the inference that restitution is an appropriate way of resolving colonial land issues, as it has been for expropriation in Eastern Europe.

“The unethical seizure of Amerindian lands by colonials should be atoned for by Canada by a return to the First Nations of large tracts of their former lands. There are plenty of examples of such actions being taken in the world today. For instance, in Eastern Europe, where the former Communist governments expropriated all the land for the state, there is a move by the new democratic regimes to return expropriated properties to former owners or their descendants, or, if not possible, to make financial restitution. Canada can take a valuable lesson from this” (Paul, 2000).

It can be argued that restitution can be used to advance the dialogue relating to conflicts between the descendants of indigenous peoples and those of the colonists and more recent migrants. The former may harbour long-standing resentments about how they and their ancestors have been treated and about their marginalisation in a society they regard as displacing their own. As land is frequently endowed with a cultural significance, its recovery can be an important aspect of reasserting a lost patrimony.

2. THE PROCESS OF COLONISATION IN THE AMERICAS

Cerda-Hegerl (ndg) highlights that colonisation in the Americas, and its process of frontierisation, was seen by historians as an enriching process. The process of colonisation had, according to some of these historians, enriched the democratising progress of the New Frontiers, forming a sort of 'national character' (Cerda-Hegerl, *ibid*). Accordingly, it was proposed that the constant struggle against a hostile nature had contributed to the individualism of what was to become the American character, together with the development of personal initiative and a desire for personal improvement (*ibid*). Such propositions received acclaim and were applied to other cases of colonisation around the world with recognition of the civilising nature that the 'East' had had on the 'West'. These propositions were particularly apt when applied to parts of the world which were theoretically uninhabited and where the expansion of the 'White man' was associated with ideas of liberty, with limitless opportunities, and with the pursuit of individualism and a continuous revival (*ibid*). The latter are relevant considerations to keep in mind when the evolving nature of the struggle for restitution of land made by indigenous peoples is analysed against actions of the colonisers and their descendants.

3. COLONISATION AND CONFLICTING PHILOSOPHIES OF LAND RIGHTS

The expansion of the European trade routes and empires from the 15th Century drew many subsistence societies into the global economy. It brought indigenous peoples into contact with new systems of land law and philosophies of land exploitation and their forced displacement from their ancestral patrimony. The Mi'kmaq of Canada's Atlantic Provinces experienced French and British fishermen, fur traders, whalers, and, later, colonists encroaching on their territories from the 16th Century. French fur traders established a permanent settlement at Port Royale in Nova Scotia in 1604. For other indigenous peoples, like the Inughuit of Western Greenland, contact took place much later, starting with whalers in the 19th Century. Large-scale European settlement only occurred when the military potential of their land became apparent during the Cold War. The American-Danish Agreement on the Defence of Greenland of 1941 was followed by a 1951 agreement under which weather stations were replaced by the Thule Airbase and its Ballistic Missile Early Warning System. The Mi'kmaq found themselves being displaced by colonists and receiving back as land grants a small proportion of the territories they formerly occupied once Britain replaced France as the dominant colonial power in the 18th Century. The Inughuit of Uummannaq in Greenland were forcibly relocated to a new settlement ninety miles away in 1953 to make way for the Thule Airbase (Herbert, 2004).

The consequences of the contact between indigenous peoples and European colonialists and traders were mixed. Improved trade, access to metal-based technologies, and diversified employment opportunities were counter-balanced by exposure to diseases, for which the population lacked immunity, submission to colonial rule, adverse environmental consequences, and the weakening or destruction of traditional social authority. Indigenous peoples do not view land as a commodity capable of being bought and sold in impersonal markets but as *a substance endowed with sacred meanings which defines their existence and identity* (Davis, 1993). Indigenous peoples found that their systems of law, authority, and

belief came into conflict with the colonialists' legal and philosophical systems. The colonialists did not share their view of stewardship of the earth. Rather, they saw it as a natural resource to be exploited, and often perceived the newly-discovered areas as being empty lands and as resources without owners. Some of these differences in world view are summarised in Table 1.

Table 1. Some divergent views that differentiate the world view of indigenous peoples from that of the West.

