5

Indigenous Land Rights in Chile

Dispossession, Misrecognition, and Litigation

ALEXANDRA TOMASELLI

Introduction

Almost 13 percent of Chile's population self-identified as "Indigenous" in the 2017 census, or 2,185,792 individuals (Instituto Nacional de Estadísticas Chile, 2018, p. 16). National legislation recognizes ten Indigenous Peoples (albeit by defining them as "ethnicities"): Aymara, Chango, Colla, Diaguita, Kawashkar o Alacalufe, Likan Antai (previously called Atacameños), Mapuche (the most populous), Quechua, Rapa Nui, and Yagán o Yámana (Article 1, paragraph 2 of the so-called Indigenous Law, *Ley Indígena*, Law 19.253 of 1993, as modified to include the Diaguita people in 2006 by Law 20,117 and the Chango people in 2020 by Law 21,273).

The majority of Indigenous individuals live in urban settings, and while poverty among Indigenous Peoples has slowly decreased in recent decades, the unemployment rates remain higher than the national average (Ministerio de Desarrollo Social, 2022). This is probably due to the widespread discrimination suffered by Indigenous Peoples throughout Chile (Briones & Lepe-Carrión, 2023; Molina, 2007).

Since the *Conquista*, Indigenous Peoples' lands, and their access to natural resources, have been dramatically reduced. Nowadays, the few preserved or restored Indigenous lands are constantly challenged by the neoliberal economic priorities pursued by the Chilean state. These include, among other things, the construction of hydroelectric plants (Anaya, 2009; Rosti, 2008), especially in the south (Aylwin & Silva, 2014); the aggressive extractivist agenda (Silva Neriz, 2013; Toledo Llancaqueo, 2006), principally in the north (Marimán Quemenado, 2011); the massive exploitation of forest resources (Silva Neriz, 2013; Stavenhagen, 2003); and the intense salmon farming in coastal areas (Aylwin & Silva, 2014; Soluri, 2011).

https://doi.org/10.1017/9781009521581.007 Published online by Cambridge University Press

In recent years, some positive trends have emerged, including an official state apology that (then) President Bachelet offered to the Mapuche people in 2017 for the "errors and the horrors" committed or tolerated by Chile throughout its history. However, the election of (former) President Piñera (his second mandate, 2018–2022) had another dramatic effect on Indigenous policies (Didier et al., 2019). The nationwide protests that took place in Chile starting in October 2019 relate to broad unequal access to public resources (education, justice, public transport, health services, etc.) that continue to heavily affect Indigenous Peoples too.

In July 2021, the first Constituent Assembly (the so-called Constitutional Convention, *Convención Constitucional*) started working on the new Chilean Magna Carta. The Assembly was formed by 155 delegates – all elected by the Chileans – out of which seventeen seats were reserved for Indigenous Peoples in accordance with the percentages of the 2017 census. This resulted in seven seats for the Mapuche elected representatives, two for Aymara, and one for each of the other eight Indigenous Peoples (Chango, Colla, Diaguita, Kawashkar/Alacalufe, Likan Antai, Quechua, Rapa Nui, and Yagán/Yámana) (El Ciudadano, 2020). Moreover, the first president of the Constituent Assembly, Elisa Loncón Antileo, was an Indigenous academic and Mapuche woman.[1]

A constitutional text was drafted between 2021 and 2022 and included a wide array of Indigenous rights (50 provisions of 380), with references to their pre-existence, their rights to self-determination, autonomy, independent institutions, justice systems, participation, consultation, culture, and free, prior, and informed consent; also included were references to their rights to natural resources, territories, and land (Convención Constitucional, 2022b). The proposal was rejected, likely due to an inappropriate communication strategy as well as conservative propaganda, which argued that the constitutional changes would undermine the legal foundations of the Chilean state (Velásquez Loaiza, 2022).

A second text was prepared from June 7 to November 7, 2023, by a constitutional council (*Consejo Constitucional*) that was elected in May with poor Indigenous representation (Proceso Constitucional, 2023a). This proposal included only three articles on Indigenous Peoples and rights: on their recognition, their international individual and collective

[1] Elisa Loncón Antileo was then replaced by María Elisa Quinteros as a new president, vice-president, and executive body (*mesa de la convención*) was appointed on January 5, 2022 (Convención Constitucional, 2022a).

rights, and interculturality; on mechanisms to promote their political participation; and on local rights at the regional and municipal levels (Proceso Constitucional, 2023b). Hence, land rights were not included. Nevertheless, this text was also rejected at the referendum held on December 17, 2023 (Sanhueza, 2023). Against this background, this chapter analyzes the process of dispossession faced by Indigenous Peoples in relation to their traditional lands, how they have contested the titles to ownership and possession of such territories, and the outcomes of their litigation strategy both in the north and in the south of Chile in recent decades. This chapter confirms the consensus in other chapters in this book: dispossession has been followed by processes for recognizing and reclaiming land rights, but implementation has been problematic. In addition, the chapter identifies how litigation in national courts has created an opportunity to safeguard land rights, at least at the jurisprudential level.