Indigenous peoples' culture	Based on the collective	Non-intensive use of the environment	Balanced and reciprocal interaction with the environment	Protection and preservation of ancient species and of the environment
Western culture	Based on the private	Utilitarian use of the environment as a source of wealth	Systematic and intensive exploitation conducive to accumulation	Destruction of ancient and sacred species replaced by exotic species for commercialisation

The European colonisers brought legal systems to these new lands that were derived from the feudal system of agricultural production. The colonists were used to settled agriculture systems and residences rather than the migration of a population between different natural resources according to the season. Wilderness areas in their homelands were subject to cultivation or, at least, intense management. All valuable resources were in private ownership and those without property rights were excluded from access to these. Even rights to use common land and wastes tended to be strictly defined and limited down to which property had the right to graze how many animals of what type on the commons and who could gather which natural products from wastes. By contrast, the indigenous peoples tended to have common property resources, accessible to anyone within the society, though each exploited the resources individually.

In contrast to the private ownership of resources by the colonialists, the survival of the indigenous peoples tended to depend upon the sharing of access to common property resources. They operated on the margins of subsistence without permanent surpluses that could be transferred. Division of labour was more a matter of gender and personal qualities than of social hierarchy. A more egalitarian society can be argued to have existed in pre-colonial times than in those of the colonisers (Paul, 2000). Paul has summed up the clash of cultures between the colonisers and the colonised from the latter's perspective:

“To exclusively apply the tenets of British Common Law as it existed at the time when British intrusion onto the territory of a sovereign First Nation first occurred, without giving any consideration whatsoever to the value system of the society that the British system had intruded upon, is the ultimate of arrogant White supremacist thinking” (Paul, 2000).

4. ATTEMPTS TO RECOVER LAND IN CANADA

As previously stated, the first substantive contacts that the Mi'kmaq of Atlantic Canada had with Europeans were with the French. For a century and a half from the first attempts by Anglo-American forces in 1613 to evict the French from their settlements until the fall of Montreal in 1760, the Mi'kmaq found themselves in the frontline of the conflict for worldwide supremacy between Britain and France. Canada ceased to be a major combat zone after 1760. In this conflict the Mi'kmaq were allies and co-religionists of those who were defeated. They were obliged to make peace with the British, towards whom they felt understandable antagonism and who had rival First Nation allies. The Treaty of Utrecht in 1713 gave Britain much of the French colony of Acadia (now part of modern Nova Scotia) and brought some Mi'kmaq territory under British rule. In treaties made in 1725, the British Government agreed that the Mi'kmaq:

“Shall Peaceably Enjoy all their Lands & Properties which have been by them Conveyed and sold unto, or possessed by the English & be no ways Molested or Disturbed in their planting or Improvement and further that there be allowed them the free liberty and Privilege of Hunting Fishing & Fowling as formerly”¹ (English text from the original Treaty).

After the ending of the War of Austrian Succession in 1748, in a treaty of 1752, the Mi'kmaq were promised that they *shall not be hindered from, but have free Liberty of hunting and fishing as usual*². The ending of the Seven Years War saw similar declarations and prohibitions on the taking of land reserved for the indigenous population³.

Until 1815 the indigenous population of Canada played an important strategic role as a buffer between the British colony and the newly independent United States of America and were courted by the colonial administration (Johnston, 2004). The Mi'kmaq, though, faced competition for land from Loyalists who fled the United States after its independence. Once there was peace with France and America, Britain no longer had urgent need of its First Nations allies, who became neglected and marginalised in favour of the migrants from Britain. Until the early part of the 19th Century, the indigenous population was deemed to be governed by its own laws. However, in 1826 in the Shawanakisie decision, a member of the Ottawa Nation was convicted of killing a woman in a revenge attack on a household deemed responsible for the death of a parent and the indigenous population came to be under British-Canadian law. Land reserved for the First Nations came under increasing pressure from mass immigration, the industrialisation of Atlantic Canada, and the exploitation of Canada's mineral resources. Commercially valuable reservation land, such as that at Sydney, Nova Scotia, was lost to the indigenous population and the government stood accused of failing to defend the land allocated to indigenous population. According to Paul (2000), the

¹ Treaty of 1725, Promises by Lieutenant Governor of Massachusetts Bay by the Honourable William Dummer Esq Lieutenant Governor and Commander in Chief of His Majesties Province of the Massachusetts Bay in New England.

² Treaty of 1752 Treaty or Article of Peace and Friendship Renewed between His Excellency Peregrine Thomas Hopson Esq on behalf of His Majesty and Major Jean Baptiste Chief Sachem of the tribe of Mick mack Indians.

³ Royal Proclamation 1763

administration of reservation land contains a catalogue of mismanagement, neglect, discrimination, and malfeasance.

From 1960 the indigenous peoples of Canada began to achieve the removal of inequalities in their treatment and discrimination compared with the population as a whole. Full federal voting rights were secured in 1960 and from 1970 there was equal treatment before the law in areas such as the consumption of alcohol. Accompanying this have been challenges in the courts based upon rights claimed under the treaties made with the British Crown. In a Supreme Court decision in 1985, James Simon of the Shubenacadie Band⁴ was acquitted of the illegal possession of a rifle and ammunition on the grounds that the Treaty of 1752 made with the Mi'kmaq (quoted above) remains in force. Similar cases have arisen over logging, fishing, and other natural resource issues. These include the Marshall decision of 1999 which has important implications for First Nation people's rights of access to fishing and, by extension, other natural resources (Coates, 2000). The central issue is whether the Canadian Government can make regulations over access to these resources that are binding upon the First Nations in apparent contravention of earlier treaties. The Supreme Court decisions would suggest that the earlier treaties are still binding.

The reaction of the Canadian Government and Canadian society to these decisions has been an interesting one. The Government has accepted court rulings and has not sought to reverse the court decisions through legislation. The Canadian Government's stance has been to show preference towards negotiation with First Nations, with a particularly important role being played by provincial governments, rather than using force against them or subjecting their leaders to anti-terrorist or counter-insurgency measures. The First Nations have generally preferred to negotiate to secure the assurance of a modern settlement rather than the uncertainty of 18th Century treaty rights. As the quotes above indicate, the wording of these is imprecise and much depends in interpretation of the cultural context of acts associated with the Treaties. A policy of compensation for those who lose property rights as a result of court rulings has also been pursued, such as the purchase of commercial fishing quotas for reallocation to First Nations.

5. THE CASE OF THE INDIGENOUS PEOPLES OF CHILE

The case of the indigenous peoples of Chile is highly complex in that the land rights of these peoples has during the last one hundred years experienced a wide range of socio-political changes. Lately, as will be shown in the course of this paper, these changes have been reflected in repressive conditions that affect indigenous leaders. The range of situations experienced by the indigenous peoples of Chile cannot be said to be wholly comparable to the situation of other indigenous or aboriginal populations in liberal democracies like Canada. Nevertheless, it is useful to make a comparison between both groups as together they are representative of the struggle that other indigenous peoples currently pursue around the world. As this section will elaborate, not only are the structural and legal conditions affecting the Chilean indigenous peoples different but the semantics used by them to refer to their situation and, the conditions that they have experienced, is also different. The latter is a clear reflection

⁴ A band is the term used in Canada to describe a community within a First Nation.

of the singularity of the struggle that the indigenous peoples of Chile maintained against the colonisers and their descendants and the enduring consequences of these actions.

The context in which the struggle of indigenous peoples evolves relates to the universal concept of human rights and forms part of a global struggle by indigenous peoples everywhere for right to access and control of their patrimony. Although manifest at different stages, this global movement for rights and access by indigenous populations can be traced in Latin America to the 1970s (Lillo Vera, 2003b).

6. THE SIGNIFICANCE OF LAND FOR THE INDIGENOUS PEOPLES OF CHILE

Since the time of the Spanish colonisation in the 16th Century, many of the nations that formed Chile's "original peoples"⁵ have become extinct (Flores-Bórquez, 2004). National census carried out in Chile, revealed that, out of a total population of 15 million inhabitants, the number of original peoples has fallen just below 1 million. In fact, while conducting fieldwork in 2004 in the IX Region of Chile⁶, the Mapuche highlighted that the 1 million estimates have since the last census decreased further.

The Mapuche currently constitute the largest group of original peoples in Chile, with an estimate that exceeds 90% of the total number of original peoples in the country. The word Mapuche is composed of two words in Mapugundún⁷. *Mapu* means land and *Che* means people. Hence, the word *Mapuche* literally means 'people of the land'. The ancestral territory of the Mapuche originally extended to the South of the Bio-Bio River and over the Andes from Chile to Argentina (Lillo Vera, 2003a). Their social system was egalitarian and only became hierarchical and tribal in times of war. Trade and commerce were central aspects of their nomadic life as they interacted and co-existed with the environment the latter (as their name and language imply) being the most important aspect of their culture. The concept of ownership of land was and is, therefore, alien to the culture of the Mapuche as land is something that according to their cultural beliefs cannot be owned or possessed (Basic Herzfeld, et al., 1997). Indeed, although having access to land constitutes a vital aspect of their collective existence, the Mapuche sanctions a Western meaning of its ownership as do many other peoples whom are currently engaged in a similar struggle for restitution of ancestral patrimony.