Processes for Dispossessing Indigenous Peoples of their Lands

The independence and the foundation of the Chilean state are officially dated as 1818 and 1810, respectively. However, the territory that forms the modern Chilean state was occupied and colonized by Spaniards during different periods. For instance, the areas covering the current towns of Arica, Iquique, Antofagasta, Calama, and Pozo Almonte in the north, and where the Aymara and Lika Antai/Atacameño Indigenous Peoples have been living for centuries, were annexed to Chile only after the so-called Pacific Wars of 1879–1884 (Gudermann, 2003). In the south, the fierce resistance of the Mapuche led to the signing of a number of bilateral treaties between their leaders and the colonizers.[2] Notwithstanding that these treaties *de facto* governed the territories south of the Bío-Bío river until the Civil War of 1859 (Bengoa, 2000), the occupation of Indigenous lands started well before. For

[2] The best known of such treaties is the so-called Parliament of Quilín or Quillín (*Parlamento de Quilín* / *Quillín*) of 1641 that, among other things, was supposed to seal the Bío-Bío River as the official border between the Mapuches and the colonizers. This was reiterated in the two following well-known Parliaments of Negrete (1726) and Tepihue (1738). However, the total number of these "Parliaments" was 18: 1641 (*Quilín* or *Quillín*), 1651, 1683, 1693–94, 1712, 1726 (Negrete), 1738 (Tepihue), 1746, 1756, 1760, 1764, 1771, 1774, 1784, 1787, 1793, 1803, and 1816 (Bengoa, 2000, pp. 38–40; Guevara, 1925, p. 373 as cited by Contreras Panemal, 2003, pp. 59–61; de Avila Martel, 1973 as cited by Aylwin, 2002, p. 3).

instance, the 1,600 Indigenous Peoples living in the Araucanía region were (immensely) outnumbered by the arrival of about 14,000 new settlers in the mid-nineteenth century (Aylwin, 1995). Such a high concentration of non-Indigenous Peoples justified the first state acts to regulate both the colonization and the occupancy of these territories (Aylwin, 1995).

In 1883, the so-called Peace of Araucanía (*Pacificación de la Araucanía*) ended two years of military occupancy in the region, and marked the beginning of the arbitrary confinement of the Mapuche peoples onto reserves (*Reducciones*) or other lodgings (Bengoa, 2000; Rosti, 2008). The concept of individual property rights was unknown to Mapuche at that time (Nesti, 2002). Overall, the original Mapuche territory was reduced by 95 percent (Rosti, 2008). In addition, other state initiatives, such as granting land concessions, attracting foreign settlers "in good health" to farm the land, creating new villages, and adopting ad hoc legislation legitimizing the new property titles, resulted in a further "colonization" of traditional Mapuche lands in the current Region of Araucanía (Aylwin, 1995). Mapuche organizations were set up in the early 1900s, but they did not make any significant gains in the return of their lands (Bengoa, 2000). A further 25 percent of Mapuche territory was "absorbed" before the agrarian reforms of the 1960s by non-Indigenous settlers that first unlawfully occupied the land, and then requested (and obtained) the titling for these territories (Bengoa, 2000).

Chile has a strong tradition of legal positivism, which constrains the expression of (Indigenous) customary law. Despite centuries of dispossession, Indigenous Peoples often retain their own laws, or, for instance, what the Mapuche call *Az Mapu*, "the law of the land." It is important to note that the term "law" is derived from Western values, understood by Mapuche as "state" or *wingkas* (non-Mapuche) law. *Az Mapu* refers to the group of norms and ways of relating that regulate Mapuche peoples and lands (Cloud, 2010). *Az Mapu* is intimately linked to the Mapuche cosmo-vision of a profound spiritual conception of equilibrium and harmony with the surrounding environment, and embedded in *Mapuzungun* (or Mapuche language), as *Az Mapu* is transmitted orally (Cloud, 2010).

On Easter Island, the dispossession of the lands of Rapa Nui Indigenous Peoples – and their dehumanization through slavery – started during the nineteenth century. The Rapa Nui decreased from 2,000 to 111 people between 1864 and 1877 (Rochna Ramirez, 1996). In 1868, the French merchant Jean Baptiste Onésime Dutroux-Bornier (better known

as "Pitopito") "acquired" vast areas of land from the Rapa Nui by unlawful means, concluding contracts with children and taking advantage of the fact the Rapa Nui did not realize they were giving away their lands forever (Rochna Ramirez, 1996). In 1888, the Agreement of Wills – signed by the navy captain Policarpo Toro in representation of Chile and the Rapa Nui king Atamu Tekena – marked the annexation of the Easter Island to Chile (Chartier et al., 2011). In principle, the Rapa Nui should have remained the owners of their ancestral lands (Marimán Quemenado, 2011), but the Chilean state took control and gave concessions to the Rapa Nui's lands without any consideration of the Rapa Nui claims (Rochna Ramirez, 1996).

In 1933, the island was ultimately registered as *terra nullius* and formed part of the state lands of Chile in accordance with the then Article 590 of the Civil Code (Chartier et al., 2011; Marimán Quemenado, 2011). In 2012, a Rapa Nui family contested the validity of this registration before the Supreme Court. Nevertheless, the Supreme Court validated that title as well as other property titles enacted in the past that ignored the Rapa Nui's land titling (Silva Neriz, 2013). The Rapa Nui were kept in semi-slavery conditions until the adoption of the so-called Easter Law (*Ley Pascua*) 16.441 in 1967 (Chartier et al., 2011); thereafter, a national park over the island (called *Hanga Roa*) was established in the 1980s (Rochna Ramirez, 1996). The park is currently administered by the National Forestry Corporation (*Corporación Nacional Forestal* – CONAF) (Marimán Quemenado, 2012), but without the participation of any Rapa Nui (Cloud, 2013). Therefore, 13 percent of Easter Island is held by the Rapa Nui people, 17 percent is in the hands of private owners, and 70 percent is state land (Aylwin & Silva, 2014).

Only the agrarian reform of the 1960s brought some changes into Indigenous land titling. In particular, Law 17.729 of 1972 ruled a system of land restitutions (Article 17) and established an Institute for Indigenous Development (Articles 34 and ff.).[3] However, after the 1973 military *golpe* (coup), Law Decree 2,568 of 1979 modified the system of land restitution that became more arbitrary (Articles 9–26).[4]

[3] Law 17.729 of 1972, *Establece Normas sobre Indigenas y Tierras de Indigenas. Transforma la Direccion de Asuntos Indigenas en Instituto de Desarrollo Indigena. Establece Disposiciones Judiciales, Administrativas y de Desarrollo Educacional en la Materia y Modifica o Deroga los Textos Legales que Señala*.

[4] Law Decree 2.568 of 1979, *Modifica Ley N° 17.729, Sobre Proteccion de Indigenas, y Radica Funciones del Instituto de Desarrollo Indigena en el Instituto de Desarrollo Agropecuario, Decreto Ley 2568 Ministerio de Agricultura*. See also Nesti (2002).

Moreover, the dictatorship introduced a system of land "normalization," which was realized through revocations or expropriations and reallocation (via reselling) of land titles via unscrupulous transactions – for example, by concluding contracts with illiterate or poorly literate individuals, including Indigenous Peoples. This transformed all the lands that had been given back during the agrarian reform into private lands by the early 1980s (Toledo Llancaqueo, 2006, p. 56). Finally, the Water Code (Decree 1,122 of 1981)[5] legitimized the privatization and appropriation of watercourses, depriving Indigenous Peoples of water access (see more on this further below).

Once democracy was restored in 1989, the then presidential candidate and future first democratically elected president after the dictatorship, Patricio Aylwin, signed the so-called (first) Agreement of Nueva Imperial with some Indigenous representatives. Among other things, he promised to promote a constitutional reform that would include Indigenous Peoples and to recognize their socio-economic and cultural rights. Despite several attempts, the constitutional recognition never followed, and as mentioned, the recent attempts of the constitutional reforms failed too. Under Aylwin's mandate, the abovementioned "Indigenous Law" was eventually adopted in 1993.

The (Mis)Recognition of Indigenous Land Rights

Overview

The Chilean state has not protected Indigenous Peoples from dispossession. This failure has ultimately resulted in a number of socio-environmental conflicts. Since the late 1990s, Indigenous Peoples and their organizations have used different instruments to denounce this gap, such as peaceful marches or protests, as well as some frustration-led land occupations. However, the Chilean state has often (if not always) replied in an austere way, such as by ordering the police to repress the direct actions[6] or by using the military justice system under the anti-terrorism

[5] Decree 1,122 of 1981 of the Chilean Ministry of Justice (*Ministerio de Justicia*), *Código de Aguas. Decreto con Fuerza de Ley Nº 1.122*.

[6] For instance, the killing of the two Mapuche youngsters (Matías Valentín Catrileo Quezada and Jaime Facundo Mendoza Collio) who were shot by police during an uprising in the late 2000s (Cayuqueo 2008; Paillan 2009) or the most recent death of another youngster (Camilo Catrillanca) in late 2018 in Temucuicui (Ercilla) (Trincado Vera & Muñoz Sims, 2020); the forced displacement of those Indigenous Rapa Nui that were peacefully protesting against land

law – an inheritance of the dictatorship[7] – instead of the civil or criminal standard of justice. Furthermore, as mentioned, economic interests are prioritized over Indigenous land claims and rights.[8]

The Chilean economy is largely based on the export of raw materials (Equipo OCMAL, 2015), including some of the world's largest copper deposits, and is a leading exporter of lithium, iodine, molybdenum, silver (Prieto, 2015; Yáñez & Molina, 2008), and gold. All of these minerals are concentrated in the lands of the northern Indigenous Diaguita and Collas peoples (Molina, 2007, 2013). At the time of writing (December 2023), Chile had forty-nine ongoing mining conflicts, and was ranked fourth for the number of such conflicts in Latin America (Equipo OCMAL, 2023).

Chile has ratified the majority of the international human rights treaties, endorsed both the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the 2016 American Declaration of the Rights of Indigenous Peoples (ADRIP), and, most importantly, it ratified the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention of 1989 in 2008 (hereafter, C169).[9] The C169 entered into force on September 15, 2009.

The Indigenous Law

At the national level, Indigenous rights continue to be governed by the Indigenous Law (Law 19,253 of 1993), which might be changed by future constitutional reforms. The Indigenous Law has done the following:

dispossessions in August 2010 (Inter-American Commission on Human Rights, 2011: p. 78); or the violence against the Mapuche peoples of Temucuicui (Ercilla), which the Court of Appeal of Temuco defined as a place in a permanent state of militarization and repression (Corte de Apelaciones de Temuco, 2012).

[7] Law 18,314 of 1984, *Determina Conductas Terroristas y fija su Penalidad*. In accordance with this law, crimes such as setting fires (Article 2) have to be dealt with in front of military tribunals if there was an intention of menacing the population or a part of it, which makes this a crime of "terrorist" nature (Article 1). To provide evidence of such intentions, the plaintiff (usually the Chilean state) may call upon the so-called "faceless" witnesses (*testigos sin rostro*) (i.e., witnesses that cannot be identified and remain unknown to the defense) (Articles 15–18). Moreover, the penalties are longer than those foreseen under standard criminal law.