⁵ The term "original peoples" is the preferred term with which the Mapuche in Chile wish to be described. The Mapuche object to the term indigenous as it is incorrectly applied to original tribes of inhabitants since the times in which Christopher Columbus set off on a voyage towards the Indies and mistakenly discovered the Americas. The term "original peoples" will henceforth be used to refer to the subject of this paper.

⁶ Flores-Bórquez conducted field work research for this paper in August 2004 in Chile. The IX region of Chile is where the original peoples of Chile had rights to ancestral territory granted by Treaties signed with the Spanish Crown. During the dictatorship of General Pinochet (1973-1990), Chile was divided into regions of geopolitical classification and what was previously known as Araucanía, became the IX Region. The latter is where 90% of Chile's original peoples are estimated to exist with the Mapuche constituting 50% of the total percentage of the population living in the IX Region of Chile.

⁷ Mapugundún, means language of the land.

7. THREE HUNDRED YEARS OF RESISTANCE TO COLONISATION

Colonisation of the Americas was regarded by the Spanish Crown as vital for sustaining the commercial interests of its Crown in the New World. Establishing a secure shipping route for their vessels was essential and great battles with heavy losses were fought with the original peoples to ensure control of these trade corridors (Flores-Bórquez, 2004). The Spaniards sought to exclude other countries from trading with the original peoples. After 300 years of bellicose persistence by the Spaniards, lasting treaties between the Spanish Crown and the Indigenous Nations were signed recognising rights to the indigenous peoples over clearly defined territory (Flores-Bórquez, 2004). It must be highlighted that the 300 hundred-year-battle fought by the Spanish Crown for control over land inhabited by the original peoples lasted so long due to the fact that while the culture of the latter enabled them to work integrally with the environment, the colonisers found that the environment was hostile and it thwarted their efforts. Hence, when the Spaniards were able to advance in pursuit of the original peoples in the summer, the latter had moved on their seasonal migration from Chile to Argentina. The converse was the case in the winter as when the Spaniards retreated away from the South of Chile, the original peoples came back from Argentina to winter in the South of Chile. Hence, from 16th to 19th Century, whenever the Spaniards met with the original peoples the former were defeated, and when they were sufficiently prepared for battle, the original peoples were no longer there to be fought against.

It is estimated that at least 20 treaties were signed in the 19th Century recognising rights of the original peoples in Chile. These constituted the basis for the exercise of their patrimony. Although the latter were the most important treaties in respect of the fate of the original peoples, many more were signed with the colonisers. However, under legislation passed since the Spanish Crown granted these treaties, the rights of Chile's original peoples have been increasingly eroded. Examples of ways in which some of these rights have been eroded will be examined further on in this paper.

8. DIVERGENT DISCOURSES ON RESTITUTION OF ANCESTRAL PATRIMONY AND CONSEQUENCES

Two divergent discourses are hitherto observed in relation to rights of access to patrimony. One discourse relates to the concept of rights which, in the first instance, relates to rights that the original peoples hold since ancient times and which are enshrined in their cultural patrimony, and secondly to the legal concept of rights inscribed in an alien system of law that is applied to subjugated peoples. Another discourse is the object of dispute: *land*. While, as previously intimated, the aim of the colonisers was the acquisition of new frontiers (land) for the expansion of their own commercial interests, the original people's relation to the land was as themselves being an extension of the land.

As was previously mentioned it has been interesting to note that one of the peculiar distinctions that differentiate the Chilean case from other indigenous cases is that of semantics which refers to the habitation of space post-colonisation. Thus, it can be observed that whilst in the north of the American continent the habitable space where indigenous peoples were

confined to live in by the colonisers was referred to as “reservations”, in Chile it was referred to by the colonisers as “reductions”.

Under the influence of the colonisers, Chile changed from being a territory inhabited by peoples who enjoyed clear rights to patrimony to a situation where an alien minority conquered and imposed a legalised system that deprived and subjugated the majority peoples who became a conquered and dispossessed minority. The ways by which this was done involved a variety of brutal and oppressive means. The implications of executing such a system through force, has practical consequences. The aim of imposing the alien legal system had no other purpose than to literally reduce both the patrimony but, most importantly, the size of the population of the original peoples. The latter was achieved in the 19th Century by restricting the access of these nations to the cultural means of natural subsistence and also by increasingly reducing their territorial space for habitation. In order to survive, during the 20th Century, these original peoples had to migrate from these reductions to urbanised areas in order to find alternative forms of economical subsistence (Pinto Rodríguez, 1998). In doing so, as has been the case for other indigenous minorities post-colonisation, they experienced further oppressive conditions and discrimination at the hands of the colonisers (the conquerors).