[8] The most glaring example is the controversial story of the construction of the Ralco's six hydroelectric plants on the Bío-Bío River by the National Electric Enterprise (ENDESA) (see Aylwin, 2002; Barrera-Hernández, 2005; Nesti, 2002; Tomaselli, 2012, 2016).

[9] Decree of the Ministry of Exterior No. 236 of 2008, *Promulga El Convenio Nº 169 Sobre Pueblos Indigenas Y Tribales En Paises Independientes De La Organizacion Internacional Del Trabajo*.

- recognized the ten "ethnicities" (*etnias*) (i.e., Indigenous Peoples) of Chile (Article 1);
- established Indigenous "communities" and how they can be created (Articles 9–10);
- acknowledged Indigenous lands, also those registered in various statutes during the nineteenth and twentieth centuries (Articles 12–19);
- established a fund for the redistribution of land and water resources to Indigenous Peoples (Articles 20–22) and another fund to finance programs for Indigenous economic development (Articles 23–27);
- recognized Indigenous cultural rights (Articles 28–31);
- introduced intercultural and bilingual education (Articles 32–33);
- recognized some (albeit limited) political participation rights (Articles 34–35);
- created the National Corporation of Indigenous Development (*Corporación Nacional de Desarrollo Indígena*, CONADI), which is a public body charged with, among other things, promoting the national Indigenous policy and agenda, as well as implementing the Indigenous Law (Articles 38–40);
- established the CONADI steering body (National Council, *Consejo Nacional*) formed by seventeen members, of which eight must be elected by Indigenous communities (Articles 41–44); and,
- included a special protection for watercourses of the Indigenous Aymara and Likan Antai/Atacameño peoples, although without infringing on third-party "water rights"" of the same sources (Article 64; see further below).

However, the Indigenous Law contains many flaws, such as:

- referencing "ethnicities" and not Indigenous Peoples, thus ignoring their ancestral history and cultures;
- requiring the registration of Indigenous organizations at CONADI without respecting their own governance, and fueling divisions and conflicts (Instituto de Estudios Indígenas, 2003);
- establishing a very complicated system of land redistribution, resulting in many delays, causing unsuccessful investments, and creating overall discontent (Carruthers & Rodriguez, 2009);
- providing CONADI with an excessive concentration of power, which is easy to manipulate, as reflected in the notorious case of the Ralco-Endesa hydroelectric plant (Nesti, 2002);

https://doi.org/10.1017/9781009521581.007 Published online by Cambridge University Press

- focusing on rural areas without considering its application in urban contexts, where most Indigenous Peoples live (Vergara et al., 2006); and,
- failing to prevent forced relocation and guarantee rights to natural resources (Instituto de Estudios Indígenas, 2003), with the abovementioned exclusion for the Aymara and Likan Antai/Atacameño peoples from water sources.

Importantly, the key problem, as expressed across most of the chapters in this book, is the overall lack of implementation of this law (Becerra Valdivia, 2023; Instituto Nacional de Derechos Humanos, 2013).

The land redistribution provided for in the Indigenous Law requires a procedure that has created a lot of confusion and even a speculative increase in prices for land acquisitions over the years (Stavenhagen, 2003). Most of the lands returned to Indigenous Peoples were marginal (Anaya, 2009), with more than 40 percent of lands returned between 2000 and 2005 barely fertile (Toledo Llancaqueo, 2007). From 2009 until 2018, CONADI acquired only 125,000 hectares through the land fund (Didier et al., 2019). In 2010, CONADI spent only one-third of the allocated $158 million (USD). Two-thirds of that year's budget had to be returned due to incomplete land purchase contracts (Marimán Quemenado, 2011). This caused a decrease in CONADI's budgets in the following years (Aylwin & Silva, 2014; Didier et al., 2019; Marimán Quemenado, 2012).

Other Laws and Norms

The "Law on Marine Coastal Spaces of Native Peoples," also known as "Ley Lafkenche," which refers to those Mapuche peoples of the coast,[10] regulates the establishment of coastal marine space(s) for those Indigenous Peoples who have customarily used them (Article 3). This law has been poorly implemented (Aylwin & Silva, 2014; Kaempfe & Ready, 2011). Currently, Indigenous Peoples, especially women, have been particularly active in claiming the creation of their marine spaces according to this law. However, of more than 100 requests only 13 percent have been completed due to long and bureaucratic procedures (Arce et al., 2023).

Indigenous land rights are also often infringed upon by laws that favor the Chilean resource extraction model. These laws were adopted under

[10] Law 20,490 of 2008, *Crea el Espacio Costero Marino de los Pueblos Originarios*.

the dictatorship but were never amended afterwards. They have been widely used, especially after the return of the democracy. These are the Law on Mining Concession (Law 18,097 of 1982, *Ley Orgánica Constitucional sobre Concesiones Mineras*); the Mining Code (*Código de Minería*; Law 18,248 of 1983 and following amendments); and Article 19.24, paragraph 6 of the constitution that recognizes the exclusive, inalienable, and imprescriptible property right of the state to mining resources, as well as state power to grant concessions to private entities for both exploration and exploitation purposes (Yáñez & Molina, 2008) through a presidential decree (Article 8 of the Mining Code), thus giving a high level of discretion to the executive.