Natural habitat at Pidima, in the IX region of Chile, where isolated members of the indigenous Mapuche minority live in an increasingly hostile environment fighting for access to their patrimony whilst experiencing harsh repressive conditions imposed by the State. The IX region of Chile is the geographical area where most of the indigenous population of the Mapuche peoples live constituting an estimated 90% of all the indigenous peoples of Chile. Photograph courtesy of ©JUSTICIA, 2004.

No enforceable rights or access to the imposed justice system was available to the original peoples in the early 20th Century. Conditions experienced by members of the original nations, who had migrated, were of servitude. As such, these individuals were deprived of rights of access to their own system of natural law and were also excluded from access to the alien laws that now governed their conquered territory.

The only nominal form of advocacy seen in the 20th Century was experienced amongst the newly scattered individuals who experienced circumstances that were alien to those members of the original nations left behind in the various reductions. At odds with the ancestral cultural patrimony were the new circumstances experienced through adopted forms of feudal subsistence and these, in turn, were culturally sanctioned by their leaders⁸.

As previously highlighted, a highly egalitarian society became hierarchical in times of war. Migration undertaken post colonisation was, therefore, a consequence of an attack to the patrimonial beliefs of the original peoples and, as such, engendered a highly formalised hierarchical network that was weakened further by forced migration. The latter, as previously intimated, also meant a significant level of social exclusion from their ancestral networks (Pinto Rodríguez, 1998).

9. ACHIEVEMENTS AND CONCESSIONS DURING THE 1960S AND 1970S

Evidence was found through fieldwork conducted by Flores-Bórquez in 2004 with the Mapuche in the IX Region of Chile⁶, of clear divisions in the social cohesion of the Mapuche. In the context of this paper, the most interesting of these social divisions relates to events in the historical period that was experienced in Chile during the years 1970 and 1973.

As highlighted by Flores-Bórquez (2004), the socialist presidential candidate Salvador Allende was elected in 1970 due to strong support for a package of social reforms, and most importantly, agrarian reform. The most disadvantaged group that had experienced systematic dispossession of land in Chile had been the original peoples of Chile. Their tenuous relation to the land post-colonisation had been as seasonal workers due to the fact that the mestizo⁹ had been given preference as land workers by the wealthy foreign land-owners. Hence, the original peoples now worked the land for others, which had, until then, been their ancestral patrimony.

A package of agrarian reforms had, since the mid 1960s, sought to provide an impoverished peasantry with nominal collective ownership of land by means of a redistribution of vast expanses of arable land (Flores-Bórquez, 2004). However, the programme of social reform of the 1970s did not take into consideration the distinguishable conditions of the original peoples and, instead, also treated them as an impoverished peasant.

⁸ Subjugation was, for example an adaptive condition that was central to the possibility of survival amongst the colonisers but strongly sanctioned by the original peoples.

⁹ The mestizo was the result of a forced genetic mixture between the Hispanic colonisers and the original peoples of Chile, and regarded by the colonisers as more compliant.

Field interviews conducted with Nizol Logko¹⁰ by Flores-Bórquez in 2004 in Chile, found that, the Mapuche perceive that nothing has changed since the Spanish colonisation of Chile. In particular, laws are perceived as being created for the benefit of the Hispano-Chilean population¹¹. Furthermore, changes in government are perceived by the Mapuche as perpetuating legislation that disfavours the original peoples in their struggle for the restitution of their patrimony, as these laws remain inscribed in the political constitution of Chile.

10. CONSEQUENCES OF ALLYING WITH THE SOCIALIST REFORMS OF THE YEARS 1970-1973

As previously stated, the conditions of the original peoples of Chile differ to that of other indigenous and aboriginal populations whom are engaged in a similar struggle in some important respects. These crucial differences relate to the consequences of the alliance that the original peoples of Chile made with the socialist government of 1970-1973. The programme of socio-political reforms threatened the rights of powerful owners whom, through an alien legal system, possessed conquered land, which was the ancestral patrimony of the dispossessed (Flores-Bórquez, 2004).