In addition, legislation enacted during the dictatorship that is still in force favors foreign investors who have the right to compete on equal footing with national enterprises (Legislative Decree 600 of 1974); foresees a customs and fiscal system that promotes the mining sector in the north (Legislative Decree 889 of 1975); and regulates the fiscal system on economic activities in Chile (Law 18,293 of 1984), which suffers from a huge tax evasion. Furthermore, Chile used to have the lowest tax rate in the whole of Latin America until the adoption of Law 20,026 of 2005 on Mining Royalties, which, however, covers only the royalties of copper mining (Yáñez & Molina, 2008).

National water legislation inherited from Pinochet's dictatorship (Article 19, paragraph 24 of the Chilean constitution) created private "water rights" to water resources, which could be traded (*derecho de aprovechamiento de aguas*) once recorded in the national register, in accordance with Article 6 of the Water Code. This has caused a massive privatization of water resources that heavily impacts Indigenous Peoples, especially in the north. After long debates, Law 20,411 of 2010 excluded the possibility to register new water rights in northern and central Chile, although without infringing on those rights that were already recorded.

Finally, the recent legislation on the Right to Consultation of Indigenous Peoples (Decree 66 of 2013) and the Environmental Impact Assessment System (Decree 40 of 2013) have, ironically, further undermined Indigenous Peoples' voice on economic activities on their lands. There is no obligation to fully comply with a consultation process (Tomaselli, 2019).

Litigation for Land Rights

Indigenous Peoples have used litigation to advance and safeguard their land rights. Four specific cases are analyzed in this section, one in the north

https://doi.org/10.1017/9781009521581.007 Published online by Cambridge University Press

of Chile, and three in the south. Each of these demonstrate how national courts have become – in the last decades – *the* avenue to secure land rights, notwithstanding the unfavorable national legislative framework.

The El Morro Case: Northern Chile

In the north, the so-called El Morro case involved the Indigenous Diaguita community of Huasco Altinos (*Comunidad Agrícola Diaguita de los Huasco Altinos*). The community filed an *Amparo* proceeding for the protection of its constitutional rights[11] before the Court of Appeal of Antofagasta against the Atacama regional branch of the National Environmental Commission (*Comisión Nacional del Medio Ambiente*, CONAMA). CONAMA had approved the open-pit gold mining project "El Morro" in March 2011; covering 2,463 hectares, the project area spanned a significant part of Diaguita (registered) territory (Corte de Apelaciones de Antofagasta, 2011). The Court of Appeal found this project adversely impacted the Diaguita's land rights (recognized under Article 64 of the Indigenous Law), as well as their rights to culture and way of life as a consequence of forced relocation (per Article 16 of the C169) (Corte de Apelaciones de Antofagasta, 2011). Their right to consultation in accordance with C169, Articles 6, 7, 15, and 16.2, was also infringed (Corte de Apelaciones de Antofagasta, 2011). The Court declared CONAMA's authorization as null and void, thereby blocking the project and safeguarding Indigenous Diaguita land (Corte de Apelaciones de Antofagasta, 2011). The Chilean Supreme Court upheld this decision in April 2012 (Corte Suprema, 2012).

Despite these rulings, this case did not end here. CONAMA subsequently approved the mining project after these decisions. The Diaguita filed another lawsuit directly with the Supreme Court, which ultimately declared null and void the second of CONAMA's authorizations (Corte Suprema, 2014).[12]

[11] In Chile, this type of proceeding is called *Recurso de Protección*; see Article 20 of the Chilean constitution.

[12] The El Morro project was halted for a while. In 2015, it was merged with another mining site (*Relincho*) into a new, larger mining project – that is, the "NuevaUnión" (initially called "Corredor"). This project is owned and managed by Canada's Goldcorp, one of the Canadian companies involved in El Morro, and another Canadian company, Teck Resources. Both companies declared that this project had changed substantially from the previous ones, and that they had taken into consideration the environmental and social impacts. However, the Diaguita, together with other local associations, complained that this project did not respect environmental laws, would impact the Huasco river and the valley, and that the companies started the mining activities without obtaining the

Decisions from Southern Chile

In the south, three cases illustrate the impact of Indigenous strategic litigation. The first involved a traditional healer (*Machi*), Francisca Linconao Huircapan, against a logging company (*Sociedad Palermo Itda*) that had unlawfully extended its activities into Mapuche lands. The Court ruled that in accordance with Articles 13 and 14 of C169, Mapuche were to be protected against invasive logging activities that had seriously damaged sacred Mapuche sites (*menocos*), affecting herb collection and the gathering of traditional medicines (Corte de Apelaciones de Temuco, 2009). The Supreme Court confirmed the judgment of the Court of Appeal of Temuco in November 2009 (Corte Suprema, 2009).

In the second case, Mapuche Huilliche Pepiukelen had their lands adversely affected by the salmon farming activities of the *Los Fiordos SA* company, in the region of Puerto Montt. The Court of Appeal of Puerto Montt eventually condemned the salmon farming company for contaminating a natural lake in Mapuche Huilliche Pepiukelen territory, and ruled that access to water is one of the essential parts of Indigenous land rights in accordance with Article 13, paragraph 2 of C169 (Corte de Apelaciones de Puerto Montt, 2010). The Supreme Court upheld this decision in September 2010 (Corte Suprema, 2010).

The third case, heard by the Court of Appeal of Valdivia, and brought by the Mapuche Lanco-Panguipulli communities against the Region of Los Lagos' CONAMA office, involved the authorization of a dump in a ceremonial area. No consultation was carried out, and because of this, the Court declared the authorization null and void (per Articles 6 and 7 of C169). Importantly, the Court reasoned that Indigenous Peoples' enjoyment of their lands for ceremony was an important component of land rights (Corte de Apelaciones de Valdivia, 2010). The Court also cited Article 25 of the UNDRIP to stress the importance of supporting Indigenous Peoples' spiritual relationships with their territories.[13] The Supreme Court confirmed this lower court decision in January 2011 (Corte Suprema, 2011).

environmental impact assessment (Chile Minería, 2021; Equipo OCMAL, 2019; Tapia, 2018). It remains to be seen whether the Diaguita and the other local associations will take legal action again.

[13] Article 25 of the UNDRIP affirms that "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."

Conclusions

For Chile's ten recognized Indigenous Peoples, the nation's history has been characterized by dispossession, encroachment, and conflict. Indigenous Laws, like the *Az Mapu*, of the Mapuche, are ignored. There are significant pressures on Indigenous lands. Unique among Latin American countries, there is no constitutional recognition of Indigenous rights in Chile. The recent failed constitutional reforms would have strengthened Indigenous rights in a revitalized constitution. The future for Indigenous land rights, largely entrenched in the problematic Indigenous Law, remains uncertain.

The litigation strategy pursued by Chile's Indigenous Peoples has been quite successful for safeguarding their land rights. The chapter presented four cases brought before the Chilean national courts, where Indigenous land rights – despite an unfavorable legislative framework – have ultimately been protected due to the Indigenous parties' arguments and the courts' use of international standards of Indigenous rights (the C169 and UNDRIP). The courts have embraced a broad conceptualization of Indigenous land rights, recognizing these rights are intimately linked with the right to access water, the rights to culture and way of life, the right to traditional medicine, and the preservation of Indigenous ceremonial areas due to the spiritual relationship that Indigenous Peoples enjoy with their lands. The courts' rulings are becoming more aligned with the Indigenous customary conceptions of land, such as the Mapuche's *Az Mapu*, and the balance it sustains between people and nature.

Chile's national courts have matured on Indigenous rights issues, taking account of international standards and norms. However, the independence of the judiciary is fragile, being heavily influenced at times by the executive. Now, after two referendums that rejected a new and very progressive constitutional text in 2022 and a rather conservative proposal in 2023, it remains unclear how to move beyond Pinochet's unequal constitution from 1980. In the meantime, despite many other implementation challenges, Indigenous Peoples in Chile may at least enjoy some jurisprudential protection of their lands and rights.

References

Anaya, J. (2009). Informe del Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas. Human Rights Council, UN Doc. A/HRC/12/34/Add.6.

Arce, L, Aylwin, J., Didier M., Crisóstomo S., & Vargas K. (2023). *The Indigenous World 2023: Chile*. IWGIA. www.iwgia.org/en/chile/5081-iw-2023-chile.html

Aylwin, J. (1995). *Estudio sobre Tierras Indígenas de la Araucanía: Antecedentes Históricos Legislativos (1850–1920)*. Temuco: Instituto de Estudios Indígenas, Universidad de la Frontera.

(2002). *Tierra y territorio mapuche: un análisis desde una mirada històrico jurídica*. Proyecto Mapu Territorialidad. Temuco: Instituto de Estudios Indígenas, Universidad de la Frontera.

Aylwin, J., & Silva, H. (2014). Chile. In International Work Group for Indigenous Affairs (IWGIA) (eds.), *The Indigenous World 2014* (pp. 203–213). Copenhagen: IWGIA.

Barrera-Hernández, L. (2005). Indigenous Peoples, human rights and natural resource development: Chile's Mapuche Peoples and the right to water. *Annual Survey of International and Comparative Law*, 11(1): 1–28.

Becerra Valdivia, K. (2023). Chile sin derechos colectivos indígenas. Factores institucionales y organizacionales de la cuestión. In R. Cammarata and M. Rosti (eds.), *I popoli indigeni e i loro diritti in America Latina. Dinamiche continentali, scenari nazionali* (pp. 497–516). Milan: University of Milano Press.

Bengoa, J. (2000). *Historia del Pueblo Mapuche Siglo (XIX y XX)*. Santiago de Chile: LOM Ediciones.

Briones, C., & Lepe-Carrión P. (2023). Racialization in Wallmapu: Contemporary perceptions of the 'Mapuche threat.' *Latin American and Caribbean Ethnic Studies*, 19 (1): 7–20.

Carruthers, D., & Rodriguez, P. (2009). Mapuche protest, environmental conflict and social movement linkage in Chile. *Third World Quarterly*, 30(4), 743–760.

Cayuqueo, P. (2008). Muerte de Matías Catrileo Quezada: Estado policial en zona Mapuche. *El Ciudadano*. www.elciudadano.com/pueblos/muerte-de-matias-catrileo-quezada-estado-policial-en-zona-mapuche/03/11/

Chartier, C., Chirif, A., & Tomas, N. (2011). *The human rights of the Rapa Nui people on Easter Island*. Santiago de Chile: Observatorio Ciudadano and International Work Group for Indigenous Affairs (IWGIA Report No.15).