Figures gathered by Flores-Bórquez in 2004 in Chile, highlighted that in spite of a Mapuche presence in other parts of the country and of active political participation in the syndicalism of the metropolitan Region of Chile, it was in the IX Region of Chile where during the military dictatorship of General Pinochet, the Mapuche experienced the greatest level of repression. In fact, the IX Region was fourth in relation of the number of citizens per capita to experience repression during the dictatorship. Through statistics gathered at CINPRODH¹² by Flores-Bórquez, it is estimated that over 22% of Mapuche who lived in the IX Region experienced exceptional levels of repression which incorporated racism and classism not experienced in other parts of the country during the military repression. The repressive conditions which prevailed during the dictatorship gave legitimacy to the wealthy land-owners so that they could “settle scores” with those to whom their acquired land had been distributed under the socialist government and to others¹³ who aspired to favours from a newly ‘vindicated’ oligarchy.

Recriminations now exist in relation to the Mapuche experience of the socio-political reforms of the years 1970-1973. The original peoples of Chile believe that their support for the programme of social reforms of the presidential elections of 1970 was instrumental to the election of the socialist government. With hindsight, the Mapuche hierarchy realises that, in

¹⁰ Field interview conducted with Mapuche Chief; Don Augusto Nawelpán Kalfikura, Logko Lilkoko Lofmapu, Nizol Logko Pikunwijimapu Najmapu, Territorio Norte de los Grandes Territorios del Sur.

¹¹ The original peoples of Chile emphasize the effect of the conquering effects of the Spanish colonisers by referring to the Chileans as Hispano-Chileans, whom are perceived as an oppressive population.

¹² CINPRODH is a Center for the Investigation and Promotion of Human Rights, an NGO created in 1991 in Temuco, IX Region of Chile.

¹³ A case in point was that of the middle and lower ranks of the military who were seen to pander to the agendas of the wealthy land owners who had historical connections with the military as, when the Mapuche were arrested, disappeared or executed, their land was restored to the previous land owner.

supporting a package of reforms that did not consider their ancestral rights, they neglected their struggle for restitution of patrimony.

The social divisions that resulted from the involvement of the original peoples with the programme of reforms of the 1970-1973, refer therefore to a diversion from their own struggle for the restitution of patrimony. Hence, findings from field work highlighted that the active participation of those who supported the above programme as well as those who resisted it and joined forces with the opponents of the socialist government were equally criticised in the Mapuche hierarchy. In practice, when the brutal repression of the military dictatorship against the Mapuche took place, these did not have recourse to the supportive networks that were informally available to the Hispano-Chileans¹¹ as the former had, in spite of their allegiance, remained a segregated population. As a result, those whom amongst the Mapuche experienced repression, suffered greater economical and social deterioration than those whose employment was in jeopardy as a result of the restitution of land to those whose land had been expropriated during the period 1972-1973.

11. THE MAPUCHE STRUGGLE FOR RESTITUTION OF PATRIMONY SINCE THE 1990s

As previously pointed out by Flores-Bórquez (2004), tentative steps to redress some wrongs done to the original peoples have been made through the promulgation of an Indigenous Law. However, it has been clear that the Indigenous Law has not redressed the huge gap that exists in restoring patrimony to the original peoples of Chile. In fact, much the contrary is the case. Hence, at a more global level, the Mapuche have made recourse to legal instruments that reinforce their struggle.

In 1957 The United Nations Human Rights Commission established a Sub-commission for the Prevention of Discrimination and the Protection of Minorities. The Sub-commission was formed by 26 expert members, non-representatives of their countries, whose role was to make recommendations before the Commission on matters related to the prevention of all forms of discrimination and the protection of minorities. As such, in 1966, this Sub-commission incorporated the first link instrument in law; the Pact on Civil and Political Rights. Article 27 of the latter grants *rights to ethnic, religious, and linguistic minorities to develop their culture, exercise their religion, and use their idiom*. An important loop found in this legal instrument relates to the fact that it is up to the States to decide whether they possess minorities within their territories, as the Pact does not grant rights that can be claimed by individuals. Hence, a State can opt out from implementing the above rights if it decides that, within its territory, it does not have minorities as these are instead relabelled as something else. A clear example of the latter is found in the case of Chile as its judiciary has since the 19th Century increasingly relabelled their indigenous minorities to suit their needs. The implications of steps taken by the Chilean judiciary since the passing of Article 27 (above) have meant that by taking advantage of the above mentioned loophole Chile can effectively control the progress of claims made by the indigenous minorities for rights to restitution of their land as land is the central aspect in the culture of Chile's indigenous peoples (Lillo Vera, 2002).