Chile Minería. (2021, October 7). Aseguran que proyecto Minero NuevaUnión comenzó a realizar actividades sin evaluación ambiental. *Chile Mineria*. www.chilemineria.cl/2021/10/aseguran-que-proyecto-minero-nuevaunion-comenzo-a-realizar-actividades-sin-ingresar-a-evaluacion-ambiental

Cloud, L. (2010). *Az Mapu*. El derecho 'invisible' o el derecho de los Mapuche (Chile). *Thule – Rivista italiana di studi americanistici*, 26–29, 501–542.

(2013). La patrimonialización de Te Pito O Te Henua: Historia del Parque Nacional Rapa Nui – Chile. *Revista de Estudios Sociales Comparativos*, 7(1), 18–31.

Contreras Panemal, C. (2003). Los Parlamentos. In C. Contreras Panemal (ed.), *Actas del Primer Congreso Internacional de Historia Mapuche* (pp. 59–61). Siegen: Eigenverlag.

Convención Constitucional. (2022a). Mesa de la Convención. www.chileconvencion.cl/convencionales.
(2022b). Propuesta Constitución Política de Chile 2022. www.chileconvencion.cl/wp-content/uploads/2022/07/Texto-CPR-2022.pdf
Corte de Apelaciones de Antofagasta. (2011). Rol No. 618-2011, 17 February.
Corte de Apelaciones de Puerto Montt. (2010). Rol No.36-2010, 27 July.
Corte de Apelaciones de Temuco. (2009). Rol No. 1773-2008, 16 September.
(2012). Rol No. 838-2012, 20 December.
Corte de Apelaciones de Valdivia. (2010). Rol No. 243-2010, 4 August.
Corte Suprema. (2009). Rol No.7287-2009, 30 November.
(2010). Rol No.5757-2010, 15 September.
(2011). Rol No. 6062/2011, 4 January.
(2012). Rol No. 2211-2012, 27 April.
(2014). Rol No. 11, 299-2014, 7 October.
COTAM-Comisión de Trabajo Autónoma Mapuche. (2003). Informe de la Comisión Histórica y Nuevo Trato, Chile.
de Avila Martel, A. (1973). *Régimen jurídico de la guerra de Arauco*. III Congreso del Instituto Internacional de Historia del Derecho Indiano. Madrid: Instituto Internacional de Estudios Jurídicos, Madrid.
Didier, M., Aywin, J., Silva, H., & Guerra, F. (2019). Chile. In International Work Group for Indigenous Affairs (IWGIA) (eds.), *The Indigenous World 2019* (pp. 143–152). Copenhagen: IWGIA.
El Ciudadano. (2020). Guía El Ciudadano para Elección de Constituyentes – Escaños Reservados para Pueblos Originarios. https://drive.google.com/file/d/1N3kPmPLeV-gUus4ave3kD4uQNSms5tr_/view
Equipo OCMAL-Observatorio de Conflictos Mineros de América Latina. (2015). *Conflictos Mineros en América Latina: Extracción, Saqueo y Agresión. Estado de situación en 2014*. www.ocmal.org/wp-content/uploads/2017/03/Conflictos-Mineros-en-America-Latina-2014-OCMAL.pdf
(2019). *Conflicto Minero: Comunidades del Valle del Huasco se oponen a Minera Nueva Unión*. https://mapa.conflictosmineros.net/ocmal_db-v2/conflicto/view/988
(2023). Conflictos Mineros en América Latina. https://mapa.conflictosmineros.net/ocmal_db-v2
Gudermann, H. (2003). Las poblaciones indígenas andinas de Chile y la experiencia de la ciudadanía. In H. Gudermann, R. Foester, & J. I. Vergara (eds.), *Mapuches y Aymaras: El debate entorno al Reconocimiento y los Derechos Colectivos* (pp. 19–104). Santiago de Chile: RIL Editores.
Guevara, T. (1925). *Chile prehispanico*. Santiago de Chile: Universidad de Chile.
Instituto de Estudios Indígenas. (2003). *Los derechos de los pueblos indígenas en Chile: Informe del Programa de Derechos Indígenas*. Santiago de Chile: LOM Ediciones.

Instituto Nacional de Derechos Humanos. (2013). *Situación de los Derechos Humanos en Chile. Informe 2013*. Santiago de Chile: Instituto Nacional de Derechos Humanos.

Instituto Nacional de Estadísticas Chile. (2018). Síntesis de resultados Censo 2017. www.censo2017.cl

Inter-American Commission on Human Rights. (2011). Annual Report of the Inter-American Commission on Human Rights 2011, Chapter III C. Petitions and cases before the Inter-American Commission on Human Rights. Precautionary measure (PM) No. 321/10, Rapa Nui Indigenous People, Chile.

Kaempfe, I., & Ready, G. (2011). Comentarios a la Ley N° 20.249, que crea los ECMPO y su Relación con el Convenio N° 169 de la OIT. *Ideas para-Chile*, 1(9), 1–33.

Marimán Quemenado, P. (2011). Chile. In International Work Group for Indigenous Affairs (IWGIA) (eds.), *The Indigenous World 2011* (pp. 211–219). Copenhagen: IWGIA.

(2012). Chile. In International Work Group for Indigenous Affairs (IWGIA) (Eds.), *The Indigenous World 2012* (pp. 204–213). Copenhagen: IWGIA.

Ministerio de Desarrollo Social. (2022). Informe de Desarrollo Social 2022. www.desarrollosocialyfamilia.gob.cl/storage/docs/ids/Informe-desarrollo-social-2022.pdf

Molina, R. (2007). Identidad Diaguita, derechos indígenas y proyectos mineros en el Husaco Alto. In N. Yáñez & J. Aylwin (eds.), *El gobierno de Lagos, los pueblos indígenas y el "nuevo trato": Las paradojas de la democracia chilena*. Santiago de Chile: LOM Ediciones.

(2013). Artículo 5. Los collas: Identidad y relaciones interculturales en Atacama. In J. Durston (ed.), *Pueblos originarios y sociedad nacional en Chile: La interculturalidad en las prácticas sociales* (pp. 99–113). Santiago de Chile: Programa de las Naciones Unidas para el Desarrollo.

Nesti, L. (2002). The Mapuche-Pehuenche and the Ralco Dam on the Bíobío River: The challenge of protecting Indigenous land rights. *International Journal on Minority and Group Rights*, 9(1), 1–40.

Newsroom Infobae. (2021). Chile decreta su primer Día Nacional de los Pueblos Indígenas. www.infobae.com/america/agencias/2021/06/17/chile-decreta-su-primer-dia-nacional-de-los-pueblos-indigenas

Paillan, E. (2009, Aug. 12). Jaime Facundo Mendoza Collio, de 24 años, es mapuche asesinado por carabineros. *El Ciudadano*. www.elciudadano.com/justicia/mapuche-asesinado-por-carabineros-seria-jaime-facundo-mendoza-collio-de-24-anos/08/12

Prieto, M. (2015). Privatizing water in the Chilean Andes: The case of Las Vegas de Chiu-Chiu, Mountain Research and Development. *Mountain Research and Development*, 35(3), 220–229.

Proceso Constitucional. (2023a). Consejo Constitucional. www.procesoconstitucional.cl/consejo-constitucional

(2023b). Propuesta Constitución Política de la República de Chile. www.procesoconstitucional.cl/wp-content/uploads/2023/11/Propuesta-Nueva-Constitucion.pdf

Rochna Ramirez, S. (1996). *La Propriedad de la Tierra en la Isla de Pascua*. Santiago de Chile: CONADI & AECID.

Rosti, M. (2008). Reparations for Indigenous Peoples in two selected Latin American countries. In F. Lenzerini (ed.), *Reparations for Indigenous Peoples: International and comparative perspectives* (pp. 345–362). Oxford: Oxford University Press.

Sanhueza, A. M. (2023, Dec. 18). Así es la Constitución que seguirá vigente en Chile y que se intent cambiar dos veces en cuatro años. *El País*. https://elpais.com/chile/2023-12-17/asi-es-la-constitucion-que-seguira-vigente-en-chile-y-que-se-intento-cambiar-dos-veces-en-cuatro-anos.html

Silva Neriz, H. (2013). Chile. In International Work Group for Indigenous Affairs (eds.), *The Indigenous World 2013* (pp. 188–196). Copenhagen: IWGIA.

Soluri, J. (2011). Chile's Blue Revolution, commodity diseases, and the problem of sustainability. *Latin America Research Review*, 46(1), 55–81.

Stavenhagen, R. (2003). Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, submitted in accordance with Commission resolution 2003/56. Addendum, Mission to Chile. Commission of Human Rights, sixtieth session, UN Doc. E/CN.4/2004/80/Add.3, 17 November.

Tapia, D. (2018, Nov. 26). ¿En qué está el proyecto NuevaUnión? *Revista Nueva Minería y Energía*. www.nuevamineria.com/revista/en-que-esta-el-proyecto-nuevaunion

Toledo Llancaqueo, V. (2006). *Pueblo Mapuche. Derechos Colectivos y Territorios: Desafíos para la Sustentabilidad Democratica*. Programa Chile Sustentable. Santiago de Chile: LOM Ediciones.

(2007, October 28). Presupuesto del Sector Público y Políticas Indígenas. Chile 1994–2008. *Documentos de Politicas Públicas y Derechos Indígenas – Informe Nº 36*. Santiago de Chile.

Tomaselli, A. (2012). Natural resources claims, land conflicts and self-empowerment of indigenous movements in the Cono Sur: The case of the Mapuche People in Chile. *International Journal of Minority and Group Rights*, 19(2), 153–174.

(2016). *Indigenous Peoples and their right to political participation. International law standards and their application in Latin America*. Baden-Baden: Nomos.

(2019). Processes and failures of prior consultations with Indigenous Peoples in Chile. In C. Wright and A. Tomaselli (eds.), *The prior consultation of*

Indigenous Peoples in Latin America: Inside the implementation gap (pp.119–132). New York: Routledge.

Trincado Vera, P., & Muñoz Sims, A. (2020, January 23). Violencia policial contra el pueblo mapuche: Aún queda mucho por avanzar. Amnesty International, Santiago, Chile. https://amnistia.cl/noticia/violencia-policial-contra-el-pueblo-mapuche-aun-queda-mucho-por-avanzar

Velásquez Loaiza, M. (2022, September 5). Las razones detrás del rechazo a la nueva constitución de Chile y lo que sigue. *CNN Español*. https://cnnespanol.cnn.com/2022/09/05/razones-rechazo-no-plebiscito-nueva-constitucion-chile-lo-que-sigue-orix/#0

Vergara, J. I., Gundermann, H., & Foerster, R. (2006). Legalidad y legitimidad: Ley indígena, Estado chileno y pueblos originarios (1989–2004). *Estudios Sociológicos*, 71(24), 331–361.

Yañez, N., & Molina, R. (2008). *La gran minería y los derechos indígenas en el norte de Chile*. Santiago de Chile: LOM Ediciones.