In 1983, Jose Martinez Cobo, United Nations rapporteur, published a report in which Communities, Peoples, and Indigenous Nations are defined as follows:

“Communities, Peoples, and Indigenous Nations are those which having an historical continuity with societies previous to invasion and pre-colonisation which developed in their territories, consider themselves distinct to other sectors which now prevail in these territories, or in part of them. They now constitute non-dominant sectors of society and have the determination to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity as the base of their continuous existence as a peoples, in accordance with their own cultural patterns, their social institutions, and their legal systems”.

Since the 1990s, the Mapuche’s struggle for restitution has referred to a claim for territory rather than to the restitution of parcelled out land. However, whilst an arduous struggle for restoration of ancestral territory takes place, this territory is eroded further by processes of globalisation. The latter, is aided by the economic interests of the Chilean State as highlighted on 22nd August 2004 in a Chilean national newspaper when it was revealed that the government was pursuing a deliberate policy of delaying the progress of claims made by the Mapuche for restitution of patrimony.



One of a network of newly-laid roads cut through the ancestral Mapuche lands planted with eucalyptus in the IX Region of Chile. The roads provide a connecting web amongst the plantations to provide easy transportation of logs once the trees have been cut down. The most frequently seen type of vehicles on these roads are lorries like the one above transporting logs. Photograph: Courtesy © JUSTICIA, 2004.

In the meantime, as seen in the previous two photographs, the ancestral land of the original peoples has been sold to big multinationals that have substituted the virgin forests for exotic commercial plantations, which are harvested to supply logging and cellulose for Western consumption (Flores-Bórquez, 2004).

12. ECOLOGICAL AND LEGAL CONSEQUENCES OF POLICIES ON THE MAPUCHE



Aerial photograph showing ancestral Mapuche land in the IX Region of Chile. Clearly identifiable in the photograph are the network of roads which cut through land appropriated from the Mapuche for the plantation of fast growing exotic species. The empty and barren land which is left behind when these have been cut down for commercial exploitation can also be seen. A further 40,000 hectares of exotic plantations are planned for the IX Region in 2005. Photograph Courtesy © JUSTICIA, 2004.

As seen in the above aerial photograph, vast expanses of ancestral Mapuche land are now used for the commercial exploitation of exotic plantations. An analysis of such exploitation of resources must focus firstly on the management and care of the imported species. *Eucalyptus Dalrympleana* is the most successful and vast of the exotic species planted in the IX Region of Chile due to its fast growing characteristics. The species is also rapacious; sucking up great quantities of water, which used to flow freely in times past, whilst pesticides and fertilisers are sprayed liberally on its vast plantations to ensure maximum and efficient productivity of this crop.

As the gradual decimation of the original peoples of Chile takes place, it is important to examine the environmental effect that the above set of circumstances has had on their survival. Firstly, as a peoples whose ancestral way of life is so inextricably connected with the land, the Mapuche are no longer able to rely on the land for subsistence because (a) they have been dispossessed of their patrimonial territory but also because (b) the land and fresh water have been increasingly poisoned by chemicals that ensure a successful exploitation of the exotic plantations. For example, during fieldwork conducted in 2004 for this research, the author found that no fauna or traditional edible crops (berries) were in existence amongst these vast exotic plantations. The former being a traditional means of subsistence and income for the Mapuche. Furthermore, as the numbers of its population decrease and become increasingly fragmented, they find themselves deprived of livelihood amongst exotic plantations that surround their modest homes. The health and social effects of the latter are grave as mal-nutrition and health problems arising from chemical contamination are seen

amongst the isolated rural areas of the IX Region where the Mapuche exist. Access to non-traditional forms of subsistence is, as previously highlighted, not devoid of a considerable departure from their ancestral way of being but, most importantly, subject to considerable discrimination and racism (Gacitua-Marió, 2000; Millamán Reinao, 2004).

The above circumstances set the scene for a struggle for survival which is currently conducted by the Mapuche in Chile. And the latter, has also resulted in serious consequences that affects them as a peoples.

The legal system and the national media have responded to the claims for restitution of territory made by the original peoples with a concerted campaign designed to criminalise their actions. Lillo Vera (2003b)¹⁴ notes that television portrays both images and a language that criminalises the actions of the original peoples. Aylwin (2003) has also pointed out that the Chilean State and the media have effectively absolved themselves of their historical responsibility towards the plight of the original peoples by designating the claim for rights as “the indigenous problem” (ibid). More gravely, a democratic right to carry out actions in respect of their claims for restitution of land (like demonstrating outside barbed wired ancestral land) have been met with the application of Anti-terrorist legislation passed by the military government of General Pinochet in the 1980s designed to deal with opponents of his brutal military regime (Flores-Bórquez, 2004). In an interview carried out by the author with the Nizol Logko¹⁰, he referred to conditions experienced by the Mapuche people as those experienced under a dictatorship. An example of the latter was found in a recorded field interviews were the author spoke with the parents of the child Alex Lemún Saavedra who was an innocent casualty of brutal paramilitary activities of the Chilean carabineros in the suppression of a claim for restitution of land made by the Mapuche in the IX Region of Chile (Aylwin, 2003; Human Rights Watch, 2004).

Hence, in the context of findings from the fieldwork conducted in Chile, August 2004, the following relevant legal instruments are considered. Under Article 3.1 of the United Nations Declaration on the Rights of Persons Belonging to National, Ethnic, Religious or Linguistic Minorities of 1992, special provision is made for the following:

“That persons belonging to minorities will be able to exercise their rights, including those contained in this Declaration, either individually or as part of their community with the rest of the members of their community, without any discrimination”.

Furthermore, in Article 4.1 of the said Declaration, it is stated that: “*States are called upon to adopt necessary measures to guarantee that persons belonging to minorities can fully and efficiently exercise all their rights*”. The latter is a provision contained also in the Pact on Civil and Political Rights, which under Article 9.2 makes further provision for “*all persons whom are detained to be informed about the reason for the detention and notified without delay of the accusation made against them*”.

¹⁴ Lillo Vera, is a Chilean lawyer who acts in defense of the Mapuche in their claims for restitution of land and civil rights.

As part of the field work carried out in Chile for this research, the author also interviewed two Mapuche Logkos¹⁵ imprisoned by the application of the Anti-terrorist law for their alleged involvement in criminal activities carried out in pursuit of land rights (Fredes, 2004; Human Rights Watch, 2004). Through discussions held with their defence lawyer¹⁶ and whilst examining documented research (Aylwin, 2003) breaches under Article 3.1 of the United Nations Declaration on the Rights of Persons Belonging to National, Ethnic, Religious or Linguistic Minorities of 1992; Article 4.1, and under Article 9.2 of the Pact on Civil and Political Rights contained in recommendations made by the Sub-commission for the Prevention of Discrimination and the Protection of Minorities set out in 1957 by the United Nations Human Rights Commission, were found to exist.

13. CONCLUSION

Canada and Chile represent different experiences of indigenous peoples of colonisation and the policies of the successor governments to the European empires. Although the colonisation of both countries occurred over a similar timescale, the attitudes of the colonial regimes and their successor states have been very different.

Ferguson (2003) has noted that the British Empire was created as a commercial enterprise, experienced a vast movement of people to it out of the British Isles, and was substantially the product of voluntary non-governmental activity. He has argued that it contained the seeds of its own destruction through its export of the ideals of individual liberty, parliamentary democracy, and the rule of law, which were capable of being turned against the colonial power. Once these concepts became available to indigenous peoples, as racist ideas diminished in the wake of the American Civil Rights Movements, they were also capable of being used by indigenous peoples to demand a position as equals of the non-aboriginal populations. It was inevitable that the First Nations would seek the honouring of past contracts embodied in colonial treaties as the passage of time does not diminish the obligations. The response of the Canadian Government has been to accept the rulings of the courts and to seek to negotiate settlements of the claims by First Nations.

The key issue is whether the colonial heritage makes a difference to the marginalisation of indigenous peoples and their ability to recover the cultural and economic patrimony of ancestral lands. Does an approach that is rooted in the rule of law and the adherence to contracts provide an environment in which the social exclusion of indigenous peoples can be tackled better than other approaches?

¹⁵ Logkos, are Mapuche chiefs. The interviewees were Don Aniseto Norín Catrیمان, Logko de la comunidad de Daidaco, and Don Pascual Huentequeo Pichún Paillalao, Logko de la comunidad de Temulemu, Region de la Araucania who are currently imprisoned in the Traiguén jail of the IX Region of Chile.

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BIOGRAPHICAL NOTES

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